J K SOONAVALA

SUPREME COURT CRIMINAL DIGEST
(1950-2010)

6th Edition 2011

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Former Advocate General of Maharashtra

Vol. 2
COGNIZANCE TO
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J. K. SOONAVALA'S

Supreme Court Criminal Digest

1950-2010

Fifth Edition 2011
Revised and Enlarged
Volume 2 (C- D)
(Cognizance to
Dominion over Property)

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J. K. SOONAVALA'S

Supreme Court Criminal Digest (1950-2010)

A complete digest of Supreme Court on Criminal Laws, digest of cases arranged subjectwise under headings & sub-headings on various criminal laws. An analysis of the decisions of the Supreme Court during the last sixty years on Constitutional principles applicable to Criminal Law, the Indian Penal Code, the Code of Criminal Procedure, the Law of Evidence, appeals to the Supreme Court, all other criminal enactments Central and State and interpretation of criminal statutes.

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by

J. K. Soonavala, B.A., LL.B., Attorney-at-Law, Bombay High Court

Fifth Edition 2011 (Revised and Enlarged)

Volume 2 (C-D)

(Cognizance to Dominion over Property)

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We feel privileged to be able to place before the legal fraternity the 5th edition of *Soonavala's Supreme Court Criminal Digest*, a comprehensive work covering all aspects of criminal law from the earliest days of the Indian Supreme Court to the present day — 1950 to 2010.

The decisions of the Supreme Court over the last 6 decades have had an immense impact on every branch of criminal law and are of course binding on all the Courts of the land. The law as interpreted by the highest court is the guiding force for every practitioner and court in the criminal law jurisdiction. The continuous interpretation and evolution of law has resulted in settling major principles and the unsettling of others. One of the consequences has also been that new questions have been raised and new issues brought into focus. Such developments require regular chronicling and updating of judgments in works such as this one. We have endeavored to make this digest the most reliable, user friendly, and organized work in its field.

The case law has been brought up-to-date by including all cases collected till 31st December, 2010. The editors have taken steps to re-arrange the case law in a more orderly fashion. Many distinctive new topical headings have been formulated for this new edition. The present fifth edition covers nearly 30,000 case references, as almost 7500 new references have been added.

We are confident that the present new edition will prove to be an indispensable tool to a wide range of legal professionals as well as the Bench.

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Printed and bound in India

preface
to the fourth edition

This work is meant to be a complete digest on the decisions of the Supreme Court on Criminal Law from the time of its inception in the year 1950. We all know that the law, as declared and interpreted by the Supreme Court, is binding on all the Courts of the land. The exercise by the Court of this power of authoritative interpretation has made an immense impact on every branch of criminal law. The continuity and uniformity of interpretation which has been introduced has resulted in gradually dissolving and setting at rest the prevailing conflict of opinion on various aspects of the law, so that once the law relating to any subject is decided by a judgment of the Supreme Court, it becomes profitless labour to delve into the earlier cases covering the same field of conflict.

It has, therefore, become essential for judges and lawyers alike to have ready at hand a comprehensive digest containing between its two covers all the decisions of the Supreme Court on the entire range of criminal law, and it is this need which this book is intended to serve. It contains every decision of the Court till date on every aspect of criminal law, and covers every criminal enactment which has come under the scrutiny of the Court. Its sole purpose is to enable the reader to find the authority on any proposition as to any law which he requires at minimum expenditure of time and energy, and the new scheme of arrangement which is adopted is meant to serve that end.

In compiling the present edition, the editors have taken the liberty of re-arranging the material alphabetically topic-wise, case-law had to be re-arranged, new topics created and some of the old topics re-arranged. This arrangement has been conceived for the purpose of convenience to the readers and in view of the bulk of case-law that has come up under each of the major topics, each of them deserving separate treatment in a topic by itself. Further, each topic has been divided into several headings and sub-headings or division of the subject into various headings, heads and sub-heads with alphabetical letters considering the convenience for easy references.

All the references available in various journals are given underneath the name of the case itself. It is hoped that the new arrangement will be appreciated and found more useful as it also caters to the readers getting only local law journals. The contents have been made thoroughly exhaustive so as to contain every heading in the text of the book.

The case-law has been brought up-to-date by including all cases collected till the work was sent to the press. Thus, this work covers case-law of more than five decades from the inception of the Supreme Court of India in 1950 till 2006. No pains have been spared to make this publication as useful as its predecessor, to the Bench and the Bar.

Although we have spared no pains in bringing and arranging the case-law up-to-date, we are conscious that there may be some scope for improvement and any criticism suggesting such improvement will be most welcome.

It is definitely going to be a tribute to the great author, late Shri J.K. Soonavala, who enlightened for the first time in such a fashion with great deal of labour to put before readers, extracts with his valuable commentaries and notes on all the cases decided by Supreme Court of India on the subject of Criminal Law.

14th December, 2006 —EDITORS

preface
to the third edition

The publishers of this edition were pleased to entrust to us the revision of this monumental work for bringing out its third edition and we accepted the same considering the fact that we have to collect the case-law rendered by the Supreme Court during the last 22 years after the previous edition, on all the criminal enactments in India, both Central and State. It took us five years to do the same while attending to our other appointments and assignments.

Subsequent to the previous edition of this work of 1968, the Code of Criminal Procedures, 1898 was repealed by the Code of 1973 consolidating and amending the law relating to Criminal Procedure. So much so that, the provisions of the old Code regarding committal enquiries in police cases have been repealed, some sections omitted altogether, chapters re-arranged, and new sections enacted. It has therefore become our duty to give corresponding sections of the 1973 Code for the old sections wherever they are noticed in this work and wherever they are available. Further, new Central Acts like MISA, NASA, FERA, COFEPOSA, etc., have been enacted after the previous edition and a huge amount of case-law has come up under those enactments.

In compiling this edition, case-law had to be re-arranged, new chapters and topics created and some of the old topics re-arranged or omitted. Further, we took the liberty of changing the method of dividing the work into "Parts" as in the previous edition into "Volumes" and re-arranging them into 3 Volumes. Now, Volume I deals with the 'The Constitutional Principles of Criminal Law' and 'Indian Penal Code'; Volume II with the Code of Criminal Procedure and the Law of Evidence; Volume III with other Criminal enactments, Central and State, and Interpretation of Statutes. This arrangement has been conceived for the purpose of convenience to the readers and in view of the bulk of case-law that has come up under each of the major Acts and constitutional principles, each of them deserving separate treatment in a volume by itself. Further, each volume has been divided into several chapters and each chapter sub-divided into various topics or the division of the subject in the previous edition into various headings, heads and sub-heads with alphabetical letters is considered to be not convenient for easy references.

But the old method of dealing with the subject has been maintained almost throughout this edition also. A major departure from the previous edition has, however, been made with regards to giving corresponding references for each case noticed in this edition. Now all the references available in various journals are given underneath the name of the case itself. It is hoped that the new arrangement will be appreciated and found more useful as it also caters to the readers getting only local law journals. Another departure from the previous edition is, deletion of Part V thereof dealing with "Criminal Appeals to the Supreme Court" covering Articles 132 to 136 of the Constitution, and including them in Volume I itself dealing with "Constitutional Principles" wherein the serial order of the concerned Articles and a Note has been appended in Volume II on the Cr.P.C. to refer to that portion of Volume I to have a complete idea of appeals in criminal matters.

The case-law has been brought up-to-date by including all cases collected till the work was sent to the press. Thus, this work covers case-law of almost four decades from the inception of

(contd.)

preface to the third edition (*contd.*)

the Supreme Court of India. No pains have been spared to make this publication at least as useful as its predecessor if not more, to the Bench and the Bar.

Another new feature to this edition is that at the end of each volume the reader will find a subject index which has been prepared as exhaustive as possible with profuse cross referencing if such topic/point is involved in any other case. This systematic index provided in each volume will prove a boon to the readers for locating any point of their need in minutes. The subject index is arranged alphabetically and at places act-wise and topic-wise covering each and every subject-matter and point involved in each of the particular case-law covered in each volume.

It is definitely going to be a tribute to the great author, late Shri J.K. Soonavala, who enlightened for the first time in such a fashion with great deal of labour to put before readers extracts with his valuable commentaries and notes on all the cases decided by Supreme Court of India on the subject of Criminal Law.

Bombay
14th April, 1990

M. HIDAYATULLAH
Y. RAMA RAO

preface to the second edition

I had the honour to be associated with my late esteemed friend Shri J.K. Soonavala, the learned author of this book when the first edition of this book was published. The first edition received tremendous response and was highly appreciated by the members of the Bench and the Bar with the result that all the copies were sold out in a couple of months. Shri Soonavala's style and novel method of arranging the subject-matter in a systematic way has distinguished this book from other books on the same subject. The learned author, himself being a senior counsel knew the difficulties of the Bench and the Bar and evolved a new method whereby authorities could be picked up with minimum time and effort.

The success and the popularity gained by the first publication prompted the publishers M/s. N.M. Tripathi Pvt. Ltd., Bombay, to request him to write a book on Industrial Law adopting the same method. This work was by no means an easy task, but late Shri J.K. Soonavala spared no pains in also mastering this branch of law and completed the said book "Supreme Court on Industrial Law", which also has proved to be as popular as his previous publication.

The publishers Messrs. N.M. Tripathi Pvt. Ltd., Bombay, on seeing the success of the "Supreme Court on Criminal Law" requested him to compile the second edition of the book. The late Shri J.K. Soonavala readily agreed and undertook the strenuous job of writing both the books simultaneously. He worked round the clock for both the books in his usual way. But as fate would have it, he was not to see his work published as he suddenly passed away in December 1965, when his book "Supreme Court on Industrial Law" was in press nearing completion. He had also prepared the manuscript of this edition bringing the case-law up to June 1965.

His wife, Smt. Nargis J. Soonavala, though bereaved by the sudden and untimely death of her husband being impelled by her devotion towards him and to his masterpiece work, undertook to complete both the books of her husband with great determination. Her experience in assisting her husband in his work helped her in this matter. She speedily set herself to this hard and laborious task of collecting and reading through the huge mass of manuscript pages and sending the same to the press after giving her careful attention to the minutest details such as arranging and placing the case-law in their proper order, the preparation of the different indexes and reading the proofs. It is only because of her ability and industry that both these books could be published in time. Her daughter-in-law Smt. Vera P. Soonavala has ably assisted her during all the stages in the preparation of this edition.

I had the honour and privilege in completing the supplement for the year 1965 to his book "Supreme Court on Industrial Law". I was then entrusted with the work of bringing out this edition by adding case-law up to December 1967. The late Shri J.K. Soonavala's first edition of this book had already laid the solid foundation on which the edifice of the present edition could be built. Our patrons will note that I have closely followed in his footsteps in keeping the same arrangement and meticulously bringing the case-law up-to-date and enhancing its utility. The addition of 406 Cases of the Supreme Court to the present edition had necessitated publishing this edition in two volumes. Although we have spared no pains in bringing and arranging the case-law up-to-date, we are conscious that there may be some scope for improvement and any criticism suggesting such improvement will be most welcome.

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preface
to the second edition (*contd.*)

I express my deep sense of gratitude to Smt. Nargis J. Soonavala and her sons Shri P.J. Soonavala and Shri N.J. Soonavala in reposing their fullest confidence in me by giving me an opportunity to compile this edition. I am indebted to all my colleagues who encouraged me in completing the manuscript of this book.

Lastly, I thank Shri A.G. Rajadhyaksha, I.G. of Police, Maharashtra State (the then Commissioner of Police, Greater Bombay) and Shri J. V. Rajadhyaksha, the Chief Police Prosecutor, Greater Bombay, for readily granting me permission which enabled me to complete this work.

VASANT D. NAYAK
B.Sc.. LL.M.
Police Prosecutor, Greater Bombay.

Note:—

I have to record here with much grief the sorrowful death of my husband Shri J.K. Soonavala on 4th December 1965, while he was preparing and compiling the second edition of this reference book. As written in the above preface his good friend Shri V.D. Nayak, B.Sc. LL.M., very willingly agreed to our request to complete this massive edition. I have to express my sincere thanks to Shri Nayak for undertaking and completing, so ably, this responsible task, in spite of his official duties.

Lastly, I also wish to thank my sons Parviz and Navroze and my daughter-in-law Vera and Freni for helping me in the preparation of this book and particularly in reading the proofs of this voluminous book.

15th July, 1968
20, Altamount Road,
Cumballa Hill,
Bombay-26.

NARGIS J. SOONAVALA

preface
to the first edition

This work is meant to be a complete reference-book on the decisions of the Supreme Court on Criminal Law from the time of its inception in the year 1950.

We all know that the law, as declared and interpreted by the Supreme Court, is binding on all the Courts of the land, and that even during the relatively short period of a little over a decade, the exercise by the Court of this power of authoritative interpretation has made an immense impact on every branch of criminal law. The continuity and uniformity of interpretation which has been introduced has resulted in gradually dissolving and setting at rest the prevailing conflict of opinion on various aspects of the law, so that once the law relating to any subject is decided by a judgment of the Supreme Court, it becomes profitless labour to delve into the earlier cases covering the same field of conflict.

It has, therefore, become essential for judges and lawyers alike to have ready at hand a comprehensive reference-book containing between its two covers all the decisions of the Supreme Court on the entire range of criminal law, and it is this need which this book is intended to serve. It contains every decision of the Court till date on every aspect of criminal law, and covers every criminal enactment which has come under the scrutiny of the Court.

Its sole purpose is to enable the reader to find the authority on any proposition as to any law which he requires at minimum expenditure of time and energy, and the scheme of arrangement which is adopted is meant to serve that end. The text has been divided into seven parts, each comprising a main branch of criminal law, and each part has been divided into appropriate heads. The decisions of the Court are classified subject-wise. All the cases relating to each subject are first set down in their chronological order under the head covering that subject, and then follows an analysis of each case in the same order. Great care has been taken in the notes to bring out in bold relief the principles of law laid down in each case and the reasoning on which each enunciated principle is founded, and wherever the facts of the case serve to illustrate the application of a principle enunciated therein, such facts have been briefly given. The effort has been to present in an easily assimilable form the continuity and development of interpretation on each subject in successive judgments of the Court.

A simple scheme of reference has been adopted. The contents have been made thoroughly exhaustive so as to contain every heading in the text of the book, and further, two indexes are given, one a chronological and comparative index, and an alphabetical index containing all the page numbers of each case in the text. The chronological index has been made as comprehensive as was feasible and contains a reference to four different series of Law Reports. In the body of the text, citations from the Law Reports at the bottom of each page of the cases annotated on that page, as is usually done, has been avoided, and instead, against the name of each case, its serial number in the chronological index is given, so that when the citation of any case is required, it could be picked up by referring to its serial number in that index. The scheme of reference thus is that when an authority on a particular subject is sought for, the reader has only to refer to the contents and trace the approprite heading covering that subject, and then to look up the same heading in the body of the text where all the cases relating

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preface
to the first edition (*contd.*)

to that subject are grouped together, with their serial numbers indicating their citations in the Law Reports. It is hoped that such combined use of the contents, the text, and the indexes will serve the purpose of quick and easy reference within a few minutes to all the authorities on a required subject.

The necessity of including in a book on criminal law, a Part dealing with constitutional principles needs no stress. The Constitution is the paramount law which has laid down for our country a scheme of governance under which a balance has been struck between the rights and freedoms of the citizen and the State's power of social control, and to that end, new tests have been forged for judging the constitutionality of all laws. Hence, after the advent of the Constitution, no study of criminal law can be complete without a thorough understanding of the basic principles of the Constitution as explained and enunciated in the decisions of the Supreme Court.

Interpretation of criminal statutes is a subject in itself, and it comprises important aspects of criminal jurisprudence, such as, basic rules of construction, use of ancillary aids, the effect of the repeal of expiry of statutes, etc. The Court has laid down a large number of principles on this subject, which, however, are interspered. An effort has been made to collect these principles and present them in a classified form, and for that purpose a final Part has been added.

The law relating to several important subjects has now become crystallised as a result of a large number of decisions of the Supreme Court. The principles laid down by the Court as to various aspects of these subjects have been classified under special heads, in the hope that they might be found useful when dealing with cases in which questions as to any of these matters arise. These subjects to which special attention is invited are:

1. Law as to Circumstantial Evidence;
2. Law as to Confessions;
3. Law as to Sufficiency and Corroboration; and
4. Law as to the Effect of contraventions of mandatory rules of procedures.

Appeals to the Supreme Court have been assigned a Part to themselves, and the subject-matter has been classified under headings, such as, principles governing the issue of a Certificate under Article 134, principles as to interference on questions of fact and law with different kinds of orders made by the High Court, rules as to when a new point would or would not be allowed to be urged, the discretion of the Court in the matter of sentence or order, etc.

Finally, all the criminal laws other than the major ones have been dealt within Part VI, under separate main heads, and each main head is sub-divided into sub-heads covering the different principles laid down by the Court as to the different provisions of each enactment.

I have only to add that, though no effort has been spared to present the entire subject-matter in a systematic and classified form, I am conscious of the scope for improvement in its arrange-

(contd.)

preface to the first edition (*contd.*)

ment, and any suggestion or criticism aimed at such improvement will be most welcome.

I have to convey my thanks to a number of my friends for their encouragement in this endeavour, and particularly to Mr. V.D. Nayak, B.Sc., LL.B., Mr. K.S. Kamath, B.Sc., LL.B., Mr. H.M. Joshi, B.A., LL.B., and to my wife, for their assistance in reading the proofs.

11th September, 1961.
20, Altamount Road,
Cumbala Hill,
Bombay.

J.K. SOONAVALA

SOONAVALA'S
SUPREME COURT CRIMINAL DIGEST
(1950-2010)

VOLUME II
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C

COGNIZANCE

[7028] ● ***Taking cognizance on interlocutory order.***—The mere fact that a Magistrate has applied his mind to a case is not enough for saying that he has "taken cognizance" of that case. The question whether a Magistrate has "taken cognizance" of any offence depends upon the *purpose* for which he has applied his mind to it and *the stage* at which he has done so.

If the purpose for which a Magistrate looks into the papers of a case is only for making some *interlocutory* order at a stage when the matter is under investigation, which is required as a step in the investigation, it cannot be said merely on that account that he has "taken cognizance". On the other hand, if he applies his mind to a case after receiving a police-report or a complaint of an offence, and does so for the purpose of proceeding with the case, he must be said to have "taken cognizance" of that case.

Application of a Magistrate's mind to a case does not amount to "taking cognizance" within the meaning of that expression as used in the Code if it has been done only for the purpose of making any of the following orders which are only steps in the investigation of the case :

1. an order under Section 155(2) or 156(3) directing an investigation to be made by a police officer in any case, or
2. an order under Section 96 issuing a search-warrant for any document or thing, or
3. an order under Section 167(2) remanding an accused to custody, or
4. an order under Section 496 or 497 (now Section 436 or 437) granting or refusing bail.

On the other hand, application of a Magistrate's mind to a case amounts to "taking cognizance", if it has been done for any of the following purposes :

1. examination of the complainant under Section 200, or
2. directing an inquiry under Section 202, or
3. issue of an order under Section 207-A (no new section), or
4. taking the plea of an accused under Section 242 (now Section 251), or
5. taking any action under Section 251-A (now Section 238).

An order under Section 5-A of the Prevention of Corruption Act authorising an officer below the rank designated in that section to investigate an offence referred to in the Act, is only an interlocutory order which precedes the taking of "cognizance" of that offence within the meaning of Section 190 of the Code, or Section 6 of the Act, and the legality of such an order is not open to question merely because sanction for prosecution under Section 6 of the Act, which is a prerequisite of cognizance of such offences, has not been granted at the date when the order under Section 5-A is made by the Magistrate. *R.R. Chari*

v. *State of Uttar Pradesh*, AIR 1951 SC 207 : 1952 CrLJ 775 : 1951 SCJ 302.

[7029] ● *Legality of trial not to be questioned on invalidity of cognizance.*—All that Section 173(1) of the Code requires is that as soon as an investigation of an offence by the police is complete, they should forward to the Magistrate empowered to take cognizance of the offence, a report in the prescribed form and containing the details mentioned in that section. If a report so received by a Magistrate is a complete report in the prescribed form which sets out all the particulars required by Section 173(1), the Magistrate has the power under Section 190(1)(*b*) to take cognizance of the case, and a cognizance so taken is valid cognizance. In such a case, even though the police themselves later on call the report sent by them an "incomplete" report, that in itself cannot alter its character or affect the validity of the cognizance of the offence already taken. The Court can examine the report for itself, irrespective of what the police say, and if it finds it to be complete, the Court has the power to take further proceedings in the case on the strength of the cognizance it has taken. Further, if in such a case the police put in one or more supplementary reports subsequent to the date on which the Magistrate has taken cognizance and name therein further witnesses, that fact cannot affect the validity of the cognizance which the Magistrate has taken at an earlier date. In other words, if a cognizance taken by a Magistrate is perfectly valid and according to law when it was taken, it continues to be valid, whatever may be done thereafter by the police, and the legality of a trial cannot be questioned on the ground of any invalidity in the taking of cognizance. *Tara Singh* v. *State*, AIR 1951 SC 441 : 1952 CrLJ 1491 : 1951 SCJ 518.

[7030] ● *Cognizance on a private complaint.*—Section 195(1)(*a*) prohibits the prosecution for an offence under the Penal Code referred to therein, except upon the written complaint of the public servant concerned. Therefore, when it is alleged against an accused that he gave a false information to a police officer with a view to such officer taking any action against an innocent person, and the offence charged is one under Section 182 of the Penal Code, cognizance of that offence can be taken by a Magistrate only when the officer concerned or his superior makes a complaint of such an offence as required by Section 195(1)(*a*), CrPC. But the operation of Section 195(1)(*a*) stops there and does not extend to any other distinct offence which is committed by the accused in the course of giving such false information.

Therefore, if an information given by the accused to a police officer has a double aspect, so that it is not only false but also defamatory, so as to constitute not only an offence under Section 182 but also an offence under Section 500 of the Penal Code, it is open to the person so defamed to institute criminal proceedings against the accused under a private complaint made under Section 200, CrPC, and the accused cannot be allowed to plead that Section 195(1)(*a*) operates as a bar against such a complaint, merely because the defamatory statement which forms the basis of the charge was contained in a false information given to a police officer.

The two offences committed by the accused in such a case, the one under Section 182 and the other under Section 500, even though they be committed by the same act of giving a report to a police officer, are yet quite distinct and separate in their character, the former being against the administration of law by the State, and latter being against the rights of a private individual.

When therefore a single act of an accused is of such a character as to amount to two distinct offences, one which is covered by Section 195(1)(*a*) and the other which is not, it is open to the person aggrieved thereby to lodge a private complaint of the latter offence, and cognizance of that offence under Section 190, CrPC, is not barred by the operation of Section 195(1)(*a*). To hold otherwise would amount to adding to the language of that section in the guise of interpretation, and that is something which a Court of law is not allowed to do.

At the same time, a Court should not countenance an evasion of a mandatory rule of procedure which goes to the very roots of its competence, and if it finds that primarily and essentially the offence committed was one for which a complaint under Section 195(1)(*a*) was required, and that its garb or label was purposely changed by resorting to a device or camouflage., it must hold that Section 195(1)(*a*) applies so as to bar the cognizance of the case upon a private complaint.

There was nothing illegal in the cognizance of an offence under Section 500, Penal Code, taken upon a private complaint. Section 195(1)(*a*), CrPC, was no bar to the taking of such cognizance since the two offences, one under Section 182 and the other under Section 500 of the Penal Code, were distinct and separate offences, even when they arose out of the same act of giving a false information to a police officer. *Bashir-ul-Huq* v. *State Of West Bengal*, AIR 1953 SC 293 : 1953 CrLJ 1232 : 1953 SCJ 405 : 1953 SCR 836 : 1953 SCA 1062.

[7031] ● *Cognizance in contravention of sanction to prosecute.*—A sanction, whether under Section 197, CrPC, or under Section 6 of the Prevention of Corruption Act, 1947, is not required to be in a particular form. All that is necessary is that the sanction must state that it is for the prosecution of the public servant concerned under a particular offence, and must set out the facts which constitute that offence.

The officer before whom the papers of a case are placed for such sanction must clearly set out in the order the facts on the strength of which he gives such sanction, so that the order itself shows that the sanctioning authority has applied his mind to the facts of the case. In other words, the order of sanction must itself disclose on its face that the sanctioning authority has considered all the facts on the strength of which the sanction is accorded, and must state the offence which such facts constitute.

However, if a sanction order is defective by reason of an omission to state therein the particulars so required, it cannot be contended that such an error in the sanction renders it null and void so as to render cognizance of the offence taken by a criminal Court entirely incompetent. The only effect of such an error is that the burden falls on the prosecution to prove by extraneous evidence that all the facts complained of were placed before the sanctioning authority and that it granted the sanction asked for only after fully considering those facts.

It is only when a sanction order is on the face of it defective by reason of the absence of the particulars required to be stated therein, and the prosecution is unable to produce any satisfactory extraneous evidence to show that the sanction was properly given, that the validity of that sanction can come into question, and cognizance taken by a Court could be assailed as being in contravention of the requirements of Section 197, CrPC. *Biswabhusan Naik* v. *State of Orissa*, AIR 1954 SC 359 : 1954 CrLJ 1002 : 1954 SCA 928 : 1955 SCJ 537.

[7032] ● *Defect or omission does not disclose validity of sanction for prosecution.*—If the sanction given under Section 197, CrPC does not disclose that all the facts constituting the offences of which the accused is to be charged were placed before the sanctioning authority, or does not state the time and place of the occurrence of the transactions covered by it, or the names of persons in agreement with whom the accused committed the offence of criminal conspiracy of which he is charged, it has to be held that the sanction order is undoubtedly defective in its content. However, such defect or omission is not fatal to the validity of the sanction, if the lacuna has been remedied in the course of the trial by producing the specific evidence required in that behalf. The question of considering the effect of such a lacuna on the validity of the sanction arises only when no such evidence has been produced by the prosecution, and the question whether the sanctioning authority had applied his mind to all the facts constituting the offence for the prosecution of which sanction was given, has remained in doubt. *Gopalan M.K.* v. *State of Madhya Pradesh*, AIR 1954 SC 362 : 1954 CrLJ 1012 : 1954 SCA 557 : 1954 SCJ 534 : (1954) 2 MLJ 76 : 1954 MWN 564 : 1954 AWR (HC) 392 : 1955 SCR 168.

[7033] ● *Sanction not required if offence not committed in discharge of official duty.*—In the present case, the accused who was any army officer, was charged in 1942 along with a local contractor, under Section 120-B read with Sections 161 and 420, Penal Code. The prosecution case was that an amount, in excess by Rs. 56,000 of what was actually due, had been paid out by the Government to the private contractor for the construction of certain buildings, and that when the excess payment became known and a refund was demanded of him, the two accused entered into a conspiracy to defraud the Government, whereunder the officer prepared a false order for the construction of approach roads and on the strength of the order the contractor prepared a false bill for "additional work" which was passed by the officer, and that as a consideration for passing that bill the officer obtained from the contractor a bribe of Rs. 18,000. The two accused were jointly tried on the above charges and were convicted. There was no order from the Government sanctioning their prosecution, and the main question in appeal was whether the prosecution was bad for want of the sanction under Section 197. On the facts of the case, the offence of which the accused was charged was not committed by him while acting or purporting to act in the discharge of his official duty, and hence, the sanction under Section 197 was not necessary for the prosecution of the accused for that offence. Conviction was upheld. *Ronald Wood Mathews* v. *State of West Bengal*, AIR 1954 SC 455 : 1954 CrLJ 1161 : 1954 SCJ 649 : 1955 SCR 216.

[7034] ● *Expedient to hold inquiry.*—Relying upon the word "ordinarily" in Section 195(3), it was contended that since a right of appeal to the Supreme Court is not an ordinary right of appeal, but only a limited and circumscribed right which is exercisable only under the special circumstances set out in the Constitution, Section 195(3) could not apply for the purpose of an appeal to the

Supreme Court from an order directing a complaint to be made, which was made by the Division Bench of a High Court under Section 476, and that the powers under Section 476-B could not at all be exercised by the Supreme Court when a complaint for an offence falling under Section 195(1)(*b*) was made by the High Court. This contention could not be accepted because it completely ignored the word "appealable" in Section 195(3). The only Court to which appeal lies from the appealable decrees and orders of a Division Bench of a High Court is the Supreme Court and hence the Supreme Court is the only Court to which appeals from orders of a Division Bench of a High Court will ordinarily lie. The Supreme Court was competent to entertain an appeal under Section 476-B of the Code from an order of a Division Bench of a High Court making a complaint against an accused for an offence falling under any of the sections of the Penal Code which are covered by Section 195(1)(*b*), CrPC.

The appeal so made is perfectly competent. The Court then proceeded to consider the matter on its merits, for the purpose of seeing whether, as required by Section 476, "it was expedient in the interests of justice that an inquiry should be made" in the offence of which those officers were charged, as held by the High Court. After considering the facts of the case, the Court held that such inquiry was expedient, and dismissed the appeal. *M.S. Sheriff* v. *State of Madras*, AIR 1954 SC 397 : 1954 CrLJ 1019 : 1954 SCJ 458 : 1954 SCA 576.

[7035] ● ***Validity of sanction before cognizance of offence.***—A sanction is valid only when it has been given before cognizance of the offence for the prosecution of which it is given is taken by any criminal Court, and further when it is given after the sanctioning authority has applied its mind to the facts of the case and those facts bear out the offence for the prosecution of which sanction is given. The burden of proof of the requisite sanction lies on the prosecution, and that burden is adequately discharged either if the sanction order itself discloses on the face of it that the sanction has properly been given or if the prosecution is able to satisfy the Court by producing extraneous evidence that the material facts were placed before the sanctioning authority and were considered by it before granting the sanction. A sanction given under Section 197, CrPC can be held to be invalid only when the prosecution fails to discharge its burden in either of the two aforesaid ways.

Substance is always more important than the form, and in this matter Courts should not take a too technical view, so that, all that is required for upholding the validity of a sanction is that the Court must be satisfied that the sanctioning authority has applied its mind to the facts of the case and has given the sanction in respect of an offence which is constituted by those facts. If it is so satisfied, a mere defect in the form or contents of the sanction order cannot affect the validity of the sanction.

In the present case, the sanction order was signed, not by the sanctioning authority himself, but only by his personal assistant purporting to act on his behalf. When the validity of the sanction was assailed, the prosecution put in the original draft which carried the signature of the sanctioning authority below the word "approved" Though the sanction order was not in the correct form, it was not illegal or invalid because it showed that the sanction had been given by the proper authority and that it had been given after he had applied his mind to the facts of the case. *Madan Mohan Singh* v. *State of Uttar Pradesh*, AIR 1954 SC 637 : 1954 CrLJ 1656.

[7036] ● ***Application for sanction in purported discharge of duty.***—Section 197 of the Code must not be construed too narrowly, because if it is so construed, it can never be applied at all. It is no part of an official's duty to commit an offence and never can be, and in considering whether Section 197 applies to a case, it is not the duty one has to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The Section has content and its language must be given meaning.

The offence of criminal breach of trust under Section 409 is composed of several elements, (*a*) that there was an entrustment, (*b*) that the entrustment was 'in his capacity of a public servant', (*c*) that there was a 'disposal' of the entrusted property, and (*d*) that such disposal was done 'dishonestly'.

In a case like the present, it is evident that whether the disposal is lawful or unlawful, there could be no disposal save by an act done or purporting to be done in an official capacity. The act complained of, namely the disposal, could not be done in any other way. If it was innocent, it was an honest official act, and if it was dishonest, it was a dishonest official act. But in either case, the act was one which was done in an official capacity, and there was no other way in which the accused could have permitted the release of the goods out of the depot. Whatever the intention behind the act of 'disposal' may have been, the physical part of it remained the same, and it was equally 'in his official capacity as a public serrant' whether the intention was honest or dis- ionest. In the first event, the act of disposal vould be done in the discharge of an official duty, nd in the other, in the purported discharge of it. or these reasons it must be held that Section 197 of the Code applied to the present case. *Shree Kantiah Ramayya Munipalli* v. *State of Bombay*, AIR 1955 SC 287 : 1955 CrLJ 857 : 1955 SCR 177 : 1955 SCA 283.

7037] ● ***Absence of sanction for prosecu- ion.***—A defect in a trial arising from the absence of a sanction for prosecution which under the law a pre-requisite of cognizance is fatal to the trial. uch a defect goes to the very root of the compe- ence of the trial Court to exercise jurisdiction ver the case, and cannot be cured (by Section 37, CrPC) (now Section 465). The absence of he necessary sanction vitiates the trial from its ery start, so that the whole proceeding must be uashed, and if it has resulted in the conviction of he accused, such conviction has to be straightway et aside.

In such a case, the proper course for the ourt of Appeal is to discharge, and not acquit, he accused, leaving it to Government either to rop the matter or to institute fresh proceedings fter the required sanction is granted. *Shree Kantiah Ramayya Munipalli* v. *State of Bombay*, AIR 1955 SC 287 : 1955 CrLJ 857 : 1955 SCA 83 : 1955 SCJ 233.

7038] ● ***Sanction essential for taking cogni- ance.***—In a case in which Section 197. CrPC, pplies, and sanction for the prosecution of a ublic servant for an offence committed by him is ssential for taking cognizance of that offence, the bsence of such sanction is fatal to the main- ainability of the prosecution. In such a case, if the rial has resulted in the conviction of the accused, he whole proceeding must be quashed, and the onviction must be set aside. *Amrik Singh* v. *State f Pepsu*, AIR 1955 SC 309 : 1955 CrLJ 865 : 955 SCA 368 : 1955 SCJ 334 : 1955 SCR 1302 : 955 MWN 322 : 57 PunLR 295 : 1955 1 MLJ SC) 198 : 1955 AWR (Supp) 72 : ILR (1955) atiala 145.

7039] ● ***Cases in which sanction for prose- ution not necessary.***—1. Sanction under Section 97 is not necessary in every case in which a ublic servant is prosecuted for an offence, and he question whether such sanction is necessary or ot has to be determined in each case after scertaining from the facts of the case the nature f the act complained of.

2. It is not correct for the accused to contend hat every offence committed by a public servant necessarily involves the employment of his official capacity and that therefore sanction under Section 197 is required for every offence committed by a public servant while he holds a public office. At the same time, it is also not correct for the prosecution to contend that criminal misappropriation by a public servant could under no circumstances be an act done by him in virtue of his office, and that therefore sanction under Section 197 is never necessary when the offence charged is one under Section 409, Penal Code.

3. It is the nature of the act complained of which determines the question whether sanction under Section 197, CrPC, is or is not necessary, and for that purpose the Court must first determine whether the act done was or was not directly connected with the duties attached to the office of the accused. In other words, the test is—could the accused reasonably claim that what he did was done by virtue of his office. If the act done is so connected with the duties attached to the office of the accused that he could reasonably claim that it was done by virtue of his office, sanction under Section 197 is absolutely essential to his prosecution for that act. On the other hand, if the act done is not of such a nature, such sanction is not necessary.

4. If the act done is of such a nature that on the application of the above test sanction is *not* required, it is of no consequence at all that it was the official position of the accused which furnished him the occasion or the opportunity for the doing of that act, and it is equally unimportant that during the period when that act was done, the accused was engaged in the performance of his official duties.

5. On the other hand, if, on the application of the above test, the act done by the public servant is found to be of such a nature that sanction for prosecution is required by reason of its being done in virtue of his office, it is entirely immaterial to consider whether he did it in the proper discharge of his duties or only in abuse of his official position. *Amrik Singh* v. *State of Pepsu*, AIR 1955 SC 309 : 1955 CrLJ 865 : 1955 SCJ 334.

[7040] ● ***Act connected with official duty.***—In the present case, the accused, who was a public servant working in the PWD was charged under Sections 409 and 465, Penal Code. The prosecution case was that he had been entrusted with money for disbursement of the wages of workmen in the department, and that he misappropriated an amount of Rs. 51 after making a false entry on the pay-roll showing that the amount was paid to one *P*, and putting a forged thumb-impression on the roll against the name of *P*, showing receipt of that amount of *P*. The act done by the accused was clearly connected with his official duty and fell within its scope, and was of such a nature that, if questioned, he could reasonably claim that it was done by virtue of his office, and hence, sanction under Section 197 was essential for his prosecution. *Amrik Singh* v. *State of Pepsu*, AIR 1955 SC 309 : 1955 CrLJ 865 : 1955 SCJ 334.

[7041] ● ***Necessity of sanction to prosecute.***—The offence of fabricating false evidence punishable under Section 193 of the Penal Code falls under two parts, the first being one which relates to that offence when committed in or in relation to a judicial proceeding, and the other to the same offence when committed 'in any other case'. Section 195(1)(*b*), CrPC, applies only when the offence committed falls under the first part of Section 193, and not when it falls under its second part. Therefore even when the offence of fabricating false evidence is committed before a tribunal which is *quasi-judicial* in character, and not merely administrative or ministerial, the offence is not one to which Section 195(1)(*b*), CrPC, can apply, because such a tribunal is not a "Court" within the meaning of that expression as used in Section 195. A tribunal is a "Court" only when it has the statutory power to decide as between rival claims and give a definitive and enforceable judgment.

The question as to when sanction under Section 197 is essential for the prosecution of a public servant was considered by the Court in all its aspects, in *Amrik Singh* v. *State of Pepsu,* after reviewing the earlier authorities on this subject. The principles relating to this question which result from these decisions may be summarised as under :

The question whether sanction of the appropriate Government under Section 197 of the Code is or is not necessary for the prosecution of a public servant for an offence alleged to have been committed by him, has to be determined by the application of the following test in each case as it arises, after considering all the facts of that case. The test is—was there or was there not a reasonable connection between the act complained of and the discharge of the official duty of the officer concerned, that is, whether the act complained of and his official duty were so inter-related that the accused could reasonably claim that what he did was done by virtue of his office. If such a claim is reasonable, and not merely pretended or fanciful, sanction is necessary; otherwise, it is not. If the claim is reasonable, it is entirely immaterial whether the officer acted in excess of his duty and went beyond the needs of the situation in what he did, and sanction is necessary even though the officer may have acted in excess of his duty.

In the present case, a private complaint was lodged in the Court of a Magistrate against certain officers under Sections 323 and 342, *etc.*, of the Penal Code on the ground that when they were resisted in an attempt to carry out a search for certain books of account, they forcibly broke open the doors of the place to be searched after beating and causing injuries to the persons who resisted them in such a search, and tying them with ropes, and locking them up for some hours. During the trial the accused raised the objection of want of sanction under Section 197, CrPC.

Even assuming that the officers had acted in the present case in excess of their duty and that their belief as to their rights under a search-warrant was mistaken, it could not be said that their acts were necessarily *mala fide* and entirely unconnected with the discharge of their duty. The accused could reasonably claim that what they did was in virtue of their official duty. It is immaterial in such a case whether the claim is ultimately found to be well-founded or not. For these reasons, sanction for prosecution of the accused under Section 197, CrPC, was necessary, and the High Court was right in affirming the order of the trial Court discharging the accused for want of such sanction. Appeal was dismissed. *Matajog Dobey* v. *H.C. Bhari*, AIR 1956 SC 44 : 1956 CrLJ 140 : 1956 SCA 22.

[7042] ● ***Maintainability of private complaint.***—The Returning Officer reappointed under the Act of 1951 was not a "Court" within the meaning of Section 195, CrPC, though he discharged *quasi-judicial* functions, and hence the offence under Section 193 of the Penal Code which was committed before him was not an offence "in or in relation to a proceeding in a Court" within the meaning of Section 195(1)(*b*), CrPC. That being so, the complaint made by the Returning Officer was only a private complaint under Section 200, CrPC, and not one made under Section 476, CrPC and hence no appeal to the High Court under Section 476-B could lie against such a complaint. Under the circumstances, the order of the High Court rejecting *V*'s appeal under Section 476-B, and treating the complaint made against him as being one under Section 200 and not under Section 476, was perfectly justified and proper. *Virendra Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : 1956 SCA 410 : 1956 SCJ 138 : 1955 2 SCR 1013.

[7043] ● ***Discretion not violative of Article 14.***— Section 197 applies to the class of public servants and distinguishes them from other citizens in the matter of cognizance by criminal Court. Such a classification is perfectly reasonable because public servants acting in the discharge of their duties have to be protected against uncalled for harassment resulting from reckless litigation, and the requirement of Government sanction acts as a safeguard against groundless proceedings initiated by interested private persons.

Further, it cannot be urged that the discretion vested in the Government to grant a sanction against one officer while refusing it against another, amounts to discrimination between persons placed in the same situation. Exercise of such discretion cannot be said to be a distinction between individuals placed in the same class; it only makes a distinction between the facts of one case and the facts of another, so that while the facts of one case may justify sanction under Section 197, quite different facts of another may not. Abuse of that discretion by the Government concerned cannot be assumed for the purpose of questioning the constitutionality of that section. Section 197, CrPC, does not contravene Article 14 of the Constitution. *Matajog Dobey* v. *H.C. Bhari*, AIR 1956 SC 44 : 1956 CrLJ 140 : 1956 SCA 22 : 1956 SCJ 110 : 1955-2 SCR 925 : 1955-28 ITR 941 : 1956-I MLJ (SC) 79.

[7044] ● ***Necessity of sanction.***—The question as to the necessity for sanction under Section 197, CrPC, may arise at any stage of the proceeding before the trial Court, and the Court is bound to consider and pass the necessary order on that point at any stage of the proceeding as soon as facts are placed before the Court which make the determination of the question imperative. Facts which establish the necessity for sanction may come to light at any later stage in the proceeding after cognizance of an offence of which a public servant is accused has been taken by the Court on a private complaint. *Matajog Dobey* v. *H.C. Bhari,* AIR 1956 SC 44 : 1956 CrLJ 140 : 1956 SCJ 110 : 1955-2 SCR 925.

[7045] ● ***Objection not taken at initial stage.***—It may well happen that when a complaint against a public servant is presented, the complaint may be so framed as to show that the act complained of had nothing to do with the discharge of his office and hence taking cognizance of the offence charged may appear to the Court to be quite proper even though the want of sanction may be brought to the notice of the Court. And yet if during the cross-examination of the prosecution witness facts are brought out which show that the act complained of falls within the purview of Section 197, it is the duty of the Court at that stage to take notice of those facts, and discharge the accused for want of such sanction, even though objection on that score had not been taken by the accused at the initial stage of the proceeding. *Matajog Dobey* v. *H.C. Bhari*, AIR 1956 SC 44 : 1956 CrLJ 140 : 1956 SCJ 110 : 1955-2 SCR 925.

[7046] ● ***Trial Court's competence to take cognizance without sanction.***—There was no reason to interfere with the order of the High Court. In a case in which, on the facts of the case, it is clear that the offence in question was committed by the accused while acting or purporting to act in the discharge of his official duty, previous sanction of the Government is essential under Section 197 for the prosecution of the accused, and the trial Court has no competence to take cognizance of the offence without the requisite sanction and has no option except to discharge the accused if the sanction has not been obtained. *Matajog Dobey* v. *H.C. Bhari*, AIR 1956 SC 44 : 1956 CrLJ 140 : 1956 SCJ 110.

[7047] ● ***Power of Court to make complaint.***—The combined effect of Sections 195(1)(b) or (c), 476, 476-A, 195(3), CrPC is that the power to make a complaint required by Section 195(1)(*b*) or 195(1)(*c*) may primarily be exercised by the Court concerned, and if it has not done so, that power can be exercised only by the Court of the lowest grade to which appeals ordinarily lie from the decree or orders of the Court concerned. The power to make such a complaint cannot be exercised by any other Court. In determining the proper appellate Court which is competent to make such complaint, one has to find to which Court of lowest grade appeals lie in the ordinary way, keeping aside special notifications or laws which lift that question in a particular case out of the general class.

The Senior Subordinate Judge was not the appellate authority contemplated by Section 476-A, read with Section 195(3) of the Code, because his appellate jurisdiction was exercisable only under a special notification, and was not a Court to which appeals would 'ordinarily' lie, within the meaning of Section 195(3), from the orders of the Subordinate Judge. The District Court was the Court of inferior jurisdiction to which such appeals would ordinarily lie, and that Court alone was the proper authority for the exercise of powers under Section 476-A or 476-B. The High Court itself had no power to make the complaint applied for, and it had no jurisdiction, in the exercise of its powers in revision, either to make an order making a complaint or to restore the original order making such a complaint, because the High Court was not the Court contemplated for that purpose by Section 476-A or 476-B or 195(3). All that the High Court was authorised to do in the exercise of its powers of revision was to send the case back to the District Court for disposal according to law.

In the exercise of its extraordinary powers under Article 136 of the Constitution, this Court makes an order remitting the original application under Section 476 of the Code to the District Judge for disposal according to law in the exercise of his powers under Section 476-A with a direction that he should apply his mind to the question whether it was expedient in the interest of justice to make the complaint applied for. *Kuldip Singh* v. *State of Punjab*, AIR 1956 SC 391 : 1956 SCC 455 : 1956 CrLJ 781 : 1956 SCR 125.

[7048] ● *Offence of criminal breach of trust.*— There is quite a large body of case-law in which it has been held that ordinarily when a public servant commits the offence of criminal breach of trust in respect of property or funds belonging to the Government under his charge, he does not act in his capacity as a public servant, and that sanction under Section 197, CrPC for his prosecution under Section 409 of the Penal Code is not required. *Om Prakash Gupta* v. *State of Uttar Pradesh*, AIR 1957 SC 458 : 1957 CrLJ 575 : 1957 SCA 337.

[7049] ● *Cognizance of offence by public servant barred for want of sanction.*—In a case in which by reason of the provisions of any statute, cognizance of an offence committed by a public servant is barred if the previous sanction of the appropriate authority for the prosecution for that offence is absent, the very competence of the Court to exercise jurisdiction over the case in which the accused is charged of such an offence does not exist if the required sanction is wanting, and the whole proceeding is null and void. In such a case, the trial Court must discharge the accused as soon as the defect is brought to its notice, and if in spite of the defect it has convicted the accused, the appellate Court must set aside the conviction and discharge him.

When the whole proceedings has been vitiated by reason of such an illegality, it is null and void, whichever be the Court by which the accused is discharged, and it is open to the State to prosecute the accused again for the same offence of which he was originally charged, or on the same facts for any other offence, after obtaining the required sanction. Article 20(2) or Section 403, CrPC, cannot be pleaded as operating as a bar against such subsequent trial. *Baij Nath Preasad Tripathi* v. *State of Bhopal*, AIR 1957 SC 494 : 1957 CrLJ 597 : 1957 SCA 459 : 1957 SCJ 405 : 1957 SCR 650 : 1957 MPC 390 : 1957 BLJR 479 : 1957 ALJ 569 : (1957) 1 MLJ (Cr) 362 : 1957 JabLJ 759 : 1957 AWR (HC) 491.

[7050] ● *When sanction is made condition precedent to taking cognizance.*—When by any statute sanction for the prosecution of any person for an offence is made a condition precedent to the taking of cognizance of that offence by a criminal Court, prosecution of that person without the requisite sanction makes the entire proceeding *ab initio* null and void. In such cases, the sanction is not a mere formality but is an essential safeguard against frivolous prosecutions by giving the authority concerned the statutory discretion to decide whether in view of all the circumstances of the case the application for grant of sanction be refused or acceded to. Therefore, when a sanction required by law for any prosecution is wanting, the absence of such sanction makes the entire trial incompetent from its very commencement, and if such a trial has resulted in conviction, such conviction must be straightway set aside by the appellate Court. *Kapur Chand Pokhraj* v. *State of Bombay*, AIR 1958 SC 993 : 1958 CrLJ 1558.

[7051] ● *Application of principles.*—The intention of the legislature in making previous sanction of an appropriate Government or authority a prerequisite of a prosecution of a public servant and a condition precedent to the taking of cognizance of an offence committed by him, obviously was to serve the accepted principle of efficient governance that a public servant acting in the discharge of his duties should be safeguarded against harassment, and that prosecution should be sanctioned only when the Government is satisfied on facts that a *prima facie* case exists. The very purpose of such protection ceases to exist if that person has ceased to be a public servant at the time when he is threatened with prosecution.

But even apart from that, a section has to be construed according to the plain meaning of its language, and when the general power of a criminal Court to take cognizance of offences is restricted under a provision which is in the nature of an exception to that power, the limitation imposed by that provision must be so construed as to confine it strictly to the very terms of the provision.

A plain reading of Section 6 of the Act shows that it can operate only when *both* the following conditions exist, namely, that the person concerned *is* a public servant and that he is not removable from his office save under the sanction of the appropriate Government or authority. The question of removability cannot possibly arise in the case of a person who has already ceased to be a public servant at the relevant time.

For these reasons it must be held that sanction for prosecution is required only when the person concerned is still a public servant at the time when cognizance of a criminal Court is asked for, and is not required if he has ceased to be one at that time. *S.A. Venkataraman* v. *State*, AIR 1958 SC 107 : 1958 CrLJ 254.

[7052] ● *Sanction not a mere formality but a valid requirement.*—*Note* : This decision expressly relates to sanction required under Section 6 of the Prevention of Corruption Act, but its principles would presumably apply with equal force to sanction under Section 197, CrPC.

A sanction for prosecution of a public servant is not a mere formality, and the sanction can be held to be valid only when the requirements of a valid sanction have been observed with complete strictness. When considering whether a sanction applied for should be granted or refused, the sanctioning authority must carefully apply his mind to all the facts of the case, and in order to satisfy the Court which takes cognizance of the case on such sanction that the requirements of a valid sanction have been complied with by the sanctioning authority, the order of sanction must be clearly worded so as to make it evident on the face of it that those requirements were before the mind of the sanctioning authority at the time when the sanction order was made. For that purpose, the order must briefly set out the facts of the case and the particular section of the Penal Code or the Act under which prosecution has been sanctioned, and if those facts disclose the commission of more than one offence, all those sections must be mentioned in the order of sanction. *Jaswant Singh* v. *State of Punjab*, AIR 1958 SC 124 : 1958 CrLJ 224 : 1958 SCA 407 : 1958 SCJ 355.

[7053] ● *Sanction should disclose offence with which accused is charged.*—In the present case, the sanction was in the following words—"whereas I am satisfied that *J* (the accused) has accepted an illegal gratification of Rs. 50 and whereas the evidence discloses that he has committed an offence under Section 5 of the Prevention of Corruption Act, I hereby sanction his prosecution under Section 5 of the act". On this sanction the accused was charged under Sections 5(1)(*a*) and 5(1)(*d*) of the Act. It may be noted that Section 5(1)(*a*) defines an offence arising only from *habitual* acceptance of bribes by a public servant. In the trial Court the accused was convicted under both sections. On appeal, it was contended by the accused that even though the evidence on record had established that he had been receiving bribes habitually, his conviction under Section 5(1)(*a*) was bad because the sanction order had not referred to facts disclosing habitual acceptance of bribes and was confined only to one act of accepting a bribe of Rs. 50 and hence even though the order sanctioned prosecution "under Section 5" it must be taken that what was in fact sanctioned has only prosecution under Section 5(1)(*d*). It was further contended that as a result the trial was wholly void and without jurisdiction and his conviction even under Section 5(1)(*d*) was illegal and was required to be set aside. The High Court upheld the first contention and set aside the conviction under Section 5(1)(*a*) of the Act, but it rejected the second contention and upheld the conviction of the accused under Section 5(1)(*d*). The High Court is perfectly right in reversing the conviction under Section 5(1)(*a*) of the Act, because cognizance could be taken only of the very offence disclosed in the order, and not of any other offence. Further, merely because the trial Court had taken cognizance of two offences, one as to which there was a proper and valid sanction, and the other as to which there was none, the whole trial was not vitiated on that account, and trial of the accused on the charge as to which there was a valid sanction remained perfectly competent and within jurisdiction. Since the offence charged under a valid sanction had been proved, conviction of the accused on that charge was quite proper. For these reasons, the High Court was right in rejecting the contention that the trial was wholly void and in confirming the conviction under Section 5(1)(*d*) of the Act. Conviction under Section 5(1)(*d*) of the act was upheld. *Jaswant Singh* v. *State of Punjab*, AIR 1958 SC 124 : 1958 CrLJ 224 : 1958 SCA 407 : 1958 SCJ 355.

[7054] ● *Conditions for valid sanction.*—A sanction purporting to be given under Section 197, CrPC, or Section 6 of the Prevention of Corruption Act, 1947, is valid only when all the following conditions are fulfilled, namely—

1. that the sanction is given by the appropriate Government or authority competent to give it,
2. that it is given *before* cognizance of the offence in respect of which it is given is taken by any criminal Court,
3. that is contains all the required particulars, and shows on the face of it that the sanctioning officer had applied his mind to all the facts of the case and was satisfied, after considering those facts, that in the interest of justice the

public servant concerned should be prosecuted.

However, for the purpose of the validity of a sanction it is not necessary that the sanctioning officer must personally inquire into the truth of the facts placed before him or the merits of the case, nor is it necessary that he should call for the records from his own office for the purpose of such satisfaction. It is enough if all the required material is placed before him by the investigating police-officer, and he is satisfied as to the necessity of the prosecution after considering such material and the report made by the investigating officer. Of course, when the validity of the sanction is challenged, the onus lies on the prosecution to prove affirmatively that the sanctioning authority applied his mind to the facts of the case before giving his sanction, but that onus can be discharged either by the language of the sanction order itself, or when the sanction order contains any omissions in that behalf, by producing evidence *aliunde* showing that sanction was in fact given after a due consideration of all the facts of the case. In the present case, the sanction order had been drafted by the police officer and had been placed by him before the sanctioning authority along with the case record and his own report. The sanctioning authority had placed his signature on that draft after considering the papers placed before him, but without calling for any record from his own office.

Though the sanction so given was not quite in the correct form, it was perfectly valid, because it could not be assumed that the sanctioning authority did not apply his own mind to the facts of the case, merely because he had accepted the draft prepared by another. *Indu Bhusan Chatterjee* v. *State of West Bengal*, AIR 1958 SC 148 : 1958 CrLJ 279 : 1958 SCA 348 : 1958 SCJ 581.

[7055] ● ***General Note.***—Though the above cases clearly set out the requirements of a valid sanction, none of these cases expressly state the effect of an invalid sanction on the legality of the trial of a public servant under such invalid sanction. Presumably, an invalid sanction is no sanction, and the effect of such invalidity must be taken to be the same as that of absolute absence of sanction in a case in which sanction is required by law. (For those cases, see under Topic No. F(2) in Chapter XIII of this Part.)

[7056] ● ***Application of mind.***—A Magistrate can be said to have 'taken cognizance' of an offence only when both the following conditions are satisfied, namely, (*a*) that he has applied his mind to that offence upon receiving either a complaint of it under Section 200 or a police report relating to it forwarded to him under Section 173(1), and (*b*) that he has so applied his mind to that offence for the purpose of proceeding with the case in respect of it in one of the ways mentioned in the subsequent provisions of the Code, such as, transfer of the case for inquiry or trial to another Magistrate under Section 192, or sending it for inquiry and report to a subordinate Magistrate or police officer under Section 202, or issue of a process against the accused under Section 204.

On the other hand, the Magistrate may have to apply his mind to any case for some purpose or at a stage other than the one mentioned above, such as, for an order under Section 155(2) or 156(3) directing an investigation to be made by a police officer, or for an order under Section 96 issuing a search-warrant, or for an order under Section 167(2) remanding an accused to custody, or for an order under Section 496 or 497 releasing an accused on bail. In all these cases, the Magistrate has to apply his mind to the case for making the required order, but merely on that account it can not be said that his act amounts to 'taking cognizance of the offence' within the meaning of that expression as used in the Code. In other words, the question whether or not a Magistrate has taken cognizance of an offence depends upon the stage at which and the purpose for which he has applied his mind to it, and not merely upon the fact of his applying his mind to it.

In the present case, the accused, who was caught on 7-9-1952 when he was about to board a plane leaving India with undeclared Indian currency, was charged for offences under the Foreign Exchange Regulation Act, 1947, and the Sea Customs Act. Thereafter, when authority to initiate criminal proceedings against him was obtained from the Reserve Bank, the police applied to the District Magistrate on 16-9-1952 for the issue of a search-warrant against the accused under Section 19(3) of the Foreign Exchange Regulation Act, for permission to investigate the case, and for arrest of the accused, and the application was granted. Three days later, on 19-9-1952, the accused was arrested and was released on bail. Since the order made on 16-9-1952 had directed that the investigation be completed and a report thereon be made on 19-11-1952, and the said investigation could not be completed by then, the police officer applied on 19-11-1952 for further time for investigation till 2-1-1953, and that application was granted, and on 2-1-1953 the time was further extended till 2-2-1953. On 2-2-1953 a complaint was filed against the accused, after the authority to file such a complaint as required by Section 23(3)(*b*) of the Foreign Exchange Regulation Act, was obtained from the Reserve Bank on 27-1-1953. The authority so received was for a prosecution of the accused on charges under Section 8(2) of the Foreign Exchange Regulation Act read with Section 19 of the Sea Customs Act :

(i) The orders passed by the Magistrate on 16-9-1952, 19-9-1952, 19-11-1952 and 2-1-1953 were only orders which were steps in the investigation of the case. An order of a Magistrate authorising the police to investigate non-cognizable offence, or issuing a search-warrant or directing arrest, or releasing an accused on bail, or extending the time for the investigation, could not be held to amount to "taking cognizance" within the meaning of Sections 190 and 200 of the Code. Such orders have to be passed under the Code by a Magistrate while investigation by the police into a non-cognizable offence is in progress, for the purpose of it being effectively carried out, and they do not amount to "taking cognizance" of an offence.

(ii) Cognizance in the present case was taken on 2-2-1953 when the complaint was filed by the police officer in the Court of the Magistrate, and since on that date the requisite authority of the Reserve Bank for filing the complaint had already been given, there was no legal bar on that date to the taking of cognizance of the offence of which the accused was charged.

(iii) Even when it is required by any statutory provision that cognizance of an offence shall not be taken except upon a previous complaint or sanction of an appropriate authority, there is nothing illegal in commencing or carrying out an investigation into such offence or in a Magistrate issuing necessary orders which are steps in such investigation even before the requisite authority for the cognizance of such offence has been obtained.

(iv) The cognizance in the present case had been taken in due compliance with the provisions of law in that behalf and no such illegality in the proceedings had been shown as would vitiate the trial. *Narayandas Bhagwandas* v. *State of West Bengal*, AIR 1959 SC 118 : 1959 CrLJ 1368.

[7057] ● ***Cognizance of offence of defamation.***—The provisions of Section 198 are mandatory, and cognizance of an offence of Defamation under Section 500, Penal Code, can be taken only when both the following conditions are satisfied, namely, (*a*) that the complaint is made by the person aggrieved by the defamation, and (*b*) that the very offence disclosed by the facts stated in the complaint is made out by the prosecution evidence.

In a case in which the accused is charged under Section 500, Penal Code, if the facts stated in the complaint are not made out by the prosecution witnesses, the Court must discharge the accused, even though the Court is of opinion that on their evidence another but quite different offence of defamation has actually been made out, and it must be left to the complainant to file, if he so chooses, a fresh complaint on the basis of the facts made out in such evidence. In other words, Section 198 operates as a bar against the framing of a charge of defamation on facts as to which no grievance has been made by the person aggrieved in the complaint made under Section 200 on which cognizance has been taken.

In the present case, a Magistrate wrongly framed a charge under Section 500, Penal Code, on evidence which made out a *prima facie* case under that section against the accused, though the facts which came out in that evidence had not been stated in the complaint which was based on entirely different facts. Later on, he realised his mistake, and after stating in his order that he had no jurisdiction to frame the charge which he had framed, he made an order acquitting the accused. The complainant moved the High Court in revision against this order, but his application was dismissed. He then appealed to the Supreme Court against the decision of the High Court. Since the trial Magistrate had no jurisdiction to frame the charge which he had framed, the order of acquittal made thereafter must be regarded as a nullity. When he discovered his error, he should have brought the matter to the notice of the High Court for getting the error corrected. When the error was brought to the notice of the High Court in revision, it should have set the wrong order of acquittal aside. In an appeal before it, the Supreme Court can do what the High Court could have done. Accordingly, the appeal was allowed, the order of acquittal made by the Magistrate was set aside, and that order was replaced by an order discharging the accused in the case. *Abdul Rehman Mohomed Yusuf* v. *Mohomed Haji Ahmad Agbotwala*, AIR 1960 SC 82 : 1960 CrLJ 1581.

[7058] ● *Private visit cannot be an act in performance of official duty.*—To do so by a police officer, therefore, when the accused went to the house of the complainant with the police, they had gone in their private capacity like any other person called upon to act as a panch witness, and it could not be claimed that they had acted or had purported to act in the performance of their official duties.

Further, even if it could be said that witnessing a search is an act done in the performance of official duty, it could not possibly be said that the offences alleged to have been committed by the accused had any connection with the act of witnessing a search. The presence of the accused in the house of the complainant, even though it be held to be in an official capacity, only gave them an opportunity to commit the offences complained of, and it could not be said that the criminal acts done by them were done while acting or purporting to act within the scope of their official duty.

For these reasons, it must be held that the Courts below had erred in holding that Section 197 applied and that sanction of the Government was required for the prosecution of the offences of which the accused had been charged. *Dhananjay Ram Sharma* v. *M.S. Uppadaya*, AIR 1960 SC 745 : 1960 CrLJ 1153.

[7059] ● *Tests for sanctioning prosecution of public servant.*—It is now well settled that the test for determining the question whether sanction under Section 197 for the prosecution of a public servant is necessary is this—is the act complained of such as to lie within the scope of his official duties, so that he could reasonably claim that what he did was done in virtue of his office, that is, does the act done directly bear on the duties which he has to discharge in his official capacity. The mere fact that an opportunity to commit an offence is furnished by the official duty is not such a connection of the offence with the performance of such duty as to justify even remotely the view that the act complained of is within the scope of the official duty of the accused. *Dhananjay Ram Sharma* v. *M.S. Uppadaya*, AIR 1960 SC 745 : 1960 CrLJ 1153.

[7060] ● *Sanction for prosecution not required for offence of cheating.*—The accused in the present case who were both railway servants were charged under Sections 342, 379 and 403, Penal Code. The case against them was that they had been taken by the police as panch witnesses to a raid on the house of a railway employee, and that during the search they had confined the person whose house was searched in a room and had removed cash and other articles from his trunks and boxes in another room. During the trial it was contended that sanction under Section 197 was necessary for the prosecution of the accused, and that in the absence of such sanction the Magistrate had no competence to take cognizance of the cases. Accepting this view, the Magistrate discharged the accused for want of sanction under Section 197, and on application in revision, the High Court affirmed the order of discharge. The complainant in the case appealed to the Supreme Court against this order. The scope of the official duties of the accrued obviously did not extend to acting as panch witnesses to search made by the police and helping them in such searches. No doubt, there was in force a Home Office Memorandum which stated that whenever the Special Police Establishment made a request to any Ministry to depute its officers to witness a police-trap, the Ministry should ‘extend its co-operation in the matter’. No such request had been made in the present case, and all that had happened was that the accused had gone as witnesses to the search on being called upon. It is now well settled that Section 197 can apply only when the act done bears such a relation to the official duties of the public servant concerned that he can lay a reasonable, and not merely a pretended and fanciful, claim that the act complained of was done by him in the course of performance of his official duty and not otherwise. If there is no necessary connection between the offence committed by him and his performance of his official duties, and all that he can prove is that his official status furnished him the occasion or the opportunity for the commission of the offence of which he is charged, Section 197 cannot be invoked and it cannot be claimed that sanction of the appropriate Government was necessary for his prosecution for that offence. An act of cheating or an act of abetment of cheating is of its very nature such that there cannot be any reasonable connection between it and the discharge of the official duties of the accused, and hence, Section 197 does not apply to the prosecution for an offence under Section 420, or Section 420 read with Section 109, Penal Code, and sanction for such prosecution is not required. *Satwant Singh* v. *State of Punjab*, AIR 1960 SC 266 : 1960 CrLJ 410 : 1960 SCJ 863.

[7061] ● *Trial not affected in absence of sanction for prosecution.*—In the present case, *S*, a private contractor, and *H*, a public servant, were jointly tried, *S* on the charge under Section 420, and *H* on the charge under Section 420/109. The case against them was that *S* had obtained from the Government payments of moneys under false claims, and that *H* had falsely certified those claims as true, knowing that they were false. Both the accused were convicted as charged. There was no sanction under Section 197 for this prosecution. It was contended that the trial was bad and had been vitiated from its start by the absence of the requisite sanction under Section 197, and it was urged that the act of *H,* which consisted of the issue of a false certificate, was necessarily an official act done while he purported to act in the discharge of his official duty. *H* having been prosecuted for an offence of abetment of cheating, and not for any offence concerning the issue of a false certificate, it could not be said that the trial was for an offence committed while he was acting or purporting to act in the discharge of his official duty. That being so, Section 197 did not apply and the validity of the trial was not in any way affected by the absence of a sanction for prosecution. *Satwant Singh* v. *State of Punjab*, AIR 1960 SC 266 : 1960 CrLJ 410 : 1960 SCJ 863.

[7062] ● ***Power of Magistrate to proceed for trial in warrant case after discharge in summons case.***—When a Magistrate takes cognizance of a case under Section 190(1)(*b*) on a police report, the cognizance so taken is in respect of every offence disclosed in that report, whether it is triable as a warrant-case or as a summons-case, and only in respect of offences enumerated in the report; in other words, the cognizance taken is of the whole case and not only of a particular part of it. Thereafter when the stage under sub-sections (2) and (3) of Section 251-A has been reached, it is quite clear from the language of these sub-sections that in deciding what action should be taken, the Magistrate has to form an opinion whether or not there is ground for presuming that the accused has committed an offence triable under Chapter XXI (now XIX). Therefore, when an order of discharge is made in the exercise of the powers under Section 251-A(2), the discharge is not in respect of all the offences which the facts mentioned in the police report make out, but only in respect of such of the offences mentioned in the report as are triable under Chapter XXI.

In such a case, if the facts mentioned in the charge-sheet constitute, not only one or more offences triable under Chapter XXI as warrant-cases, but also one or more other offences ordinarily triable under Chapter XX as summons-cases, the order of discharge, which is only in respect of the former class of cases, does not affect in any way the position as regards offences triable under Chapter XX as to which also charges are contained in the police report, and the Magistrate has the power to proceed with the trial in respect of such other offences. In such a case, it cannot be contended that the cognizance which the Magistrate had taken on the police report was only of offences triable as warrant-cases, and hence a fresh complaint in respect of such other offences triable under Chapter XX has to be made before the Magistrate can take cognizance of them, and then alone would he have the power to proceed with their trial. Such an argument is based on a false assumption as to the nature of the cognizance taken by a Magistrate under Section 190(1)(*b*) upon a police report. That cognizance having been of *all* the offences constituted by the facts mentioned in the report, and not only of such of those offences as are triable as warrant-cases, there is nothing in law to prevent the Magistrate from proceeding against the accused in the same trial in respect of offences triable as summons-cases which are constituted by the facts mentioned in the report after he has made an order of discharge in respect of the offences triable as warrant-cases.

The facts stated in the police report on which cognizance was taken by the Magistrate necessarily constituted only not an offence under Section 332 of which the accused was discharged, but also the minor offence under Section 323; when the Magistrate took cognizance he did so in respect of both these offences, and not only in respect of the offence under Section 332. Consequently, even after the accused was discharged of the offence under Section 332, the minor offence under Section 323 of which also he had taken cognizance remained for trial, and the Magistrate was right in proceeding with the trial in respect of that offence after following the procedure under Chapter XX of the Code. Conviction was upheld and the appeal was dismissed. *Pramatha Nath Mukherjee* v. *State of West Bengal*, AIR 1960 SC 810 : 1960 CrLJ 1165 : 1960 SCJ 926.

[7063] ● ***Sanction not necessary if offence committed by person ceased to be Magistrate.***—The words "any Magistrate" in Section 197(1) mean 'any person who is a Magistrate', and the words "when any Magistrate is accused of any offence" mean 'when an accusation of an offence is made against a person who is a Magistrate at the time when the accusation is made'. The question of taking cognizance arises only at a stage when a complaint is made or a police report submitted to the proper criminal Court for taking action, and what Section 197 requires is that if at that stage the person accused is a Magistrate, the Court shall take cognizance of the offence only if previous sanction for the prosecution has been given by the appropriate Government. Previous sanction for prosecution under Section 197 is not necessary for taking cognizance of an offence committed by a Magistrate while he was acting as a Magistrate, if he has ceased to be a Magistrate at the time when the complaint is made or the police report is submitted to the Court, that is, at the stage when the Court takes cognizance of the offence. It is immaterial for this purpose to consider whether the accused was a Magistrate at the earlier stage when the allegation about the offence was made against him when a complaint was made to his superiors or to the police, or at the time when a departmental enquiry was held against him. *Keshavlal Mohanlal Shah* v. *State of Bombay*, AIR 1961 SC 1395 : 1961 (2) CrLJ 571 : 1961 (2) SCJ 649.

[7064] ● ***Special procedure for trial of defamation case.***—Section 198-B provides for a special procedure for the trial of the offence of defamation of certain classes of persons specified in that section, and prescribes several conditions precedent to a trial of an offence falling within that section. These conditions are—

1. that the defamation is not by spoken words,
2. that the defamation is alleged to have been committed against some person specified in that section,
3. that the defamation is in respect of such person's conduct in the discharge of his public functions,
4. that a complaint of such an offence is made with the previous sanction of the appropriate authority specified in sub-section (3),
5. that the complaint is made by the Public Prosecutor, and,
6. that the complaint is made within six months from the date on which the alleged offence is committed. *P.C. Joshi* v. *State of Uttar Pradesh*, AIR 1961 SC 387 : 1961 (1) CrLJ 566 : 1961 (2) SCA 334 : 1961 (2) SCJ 48.

[7065] ● ***Complaint by Public Prosecutor.***—Sub-section (13) of Section 198-B CrPC is enacted with a view to state *ex abundanti cautela* that the right of a party aggrieved by publication of a defamatory statement to proceed under Section 198 is not taken away by Section 198-B. The expressions "in addition to" and "not in derogation of" mean the same thing that Section 198-B is an additional provision which is not intended to take away the right of a person aggrieved even if he belongs to the class specified in that section, to file a complaint, if he so elects, in the manner provided by Section 198. The context in which sub-section (13) occurs, clearly shows that what was intended was that the remedy of the person aggrieved provided in Section 198 is not impaired by the provision of Section 198-B. Section 198-B does not provide that the complaint shall be signed by any person other than the Public Prosecutor. In terms it requires only a complaint in writing by the Public Prosecutor. In the absence of any compelling reasons, it would be an unwarranted addition to sub-section (1) of the section to hold that the complaint shall also be signed by the person aggrieved. It must therefore be held that the complaint under Section 198-B is required to be signed only by the Public Prosecutor and there is no requirement that it must also be signed by the public servant who has been defamed. *P.C. Joshi* v. *State of Uttar Pradesh*, AIR 1961 SC 387 : 1961 (1) CrLJ 566 : 1961 (2) SCA 334 : 1961 (2) SCJ 48.

[7066] ● ***Application of mind by sanctioning authority.***—Even when the sanction for prosecution is given by the proper authority under Section 198-B(3), it is not enough merely to produce a document setting out the name of the person to be prosecuted and the provisions of the statute alleged to be contravened. The grant of a valid sanction is a condition precedent to the exercise of jurisdiction by the criminal Court, and the Court is invested with the jurisdiction to try the offence only when there is a proper sanction showing that the sanctioning authority has applied his mind to all the material facts of the case. Mere production of a document under the signature of the sanctioning authority would not satisfy the requirements of Section 198-B(3). If the facts which constitute the offence do not appear on the face to the sanction, it must be established by extraneous evidence that those facts were placed before the sanctioning authority and that the authority had applied his mind to those facts before giving the sanction. *P.C. Joshi* v. *State of Uttar Pradesh*, AIR 1961 SC 387 : 1961 (1) CrLJ 566 : 1961 (2) SCA 334 : 1961 (2) SCJ 48.

[7067] ● ***Sanction necessary in cases of conspiracy.***—Section 196-A(2) (now Section 196) provides that in a case in which the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with imprisonment for a term of two years or upwards, cognizance of the offence of criminal conspiracy under Section 120-B, Penal Code, can be taken by a Court only when the competent State Government, or the District Magistrate empowered in this behalf has consented to the initiation of the proceeding by order in writing. Offence under Sections 466 and 467 of the Penal Code are non-cognizable offences, and therefore sanction of the Government is necessary for the prosecution of the accused on the charge under Section 120-B where the alleged object of the conspiracy is to commit offences under Sections 466 and 467. *State of Andhra Pradesh* v. *Kandimalla Subbaiah*, AIR 1961 SC 1241 : 1961 (2) CrLJ 302.

[7068] ● ***Sanction necessary in cases of conspiracy.***—The question whether Section 196-A(2) applies in a case in which the main object of the conspiracy is to commit the offence of cheating under Section 420, Penal Code and the offences under Sections 466 and 467 are only the means to that end, so as to require the sanction of the Government for the prosecution for the class of criminal conspiracy was left undecided in this case, because the case was being sent back to the trial Court for other reasons and thus there was time enough for the Government to consider whether it should give sanction to the prosecution for the non-cognizable offences alleged to have been committed by the accused in pursuance of the conspiracy. *State of Andhra Pradesh* v. *Kandimalla Subbaiah*, AIR 1961 SC 1241 : 1961 (2) CrLJ 302 : 1961 (2) SCJ 686.

[7069] ● ***Transfer of case before taking cognizance is an administrative order.***—The transfer of a case by a District Magistrate to a subordinate Magistrate contemplated by Section 192, CrPC, is only transfer of a case in which cognizance of an offence has been taken. When a complaint is presented before a District Magistrate instead of presenting it before a Magistrate before whom it should ordinarily have been presented, the District Magistrate has the power, without taking cognizance of the case, to send it for disposal to the Magistrate before whom it should ordinarily have been filed. In such a case, the order of the District Magistrate is only an administrative order, and the action taken by him is not "transfer of a case for inquiry or trial" within the meaning of Section 192.

(*Note* : The significance of the difference lies in this that when a case is transferred by the District Magistrate under Section 192, he does so only after judicial cognizance of the case has already been taken by him for the purpose of inquiry or trial as the case may be, and in such a case there is no scope for the Magistrate to whom the case is transferred to send the case to the police for investigation in the exercise of his powers under Section 156(3). On the other hand, when the District Magistrate forwards a case "for disposal" to a subordinate Magistrate in the exercise of his administrative powers, as no judicial cognizance of the case has been taken, the Magistrate to whom the case is sent has the discretion to direct the police under Section 156(3) to investigate the case and report thereon before proceeding to hold the inquiry or trial.). *Gopal Das Sindhi* v. *State of Assam*, AIR 1961 SC 986 : 1961 (2) CrLJ 39 : 1961 (1) SCJ 573.

[7070] ● ***Meaning of "taking cognizance".***—What is meant by the words "take cognizance" in Section 190(1) of the Code is now well settled. Before it can be said that a Magistrate has "taken cognizance" of any offence under Section 190(1), he must not only have applied his mind to the complaint or the police report presented before him, but he must have done so for the purpose of proceeding in a particular way under the subsequent provisions of the Code which lay down the procedure for commencing an enquiry or trial into the offence. When the Magistrate applies his mind to the complaint or report, not for any such purpose, but only for the taking action of some other kind, for instance, for ordering an investigation under Section 156(3), or for making an order of bail, or for issuing a search warrant, he cannot be said to have taken cognizance of the offence. *Gopal Das Sindhi* v. *State of Assam*, AIR 1961 SC 986 : 1961 (2) CrLJ 39.

[7071] ● ***Appeal against order of single Judge lies to High Court.***—The decrees of a single judge of the High Court exercising civil jurisdiction are ordinarily appealable to the High Court under clause 10 of the letters Patent of the Allahabad High Court. It is true that the decision of a single Judge of the High Court is as much a decision of the High Court as the decision of a Division Bench. But Section 195(3) creates an artificial judicial subordination, and in view of its provisions the single judge of the High Court has to be deemed to be subordinate to the Division Bench to which appeals from his decrees and orders would ordinarily lie, for the purposes of an appeal under Section 476-B of the Code against an order of the single judge made under Section 476 or 476-A. Section 476-B not only provides for an appeal against the order of a single judge of the High Court refusing to file a complaint against any person for an offence under the Penal Code referred to in Section 195(1), CrPC, but further it also determines the forum to which the appeal shall lie.

It must therefore be held that an appeal from the order made by a single Judge of the High Court under Section 476, CrPC lies to the appellate Bench of the High Court, and not to the Supreme Court. The decision in *Sheriff, M.S.* v. *State of Madras,* AIR 1954 SC 397 : 1954 CrLJ 1019 : 1954 SCR 1144, cannot be relied upon for contending that the appeal lies to the Supreme Court, because the question which was considered in that case was as to the forum of appeal from the orders of a Division Bench of a High Court, and as no appeal lies to the High Court against the decision of a Division Bench of the High Court, it was held that the appeal under Section 476-B would lie in such a case to the Supreme Court. Further, in view of the specific provisions of Section 476-B, the provisions of Article 132 of the Constitution can be of no assistance in deciding the forum of appeal in such a case. *Narain Das* v. *State of Uttar Pradesh*, AIR 1961 SC 181 : 1961 (1) SCJ 375.

[7072] ● ***Validity of sanction for prosecution.***—What is relevant for the purpose of deciding as to who should give the sanction is the question as to which is the Government under whom the public servant is employed at the relevant time. If he is employed in connection with the affairs of the Federation (now, the Union), the sanction must be given by Governor General (now, the Central Government), and if he is employed in connection with the affairs of the State, by the Governor (now, the State Government). When the person is employed in connection with the affairs of the Federation, the sanction given must be by the Governor General even when such employment is only temporary and is the result of the services of the public servant having been loaned by a State Government to the Government of India, and it cannot be contended that the question as to which is the Government by which sanction under Section 197 must be given is determined by the permanent employment of the public servant.

In the present case, the accused was permanent employee in a gazetted post under the Government of Assam, but at the time when the alleged offences were committed by him his services were lent to the Government of India. The sanction for his prosecution was given by the Government of India. At the date when the sanction was given, the accused was on leave and he had applied to the State Government for extension of his leave. The accused was a "person employed in connection with the affairs of the Federation". Within the meaning of Section 197(1)(a) (as it stood before its amendment in 1950) and the sanction granted by the Governor General was valid. *R.R. Chari* v. *State of Uttar Pradesh*, AIR 1962 SC 1573 : 1962 CrLJ 510.

[7073] ● ***Cognizance of offence of criminal conspiracy.***—Section 196-A (now Section 196) of the Code provides that no Court shall take cognizance of the offence of criminal conspiracy under Section 120-B of the Penal Code except upon the complaint made or order of consent by the State Government or by some authority empowered by the State Government mentioned in the section. The mandatory provisions of Section 196-A cannot be evaded by resorting to a mere device or camouflage. The test whether sanction under Section 196-A is or is not necessary does not depend upon mere as triteness of drafting the petition of complaint, The question whether Section 196-A applies has to be decided, not merely by considering the offences mentioned in the heading or the body of petition of complaint, but by examining the actual allegations made in the petition of the complaint. The test is whether the allegations made disclose primarily and essentially the offence of criminal conspiracy as defined in the Penal Code. *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 876 : 1962 (1) CrLJ 770.

[7074] ● ***No bar to taking cognizance without sanction.***—The further question which arises is what is the position when some of the offences disclosed do not require any sanction while others require sanction. Where distinct offences are committed in the course of the same transaction, some of which require sanction and some do not require sanction, there is no bar against cognizance being taken without sanction of the offences which do not require sanction. *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 876 : 1962 (1) CrLJ 770.

[7075] ● ***Distinct offences—Cognizance not barred.***—The offences under Sections 467 and 471 of the Penal Code are distinct from the offence of criminal conspiracy and Section 196-A, CrPC does not apply to them. Therefore, even in a case in which criminal conspiracy is alleged, if the complaint discloses the actual commission of offences in pursuance of the conspiracy is alleged, if the complaint discloses the actual commission of offences in pursuance of the conspiracy, then, even in the absence of any sanction or consent under Section 196-A, the Court is not barred from taking cognizance of the case in so far as it relates to the commission of such offences other than criminal conspiracy. *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 876 : 1962 (1) CrLJ 770.

[7076] ● ***Distinction between abetment of conspiracy.***—The exact position in law is this. The gist of the offence of criminal conspiracy is in the agreement to do an illegal act, or to do an act which is not illegal by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an act which is not an offence, but is to do such act by illegal means, some act besides the agreement is necessary. The distinction between the offence of abetement by conspiracy under Section 107. Penal Code and the offence of criminal conspiracy under Section 120-B, lies in this. In the former offence a mere combination of persons and agreement between them is not enough, and an illegal act or omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of criminal conspiracy, the mere agreement or plot to commit an offence is an offence by itself. Where the complaint discloses that offences were actually committed in pursuance of the conspiracy, it is open to the Court to take cognizance of those offences, even though they were committed in pursuance of the criminal conspiracy and consent or sanction under Section 196-A has not been given. *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 896 : 1962 (1) CrLJ 770.

[7077] ● *Sales Tax Officer not a "Court".*— Merely because these instrumentalities of the State employed for the purpose of taxation have, in the discharge of their duties, to perform certain *quasi-judicial* functions, they are not converted thereby into Courts. They remain the instrumentalities of the State and are within the definition of "State" in Article 12. No doubt, they have certain powers which are similar to the powers exercised by Courts, but that would not make them "Courts" as understood in Section 195 of the Code. Under the Sales Tax act, a Sales Tax Officer is only an assessing authority and the scheme of the Act shows that the Sales Tax Officer cannot be equated with a Court.

In 1923, Section 195(2) was amended and by the amendment the word "includes" was substituted for the word "means". The amendment was no doubt intended to enlarge the definition of "Court" so as to include all Civil, Revenue and Criminal Courts. But it cannot be said that a Sales Tax Officer is a Revenue Court, or that by the said amendment the definition of the words "Revenue Court" was enlarged so as to include officers whose function mainly is assessment and collection of taxes.

When a question arises as to whether an authority created under any special Act is a "Court" or a "*quasi-judicial* tribunal", the test for determining that question is whether having regard to all the provisions of the Act that authority is charged with a duty to decide disputes and declare the rights of the parties in a definitive judgment. It is only when the authority is charged with such duty that it could be said that it possesses the attributes of a Court. The mere fact that an administrative authority is vested with what have been called "the trappings of a Court" would not make that authority a Court. Merely because a duty is cast on the executive or authority to conform to the norms of judicial procedure in performing some acts in its exercise of its exclusive power would not make it a "Court".

A Sales Tax Officer is not a Court within the meaning of Section 195, CrPC and therefore a complaint by a Sales Tax Officer is not necessary for prosecuting any person for an offence under the Sales Tax Act, or the Penal Code committed in or in relation to a proceeding before such officer. *Jagannath Prasad* v. *State of Uttar Pradesh*, AIR 1963 SC 416 : 1963 (1) CrLJ 330 : 1963 (2) SCJ 120.

[7078] ● *General authorisation to file complaint.*—The appellant was the editor of a daily newspaper, "Matrubhumi". In an issue of the newspaper he published extracts from a speech by a political leader wherein he made certain defamatory statements against the Governor of the State. The Home Secretary to the State Government made order purporting to be a sanction under Section 198-B of the Code for the prosecution of the appellants for offences under Sections 500 and 501, Penal Code. On the basis of the order, the Public Prosecutor lodged a complaint. Under Section 198-B(3)(a) two restrictions are placed upon the power of the Public Prosecutor to lodge a complaint with respect to the defamation of the Governor. The first is that the Secretary to the Government must have given the sanction to lodge the complaint, and the second is that the Secretary must have been authorised by the Governor in this behalf. This means that the Governor has first to consider for himself whether the alleged defamatory statement is of a kind of which he should take notice and seek to vindicate himself or whether the defamatory statement should be ignored as being either of a trivial nature or made by an irresponsible person. This decision whether a complaint should be lodged or not has to be taken by the Governor himself and he cannot leave it to some other person or an authority like the Government.

In the present case, the Governor himself gave evidence in the case and in his evidence he stated that he did not authorise the Government to start the case or gave any specific directions in that behalf, and had left it to the Government to take such action as it deemed proper. The inference, therefore, must be that the Governor was personally indifferent whether a complaint was lodged or not. In the circumstances it could not be said that the Governor had authorised the lodging of the complaint made in the present case. It is no doubt true that the decision whether to sanction or not to sanction the making of the complaint is that of the Secretary even when the Governor has authorised him in that behalf. There are good reasons why this should be so. The Secretary is expected to look at the question objectively and decide whether it is in the public interest to take notice of the defamatory statement and prosecute the person who made it. A person who is directly aggrieved by the statement may not be in a position to take an objective view of the matter and since the expenses for the prosecution have to be borne by the State, the legislature evidently felt that there was good reason for leaving the final decision to a third person rather than with the aggrieved person. All the same, the initiative to lodge a complaint must be taken by the Governor himself, and unless he has taken the decision to lodge a complaint and has authorised the Secretary to sanction the lodging of the complaint, the Secretary gets no power to accord his sanction. This authorisation is as much a pre-condition of the prosecution governed by Section 198-B as the sanction of the Secretary.

Whether the sanction for prosecution was authorised by the Governor could be proved either from the evidence of the Governor himself or from any writing from him in which he has said that he authorised the lodging of the complaint. In the present case, the evidence given by the Governor clearly showed that there was no express authorisation by him to the Secretary, and there was nothing in writing from him to that effect on the record.

Section 198-B(3)(a) does not contemplate a general authorisation. The authorisation by the Governor has to be for a sanction with respect to a specific complaint, and a general authorisation given by the Governor to the Secretary in the Home Department to accord sanction in such cases as fall under Section 198-B(1) would not be sufficient to comply with the requirements of the section. Section 14 of the General Clauses Act has no relevance to this question. Considering the nature of the offence, it has to be held that a general authorisation given in advance and covering all defamations falling under Section 198-B would not meet the requirements of Section 198-B(3)(a). For all these reasons, it must be held that the sanction given by the Government Secretary in the present case was not duly authorised by the Governor and hence the prosecution of the appellant was bad in law. *Gour Chandra Rout* v. *Public Prosecutor*, AIR 1963 SC 1198 : 1963(2) CrLJ 194 : 1963 SCD 423.

[7079] ● ***Question of valid sanction not revised earlier, cannot be.***—Though the document in question was not the original order made by the Governor, or even its copy, it clearly recited that the Governor had been pleased to grant sanction to the prosecution of the appellants for certain offences as required by Section 196-A. The document was an official communication from the Home Department and was addressed to the District Magistrate. Therefore, a presumption would arise that the sanction referred to in the document had in fact been given by the authority mentioned therein. Further, since the communication was an official communication a presumption would also arise that the official action referred to in the document was regularly performed. Therefore, the document placed on record *prima facie* met the requirements of Section 196-A, and since the point about a valid sanction had not been raised in the Courts below, it was not open to the appellants to contend for the first time before the Supreme Court that there was no evidence of the grant of a valid sanction as required by Section 196-A. *Tulsi Ram* v. *State of Uttar Pradesh*, AIR 1963 SC 666 : 1963(1) CrLJ 623 : 1963 (2) SCJ 274.

[7080] ● ***Cognizance by special Court.***—The word "cognizance" as used in the Code or in any Special Act has no mystic significance as distinct from jurisdiction, requiring some special technical requisite. "Cognizance" simply means—'become aware of' and with reference to Courts means 'taking judicial notice'. Taking cognizance does not involve any formal act. Cognizance is taken as soon as the Court applies its judicial mind to the facts of a case for taking any step in its trial. *Ajit Kumar Palit* v. *State of West Bengal*, AIR 1963 SC 765 : 1963 (1) CrLJ 797 : 1964 (1) SCJ 75.

[7081] ● ***Complaint by Court.***—Under Section 195(1)(c) a complaint by the Court is required when the prosecution is for the offence of forgery or using a forged document as genuine, when "such document" is produced or given in evidence in any proceeding in that Court. It is clear that it is only when the forged document itself is produced in Court that a complaint by the Court is required. Where what is produced before the Court is not the forged document itself but only a copy thereof Section 195(1)(c) does not apply and a complaint by the Court is not necessary.

Therefore, even if the Settlement Officer under the Act is assumed to be a Court within the meaning of Section 195(1)(c), a complaint by him was not necessary in the present case because what was produced before him was not the forged original verified claim itself, but only a copy thereof. *Budhu Ram* v. *State of Rajasthan*, 1963 (2) CrLJ 698 : (1963) 3 SCR 376.

[7082] ● ***Legality of sanction.***—Section 6 of the Prevention of Corruption Act, 1947 does not require the sanction to be given in a particular form. All that is required for compliance with its provisions is, firstly, that it must be proved that the sanction was given in respect of the facts constituting the offence charged, and secondly, that those facts must either be shown on the face of the sanction, or it must be otherwise proved that they were placed before the sanctioning authority. Both these conditions had been satisfied in the present case. All the facts constituting the offence of misconduct under Section 5 with which the accused was charged were placed before the Government. As regards the second condition though the sanction order did not itself mention the facts on which the sanction was given, the attached document referred to therein gave all the necessary and relevant facts constituting the offence of criminal misconduct. In the circumstances, the contention that the sanction given was illegal because it was not proved that all the relevant facts were placed before the sanctioning authority was not right and had to be rejected. *Ram Sagar Pandit* v. *State of Bihar*, 1963 Supp (2) SCR 652 : 1964 (2) CrLJ 65.

[7083] ● ***Application of S. 197, CrPC.***—The question which arose in this case was whether sanction under Section 197, CrPC was necessary for the prosecution of a Sub-Inspector of Police serving under the Government of Mysore State to whom the Mysore Police Act, 1908, applied. Under Section 197-B, CrPC, previous sanction of the State Government is required for the prosecution of any public servant who is not removable from his office save under the sanction of the State Government. Under Section 8 of the Mysore Police Act, the power to appoint and to dismiss "Inspectors" of all grades vests in the State Government. The word "Inspector" in Section 8 does not include Sub-Inspectors. Further, under Section 26 of the Act, any police officer below the grade of Assistant Superintendent can be dismissed by the Inspector General of Police. In view of these provisions it cannot be said that a Sub-Inspector of Police can be removed from service only by the State Government. It must therefore be held that Section 197 of the Code does not apply to a Sub-Inspector of Police and sanction of the State Government is not required for his prosecution even though he had committed the alleged offence while acting or purporting to act in the discharge of his official duty. *Nagraj* v. *State of Mysore*, AIR 1964 SC 269 : 1964 (1) CrLJ 161 : 1964 SCD 35.

[7084] ● ***Cognizance taken on complaint and not on police report.***—A case can be said to be "instituted" in a Court only when the Court takes cognizance of the offence alleged therein. An examination of the provisions of Section 190 makes it clear that a case is instituted in the Court of a Magistrate when the Magistrate takes cognizance of the facts which constitute such offence. Under Section 190(1) cognizance of offences can be taken by the Magistrate in three ways, upon receiving a private complaint of facts constituting an offence, or upon a police report of such facts made by any police officer, or upon the Magistrate's own knowledge or suspicion of such offence having been committed. Thus under Section 190(1), a case is instituted in the Court of a Magistrate when he takes cognizance of the offences alleged therein either upon receiving a private complaint of the facts constituting such offence, or upon a report of such facts made by any police officer. It is now well-settled that when a petition of complaint is filed before a Magistrate under Section 200 of the Code, the question whether he can be said to have taken "cognizance" under Section 190(1) of the offence alleged in the complaint depends upon the purpose for which he applies his mind to the complaint. If the Magistrate applies his mind to the complaint for the purpose of proceeding with the complaint under the various provisions of Chapter 16 of the Code, he must be held to have taken cognizance of the offences mentioned in the complaint, on the other hand, if he applies his mind to the complaint; not for any such purpose, but only for the purpose of ordering an investigation under Section 156(3) of the Code, or for issuing a search warrant under Section 96 he cannot be said to have taken cognizance of the offence. In the present case, after completing the examination of the complainant under Section 200, the Magistrate had made his order, "To S.I.B. for instituting a case and report." The order was clearly an order under Section 202 of the Code, and the fact that instead of using the words "for investigation", the words used in the order were "for instituting a case" would not make any difference in the nature of the order. The order could not be said to be an order directing an investigation of the case by the police under Section 156(3) of the Code. An order under Section 156(3) can be made without taking cognizance. Once cognizance of the case has been taken by the Magistrate by completing the examination of the complainant under Section 200, it is not open to him to order investigation under Section 156(3), and he can order investigation only under Section 202. In the circumstances, it must be held that though the Magistrate had used the words "for instituting a case" in his order, he had actually taken action under Section 202, that being the only section under which he was in law entitled to act. Further, the fact that the police officer has submitted a "charge-sheet" against the accused could not make any difference. Since the order passed by the Magistrate was an order made under Section 202, the report made by the officer must be treated as a report under that section, and not as a report under Section 173 of the Code. Cognizance having already been taken by the Magistrate before he made his order, there was no scope for cognizance being taken again of the same offence after the police officer's report was received. Therefore it must be held that the case was instituted on B's complaint, and not on the police report submitted later by the police officer. At most, it might be said that the Magistrate had committed irregularity in making his order, but the irregularity had not resulted in any failure of justice, and it could not be said that the proceedings subsequent to that order were all void. *Jamuna Singh* v. *Bhadai Shah*, AIR 1964 SC 1541 : 1964 (2) CrLJ 468 : 1964 SCD 103 : 1964 (2) SCJ 439.

[7085] ● ***Necessity of sanction.***—It is true that for considering whether Section 197, CrPC would apply, the Court must confine itself to the allegations made in the complaint. But that does not mean that it need not look beyond the form in which the allegations have been made and is incompetent to ascertain for itself their substance. It cannot be disputed that whether a person charged with an offence should or should not be released on bail was a matter within the discretion of the respondent and if while exercising a discretion he acted illegally by saying that bail would not be granted unless the appellant did something which the appellant was not bound to do, the respondent cannot be said to have acted otherwise than in his capacity as a public servant. For this reason, sanction of the appropriate authority for the respondent's prosecution was necessary under Section 197, CrPC. *Somchand Sanghvi* v. *Bibhuti Bhusan Chakravarty*, AIR 1965 SC 588 : 1965 (1) CrLJ 499 : 1964 (6) SCR 275 : 1964 SCD 496.

[7086] ● ***Inclusion of non-cognizable offence in charge.***—In Section 190, a distinction is made between the classes of persons who can start a criminal prosecution. Under the three clauses of Section 190(1), to which we have already referred, criminal prosecution can be initiated (i) by a police officer by a report in writing; (ii) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion, and (iii) upon receiving a complaint of facts. If the report in this case falls within (i) above, then the procedure under Section 251A, Criminal Procedure Code, must be followed. If it falls in (ii) or (iii), then the procedure under Section 251, Criminal Procedure Code, must be followed. We are thus concerned to find out whether the report of the police officer in writing in this case can be described as a "complaint of facts" or as "information received from any person other than a police officer". That it cannot be the latter is obvious enough because the information is from a police officer. The term "complaint" in this connection has been defined by the Code of Criminal Procedure and it means "the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer". It, therefore, follows that Section 252, Criminal Procedure Code, can only apply to those cases which are instituted otherwise than on a police report, that is to say, upon complaints which are not reports of a police officer or upon information received from persons other than a police officer. The initiation of the prosecution in the instant case was upon a report in writing by the police officer. Section 11 of the Essential Commodities Act, 1955, provides that no Court shall take cognizance of any offence punishable under that Act except on a report in writing of the facts constituting, such offence made by a person, who is a public servant, as defined in Section 21 of the Indian Penal Code.

Where the information discloses a cognizable as well as a non-cognizable offence, the police officer is not debarred from investigating any non-cognizable offence, which may arise out of the same facts. He can include that non-cognizable offence in the charge sheet which he presents for a cognizable offence. Both the offences if cognizable could be investigated together under Chapter XIV of the Code and also if one of them was a non-cognizable offence. *Pravin Chandra Mody* v. *State of Andhra Pradesh*, AIR 1965 SC 1185 : 1965 (2) CrLJ 250 : 1965 SCD 417.

[7087] ● ***Form of sanction.***—The sanction under Section 198-B, CrPC, granted by the State Government of U.P. was a sanction for making a complaint under Section 500, IPC against the appellant with respect to the article published in the issue of 'Kaliyug' dated September 12, 1960, under the heading "Ulta Chor Kotwal Ko Dante" which contained defamatory remarks against the Assistant Public Prosecutor, R.K. Sharma, or Aligarh, and other prosecuting staff of the Government in respect of their conduct in the discharge of public functions. The sanction in question was with respect to defamation of two persons (i) R.K. Sharma, Assistant Public Prosecutor, Aligarh; and (ii) the other police prosecuting staff of the Government of Uttar Pradesh, which would be the entire prosecuting staff in the State. There was nothing wrong in the form of the sanction and it did not suffer from any defect. *Sahib Singh Mehra* v. *State of Uttar Pradesh,* AIR 1965 SC 1451 : 1965 (2) CrLJ 434 : (1965) 1 SCWR 571 : 1965 SCD 600.

[7088] ● ***False evidence complaint by Court.***—If Dr. Dutt fabricated the false diploma, he made a document containing a false statement intending that it may appear in evidence and so appearing in evidence may cause any person who is to form an opinion upon it to entertain an erroneous opinion touching on a point material to the result of a judicial proceeding. Dr. Dutt, as alleged, was falsely posing as an expert and was deposing about matters which were material to the result of the trial. He had a document to support his claim, should occasion arise. He produced the document, when asked to do so, intending that the presiding Judge may form an erroneous opinion about Dr. Dutt and the relevancy of his evidence. The case was thus covered by Section 192. When Dr. Dutt deposed let us assume, falsely, about his training, he committed an offence under Section 193. Again when Dr. Dutt used the diploma as genuine his conduct was corrupt, whether or not it was dishonest or fraudulent.

It would thus be seen that the action of Dr. Dutt was covered by Sections 192 and 196 of the Penal Code. If Dr. Dutt gave a false evidence in Court or if he fabricated false evidence the offence under Section 193 was clearly committed. If he used fabricated evidence an offence under Section 196 was committed by him. These offences would have required a complaint in writing of the Sessions Judge before cognizance could be taken.

Dr. Dutt's conduct did not come within Section 471. On the other hand, it falls within purview of Section 196 which casts its net wider in the interest of the purity of administration of justice. It may be noted that an offence under Section 196 of the Penal Code is far more serious offence than the offence under Section 465/471. The offence in the instant case did not fall within Section 465/471, IPC and the prosecution launched against Dr. Dutt cannot be allowed to go on. *S. Dutt (Dr.)* v. *State of Uttar Pradesh*, AIR 1966 SC 523 : 1966 CrLJ 1459 : 1966 (1) SCR 493.

[7089] ● ***Offence not connected with official duty—Sanction not necessary.***—It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code, nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties, so that if questioned it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable.

Applying the principle to the present cases, we are of opinion that sanction of the State Government was not necessary for the prosecution of Gupta under Section 409 of the Indian Penal Code, because the act of criminal misappropriation was not committed by the appellant while he was acting or purporting to act in the discharge of his official duties and that offence has no direct connection with the duties of the appellant as a public servant, and the official status of the appellant only furnished the appellant with the occasion or an opportunity of committing the offence. *Baij Nath Gupta* v. *State of Madhya Pradesh*, AIR 1966 SC 220 : 1966 CrLJ 179.

[7090] ● ***Trial after distinct offence disclosed by different facts.***—Section 195, CrPC does not bar the trial of an accused person for a distinct offence disclosed by the same of slightly different set of facts and which is not included within the ambit of the section, but we must point out that the provisions of Section 195 cannot be evaded by resorting to devices or camouflage. For instance, the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply, and then convicting him of an offence to which it does, on the ground that the latter offence is a minor one of the same character, or by describing the offence as one punishable under some other section of the IPC, though in truth and substance the offence falls in the category of sections mentioned in Section 195, CrPC. Merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of Section 195 prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it. On behalf of the appellants it was suggested that the prosecution of the appellants under Section 353, IPC, was by way of evasion of the requirements of Section 195, CrPC. But we are satisfied that there is no substance in this argument and there is no camouflage or evasion in the instant case. *Durgacharan Naik* v. *State of Orissa*, AIR 1966 SC 1775 : 1966 CrLJ 1491 : 1966 SCD 1043.

[7091] ● ***Power of Court to proceed with trial of substantive offence without sanction.***—It is clear that the Court cannot take cognizance without the necessary consent in the case of a charge of criminal conspiracy under Section 120-B of which the object is as stated therein. The conspiracy to commit an offence is by itself distinct from the offence to do which the conspiracy is entered into. Such an offence, if actually committed, would be subject-matter of a separate charge. If that offence does not require sanction though the offence of conspiracy does and if sanction is not obtained it would appear that the Court can proceed with the trial as to the substantive offence as if there was no charge of conspiracy.

There was in the instant case not only a charge for conspiracy under Section 120-B but also two other separate charges for offences under Sections 409 and 477-A alleged to have been committed in pursuance of the conspiracy. Though the charge under Section 120-B required sanction, no such sanction was necessary in respect of the charge under Section 409. At the most, therefore, it can be argued that the Magistrate took illegal cognizance of the charge under Section 120B as Section 196-A(2) prohibits entertainment of certain kinds of complaints for conspiracy punishable under Section 120-B without the required sanction. The absence of sanction does not prevent the Court from proceeding with the trial if the complaint also charges a co-conspirator of the principal offence committed in pursuance of the conspiracy or for abetment by him of any such offence committed by one of the co-conspirators under Section 109 of the Penal Code. In our view the fact that sanction was not obtained in respect of the complaint under Section 120-B did not vitiate the trial on the substantive charge under Section 409. No prejudice could be said to have resulted in view of the appellant's confession that he had in fact misappropriated Rs. 2,500 and was prepared to deposit that amount. *Madan Lal* v. *State of Punjab*, AIR 1967 SC 1590 : 1967 CrLJ 1401 : 1967 SCD 1036.

[7092] ● ***Trial not vitiated for want of sanction.***—It has already been held by this Court in a very similar case of *Satwant Singh* v. *State of Punjab,* AIR 1960 SC 266, that sanction under Section 197 of the Code of Criminal Procedure was not required for a valid trial for the offence of abetement of cheating, because it cannot be held that a public servant committing such an offence is acting in the discharge of his duties as such.

Henderson was not being prosecuted for the act of certification of the correctness of the bills which were sent to him for verification, but was to be prosecuted for abetment of the offence of cheating committed by those persons, who had submitted the bills, by falsely certifying the correctness of those bills. The act of thus abetting the principal offenders could not possibly be held to have been done in the discharge of official duties as a public servant.

Besides, after the trial against the appellant had proceeded to some extent, the case against Henderson was separated and the appellant was tried alone in all the four cases. The appellant was not a Government servant, but only an independent contractor, and in his case, therefore, there was no question of any sanction of the Central Government being obtained under Section 197 of the Code of Criminal Procedure. His trial would therefore be unaffected by the want of sanction of the Central Government for the prosecution of Henderson. *Bakshish Singh Dhaliwal* v. *State of Punjab*, AIR 1967 SC 752 : 1967 CrLJ 656 : 1967 (1) SCR 211.

[7093] ● ***Power of Magistrate to take cognizance of offence.***—Under the Code of Criminal Procedure which applies to trials of such cases, the only provision for taking cognizance is contained in Section 190(1)(*a*), (*b*), (*c*). In the present case, the Judicial Magistrate at Chandigarh had before him the complaint filed by the respondent, and if Section 190 stood by itself, he was competent to take cognizance of it under clause (*a*) of sub-section (1) of that section. This power of taking cognizance was, however, subject to the subsequent provisions contained in the Code of Criminal Procedure including that contained in Section 195(1)(*a*), (*b*), (*c*). This sub-section thus bars any Court from taking cognizance of the offences mentioned in clauses (*a*), (*b*) and (*c*), except when the conditions laid down in those clauses are satisfied. In the case of an offence punishable under Section 211, IPC, the mandatory direction is that no Court shall take cognizance of any offence punishable under this section, when such offence is alleged to have been committed in, or in relation to, any proceedings in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. This provision in clause (*b*) of sub-section (1) of Section 195 is thus clearly a limitation on the power of the Court to take cognizance under Section 190. Consequently, it is at the stage when a Magistrate is taking cognizance under Section 190 that he must examine the facts of the complaint before him and determine whether his power of taking cognizance under Section 190 has or has not been taken away by clause (*b*) of sub-section (1) of Section 195, CrPC. In the present case, therefore, at the time when this complaint was filed by the respondent in the Court of the Judicial Magistrate at Chandigarh, it was necessary and incumbent on that Magistrate to examine whether his power of taking cognizance of the offence was limited by the provisions of Section 195(1)(*b*). He had, therefore, to determine whether cognizance of this complaint charging the appellant with commission of an offence under Section 211, IPC, could not be taken by him because that offence was alleged to have been committed in, or in relation to, any proceedings in any Court, and if he found that it was so, whether a complaint in writing by such Court or some other Court to which such Court was subordinate was necessary before he could take cognizance. Consequently, in deciding this appeal, this Court has to examine whether on the date when cognizance was taken by the Judicial Magistrate at Chandigarh, such cognizance was barred under Section 195(1)(*b*), CrPC, because the offence punishable under Section 211, IPC, included in the complaint was alleged to have been committed in, or in elation to, any proceeding in any Court. This provision bars taking of cognizance if all the following circumstances exist, *viz*; (1) that the offence in respect of which the case is brought falls under Section 211, IPC; (2) that there should be a proceeding in any Court; and (3) that he allegation shall be that the offence under Section 211 was committed in, or in relation to, such a proceeding. Unless all the three ingredients exist, the bar under Section 195(1)(*b*) against taking cognizance by the Magistrate, except on a complaint in writing of a Court, will not come into operation.

The question on which the decision in the present case hinges is whether it can be held that any proceeding in any Court existed when that Magistrate took cognizance. If there is no proceeding pending in any Court at all at the time when the applicability of Section 195(1)(*b*) has to be determined, nor has there been any earlier proceeding which may have been concluded, the provisions of this sub-section would not be attracted, because the language used in it requires that there must be a proceeding in some Court in, or in relation to, which the offence under Section 211, IPC, is, alleged to have been committed. In such a case, a Magistrate would be competent to take cognizance of the offence under Section 211, IPC, if his jurisdiction is invoked in the manner laid down in Section 190 of the Code of Criminal Procedure. *M.L. Sethi* v. *R.P. Kapur*, AIR 1967 SC 528 : 1967 CrLJ 528 : 1967 (1) SCA 476 : 1967 (2) SCJ 258.

[7094] ● ***Meaning of "taking cognizance".***—Once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. As pointed out by this Court in *Pravin Chandra Mody* v. *State of Andhra Pradesh,* AIR 1965 SC 1185, the term "Complaint" would include allegations made against persons unknown. If a Magistrate takes cognizance under Section 190(1)(*a*) on the basis of a complaint of facts he would take cognizance and a proceeding would be instituted even though persons who had committed the offence were not known at that time. In our view, the same position prevails under Section 190(1)(*b*). *Raghubans Dubey* v. *State of Bihar*, AIR 1967 SC 1167 : 1967 CrLJ 1081 : (1967) 2 SCJ 427.

[7095] ● ***Prosecution without sanction of Central Government.***—The question presented for determination in this appeal is whether the appellant was, at the date of the complaint *i.e.* March 14, 1961, a Public Servant "who was not removable from his office save by or with the sanction of the Central Government" within the meaning of Section 197 of the Criminal Procedure Code and, therefore, whether sanction of Central Government was necessary for prosecuting the appellant of the offences under Sections 166 and 167 of the Indian Penal Code.

It is apparent from Discipline and Appeal Rules for Gazetted Officers (Indian Railway Establishment Code Vol. I) that if a substantive promotion is made from Class II to Class I, it is done by the President, but officiating appointments are to be made by the General Manager, and in some cases with the approval of the Railway Board. Exhibits 22, 23 and 24 which are the copies of the appointment orders of the appellant also show that he was promoted to Class I by the General Manager with the approval of the Railway Board. It is also apparent that a Railway Officer who merely officiates in Class I cannot be said to belong to class I within the meaning of Item I of Schedule II. It follows, therefore, that the appellant was removable from his office with the sanction of the Railway Board and the sanction of the President was not necessary for taking such action against the appellant.

It is true that many important powers and functions of the Central Government in respect of administration of the Railways are exercised by the Railway Board, but it does not follow that the Railway Board is exercising those powers in their own right as part of the Central Government. On the other hand, Section 2 of the Railway Board Act, 1905 itself indicates that the Railway Board is an entity which is separate from the Central Government and the powers of the Railway Board are derived as a matter of delegation either absolutely or subject to conditions by notification by the Central Government. In other words. Railway Board is a separate body which derives its powers and authority, however wide, they may be only because of delegation of powers from the Central Government in respect of the administrations of the Railways. The result, therefore, is that the appellant was appointed in an officiating position as Class I officer by the Railway Board and, therefore, he was removable by the Railway Board and not by the Central Government. It cannot be said in the circumstances that the appellant was one of those public officers who could be removed only by or with the sanction of the Central Government within the meaning of Section 197, Criminal Procedure Code. If once the Central Government has delegated its power to another authority with regard to appointment and removal of a public servant, then for the purpose of Section 197, Criminal Procedure Code, the public servant concerned will not be treated to be a public servant 'not removable from his office except by or with the sanction of the Central Government' within the meaning of that section. *K.N. Shukla* v. *Navnit Lal Manilal Bhatt*, AIR 1967 SC 1331 : 1967 CrLJ 1200 : 1967 SCD 259 : (1967) 2 SCA 290.

[7096] ● ***"May" means "must".***—Under the section, the Magistrate is bound to take cognizance of any cognizable offence brought to his notice. The words "may take cognizance" in the context means "must take cognizance". He has no discretion in the matter; otherwise that section will be violative of Article 14 of the Constitution.

Where the police report clearly disclosed offences under Section 3 of the Suppression of Immoral Traffic in Women and Children Act or under Section 7 as the case may be, the Magistrate should at the first instance proceed against the persons complained against under the penal provisions and only after the disposal of those cases take action under Section 18 if there is occasion for it. *SDM, Delhi* v. *Ram Kali*, AIR 1968 SC 1 : 1968 CrLJ 82 : (1968) 1 SCR 205 : (1967) 2 SCA 621.

[7097] ● ***Criminal conspiracy—Sanction not required.***—No sanction is necessary under Section 196A(2) of the old Code when the object of the conspiracy is to commit the offence of cheating (Section 420, IPC), but, forgery of documents under Section 467, IPC, and similar non-cognizable offences are also committed as merely steps taken, by one or other of the accused, for the purpose of effecting the main object of the conspiracy. A trial, under such circumstances, for offences under Section 120-B read with Sections 467/471 and 420, IPC without obtaining sanction, is neither illegal nor void. It is necessary to keep in mind the difference between the object of a conspiracy and the means adopted for realising that object. Even if the object of the conspiracy, *viz.*, of cheating, is sought to be attained by resort to non-cognizable offences, sanction under Section 196A of the Code is not necessary. *Bhanwar Singh* v. *State of Rajasthan*, AIR 1968 SC 709 : 1968 CrLJ 867 : (1968) 2 SCJ 359 : (1968) 2 SCR 528.

[7098] ● ***Forged entries—Bar of private complaint.***—In this appeal the prosecution case was that one Nankoo sold his half share of lands to Kamla Prasad Singh and some others. Kamla Prasad Singh filed a complaint that one Harinath Singh in conspiracy with two Lekhpals got certain forged entries to be made in the Khasra after the sale in favour of Kamla Prasad and applied for the correction of Jamabandi. The Ahlmad in conspiracy with Harinath Singh *ante*-dated the said application to make it appear that it was made prior to the sale deed and to shield the Lekhpals. The application was entered in the register of Jamabandis although the case bearing that number was a later one. It was contended in the High Court under Section 561-A, CrPC. (Section 482 now), that the offence if any was one under Section 193, IPC, and that Section 195, CrPC, barred the private complaint. The High Court upheld the said objection. Hence this appeal. It would appear that the alleged offence committed by the Ahlmad was clearly in or in relation to a proceeding in Court. In fact he made an incorrect entry about a case actually in Court with the intention that the date of the institution of the proceeding might be taken to be an earlier date. Section 192, IPC, completely covered the case against Ahlmad and also Harinath Singh the alleged abettor, and punishable under Section 193, IPC, which was one of the sections mentioned in Section 195(1)(*b*), CrPC. Hence the private complaint was therefore incompetent. But the case under Section 218, IPC, was not barred under Section 195, CrPC. *Kamla Prasad Singh* v. *Harinath Singh*, AIR 1968 SC 19 : 1968 CrLJ 86 : 1968 SCD 93 : (1968) 1 SCJ 507.

[7099] ● ***Magistrate cannot take cognizance of offences under Ss. 182, 211 and 193, IPC on***

false allegations.—Once a complaint filed by the informant which is based on the same facts and allegations on which the first information was registered, it is not open to a Magistrate to take cognizance of any offence alleged to have been committed under Section 211, IPC unless there has been proper compliance with the provisions of Section 195(1)(*b*) of the CrPC. It will lead to very anomalous results if any other view is accepted, *e.g.*, if the complaint is ultimately dismissed and the Magistrate refused to lodge a complaint under Section 195(1)(b) its provisions will be defeated or circumvented if the police can move the Magistrate to take cognizance on a police report of an offence under Section 211, IPC. As regards an offence under Section 182, IPC, that offence is distinct from the one under Section 211, IPC, though the latter is more serious and may include the offence under the former section. The Magistrate can take cognizance of an offence under Section 182 on a complaint in writing of the police officer by virtue of the provisions contained in Section 195(1)(a), CrPC, but it would virtually lead to the circumvention of the provisions of Section 195(1)(b) if the proceedings under Section 182 can continue where the offence disclosed is covered by Section 211, IPC, and a complaint is pending which has been filed by the informant on the same facts and allegations as were contained in his FIR. On a parity of reasoning with regard to an offence under Section 211 of the Penal Code, no cognizance can be taken by the Magistrate for the alleged offence under Section 193, IPC, which is one of the sections mentioned in Section 195(1)(b). *State of Punjab* v. *Brijlal*, AIR 1969 SC 355 : 1969 CrLJ 645 : (1969) 1 SCJ 383 : (1969) 1 SCA 228.

[7100] ● ***Acts committed not in discharge of duty, sanction not necessary.***—It was only in the application of the settled rule as laid down by numerous decisions certain amount of difficult might be experienced owing to the peculiar facts of a particular case. The language of Section 197 clearly is that no Court would take cognizance of an offence alleged to have been committed by any person belonging to the category mentioned in the section which would include the appellant when he was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. It did not matter if the acts exceeded were strictly necessary for the discharge of the duty. What had to be found out was whether the act and the official duty were so inter-related that one could postulate reasonably that it was done by the accused in the performance of the official duty though possibly in excess of the needs and requirements of the situation. It was not every offence committed by a public servant which required sanction for prosecution under Section 197(1) of the Code, nor even every act done by him while he was actually engaged in the performance of his official duties. But if the act complained of was directly concerned with his official duty so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary and that would be so, irrespective of whether it was in fact a proper discharge of his duties or not. It was not clear in what capacity the appellant came to the spot. Normally it would be the officer-in-charge of the police station to go to the spot to prevent any breach of peace or apprehended breach of peace. Even if the appellant who was a superior officer could come to prevent any ugly situation arising between the complainant and the hawkers, it was not established that the appellant came in the capacity as a police officer. He came in civil dress, wanted the hawkers to be put in possession of the disputed plot and actually directed them to enter the plot and warned the complainant that if he resisted he would be slapped in his face. Until some more material was placed on the record it could not be held that it was any part of the duty of the appellant to ensure that the hawkers were put in possession of the disputed land. It was no part of the duty of a police officer to take sides and decide in favour of one party or to force one party to give up possession to the other, even if he was satisfied that the party seeking to take possession was lawfully entitled to do so. That the police officer could only do if there had been any direction by a competent Court for rendering help in the matter of delivery of possession. Whatever the way the matter was looked at, on the allegations contained in the statement of the complainant, the acts alleged against the appellant were not such as could be regarded to have been committed by him while acting or purporting to act in the discharge of his official duties. It would be open to the appellant to establish during the course of further proceedings that the requisite sanction under Section 197 should be obtained; but at the present stage the Supreme Court concurred with the view of the Judicial Commissioner that no such sanction was necessary. *Prabhakar* v. *Shankar*, AIR 1969 SC 686 : 1969 CrLJ 1057 : (1969) 1 SCJ 492.

[7101] ● ***Alleged acts inter-related with official duty.***—The question whether a particular act is done by a public servant in the discharge of his official duties is substantially one of fact to be determined on the circumstances of each case. It is not the "duty" which requires examination so much as the "act" because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. One must also guard against to wide a construction because under our constitution the idea of legal equality or of universal subjection of all citizens to one law administered by the ordinary Courts has been pushed to its utmost limits by enshrining equality before the law in our fundamental principles. In construing Section 197, a line has to be drawn between the narrow inner circle of strict official duties and acts outside the scope of official duties.

Where a Civil Assistant Surgeon had filed a complaint against the Civil Surgeon that while in the operation theatre the Civil Surgeon abused the complainant before the patients and hospital staff and ordered the hospital cook to "turn out this badmash" referring to the complainant and the cook actually pushed out the complainant, there was nothing on the record to show that this was a part of the official duty of the Civil Surgeon or that it was so directly connected with the performance of his official duty that without so acting he could not have properly discharged it. It would be open to the Civil Surgeon to place material on the record during the course of the trial for showing what his duty as Civil Surgeon was and also that the impugned acts were inter-related with his official duty so as to attract the protection afforded by Section 197. *B.P. Srivastava* v. *N.P. Mishra*, AIR 1970 SC 1661 : (1970) 2 SCC 56 : 1970 CrLJ 1401 : 1970 SCD 581.

[7102] ● ***Power to order investigation.***—The Magistrate can under Section 190 before taking cognizance, ask for investigation by the police under Section 156(3). The Magistrate can also issue warrant for production before taking cognizance. If after cognizance has been taken, the Magistrate wants any investigation, it will be under Section 202, CrPC. *State of Assam* v. *Abdul Noor*, AIR 1970 SC 1365 : (1970) 3 SCC 10 : 1970 CrLJ 1264 : 1970 SCD 358.

[7103] ● ***Legality of cognizance.***—The point of time at which the legality of the cognizance taken by the magistrate is to be adjudged is the time when cognizance is actually taken under Section 190 of the Code. Therefore, at that stage he must examine the facts of the complaint before him and determine whether his power of taking cognizance under Section 190 has or has not been taken away by any of the clauses (a) to (c) of Section 195(1) of the Code. Hence if there is non-compliance with the provisions of Section 195, the Magistrate will have no jurisdiction to take cognizance of any of the offence enumerated therein. The jurisdiction of the Court under Section 190 of the Code to take cognizance of the complaint filed by the Public Prosecutor against a Magistrate under Section 197, CrPC, for offences under Sections 167, 465, 466 and 471, IPC, for having interpolated in the order sheet, after an application for transfer of a case has been made, is not barred by Section 195 or Section 476 of the Code. *Govinda Mehta* v. *State of Bihar*, AIR 1971 SC 1708 : (1971) 3 SCC 329 : 1971 CrLJ 1266.

[7104] ● ***Consent not necessary for committal.***—The police submitted a charge-sheet before a Magistrate for offence under Sections 419 and 471 read with Section 468 and Sections 419/109, 471 and 468, IPC, against one Bakshi Singh and the appellant respectively. Admittedly it did not refer to a charge under Section 120-B in respect of either of them. But while framing charges on perusing the records under Section 173, CrPC, and passing the committal order (under the old procedure), he framed a charge against both the accused under Section 120-B, IPC As the Magistrate took cognizance of the offences on the basis of the charge-sheet which did not contain the offence under Section 120-B, consent under Section 196-A(2) was not required as a condition precedent and the committal order and the proceedings for committal were not vitiated for want of such consent. *Darshan Singh* v. *State of Maharashtra*, AIR 1971 SC 2372 : 1971 CrLJ 1697 : 1971 SCD 969.

[7105] ● ***Prohibition of cognizance of private complaints regarding offences u/s. 195(1)(b)(c), CrPC.***—The offences about which the Court alone, to the exclusion of the aggrieved private parties, is clothed with the right to complain, may, be appropriately considered to be only those offences committed by a party to a proceeding in that Court, the commission of which has a reasonably close nexus with the proceedings in that Court so that it can, without embarking upon a completely independent and fresh inquiry, satisfactorily consider by reference principally to its records the expediency of prosecuting the delinquent party. The purpose and object of the Legislature in creating the bar against cognizance of private complaints in regard to the offences mentioned in Section 195(1)(b) and (c) is both to save the accused person from vexatious or baseless prosecution inspired by feelings of vindictiveness on the part of the private complainants to harass their opponents and also to avoid confusion which is likely to arise on account of conflicts between findings of the Courts in which forged documents are produced or false evidence is led and the conclusions of the Criminal Courts dealing with the private complaint. It is for this reason that the Legislature has entrusted the Court, whose proceedings had been the target of the offence of perjury, to consider the expediency in the larger public interest, of a criminal trial of the guilty party. *Patel Laljibhai* v. *State of Gujarat*, AIR 1971 SC 1935 : (1971) 2 SCC 376 : 1971 CrLJ 1437.

[7106] ● ***Defamation—Complainant aggrieved person.***—Section 198 lays down an exception to the general rule that a complaint can be filed by any body whether he is an aggrieved person or not, and modifies that rule by permitting only an aggrieved person to move a Magistrate in cases of defamation. The section is mandatory, so that if a Magistrate were to take cognizance of the offence of defamation on a complaint filed by one who is not an aggrieved person, the trial and conviction of an accused in such a case would be void and illegal. *G. Narasimhan* v. *T.V. Chakkappa*, AIR 1972 SC 2609 : (1972) 2 SCC 680 : 1973 CrLJ 52 : (1972) 2 SCJ 596.

[7107] ● ***Criminal conspiracy not part of official duty.***—The offences of criminal conspiracy punishable under Section 120-B read with Section 409, IPC and also Section 5(2) PCA are concerned, they cannot be said to be of the nature mentioned in Section 197, CrPC. It is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197, CrPC is therefore no bar. *Harihar Prasad* v. *State of Bihar*, (1972) 3 SCC 89 : 1972 SCC (Cri) 409 : 1972 CrLJ 707 (SC).

[7108] ● ***Defamation—Complaint by other than aggrieved person.***—The appellants were at the material time the Editors and Publishers of three daily newspapers printed and published in Madras. The respondent who was the Chairman of the Reception Committee of the conference organised by the Dravida Kazhagam filed the complaints alleging that the newspapers published a distorted version of the resolution advocating that it should not be an offence for a person's wife to desire another man, that he was one of the members responsible for sponsoring and piloting that resolution. In a case where *Explanation 2* is resorted to, the identity of the company or the association or the collection of persons should be established so as to be relatable to the defamatory words or imputations. The news items complained of clearly stated that the resolution was passed by the conference and not by the Dravida Kazhagam and respondent signed describing himself in his first letter as the Chairman of the Reception Committee and not as an important member of the Dravida Kazhagam. There was no grievance there that the Dravida Kazhagam suffered injury in reputation or otherwise by that alleged distortion. In his advocate's letter to the appellants, the respondent's complaint was that the news item was highly defamatory and had tarnished the image of the conference, of whose Reception Committee he was the Chairman. In his evidence before the Magistrate also, he clearly stated that the resolution was moved by the President of and passed by the conference. Thus, his case throughout was that the publication of the said resolution reported in the said news item in distorted form had tarnished the image not of the Dravida Kazhagam but of the conference. That being so, the High Court completely missed the real issue, *viz.*, whether the conference was a determinate and an identifiable body so that defamatory words used in relation to the resolution passed by it would be defamation of the individuals who composed it, and the respondent, as one such individual and Chairman of its Reception Committee could maintain a complaint under Section 500, IPC. Whether the Dravida Kazhagam was an identifiable group or not was beside the point. The conference was not such a determinate class like the Rashtriya Swayam Sevak or the body of pubic prosecutors in the ruling cited, where complaints by its individual member or members were held maintainable. It was impossible to have any definite idea as to its composition, the number of persons who attended, the ideas and the ideologies to which they subscribed and whether all of them positively agreed to the resolution in question. The evidence simply was that the person presiding it read out the resolution and because no one got up to oppose it, it was taken as approved of by all. The conference clearly was not an identifiable or a definitive body so that all those who attended it could be said to be its constituents who, if the conference was defamed, would, in their turn, be said to be defamed. Section 198, CrPC, is mandatory, so that if a Magistrate were to take cognizance of the offence of defamation on a complaint filed by one who was not an aggrieved person, the trial and conviction of an accused in such a case by the Magistrate would be void and illegal. For the reasons set out, these appeals were allowed, the order of the High Court set aside and the proceedings taken out by the Magistrate were quashed on the ground that the respondent's complaint was not competent. *G. Narasimhan* v. *I.V. Chakkappa*, AIR 1972 SC 2609 : (1972) 2 SCC 680 : 1973 CrLJ 52.

[7109] ● ***Sanction for prosecution not necessary.***—Offences under Sections 161, 165 and 165-A, IPC, and Section 5 of the Prevention of Corruption Act are cognizable offences and there is no question of their being cognizable if investigated by a Deputy Superintendent of Police and non-cognizable when investigated by an Inspector of Police. There can also be no question of those offences being cognizable if they are investigated under Section 156, CrPC, but not when investigated in accordance with the provisions of Section 5(A) of the Prevention of Corruption Act. Hence there is no need for a sanction under Section 196-A (Section 196 o the new Code). *Union of India* v. *I.C. Lala*, AIR 1973 SC 2204 : (1973) 2 SCC 72 : 1973 SCC (Cri) 730 : 1973 CrLJ 1190.

[7110] ● ***Prosecution in larger interest.***—The Court orders prosecution in the larger interests of the administration of justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely that the Court should direct prosecution. *Santoskh Singh* v. *Izhar Hussain*, AIR 1973 SC 2190 : 1973 CrLJ 1176 : 1973 SCD 611.

[7111] ● ***Prohibition against complaint by private party.***—The words "to have been committed by a party to any proceeding in any Court" in Section 195(1)(c) mean that the offence should be alleged to have been committed by the party to the proceeding in his character as such party, that is, after having become a party to the proceeding. Where the accused put forward an unknown lady to personate one lady and two of the accused identified that lady as the person impersonated before the sub-registrar in the Registration Office knowing that she was not in fact that particular lady, and after thus securing a sale deed the other accused filed an application before the Tahsildar for mutation of revenue entries in his favour and in those proceedings he used the said forged sale deed as genuine knowing it to be forged. On receipt of notice, the lady impersonated resisted the application by denying having ever sold the plot in question or having ever executed and got registered the alleged sale deed. Thereafter she filed a complaint against the appellants under Sections 465, 468 and 471, IPC. They were acquitted by the Sessions Court and upon appeal the High Court convicted them under Section 465, read with Section 109, IPC. It was contended in the Supreme Court that even a prosecution for an offence under Section 465, IPC, required complaint by the Revenue Court concerned as such an offence was covered by Section 195(1)(c), CrPC. The contention was not correct. The prohibition contained in Section 195(1)(c) should be confined only to those cases in which the offences specified therein were committed by a party to the proceeding in the character as such party. Otherwise, documents forged long before the commencement of a proceeding in which they might happen to be actually used or produced in evidence, years later by some other party would also be subject to Sections 195 and 476, CrPC. *Raghunath* v. *State of Uttar Pradesh*, AIR 1973 SC 1100 : (1973) 1 SCC 564 : 1973 SCC (Cri) 448 : 1973 CrLJ 858.

[7112] ● ***Act of public servant purported to have been in exercise of his duty.***—Though the law is well-settled, the difficulty really arises in applying the law to the facts of any particular case. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. It is also not confined to cases where they act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence could have been committed when an act is done in the execution of duty or when an act purports to be done in the execution of the duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done or purported to be done in the execution of his duty. It does not apply to acts done purely in a private capacity by a public servant. There must be a reasonable connection between the act and the discharge of the official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of the duty. Where the accused who was the post Master General, kicked the complainant, a clerk in the post office, and abused him when the latter was making a representation to the accused for cancelling the transfer, applying the aforesaid test, the acts complained of could not be said to have been done in the course of performance of the accused's official duty, so as to require sanction for his prosecution and to justify the case being thrown out for want of sanction. It would be open to the accused to place the material on record during the course of the trial for showing what his duty was and also that the acts complained of were so inter-related with his official duty so as to attract the protection afforded by Section 197, CrPC. *Pukhraj* v. *State of Rajasthan*, AIR 1973 SC 2591 : (1973) 2 SCC 701 : 1973 SCC (Cri) 944 : 1973 CrLJ 1795.

[7113] ● ***Prohibition continued to offences alleged.***—The complaint alleged that the appellants forged the will of one Kharturam, produced it before the Patwari and used it as a piece of evidence in support of their title to a land. The Tehsildar directed that entries be made in the Record of Rights in the names of the appellants on the strength of that will. It was difficult on those facts to invoke the application of Section 195(1)(c) of the Code. In order to attract that provision, the offence should be alleged to have been committed by the party to the proceeding in his character as such party, *i.e.,* after having become a party to the proceeding. The forgery was therefore alleged to have been committed by the appellants not after they become parties to the mutation proceedings but prior to the commencement of those proceedings. The section could therefore have no application at least in regard to the offences under Sections 464, 467 and 468, IPC. Different considerations might, perhaps,arise in regard to the offence under Section 471, IPC, for the allegations might reasonably be susceptible of the construction that the offence of using a forged document as genuine punishable under Section 471 was committed by the appellants in their capacity as parties to a mutation proceeding. But the further question would be whether the will was produced or given in evidence in any "Court", within the meaning of clause (c). But that question was not answered by the Supreme Court observing that if the complainant succeeded in proving the other offences, it would be academic to consider whether the Magistrate could take cognizance for the offence under Section 471 because it was hardly likely that a separate sentence would be imposed for that offence, and on the other hand, if the charge with regard to the other offences failed, the one in regard to Section 471 would necessarily fail in the light of facts stated in the complaint. *Mohan Lal* v. *State of Rajasthan*, AIR 1974 SC 299 : (1974) 3 SCC 628 : 1974 SCC (Cri) 118 : 1974 CrLJ 350.

[7114] ● ***Magistrate ordering investigation, no cognizance taken.***—When on receiving a complaint the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If instead of proceeding under Chapter XV, he has in the Judicial exercise of his discretion taken action of some other crime, such as issuing a search-warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence. *D. Lakshminarayana* v. *V. Narayana Reddy*, AIR 1976 SC 1672 : 1976 SCC (Cri) 380 : 1976 CrLJ 1361 : 1976 CrLR (SC) 260.

[7115] ● ***Applicability of S. 195, CrPC.***—The inhibition in Section 195(1)(c) applied only where a person was being tried for an offence falling under Section 463 or punishable under Sections 471, 475 or 476. Hence so far as the offence under Sections 418 and 477-A were concerned, they were plainly not covered by Section 195(1)(c). The trial of the respondent for those two offences could not be said to be vitiated on the ground of absence of a complaint in writing by the Company Judge. The words in Section 195(1)(c) clearly meant that the offence should be alleged to have been committed by the party to the proceeding in his character as such party, that is, after having become a party to the proceeding. A reading of Sections 195(1)(c), 476 and 476-A of the Code (Sections 195(1)(b)(ii), 340(ii) & 341(1) of the new Code) together would indicate beyond doubt that the Legislature could not have intended to extend the prohibition contained in Section 195(1)(c) to offences mentioned therein when committed by a party to the proceeding prior to his becoming such party. In that view, since the offence charged against the respondent was one alleged to have been committed by him before he became a party to the proceeding before the Company Judge. Section 195(1)(c) had no application. Further neither of the two forged bills was produced or given in evidence in the proceeding before the company Judge. They were taken possession of by the Special Officer along with other records and nobody produced them in evidence before the Company Judge. On that ground also the section was not attracted. The High Court was therefore entitled to proceed with the trial of the respondent for an offence under Section 471 without any complaint in writing from the Company Judge. The appeal was allowed. *Legal Remembrancer, Govt. of W.B.* v. *Haridas*, AIR 1976 SC 2225 : (1976) 1 SCC 555 : 1976 CrLJ 1732.

[7116] ● ***Power to issue process.***—Where a Magistrate took cognizance of the offence on the police report and after taking cognizance and perusal of the record, he satisfied himself that there were *prima facie* grounds for issuing process against the respondents, he does not exceed the powers vested in him under law. *Hareram* v. *Thikaram*, AIR 1978 SC 1568 : (1978) 4 SCC 58 : 1978 SCC (Cri) 496 : 1978 CrLJ 1687.

[7117] ● ***Applicability of S. 197, CrPC.***—In the instant case the material brought on record up to the stage when the question of want of sanction was raised by the appellants, contained a clear allegation against them about the commission of an offence under Section 409, IPC, as it was substantially alleged that the appellants had seized the goods and were holding them in trust in the discharge of their official duty, for being dealt with or disposed of in accordance with law, but in dishonest breach of that trust, they criminally misappropriated or converted those goods, Whether this allegation or charge is true or false, is not to be gone into at this stage. In considering the question whether sanction for prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged. The *sine quo non* for the applicability of Section 197 is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under the colour of office held by him. One broad test may well be whether the public servant, if challenged, can reasonably claim, that what he does, he does in virtue of his office. The act complained of is dishonest misappropriation or conversion of the goods by the appellants, which they had seized and, as such, were holding in trust to be dealt with in accordance with law. There can be no dispute that the seizure of the goods by the appellants and their being thus entrusted with the goods or dominion over them, was an act committed by them while acting in the discharge of their official duty. Could the subsequent act of dishonest misappropriation or conversion complained of bear such an integral relation to the duty of the appellants that they could genuinely claim that they committed it in the course of the performance of their official duty? In the facts of the instant case the answer cannot but be in the negative. There is nothing in the nature or quality of the act complained of which attaches to or partakes of the official character of the appellants who allegedly did it. Nor could the alleged act of misappropriation or conversion, be reasonably said to be imbued with the colour of he office held by the appellants. Hence sanction of the appropriate Government was not necessary for the prosecution of the appellants for an offence under Section 409/120-B, IPC, because the alleged act of criminal misappropriation complained of was not committed by them while they were acting or purporting to act in the discharge of their official duty, commission of offence having no direct connection or inseparable link with their duties as public servants. At the most the official status of the appellants furnished them with an opportunity or an occasion to commit the alleged criminal act. *S.B. Saha* v. *M.S. Kochar*, AIR 1979 SC 1841 : (1979) 4 SCC 177 : 1979 SCC (Cri) 939 : 1979 CrLJ 1367 : 1979 CrLR (SC) 537.

[7118] ● ***Offence "in relation to proceeding in Court".***—*T* filed a report against *P* and others at the police station. Warrants were issued for the arrest of the accused who surrendered before the Court of the Sub-Divisional Judicial Magistrate and he released them on bail. Police referred the report of *T* as false and the Magistrate agreeing with the police report passed an order discharging the accused. Thereafter *P* filed a complaint before the same Magistrate accusing *T* of the commission of offences under Sections 211 and 182, IPC, by reason of the latter having lodged with the police the false complaint. *T* appeared in Court in response to a summons issued only in respect of an offence under Section 211. *T* filed a petition to the High Court of Calcutta praying for quashing of proceedings against him before the SDJM inasmuch as the latter was debarred from taking cognizance of the offence under Section 211 in the absence of a complaint in writing of the SDJM himself in view of the provisions of Section 195(1)(b), CrPC. The complaint against *T* was in respect of an offence alleged to have been committed in relation to a proceeding in Court and the SDJM acted in contravention of the bar contained in clause (b) of Section 195(1) in taking cognizance of the said complaint, as there was no complaint in writing either of the SDJM or of a superior Court. Decision of the Calcutta High Court was reversed.

A Magistrate while passing an order releasing an accused person on bail or discharging him in pursuance of a report submitted by the police to the effect that the evidence was insufficient to sustain the charge, acts judicially and therefore is a Court within the meaning of that term as used in clause (b) of sub-section (1) of Section 195 of the Code. *Kamlapati* v. *State of West Bengal*, AIR 1979 SC 777 : 1979 CrLJ 679 : 1979 CrLR (SC) 128 : (1979) 2 SCR 717.

[7119] ● ***Jurisdiction to take cognizance.***—The appellant entered into a conspiracy and tampered with the evidence of one of the defence witnesses which is a record of the Court. The Appellant was a party to a proceeding in the High Court when the appeal was heard but the document complained of as having been tampered with, *i.e.*, the evidence of the defence witness was not produced or given in evidence in the appeal before the High Court. The alleged tampering was after the hearing of the appeal was concluded. No doubt, the tampering was in a proceeding in relation to the preparation of the record. Requirements of Section 195(1)(c) having not been satisfied a complaint by the Court in writing is not necessary. Equally, under Section 195(4) relating to criminal conspiracy to commit offence, a complaint by the Court is not necessary. Therefore, Section 196-A(2) is attracted and a complaint by the State Government or the Chief Presidency

Magistrate or a District Magistrate empowered in this behalf by the State Government in writing consenting to the initiation of the proceedings for an offence under Section 120-B, IPC, is necessary. As in this case no such order consenting to the initiation of proceedings was passed, the Magistrate had no jurisdiction to take cognizance of the offence against the appellant. Judgment of the M.P. High Court was reversed and the order of committal passed by the Magistrate was *quashed. S.L. Goswamy* v. *Madhya Pradesh High Court*, AIR 1979 SC 437 : (1979) 1 SCC 373 : 1979 SCC (Cri) 311 : 1979 CrLJ 193 : 1979 CrLR (SC) 371.

[7120] ● *Power of Magistrate to dismiss complaint or issue process.*—On receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and straight way issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The police report under Section 173 will contain the facts discovered or unearthed by the Police and the conclusions drawn by them therefrom. The Magistrate is not bound by the conclusions drawn by the police and he may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record he statements upon oath of the complainant and the witnesses present under Section 200 of the Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate may, in such a case, do one of three things : (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; and (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be. *H.S. Bains* v. *State, U.T., Chandigarh*, AIR 1980 SC 1883 : 1980 CrLJ 1308 : (1980) 4 SCC 631 : (1981) 1 SCR 935.

[7121] ● *"Armed forces" includes "Central Reserve Police".*—*Expression* "Armed Forces of the Union" occurring in Section 197(2) is governed by a definition occurring elsewhere (either in the CrPC or in any other statute). Given its ordinary meaning, it includes not merely Naval, Military and Air Force but also any other Armed Forces of the Union as contained in Entry 2 in List I of the VII Schedule to the Constitution. Central Reserve Police Force is included in the "Armed Forces of the Union". *Akhilesh Prasad* v. *Union Territory of Mizoram*, AIR 1981 SC 806 : (1981) 2 SCC 150 : 1981 SCC (Cri) 337 : 1981 CrLJ 407 : 1981 CrLR (SC) 271.

[7122] ● *Improper cognizance and issuing process.*—In a private complaint, the Magistrate directed investigation under Section 202, CrPC. Report of investigation merely stated that a *prima facie* case was made out against four persons. Except expressing his opinion, no details of investigation made by him were mentioned nor did it refer to any witness examined by him or nay document perused by him. As there was no additional material before him except what was already there when he ordered an investigation under Section 202, Magistrate was wrong in taking cognizance of the case and ordering issue of process to the accused merely on the basis of opinion expressed by the investigating officer and without any reference to any further material. *Mohammad Ataullah* v. *Ram Saran*, AIR 1981 SC 1155 : (1981) 2 SCC 266 : 1981 SCC (Cri) 419 : 1981 CrLJ 616 : 1981 CrLR (SC) 192.

[7123] ● *Rent Control Officer "Civil Court".*—Offence under Section 193, IPC, was alleged for filing a false affidavit before the Rent Control Officer. Rent Control Officer shall be deemed to be a Civil Court within the meaning of Sections 345 & 346, CrPC, 1973 and in view of Section 34(2) of the U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972, shall be a Civil Court for purposes of Section 193, IPC. Complaint by the Court in writing is a precondition under Section 195(1)(b)(i) for taking cognizance of such offence by any Criminal Court. If the same is not satisfied, the Court has no jurisdiction to take cognizance. 1981 ACrR 98 reversed. *Chandrapal Singh* v. *Maharaj Singh*, AIR 1982 SC 1238 : (1982) 1 SCC 466 : 1982 SCC (Cri) 249 : 1982 CrLJ 1731 : 1982 CrLR (SC) 126 : 1982 ALJ 507 : 1982 AWC 251 : 1982 CrAppR (SC) 65 : 1982 ACrR 170 : 1982 (2) ChandLR (Cr) 46 (SC) : 1982 UJ (SC) 517 : (1982) 2 SCWR 61.

[7124] ● ***Expression "acting or purporting to act in discharge of his official duty".***—In this appeal by special leave, the short question for consideration was, if sanction under Section 197, CrPC, was necessary for the prosecution of the appellant for an offence of cheating punishable under Section 420, IPC. The appellant was Regional Officer of the Directorate of Field Publicity of the Government of India. He travelled by air on three occasions by obtaining air tickets *in lieu of* exchange orders. The cost of the tickets obtained by the appellant was debitable to the account of the Directorate and under the rules the appellant was required to exclude the same from the bills for traveling allowance. On the allegation that the appellant submitted bills including the air fare and received payment for the same, a prosecution report was submitted against him for the offence of cheating under Section 420, IPC. The appellant took the plea that in the absence of sanction under Section 197 of the Code, the prosecution was not maintainable. The trying Magistrate rejected the contention and the High Court upheld the order.

Where a public servant committed the offence of cheating or abetted another so to cheat, the offence committed by him was not one while he was acting or purporting to act in the discharge of his official duty, as such offence had no necessary connection between it and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offence. Drawing of T.A. bills could not be said to have been directly and reasonably connected with the appellant's duty as Regional Officer of the Directorate and the official status furnished the opportunity for doing the acts which constituted ingredients of the offence. He was, therefore, not entitled to claim the protection of Section 197(1) of the Code. The appeal was therefore dismissed. *Manohar Nath* v. *State of J&K*, AIR 1983 SC 610 : (1983) 3 SCC 429 : 1983 SCC (Cri) 647 : 1983 CrLJ 988 : 1983 CrLR (SC) 318 : (1983) 1 Crimes 1165 : 1983 ACrR 278 : 1983 AWC 555 : 1983 ACrC 254 : (1983) 2 ChandLR (Cr) 175 : 1983 UJ (SC) 572 : 1983 CrAppR (SC) 277.

[7125] ● ***Complaint against Magistrate.***—The respondent, an advocate, was representing the defendant in the suit which was being heard by the appellant. An application for transfer of that suit was moved by the defendant before the District Court. The District Judge called for remarks from the appellant regarding certain allegations in the transfer application. The appellant submitted his remarks in the form of a D.O. letter wherein he reported that the conduct and character of the respondent herein were not good and that it was brought to his notice that the respondent (Advocate) was a big gambler in the town and was a rowdy also and on account of that he exhibited all sorts of rowdyism in the open Court. That letter was read out by the District Judge in open Court. The respondent thereupon filed a criminal complaint against the appellant alleging that the aforesaid contents of the D.O. letter amounted to his defamation under Section 499, IPC. A question was raised before the Magistrate whether the Court could take cognizance of the offence without the sanction contemplated in Section 197, CrPC.

It was contended that the D.O. letter sent by the appellant to the District Judge was in discharge of his duties because the District Judge had called for the remarks and hence whatsoever had been written by the appellant was done while acting or purporting to act in discharge of his official duty and as such the ingredients of Section 197, CrPC, were satisfied. It was not possible to accept the said contention as there was no reasonable nexus between the act complained of and the discharge of duty by the appellant. Calling the respondent as "rowdy', 'a big gambler' and 'a mischievous element' could not even remotely be said to be connected with the discharge of official duty which was to offer his remarks regarding the allegations made in the transfer petition. The appeal was therefore dismissed. *B.S. Sambhu* v. *T.S. Krishnaswamy*, AIR 1983 SC 64 : (1983) 1 SCC 11 : 1983 SCC (Cri) 125 : 1983 CrLJ 158 : 1982 CrLR (SC) 513 : (1983) 1 Crimes 914.

[7126] ● ***Offence committed by MLA, sanction necessary.***—The appellants are being prosecuted for the criminal misconduct which they are alleged to have committed during the period they were Members of the Council of Ministers and not in their capacity as the MLAs. Hence, the provisions of Section 19 of the Prevention of Corruption Act, 1947 are inapplicable to the facts of the present case as held in *R.S. Nayak* v. *A.R. Antulay,* AIR 1984 SC 684 : (1984) 2 SCR 495.

[7127] ● ***Recital of wrong provision of law.***—A Sessions case was transferred by the Principal City Civil & Sessions Judge to the VI Additional City Civil & Session Judge. Latter tried and convicted the accused. High Court set aside the same and directed the former to try the accused.

Appeal was allowed holding that merely because an order is purported to be made under a wrong provision of law, it does not become invalid so long as there is some other provision of law under which the order could be validly made. Mere recital of a wrong provision of law does not have the effect of invalidating an order which otherwise was within the power of the authority making it. Section 409(1) instead of Section 194 was wrongly recited in the order of transfer and must be read as one made under Section 194 of the Code. *State of Karnataka* v. *Muniyalla*, AIR 1985 SC 470 : (1985) 1 SCC 196 : 1985 SCC (Cri) 50 : 1985 CrLJ 751 : 1985 CrLR (SC) 2.

[7128] ● ***Opportunity of hearing to informant before deciding not to take cognizance of offence.***—When the Magistrate was not inclined to take cognizance of the offence and issue process, on a consideration of the report made by the Officer in charge of a police station under sub-section (2)(i) of Section 173, informant should be given an opportunity of being heard so that he could make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. Similarly in a case where the Magistrate to whom a report was forwarded under sub-section (2)(i) of Section 173 decided not to take cognizance of the offence and to drop the proceeding or took the view that there was no sufficient ground for proceeding against some of the persons mentioned in the FIR, the Magistrate should give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report.

No obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased could be spelt out either from the provisions of the CrPC, 1973 or from the principles of natural justice, for providing such person an opportunity to be heard at the time of consideration of the report, unless such person was the informant who had lodged the First Information Report. But even if such person was not entitled to notice from the Magistrate, he could appear before the Magistrate and make his submissions when the report was considered by the Magistrate for the purpose of deciding what action he should take on the report. Such a person though not entitled to notice from the Magistrate, had locus to appear before him at the time of consideration of the report, if he otherwise came to know that the report was going to be considered by the Magistrate and if he wanted to make his submissions in regard to the report, the Magistrate was bound to hear him. Even though the Magistrate was not bound to give such notice he might, in the exercise of the discretion, if he so thought fit, given such notice to the injured person or to any particular relative or relatives of the deceased, but not giving of such notice would not have any invalidating effect on the order which might be made by the Magistrate on a consideration of the report. *Bhagwant Singh* v. *Commissioner of Police*, AIR 1985 SC 1285 : (1985) 2 SCC 537 : 1985 CrLJ 1521 : 1985 (1) Crimes 994.

[7129] ● ***Act not performed in discharge of official duty.***—Where the Sub-Inspector and the constable of the Delhi Police Force tampered with the search Memo while in the custody of the Court, it cannot be deemed to be an act purported to have been done by them in the discharge of their official duty and as such the previous sanction of the Lt. Governor as provided in Section 197(3), CrPC was not at all necessary for initiating the proceedings against them. *Balbir Singh* v. *D.N. Kadian*, AIR 1986 SC 345 : (1986) 1 SCC 410 : 1986 SCC (Cri) 80 : 1986 CrLJ 314 : (1986) 1 Crimes 373.

[7130] ● ***Inherent powers to stay proceedings.***—The direction made presumably under the inherent powers of the High Court contained in Section 482 was wholly unwarranted. The High Court Judge should not have made a direction at all requiring the Sessions Judge to proceed with the trial as against A-1 and A-2 merely because there was stay granted by the High Court in revision preferred by the co-accused (A-3 and A-4) against the order of the Sessions Judge rejecting the objection as to the validity of the trial for want of sanction. If the High Court felt that the grant of stay would prejudicially affect A-1 and A-2 and subject them to a protracted trial, the proper course for the High Court Judge was to have heard and disposed of the revision petition granting stay rather than make a direction to proceed with the trial against A-1 and A-2 which would in fact result in splitting up of the trial which was apt to cause miscarriage of justice, besides serious prejudice to the prosecution. It could not be said that merely because the proceedings before the Sessions Judge were held up due to stay granted by High Court in that revision, the High Court Judge should have taken recourse to the inherent powers of the High Court under Section 482, or that it was necessary to do so either to prevent abuse of the process of Court or otherwise to secure the ends of justice. Any further delay in the trial could be prevented by taking up the revision for hearing. The appeal was allowed and the High Court was directed to hear and dispose of the revision as early as possible and in the meanwhile ordered that the trial should remain stayed till the disposal of the revision. *State of Karnataka* v. *Nassa Reddy*, AIR 1987 SC

2104 : (1987) 4 SCC 170 : 1987 CrLJ 1929 : (1987)) 3 Crimes 215.

[7131] ● ***Prosecution of bank employee.***—Though an employee of a Nationalised Bank is a public servant, he does not hold a post where he could not be removed from service except by or with the sanction of the Government. *Ch. Prasad* v. *J. Vanalatha Devi*, AIR 1987 SC 722 : 1987 CrLJ 697 : (1987) 1 Supreme 111 : (1987) 1 Crimes 482 : (1987) 1 (1) IJ Rep 379.

[7132] ● ***Complaint against police officer for causing death of victim.***—Where it is alleged that grievous injuries were inflicted upon the complainant and one of the alleged accused had died, the question is while investigating and performing his duties as a police officer was it necessary for the petitioner to conduct himself in such a manner which would result in such consequences. It is necessary to protect the public servants in the discharge of their duties. They must be made immune from being harassed in criminal proceedings and prosecution and that is the rationale behind Sections 196 and 197, CrPC. It is equally important to emphasise that rights of citizens should be protected and no excesses should be permitted. "Encounter death" has become too common. In the facts and the circumstances of each case protection of public officers and public servants functioning in the discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported to discharge his duties, and whether the public servant has exceeded his limit. Though Section 196 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts comprised of were done in the discharge of the official duties, then the trial may have to be stayed, unless sanction is obtained. But at the same time it has to be emphasised that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence. In the instant case as the Court felt that unless cognizance was taken and the facts and circumstances and the nature of the allegations involved in the case were gone into, the question whether the raiding party exceeded its limits or power while acting in their official duties could not be determined. The High Court and the Supreme Court upheld the order of the trial Court. *Bakshish Singh* v. *Gurmej Kaur*, AIR 1988 SC 257 : (1987) 4 SCC 663 : 1988 SCC (Cri) 29 : 1988 CrLJ 419 : (1987) 3 Crimes 612 : 1987 CrLR (SC) 649 : JT 1987 (5) SC 190 : (1987) 3 SCJ 649 : 1988 BLJ 43 : 1988 Cal CrLR (SC) 1.

[7133] ● ***Power of High Court allot particular case to a particular Judge.***—The first part of the section clearly provides that the Sessions Judge of the Division by general or special order is supposed to allot cases arising in a particular area or jurisdiction to be tried by additional or Assistant Sessions Judges appointed in the Division but the last part of this section also authorises the High Court to allot the case to a particular Judge keeping in view of the fact that in certain cases the Sessions Judge may not like to allot and may report to the High Court or either of the parties may move an application for transfer and under these circumstances it may become necessary for the High Court to allot a particular case to a particular Judge. Thus the objection raised by the appellant's counsel that it was not necessary for the High Court to have allotted the case to a particular Judge is of no consequence. *Kehar Singh* v. *State (Delhi Admn.)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1989 CrLJ 1 : (1988) 2 Crimes 209.

[7134] ● ***Offence in respect of document produced in evidence.***—Section 195 of the Code was attracted when such offence was alleged to have been committed in respect of "a document produced or given in evidence in a proceeding in any Court", and accordingly held that since the document alleged to have been forged was not in the present case produced in the Court, the provisions of Section 195(1)(b)(ii) had no application and confirmed the High Court's direction but on a different ground as indicated. *Sushil Kumar* v. *State of Haryana*, AIR 1988 SC 419 : 1987 Supp SCC 654 : 1988 CrLJ 427 : (1988) 1 SCJ 28.

[7135] ● ***Validity of prosecution for adultery.***—Section 497, IPC, is so designed that a husband cannot prosecute the wife for defiling the sanctity of the matrimonial tie by committing adultery. Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus both the husband and the wife are disabled from striving each other with the weapon of criminal law. The philosophy underlying the scheme of Section 198(2), CrPC, and Section 497, IPC, appears to be as between the husband and the wife social goodwill be promoted by permitting them to 'make-up' or 'break-up' the matrimonial tie rather than to drag each other to a criminal Court. They can either condone the offence in a spirit of "forgive and forget" and live together or separate by approaching a matrimonial Court and snapping the matrimonial tie by securing divorce. They are not enabled to send each other to jail. The Court is not the arbiter of the wisdom or the philosophy of the law. It is the arbiter merely of the constitutionality of the law.

Section 497, IPC, and Section 198(1) read with Section 198(2), CrPC, go hand-in-hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit who invites the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting that unit. The community punishes the "outsider" who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring "man" alone can be punished and not the erring woman. There is thus reverse discrimination in "favour" of the woman rather than "against" her. Thus there is no discrimination against the woman in so far as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. *V. Revathi* v. *Union of India*, AIR 1988 SC 835 : (1988) 2 SCC 72 : 1988 CrLJ 921.

[7136] ● ***Power of Magistrate to take cognizance independently.***—The position is now well settled that upon receipt of a police report under Section 173(2) of the Code a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was therefore wrong in its view of the matter. The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the Magistrate and the latter had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). The order of the High Court is therefore set aside and that of the Metropolitan Magistrate restored. *India Carat Private Ltd.* v. *State of Karnataka*, AIR 1989 SC 885 : (1989) 2 SCC 132 : 1989 CrLJ 963.

[7137] ● ***Complaint should contain positive averments.***—It is important to state that for a Magistrate to take cognizance of the offence as against the Chief Editor, there must be positive averments in the complaint of knowledge of the objectionable character of the matter. The complaint, in the instant case, does not contain any such allegation. In the absence of such allegation, the Magistrate was justified in directing that the complaint so far as it relates to the Chief Editor could not be proceeded with. To ask the Chief Editor to undergo the trial of the case merely on the ground of the issue of process would be oppressive. *K.M. Mathew* v. *State of Kerala*, AIR 1992 SC 2206 : (1992) 1 SCC 217 : 1992 SCC (Cri) 88 : 1992 CrLJ 3779 : JT 1991 (4) SC 464.

[7138] ● ***Offences committed outside India, previous sanction not condition precedent.***—The agreement does not come to an end with its making, but would endure till it is accomplished or abandoned or proved abortive. Being a continuing offence, if any acts or omissions which constitutes an offence are done in India or outside its territory the conspirators continuing to be parties to the conspiracy and since part of the acts were done in India, they would obviate the need to obtain sanction of the Central Govt. All of them need not be present in India nor continue to remain in India.

A conspiracy thus, is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalised or done, attempted or even frustrated and *vice versa*.

Sanction under Section 188 is not a condition precedent to take cognizance of the offence. If need be it could be obtained before trial begins. Conspiracy was initially hatched at Chandigarh and though itself is a completed offence, being continuing offence, even accepting appellant's case that he was at Dubai and part of conspiracy and overt acts in furtherance thereof had taken place at Dubai and partly at Chandigarh; and in consequence thereof other offences had been ensued. Since the offences have been committed during the continuing course of transaction culminated in cheating PNB at Chandigarh, the need to obtain sanction for various offences under proviso to Section 188 is obviated. Therefore, there is no need to obtain sanction from Central Govt. The case may be different if the offences were committed outside India and are completed in themselves without conspiracy.

Preparation of bill of lading at Dubai or payment at Dubai were not isolated acts. They were part of chain activities between the appellant and his associates with whom he entered into agreement to cheat the bank at Chandigarh. Any isolated act or omission committed at Dubai was insufficient to constitute an offence. The illegal act of dishonestly inducing the bank at Chandigarh was committed not by preparation of bill at Dubai but its presentation in pursuance of agreement to cheat. The submission thus founded was on residence or on preparation of bills of lading or encashment at Dubai are of no consequence.

Nor is there any merit in the submission that even part of the offence would attract Section 188 as the section operates when offence is committed outside India. An offence is committed when all the ingredients are satisfied. The section having used the word offence it cannot be understood as part of the offence. Section 179, CrPC empowers a Court to try an offence either at a place where the offence is committed or the consequences ensue. On the allegations in the complaint the act or omissions were committed in India. In any case the consequence of conspiracy, cheating and forging having taken place at Chandigarh the offence was not committed outside the country therefore the provisions of Section 188, CrPC were not attracted. *Ajay Agarwal* v. *Union of India,* AIR 1993 SC 1637 : 1993(3) SCC 609 : 1993 CrLJ 2516 : 1993 CrLR (SC) 445 : 1993 (2) Crimes 342.

[7139] ● ***Power to summon additional accused.***—On a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power, it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this sub-section contemplates existence of some evidence appearing in the course of trial wherefrom the Court can *prima facie* conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by Section 319 of the Code.

But then it must be conceded that Section 319 covers the post-cognizance stage where in the course of an inquiry or trial the involvement or complicity of a person or persons not named by the investigating agency has surfaced which necessitates the exercise of the discretionary power conferred by the said provision. Section 319 can be invoked both by the Court having original jurisdiction as well as the Court to which the case has been committed or transferred for trial. The sweep of Section 319 is, therefore, limited, in that, it is an enabling provision which can be invoked only if evidence surfaces in the course of an inquiry or a trial disclosing the complicity of a person or persons other than the person or persons already arraigned before it. If this is the true scope and ambit of Section 319 of the Code the question is whether there is any other provision in the Code which would entitle the Court to pass a similar order in similar circumstances. On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the Court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can *prima facie* be gathered from the material available on record. *Kishun Singh* v. *State of Bihar*, 1993 (2) SCC 16 : 1993 CrLJ 1700 : 1993 CrLR (SC) 193 : 1993 (1) Crimes 494.

[7140] ● ***Offence of forgery of documents in proceedings before Revenue Court.***—The appellants in all these appeals were tried for offences punishable under Sections 466, 468, 471 read with Section 120-B, IPC, as well as under Section 5(1)(*d*) of the Prevention of Corruption Act, 1947. The object of the conspiracy was to frustrate the provisions of the newly notified Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 in so far as the provisions affected the interest of the conspirators and thereby to retain the large areas of lands with the leaders of the conspiracy and their relatives, *etc.* To achieve this object, it is alleged that certain revenue records and the records of the concerned sugar factory were forged and some incorrect entries were made.

Regarding the offences committed before the start of the proceedings, the High Court, in our view has rightly held that, no complaint is necessary by the Court concerned either in the old Criminal Procedure Code or in the new Code. Therefore, the contention that the absence of a complaint by the Revenue Court was a bar for taking cognizance by the Criminal Court in respect of these offences which were committed even before the start of the proceedings before the Revenue Court cannot be sustained. *Mahadev Bapuji Mahajan* v. *State of Maharashtra*, AIR 1994 SC 1549 (1550) : 1994 Supp (3) SCC 748 : 1994 CrLJ 1389.

[7141] ● ***Power of sessions Court to take cognizance as Court of original jurisdiction.***—On a plain reading of Section 193, as it presently stands once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a Court of original jurisdiction gets lifted. On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the Court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can *prima facie* be gathered from the material available on record. *Nisar* v. *State of Uttar Pradesh*, 1995 SCC (Cri) 306 : (1995) 2 SCC 23 : 1995 CrLJ 2118 : 1994 (3) Crimes 871.

[7142] ● ***Supplementary charge-sheet—Power to take cognizance not controlled by investigating agency.***—Merely because the prosecution had filed an application, after submission of charge-sheet seeking permission to file supplementary charge-sheet it could not affect the jurisdiction of the Magistrate to take cognizance, if he was otherwise satisfied that the cognizance was required to be taken. It is the jurisdiction of a Magistrate and Magistrate alone to decide whether the material placed by the prosecution with the report (charge-sheet) was sufficient to take cognizance or not. The power of the Magistrate to take cognizance cannot be controlled by the investigating agency, whose duty is only to investigate and place the facts and the evidence before the Magistrate. We cannot persuade ourselves to accept the view of the High Court that if the Investigating Officer terms a Police report as "incomplete", it takes away the jurisdiction of the Magistrate to take cognizance of the offence even if in the opinion of the Magistrate, the material is sufficient for him to be satisfied that it was a fit case for him to take cognizance of the offence. The Magistrate is not bound by the level given to the report of the charge-sheet by the Investigating Officer and it is for him to decide whether the report and the material on which it is based, is sufficient for him to take cognizance or not. *State of Maharashtra* v. *Sharadchandra Vinayak Dongre*, AIR 1995 SC 231 : (1995) 1 SCC 42 : 1995 SCC (Cri) 16 : 1995 CrLR (SC) 114.

[7143] ● ***Sanction for prosecution of M.L.A.***—Assuming, therefore, that the MLA is a public servant within the meaning of Section 2(c) (*viii*) of the Prevention of Corruption Act, 1947 in view of said proposition of law laid down in *R.S. Nayak* v. *A.R. Antulay,* AIR 1984 SC 684, it can be said that sanction under Section 199, CrPC, 1973 is necessary. *Habibulla Khan* v. *State of Orissa*, AIR 1995 SC 1124 : (1995) 2 SCC 437 : 1995 SCC (Cri) 382 (385, 387) : 1995 CrLJ 2071.

[7144] ● ***No sanction required when public servant retires.***—...a Constitution Bench in *Veeraswami* v. *Union of India,* (1991) 3 SCC 655, while construing the provisions of the same Section 6 of the Prevention of Corruption Act, 1947 held that no sanction under Section 6 of that Act was necessary for prosecution of the appellant in that case since he had retired from service on attaining the age of superannuation and was not a public servant on the date of filing the charge-sheet. *Habibulla Khan* v. *State of Orissa*, AIR 1995 SC 1124 : (1995) 2 SCC 437 : 1995 SCC (Cri) 382 : 1995 CrLJ 2071.

[7145] ● ***"Taking cognizance" is different from "initiation of proceedings".***—Section 190 of the CrPC talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word "cognizance" indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons

State of West Bengal v. *Mohammed Khalid*, AIR 1995 SC 785 : (1995) 1 SCC 684 : 1995 SCC (Cri) 266.

[7146] ● *Cognizance defined.*—Cognizance is defined in WHARTON'S LAW LEXICON, 14th Edition at page 209, It reads as follows:

> "Cognizance (Judicial), knowledge upon which a Judge is bound to act without having it proved in evidence: as the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with a foreign State, the several seals of the King, the Supreme Court and its jurisdiction, and many other things. A Judge is not bound to take cognizance of current events, however notorious, nor of the law of other countries." *State of West Bengal* v. *Mohammed Khalid*, AIR 1995 SC 785 : (1995) 1 SCC 684 : 1995 SCC (Cri) 266.

[7147] ● *Reasoned order.*—Court is not required to pass a reasoned order. *State of West Bengal* v. *Mohammed Khalid*, AIR 1995 SC 785 : (1995) 1 SCC 684 : 1995 SCC (Cri) 266 (294).

[7148] ● *Power to summon additional accused.*—The power under Section 319(1), CrPC can be exercised only in those cases where involvement of persons other than those arraigned in the charge-sheet comes to light in the course of evidence recorded during the enquiry or trial. As that stage had not yet reached in the present case, the appellants could not have been summoned invoking Section 319 of the CrPC. *Nisar* v. *State of Uttar Pradesh*, (1995) 2 SCC 23 : 1995 SCC (Cri) 306 : 1995 CrLJ 2118.

[7149] ● *Court to consider police report and other materials on record.*—*In Satya Narain Musadi* v. *State of Bihar*, (1980) 3 SCC 152 (See at pages 157-158, para 10, it was held as under) :

> "The report as envisaged by Section 173(2) has to be accompanied as required by sub-section (5) by all the documents and statements of the witnesses therein mentioned. One cannot divorce the details which the report must contain as required by sub-section (5) from its accompaniments which are required to be submitted under sub-section (5). The whole of it is submitted as a report to the Court. But even if a narrow construction is adopted that the police report can only be what is prescribed in Section 173(2), there would be sufficient compliance if what is required to be mentioned by the statute has been set down in the repot. To say that all the details of the offence must be set out in report under Section 173(2) submitted by the Police officer would be expecting him to do something more than what Parliament has expected him to set out therein. If the report with sufficient particularity and clarity specifies the contravention of the law which is the alleged offence, it would be sufficient compliance with Section 11...." *State of West Bengal* v. *Mohammed Khalid,* AIR 1995 SC 785 : (1995) 1 SCC 684 : 1995 SCC (Cri) 266.

[7150] ● *When Magistrate takes judicial notice of offence.*—In view of the above findings the Court while taking cognizance of offence can take into consideration not only police report but also other materials on record. *State of West Bengal* v. *Mohammed Khalid*, AIR 1995 SC 785 : (1995) 1 SCC 684 : 1995 SCC (Cri) 266.

[7151] ● *When Magistrate takes judicial notice of offence.*—The word "cognizance" has not been defined in the Criminal Procedure Code. But it is now settled law that the Court takes cognizance of the offence and not the offender. As soon as the Magistrate applies his judicial mind to the offence stated in the complaint or the Police report, *etc.*, cognizance is said to be taken. Cognizance of the offence takes place when the Magistrate takes judicial notice of the offence. Whether the Magistrate has taken cognizance of offence on a complaint or on a Police report or upon information of a person other than the Police Officer, depends upon further (sic) taken pursuant thereto and the attending circumstances of the particular case including the mode in which case is sought to be dealt with or the nature of the action taken by the Magistrate. *Anil Saran* v. *State of Bihar*, AIR 1996 SC 204 : (1995) 6 SCC 142 : 1995 SCC (Cri) 1051 : 1996 CrLJ 408 : (1995) 3 Crimes 740.

[7152] ● *Court to prima facie consider averments in charge-sheet.*—"After the investigation is conducted and the charge-sheet is laid the prosecution produces the statements of the witnesses recorded under Section 161 of the Code in support of the charge-sheet. At that stage, it is not the function of the Court to weigh the *pros* and *cons* of the prosecution case or to consider necessity of strict compliance of the provisions which are considered mandatory and its effect of non-compliance. It would be done after the trial is concluded. The Court has to *prima facie* consider from the averment in the charge-sheet and the statements of witnesses on the record in support thereof whether Court could take cognizance of the offence, on that evidence and proceed further with the trial. If it reaches a conclusion that no cognizable offence is made out, no further act could be done except to quash the charge-sheet. But only in exceptional cases, *i.e.,* in rarest of rare cases of *mala fide,* initiation of the proceedings to wreak private vengeance, process of criminal is availed of in lying a complaint or FIR itself does not disclose at all any cognizable offence—the Court may embark upon the consideration thereof and exercise the power." *State of Uttar Pradesh* v. *Pirthi Chand*, AIR 1996 SC 977 (980) : (1996) 2 SCC 37 : 1996 CrLJ 1354 : 1996 SCC (Cri) 210 : JT 1995 (9) SC 411.

[7153] ● ***Case received by transfer, Magistrate not denuded of his power to take cognizance.***—Sub-section. (1) of Section 192, CrPC has conferred a special power on the Chief Judicial Magistrate, as, normally, the Magistrate taking cognizance of an offence, has himself to proceed further as enjoined by the Criminal Procedure Code. But, an exception has been made in the case of Chief Judicial Magistrate, may be because he has some administrative functions also to perform. A Magistrate who receives the case on transfer and takes cognizance would not become incompetent to do so merely because the sanction of transfer of the case to his file is not in accordance with law. The power to take cognizance has been conferred on a Magistrate by Section 190(1) of the CrPC, and he would not be denuded of this power because the case has come to his file pursuant to some illegal order of the Chief Judicial Magistrate. The former would be exercising his power of taking cognizance even in such a case, because of his having received a complaint constituting the offence. It would not be material, for this purpose, as to how he came to receive the complaint—Directly or on transfer from the Chief Judicial Magistrate. *Anil Saran* v. *State of Bihar*, AIR 1996 SC 204 : (1995) 6 SCC 742 : 1995 SCC (Cri) 1951 : 1996 CrLJ 408 : JT 1995 (6) SC 428 : (1995) 3 Crimes 740.

[7154] ● ***Judicial discretion at the time of taking cognizance.***—Since at the time of taking cognizance, he Court has to exercise its judicial discretion, it necessarily follows that if in a given case, as the present one, - the complainant, as the person aggrieved, raises objections to the acceptance of a Police report which recommends discharge of the accused and seeks to satisfy the Court that a case for taking cognizance was made out, but the Court overrules such objections, it is just and desirable that the reasons therefore be recorded. Necessity to give reasons which disclose proper appreciation of the issues before the Court needs no emphasis. Reasons introduce clarity and minimise chances of arbitrariness. That necessarily means that recording of reasons will not be necessary when the Court accepts such Police report without any demur from the complainant. As the order of the learned Magistrate in the instant case does not contain any reason whatsoever, even though it was passed after hearing the objections of the complainant, it has got to be set aside and it is hereby set aside. Consequent thereupon two courses are open to direct the learned Magistrate to hear the parties afresh. In the question of acceptance of the prime report and pass a reasoned order or to decide for ourselves whether it is a fit case for taking cognizance under Section 190(1)(b), CrPC. *Rupan Deol Bajaj* v. *Kanwar Pal Singh Gill*, AIR 1996 SC 309 (316) : (1995) 6 SCC 194 : 1995 SCC (Cri) 1059 : 1996 CrLJ 381 : JT 1995 (7) SC 604 (2) : (1995) 4 Crimes 171.

[7155] ● ***Person auithorised by appropriate Government to file complaint.***—The provisions of Section 24 of the Industrial Disputes Act require that no Court shall take cognizance of any offence punishable under the said Act or of the abetment of such offence save on a complaint made by the appropriate Government or under the authority of the appropriate Government. There is not limitation therein in regard to the party to whom the authorisation may be given. It is the workman, the trade union and the employer who are most concerned with offences under the said Act and neither the terms of Section 34 nor public policy require that they should be excluded from making such complaints. At the same time the provisions of Section 34 are in the nature of a limitation on the entitlement of a workman or a trade union or an employer to complaint of offences under the said Act. They should, not, in the public interest, be permitted to make frivolous, vexatious or otherwise patently untenable complaints, and to this end Section 34 requires that no complaint shall be taken cognizance of unless it is made with the authorisation of the appropriate Government. Section 39 empowers the appropriate Government to delegate the powers exercisable by it under the said Act. This is altogether different from the concept of authorisation to file a complaint under Section 34 of the Act. If the powers under Section 34 have been delegated under Section 39, the delegate can file the complaint himself or authorise someone else to file it, Learned Counsel's argument, if accepted, would render the words "or under the authority of" in Section 34 otiose and that is impermissible. These words necessarily must be given due meaning and the meaning is that the appropriate Government may authorise someone other than itself, even a non-Government servant, to file a complaint under Section 34. *Raj Kumar Gupta* v. *Lt. Governor, Delhi*, AIR 1997 SC 2680 (2683) : (1997) 1 SCC 556 : JT 1996 (10) SC 559.

[7156] ● ***Magistrate after taking cognizance cannot order further investigation.***—It is not in dispute that before taking of cognizance under Section 190 (Part of Chap. XIV : Conditions Requisite for Initiation of Proceedings), The Magistrate may himself order investigations, as contemplated by sub-section (3) of Section 156 of the CrPC. Further, in exercise of power under Section 311 finding place in Chap. XXIV (General Provisions as to Enquiries and Trials), the Court may at any stage of an inquiry, trial or other proceedings under the Code summon any person as a witness if his evidence appears to be essential to the just decision of the case. But in the present appeal the learned Magistrate ordered for further investigation after the appellant had made his appearance and the case was otherwise ready for considering the question whether charge should be framed or appellant should be discharged.

The Code has compartmentalised the powers to be exercised at different stages of case, namely, at the time of cognizance after cognizance is taken, after appearance of the accused and after commencement of trial on charge being framed. The power of further investigation undoubtedly, exists in the first stage, may exist as the second and Section 311, CrPC permits to examine any witness during the course of trial. But at the third (intermediate) stage, this power has not been conferred on a Court. All that has to be done at that stage is to look into the materials already on record and either frame charge, if *prima facie* case is made out or discharge the accused. *Randhir Singh Rana* v. *State (Delhi Administration)*, AIR 1997 SC 639 : (1997) 1 SCC 361 : 1997 CrLJ 779 : 1997 CrLR (SC) 378.

[7157] ● ***Cognizance of offence by Designated Court after application of mind.***—It is seen that the order dated 18-7-1991 of the Designated Court unmistakably shows that after receipt of the case file on assignment from the Sessions Judge, the material was perused by the Designated Court itself and a *prima facie* case under Section 5 of TADA Act was found to have been made out. The cognizance was, thus, taken by the Designated Court on the basis of a complaint of facts, which disclosed the commission of an offence under Section 5 of TADA Act and the order dated 7-2-1991 read with order dated 18-7-1991 shows that the Designated Court applied its mind to the material on the record and then took cognizance. *Karan Singh* v. *State (Delhi Administration)*, AIR 1997 SC 1508 (1510) : (1996) 11 SCC 274 : 1997 SCC (Cri) 81 : 1997 CrLJ 736 : 1997 CrLR (SC) 123 : JT 1996 (9) SC 335.

[7158] ● ***Cognizance without proper sanction of government.***—During the inquiry under Section 202 it has come on record that an offence was registered against the complainant on 30-3-82 and respondent No. 2 had obtained a warrant for the arrest of the complainant and search of his premises. Admittedly, the raid was carried out under the supervision of Shri J.C. Das an Executive Magistrate who was deputed by the District Magistrate to supervise the raid, on a request made to that effect by respondent No. 2. The evidence further shows that proper lists regarding search and seizure were made and copies thereof were given to Nagendra. No complaint of any type was made by anyone to Shri J.C. Das who was supervising the acts of respondents Nos. 2 to 4. All this evidence could not have been ignored by the learned Magistrate and the High Court was; therefore, clearly wrong in holding that the learned Magistrate should have considered only the allegations made in complaint to find out whether the alleged acts were committed by respondents 2 to 4 while discharging or purporting to discharge their duties.

Thus the material collected during the inquiry discloses that material facts were suppressed by the complainant and some of the allegations made in the complaint were not correct. The High Court failed to appreciate that the search was made by respondents 2 to 4 after obtaining a warrant from the competent authority and the Executive Magistrate was kept present to supervise the raid. No complaint whatsoever was made to him regarding nay misbehaviour or the illegal acts now alleged in the complaint. Surprisingly the complainant who had returned to his house while the search was being made, did not enter his house upon knowing that the police were conducting a search and quietly went away from that place.

As the search was made by respondents 2 to 4 after obtaining a proper warrant for that purpose and as there is no credible material to show that they had either abused or assaulted the wife of the complainant or any other person what they had done appears to have been done while discharging or purporting to discharge their duty. Therefore, no cognizance of the alleged offences could be taken without a proper sanction of the Government. *State of Bihar* v. *Kamla Prasad Singh*, AIR 1998 SC 2379 : (1998) 5 SCC 690 : 1998 SCC (Cri) 1374 : 1998 CrLJ 3601 : 1998 CrLR (SC) 470 : 1998 (3) Crimes 31.

[7159] ● ***State appeal against order of acquittal.***—The cognizance in the instant case was taken upon a police report under Section 190(1)(b), CrPC. Resultantly, it was the State alone who could file an appeal in the High Court against the order of acquittal under Section 378(1), CrPC after obtaining leave under sub-section (3) thereof—and not the complainant who could only file an application under Section 401, CrPC for revision of that order. The High Court, therefore was not at all justified in entertaining the appeal of the complainant and disposing the same in the manner aforesaid. On this score alone, we allow this appeal and restore the order of the trial Court. The High Court will now treat the memorandum of appeal filed by the complainant as an application for revision of the order of the Sessions Judge, *qua* the two appellants only, and dispose of the same in accordance with law. *Jagbir* v. *State of Punjab*, AIR 1998 SC 3130 : (1998) 6 SCC 629 : 1998 SCC (Cri) 1524 : 1998 CrLJ 4588 : 1998 (3) Crimes 244.

[7160] ● ***Time limit for taking cognizance.***—As the offence under Section 7(1)(*a*)(*ii*) of the Essential Commodities Act is punishable with imprisonment up to 7 years, the offence would not attract the bar of limitation under Section 468 of the CrPC. *Nirmal Kanti Roy* v. *State of West Bengal*, AIR 1998 SC 2322 (2327) : (1998) 4 SCC 590 : 1998 SCC (Cri) 1100 : 1998 CrLJ 3282 : 1998 CrLR (SC) 573 : JT 1998 (3) SC 436 : (1998) 2 Crimes 267.

[7161] ● ***Limitation for filing complaint.***—Clause (*c*) of Section 138 of the Negotiable Instruments Act, the starting date is the date of "the receipt of the said notice". Once it starts, the offence is completed on the failure to pay the amount within 15 days therefrom. Cause of action would arise if the offence is committed. If a different interpretation is given the absolute interdict incorporated in Section 142 of the Act that no Court shall take cognizance of any offence unless the complaint is made within one month of the date on which the cause of action arises, would become otiose. *SIL Import USA* v. *Exim Aides Silk Exporters, Bangalore*, AIR 1999 SC 1609 : (1999) 4 SCC 567 : 1999 SCC (Cri) 600 : 1999 CrLJ 2276 : 1999 CrLR (SC) 317 : JT 1999 (3) SC 325.

[7162] ● ***Power of Magistrate taking cognizance not impaired by territorial restrictions.***—It is an erroneous view that the Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. Chapter XIII of the Code relates to jurisdiction of the criminal Courts "in enquiries and trials." That chapter contains provisions regarding the place where the enquiry and trial are to take place. Section 177 says that "every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed." But Section 179 says that when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the place of enquiry and trial can as well be in a Court "within whose local jurisdiction such thing has been done or such consequence has ensued". It cannot be overlooked that the said provisions do not trammel the powers of any Court to take cognizance of the offence. Power of the Court to take cognizance of the offence is laid in Section 190 of the Code. Section 193 imposes a restriction on the Court of Session to take cognizance of any offence as a Court of original jurisdiction. But "any" Magistrate of the first class has the power to take cognizance of any offence, no matter that the offence was committed within his jurisdiction or not.

The only restriction contained in Section 190 is that the power to take cognizance is "subject to the provisions of this Chapter." There are 9 Sections in Chapter XIV most of which contain one or other restriction imposed on the power of a first class Magistrate in taking cognizance of an offence. But none of them incorporates any curtailment on such powers in relation to territorial barrier. In the corresponding provision in the old Code of Criminal Procedure (1898) the commencing words were like these : "Except as hereinafter provided." Those words are now replaced by "Subject to the provisions of this chapter." Therefore, when there is nothing in chapter XIV of the Code to impair the power of a judicial Magistrate of first class taking cognizance of the offence on the strength of any territorial reason it is impermissible to deprive such a magistrate of the power to take cognizance of an offence of course, in certain special enactments special provisions are incorporated for restricting the power of taking cognizance of offences falling under such acts. But such provisions are protected by non obstante clauses. Any way that is a different matter. The jurisdictional aspect becomes relevant only when the question of enquiry or trial arises. It is therefore a fallacious thinking that only a Magistrate having jurisdiction to try the case has the power to take cognizance of the offence. If he is a Magistrate of the First Class his power to take cognizance of the offence is not impaired by territorial restrictions. After taking cognizance he may have to decide as to the Court which has jurisdiction to enquire into or try the offence and that situation would reach only during the post cognizance stage and not earlier. *Trisuns Chemi-*

cal Industry v. *Rajesh Agarwal,* AIR 1999 (SC) 3499 : 1999 (8) SCC 686 : 1999 CrLJ 4325 : 1999 CrLR (SC) 677.

[7163] ● *Mere presentation of complaint does not mean taking cognizance.*—Mere presentation of the complaint in the Court cannot be held to mean that its cognizance had been taken by the Magistrate. If the complaint is found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed. *Narsingh Das Tapadia* v. *Goverdhan Das Partani*, AIR 2000 SC 2946 : (2000) 7 SCC 183 : 2000 SCC (Cri) 1326 : (2000) 4 Crimes 12 (SC).

[7164] ● *Limitation for taking cognizance.*—The language of sub-section (3) of Section 468, CrPC makes it imperative that the limitation provided for taking cognizance in Section 468 is in respect of the offence charged and not in respect of offence finally proved. This being the position, in the case in hand, when the respondents were charged under Section 468 read with Section 120-B, for which the imposable punishment is seven years and Section 5(2) of the Prevention of Corruption Act, 1947, which is punishable with imprisonment for a term which may extend to seven years and for such offences no period of limitation having been provided for in Section 468, the cognizance taken by the learned Special Judge cannot be said to be barred by limitation. *State of Himachal Pradesh* v. *Tara Dutt*, AIR 2000 SC 297 : (2000) 1 SCC 230 : 2000 SCC (Cri) 125 (128) : 2000 CrLJ 485 : 2000 CrLR (SC) 156.

[7165] ● *Power of criminal Court to continue with proceedings.*—"We see no provision under the Reserve Bank of India Act which prohibits any criminal proceeding to be continued. The provision of Section 58-E bars taking cognizance of offence committed under the said Act, namely, Reserve Bank of India Act. The power of Company Law Board under Section 45-QA of the reserve Bank of India Act, as amended, does not in any way take away the power of the Criminal Court to continue with the criminal proceedings." *Prudential Capital Mkt. Ltd.* v. *State of Bihar*, AIR 2000 SC 3668 (3669) : (2000) 9 SCC 539 : 2001 CrLJ 121.

[7166] ● *Cognizance by condoning delay.*—Section 473, CrPC confers power on the Court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore, in respect of the offences for which a period of limitation has been provided in Section 468, the power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognised principles. This being a discretion conferred on the Court taking cognizance, wherever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect, it may not be permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence. *State of Himachal Pradesh* v. *Tara Dutt*, AIR 2000 SC 297 : (2000) 1 SCC 230 : 2000 SCC (Cri) 125 (128, 129) : 2000 CrLJ 485 : 2000 CrLR (SC) 156.

[7167] ● *Conviction for minor offences.*—But the provisions are of no application to the case in hand since for the offences so charged, no period of limitation has been provided in view of the imposable punishment thereunder. In this view of the matter, the High Court committed serious error in holding that the conviction of the two respondents under Section 417 would be barred as on the date of taking cognizance the Court could not have taken cognizance of the said offence. Needless to mention, it is well settled by a catena of decisions of this Court that if an accused is charged with a major offence but is not found guilty thereunder, he can be convicted of a minor offence if the facts of the case indicate that such minor offence has been committed. *State of Himachal Pradesh* v. *Tara Dutt*, AIR 2000 SC 257 : (2000) 1 SCC 230 : 2000 SCC (Cri) 125 (128, 129) : 2000 CrLJ 485 : 2000 CrLR (SC) 156.

[7168] ● *Word "Any offence" not restricted to offences specified in State Act.*—The words "any offence" mentioned in sub-section (3) of Section 64, of the Kerala Police Act, 1960 indicate that the provision is not restricted to the offences specified in the Kerala Police Act, 1960. It is advantageous in this context to refer to Section 2(n) of the Code which is the definition for the word "offence". It means "any act or omission made punishable by any law for the time being in force". Even otherwise there is nothing in Section 64(3) of the Kerala Police Act which would warrant a construction that the ban therein is intended only with reference to the offences mentioned in that Act. *P.P. Unnikrishnan* v. *Puthyattil Alikutty*, AIR 2000 SC 2952 : (2000) 8 SCC 131 : 2000 CrLJ 4041 : 2000 SCC (Cri) 1460 (1465) : 2000 CrLR (SC) 672.

[7169] ● ***Previous sanction of competent authority pre-condition for taking cognizance.***—On a plain reading of the provisions of Section 197, CrPC it is crystal clear that the Court is prohibited from taking cognizance of the offence except with the previous sanction of the competent authority.

Previous sanction of the competent authority being a pre-condition for the Court in taking cognizance of the offence, if the offence alleged to have been committed by the accused can be said to be an act in discharge of his official duty, the question touches the jurisdiction of the Magistrate in the matter of taking cognizance, and, therefore, there is no requirement that an accused should wait for taking such plea till the charges are framed. The decision of this Court in *Birendra K. Singh's case*, JT 2000 (8) SC 248 does not laydown the correct law by directing that the objection on the question of sanction can be raised at the stage of framing of charge and not at any prior point of time. *Abdul Wahab Ansari* v. *State of Bihar*, (2000) 8 SCC 500 : 2000 CrLJ 4631 : 2000 (4) Crimes 152 (SC).

[7170] ● ***Court can take cognizance if ingredients of offence fulfilled.***—Unless all the ingredients set out in Section 182, IPC are established by evidence, the offence cannot be treated to have been committed. In order to ascertain whether the petitioner had committed any offence under Section 182, IPC, it is necessary to find out whether all the ingredients constituting an offence under that section have been proved or not. The petitioner had only filed a complaint under Section 156(3), CrPC, before the Court of Special Sessions Judge, Farrukhabad. It is still to be investigated and found out by that Court whether the complaint lodged before that Court was false and had been made with the necessary intention or knowledge to induce the Court to exercise its lawful power so as to cause injury to respondents 3-6. Once those ingredients are established and the charge is found to have been proved, then alone the Court can take cognizance of that offence and proceed further. *Subhash Chandra* v. *State of Uttar Pradesh*, (2000) 9 SCC 356 : JT 2000 (2) SC 26.

[7171] ● ***Taking cognizance distinguished from filing complaint.***—Taking cognizance of an offence by the Court has to be distinguished from the filing of the complaint by the complainant. Taking cognizance would mean the action taken by the Court for initiating judicial proceedings against the offender in respect of the offence regarding which the complaint is filed. Before it can be said that any Magistrate or Court has taken cognizance of an offence, it must be shown that he has applied his mind to the facts for the purpose of proceeding further in the matter at the instance of the complainant. If the Magistrate or the Court is shown to have applied his mind not for the purpose of taking action upon the complaint but for taking some other kind of action contemplated under Code of Criminal Procedure, such as ordering investigation under Section 156(3) or issuing a search warrant, he cannot be said to have taken cognizance of the offence. *Narsingh Das Tapadia* v. *Goverdhan Das Partani*, AIR 2000 SC 2946 : (2000) 7 SCC 183 : 2000 SCC (Cri) 1326 : (2000) 4 Crimes 12 (SC).

[7172] ● ***Cognizance taken in absence of sanction bad in law.***—In the instant case the appellant Duty Magistrate, was directed by the Sub-Divisional Magistrate to be present with Police force and remove the encroachment in question. In course of discharge of his duty to control the mob, he directed for opening of fire. The order of opening of fire was in exercise of the power conferred upon him and the duty imposed upon him under the orders of the Magistrate. The provisions of Section 197(1). CrPC applies to the facts of the present case. In the absence of sanction, the cognizance taken by the Magistrate is bad in law and unless the same is quashed *qua* the appellant, it will be an abuse of the process of Court. *Abdul Wahab Ansari* v. *State of Bihar*, (2000) 8 SCC 500 : 2000 CrLJ 4631 : 2000 (4) Crimes 152 (SC).

[7173] ● ***Sufficient ground to proceed against accused.***—In case of a complaint under Section 200, CrPC or IPC, a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses, if any, to ascertain whether a *prima facie* case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The words "sufficient ground" used under Section 202 have to be construed to mean the satisfaction that a *prima facie* case is made out against the accused and not sufficient ground for the purpose of conviction. *S.N. Palanitkar* v. *State of Bihar*, AIR 2001 SC 2960 (2963) : 2001 CrLR (SC) 751 : 2001 Cr App R .

[7174] ● ***Order directing Magistrate to take cognizance without meaning accused quashed.***—In the instant case, the appellant is before this Court against an order of the learned single judge of Rajasthan High Court dated 6.11.1997 directing that the cognizance should be taken for the offence committed under Section 307, IPC which was passed even without hearing the accused. It transpires from the records of the case that against the order of the Magistrate not taking cognizance under Section 307, IPC, the State of Rajasthan had moved the High Court in Criminal M.P. No. 184/96 and the application was dismissed by order dated 21.11.1996 on coming to the conclusion that the Public Prosecutor has not been able to point out any *prima facie* evidence to show that a case under Section 307, IPC was made out.

We fail to understand, after the aforesaid order without even noticing the accused, how the High Court could pass the impugned order directing the Magistrate to take cognizance for the offence punishable under Section 307, IPC. In the facts and circumstances of the present case, without expressing any opinion on the merits of the matter, we are quashing the impugned order of the High Court since the same has been passed without even hearing the accused, and remit the matter to the High Court for re-disposal after giving opportunity of hearing to the parties concerned. The learned Chief Justice is requested to place this matter before a learned judge other than the judge who had passed the impugned order dated 6.11.1997. *Bhagirath* v. *Kana Ram*, 2001 CrLJ 122 (SC) : JT 2000 (7) SC 562 : 2000 (6) Supreme 640.

[7175] ● ***Power of Magistrate to take cognizance.***—In the instant case, the Magistrate merely took cognizance of the offence and issued process. At this stage the question of consideration of other materials does not arise. All the statements made in the complaint as well as the statements made under Section 202, CrPC if taken on its face value, an offence can be said to have been made out. There is no error in taking cognizance of the offence. It would be open to the accused while framing charge to argue as to whether the materials do permit frame of charge in the case in hand. *Ajay Mehra* v. *Durgesh Babu*, JT 2001 (5) SC 552 : 2001 (3) Crimes 155 (SC) : 2001 (4) Supreme 427.

[7176] ● ***S. 319, CrPC comes into operation at the stage of enquiry of trial of offence.***—At the stage of taking cognizance of the offence, provisions of Section 190, CrPC would be applicable. As per this provision, the Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under Section 204, CrPC is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against particular person/persons named in the charge-sheet and also not named therein. For that purpose, he is required to consider the FIR and the statements recorded by the Police Officer and other documents tendered alongwith charge-sheet. Further, upon receipt of Police report under Section 173(2), CrPC, the Magistrate is entitled to take cognizance of an offence under Section 190(1)(*b*) even if the Police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the Investigating Officer and independently applying his mind to the facts emerging from the investigation by taking into account the statement of the witnesses examined by the Police. At this stage, there is no question of application of Section 319, CrPC. Therefore there is no question of referring to the provisions of Section 319, CrPC. That provision would come into operation in the course of any enquiry into or trial of an offence. In the present case neither the Magistrate was holding enquiry nor the trial had started. There is no bar under Section 190, CrPC that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other persons against whom there is some material on record, but his name is not included as accused in the charge-sheet. *SWIL Ltd.* v. *State of Delhi*, AIR 2001 SC 2747 : (2001) 6 SCC 670 : 2001 SCC (Cri) 1205 : 2001 (4) Crimes 124 (SC) : 2001 CrLR (SC) 844 : JT 2001 (6) SC 405.

[7177] ● ***Cognizance of offence, not the offender.***—Under Section 190, CrPC, a Magistrate has jurisdiction to take cognizance of offences against such persons also who have not been arrested by the Police as accused-person, if it appears from the evidence collected by the Police that they were *prima facie* guilty of offence alleged to have been committed. Section 209 of the Code prescribes that when in a case instituted on a Police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session he shall commit, after compliance with the provisions of Section 207 or Section 209, as the case may be, the case to the Court of Session and subject to the provisions of the Code, pass appropriate orders

This section refers back to Section 190, as is evident from the words "instituted on a Police report" used in Section 190(1)(b) of the Code. Cognizance taken by the Magistrate is of the offence and not of offenders. Having taken cognizance of the offence a Magistrate can find out who the real offenders are and if he comes to the conclusion that apart from the report sent by the Police some other persons are also involved, it is his duty to proceed against these persons as well. *Rajinder Prasad* v. *Bashir*, (2001) 8 SCC 522 : 2002 SCC (Cri) 28 : 2002 CrLJ 90.

[7178] ● ***Bar under S. 197, CrPC is mandatory.***—Bar under Section 197, CrPC is mandatory where the act has been done by the public servant in the course of his service or in the discharge of his duty. There can be no dispute with that proposition. *Raj Kishore Roy* v. *Kamleshwar Pandey*, (2002) 6 SCC 543 : 2002 SCC (Cri) 1423 (1427) : 2002 CrLJ 3780.

[7179] ● ***Power of Magistrate to take cognizance on acceptance of final report.***—It is well settled when Police after investigation files a final form under Section 173 of the CrPC, the Magistrate may disagree with the conclusion arrived at by the Police and take cognizance in exercise of power under Section 190 of the Code. The Magistrate may not take cognizance and direct further investigation in the matter under Section 156 of the Code. Where the Magistrate accepts the final form submitted by the Police, the right of the complainant to file a regular complaint is not taken away and in fact on such a complaint being filed the Magistrate follows the procedure under Section 201 of the CrPC and takes cognizance if the materials produced by the complainant make out an offence. The acceptance of final from does not debar the Magistrate from taking cognizance on the basis of the materials produced in a complaint proceeding. *Kishore Kumar Gyanchandani* v. *G.D. Mehrotra*, AIR 2002 SC 483 : 2001 Supp (2) 386 : (2001) 3 Crimes 205.

[7180] ● ***Question of sanction left open to be decided on conclusion of trial.***—In the case of *P.K. Pradhan* v. *State of Sikkim*, (2001) 6 SCC 704 : 2001 SCC (Cri) 1234 it has been held that the legislative mandate engrafted in sub-section (1) of Section 197 is a prohibition imposed by the statute from taking cognizance. It has been held that the offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. It has been held that the only point for determination is whether the act was committed in discharge of official duty. It has been held that there must be a reasonable connection between the act and the official duty. It has been held that for invoking protection under Section 197 of the Code, the acts of the accused, complained of, must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, and the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. It has been held that if the case as put forth by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is held that the question of sanction under Section 197 of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. It is held that there can be cases when it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. It has been held that the claim of the accused, that the act that he did was in course of the performance of his duty, was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. It has been held that in such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial. *Raj Kishore Roy* v. *Kamleshwar Pandey*, AIR 2002 SC 2861 : 2002 SCC (Cri) 1423 (1427) : 2002 CrLJ 3780.

[7181] ● ***Effect of non-production of sanction order.***—In this case, the complaint was the 1st respondent had falsely implicated the appellant and his brother in order to teach them a lesson for not paying anything to him. The complaint was that the 1st respondent had brought an illegal weapon and cartridges and falsely shown them to have been recovered from the appellant and his brother. The High Court was not right in saying that even if these facts are true then also the case would come within the purview of Section 197, CrPC. The question whether these acts were committed and/or whether the 1st respondent acted in discharge of his duties could not have been decided in this summary fashion. This is the type of case where the prosecution must be given an opportunity to establish its case by evidence and an opportunity given to the defence to establish that he had been acting in the official course of his duty. The question whether the 1st respondent acted in the course of performance of duties and/or whether the defence is pretended or fanciful can only be examined during the course of trial. In our view, in this case the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of trial.

Though there is considerable force in the argument of the learned counsel for the petitioner that the Magistrate does take cognizance of the offence before committing the case to the Court of Session, still the question remains whether the sanction order is required to be produced before the Magistrate who takes cognizance in the first instance or before the Sessions Court which has exclusive jurisdiction to try the offence. Though the Sessions Court cannot take cognizance of the offence as a Court of original jurisdiction, it has to necessarily take cognizance before commencing the trial after committal. That the Sessions Court takes cognizance of the offence irrespective of the fact whether the committal Magistrate at an anterior point of time had taken cognizance of the same offence for the purpose of committal cannot be doubted. The contention with regard to non-production of the order of sanction before the Magistrate was urged for the first time in the revision filed in the High Court. Even then we could have considered this contention, if substantial relief could be granted to the petitioner or if injustice could be averted. Assuming that the petitioner is right in his contention, at best, the matter has to be sent back to the Magistrate to go through a fresh process of committal after receiving the sanction order filed by the prosecution. In any case, the matter would have to come up to the Sessions Court again. The compliance with the formality would only result in further delay in holding the trial without any corresponding advantage to the petitioner. Such a situation should not be permitted to happen while exercising the jurisdiction under Article 136, more so when the petitioner inexplicably failed to raise the objection at the earliest. *Dharmesh* v. *State of Gujarat*, 2002 SC 2784 : (2002) 6 SCC 370 : 2002 CrLJ 3573 : 2002 SCC (Cri) 1327 : JT 2002 (5) SC 474 : 2002 (3) Crimes 110 (SC).

[7182] ● *Applicability of S. 195(1)(b)(ii), CrPC to private complaint.*—Question as to whether bar u/s 195(1)(b)(ii) would apply as against a private complaint for an offence u/ss. 467 and 471 of Penal Code even in respect of a document which was forged before it was filed into Court. Divergent views have been expressed by Supreme Court in *M.S. Ahlawat* v. *State of Haryana*, (2000) 1 SCC 278 & *Sachida Nand Singh.* v. *State of Bihar*, (1998) 2 SCC 493. In view of the apparent consistency, matter requires to be placed for consideration before a larger bench and hence the matter to be placed before the learned Chief Justice for appropriate orders. *Balasubramaniam* v. *State*, (2002) 7 SCC 649 : 2002 SCC (Cri) 1812

[7183] ● *Taking cognizance without recording statement of complainant.*—Where a complaint is made by Deputy Chief Controller of Import and Exports, a public servant, Magistrate need not examine the complainant and witnesses. The Magistrate was fully justified in taking cognizance of offences without recording statement of complainant. *Deputy Chief Controller of Imports and Exports* v. *Resham Lal Agarwal*, AIR 2003 SC 1900 : (2003) 4 SCC 139 : 2003 SCC (Cri) 788 : 2003 CrLJ 1698 : JT 2003 (2) SC 370 : (2003) 2 Crimes 43 (SC).

[7184] ● *Cognizance after lapse of prescribed period.*—The bar against cognizance after the lapse of the prescribed period of limitation is laid down under Section 468, CrPC. It is within the parameters of that provision that the Court called upon to take cognizance of the offence should act. Most of the offences alleged against the respondents, *viz.* Sections 420, 467, 471 and 474, IPC are punishable with imprisonment for a term exceeding three year and, therefore, as contended by the counsel the bar of limitation under Section 468 is not attracted. *Harnam Singh* v. *Everest Construction Co.*, (2004) 6 SCC 754 : 2004 SCC (Cri) 1828 (1829-30) : 2004 CrLJ 4178 : JT 2004 (8) SC 353 : (2004) 3 Crimes 284.

[7185] ● *Magistrate can independently apply his mind and take cognizance.*—Upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. *Gangadhar Janardhan Mhatre* v. *State of Maharashtra*, 2005 SCC (Cri) 404 (409).

[7186] ● *Notice to informant.*—In a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. *Gangadhar Janardhan Mhatre* v. *State of Maharashtra*, 2005 SCC (Cri) 404 (408).

[7187] ● *Power of Magistrate to take cognizance on prima facie disclosure of offence.*—When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a *prima facie* case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded *prima facie* discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. *Gangadhar Janardhan Mhatre* v. *State of Maharashtra*, 2005 SCC (Cri) 404 (410).

[7188] ● *Absence of words "cognizance taken" in order make no difference.*—In the instant case, the appellant had filed a detailed complaint before the Magistrate. The record shows that the Magistrate took cognizance and fixed the matter for recording of the statement of the complainant on 1.6.2000. Even if assumed though that is not the case, that the words "cognizance taken" were not to be found in the order recorded by him on that date, that would make no difference. Cognizance is taken of the offence and not of the offender and, therefore, once the Court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. *CREF Finance Ltd.* v. *Shree Shanthi Homes (P.) Ltd.*, 2005 AIR SCW 5162 : (2005) 7 SCC 467 : 2005 SCC (Cri) 1697 (1701) : 2005 CrLJ 4524 : 2005 (3) Crimes 256.

[7189] ● *Words "after taking cognizance" in Section 18, TADA Act.*—The contention that the words "after taking cognizance" employed in Section 18 of the TADA Act do not include any stage of trial including the stage when the judgment is to be delivered is misconceived. The Legislature deliberately has used the words "after taking cognizance of any offence" to mean that Section 18 would be attracted only at the stage where the Designated Court takes cognizance of offence *i.e.* after the investigation is complete and charge-sheet is filed. The provisions of Section 209, CrPC are not in *pari materia* with Section 18 of TADA Act. In Section 209, CrPC the words "after taking cognizance" are absent conspicuously. Section 18 is a filtered provision. The Section is attracted only at a stage the Designated Court takes cognizance of the offence. The Designated Court is expected to scan the documents and evidence collected therewith, if the Designated Court is of opinion that the offence is not triable by it, it shall, then notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence. There is no ambiguity in the language used in Section 18. *Prakash Kumar* v. *State of Gujarat,* AIR 2005 SC 1075 : 2005 CrLJ 929 (943) : 2005 (1) Crimes 163 : (2005) 2 SCC 409.

[7190] ● *Taking cognizance distinguished from issuance of process.*—One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the Court decides to proceed against the offenders against whom a *prima facie* case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the Court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the Court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure. Many other situations may be conceived in which a Magistrate may not take cognizance at all, for instance, a case where he finds that the complaint is not made by the person who in law can lodge the complaint, or that the complaint is not entertainable by that Court, or that cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent authority, *etc.* These are cases where the Magistrate will refuse to take cognizance and return the complaint to the complainant. But if he does not do so and proceeds to examine the complainant and such other evidence as the complainant may produce before him then, it should be held to have taken cognizance of the offence and proceeded with the inquiry. In the facts and circumstances of this case, the High Court erred in holding that the Magistrate had not taken cognizance, and that being a condition precedent, issuance of process was illegal. *CREF Finance Ltd.* v. *Shree Shanthee Homes (P.) Ltd.*, 2005 AIR SCW 5162 : (2005) 7 SCC 467 : 2005 SCC (Cri) 1697 (1701) : 2005 CrLJ 4524 : 2005 (3) Crimes 256.

[7191] ● ***Cognizance of offence taken by Magistrate without referring matter to Police under Section 156(3), CrPC.***—In the instant case the Magistrate had taken cognizance of the offence without referring the matter to the police under Section 156(3). *Held*, the Magistrate after examining the complaint or oath. Came to the conclusion, *prima facie*, that an offence was made out. Since the Magistrate had exercised his power to take cognizance, the same could not be faulted on the ground that he had not refused the matter to the police for investigation under Section 156(3) of the Code of Criminal Procedure. *Ram Swarup* v. *Mohd. Javed Razack*, AIR 2005 SC 2005 : (2005) 10 SCC 393 : 2005 SCC (Cri) 1549 (1550) : 2005 CrLJ 1725 : 2005 (1) Crimes 345.

[7192] ● ***Power of Magistrate to take cognizance when the police report is to the effect that no case is made out.***—Upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused.

The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or 2002 also. *Minu Kumari* v. *State of Bihar*, AIR 2006 SC 1937 : (2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310 (314-15) : 2006 CrLJ 2468 : 2006 (2) Crimes 130.

[7193] ● ***Power of Magistrate to take cognizance on complaint.***—When the information is laid by the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a *prima facie* case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded *prima facie* discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These Section 173 in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the notice issued under some of the Police Manuals states it to be a notice under Section 173 of the Code, there is nothing in Section 173 specifically providing for such a notice. *Minu Kumari* v. *State of Bihar*, AIR 2006 SC 1937 : (2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310 (315) : 2006 CrLJ 2468 : 2006 (2) Crimes 130.

[7194] ● ***Order remanding accused to judicial custody—Not cognizance.***—An order remand accused to judicial custody does not amount to taking cognizance of an offence. In such circumstances the provisions of Section 196(1)(a), CrPC are not applicable. *State of Karnataka* v. *Pastor P. Raju,* (2006) 6 SCC 728 : 2006 CrLJ 4045 (4148, 4049) : 2006 (3) Crimes 203.

[7195] ● ***Power of Magistrate to order investigation.***—Any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complaint on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. *Mohd. Yousuf* v. *Afaq Jahan,* AIR 2006 SC 705 : 2006 (2) SCC 628 : (2006) 1 SCC 189 : 2006 CrLJ 788 (790) (SC).

[7196] ● ***High Court not ordinarily interfere with order taking cognizance.***—High Court should not ordinarily interfere with an order taking cognizance passed by a competent Court of law except in a proper case. *Musaraf Hussain Khan* v. *Bhageerath Engineering Ltd.*, AIR 2006 SC 1288 : (2006) 3 SCC 658 : 2006 (2) SCC (Cri) 98 : 2006 CrLJ 1683.

[7197] ● ***Power of Magistrate***—When a complaint is laid before the Magistrate of competent jurisdiction, the Magistrate is required to enquire into the complaint. If the Magistrate finds that complaint discloses no offence, he is empowered to dismiss the complaint. On finding that the complaint *prima facie* discloses an offence he is empowered to take cognizance and would issue process to accused. *Hari Singh* v. *State of Uttar Pradesh,* AIR 2006 SC 2464 : 2006 (3) SCC (Cri) 63 : 2006 CrLJ 3283 : 2006 (3) Crimes 109 (SC).

[7198] ● ***Investigation on direction of Magistrate.***—The investigation referred to in Section 202(1), CrPC is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from culminating words in Section 202 (1). *Mohd. Yusuf* v. *Afaq Jahan,* AIR 2006 SC 705 : (2006) 1 SCC 627 : 2006 CrLJ 788 (790) : 2006 (1) Crimes 81.

[7199] ● ***Magistrate not bound to take cognizance on police report.***—At the time of framing charge, the Magistrate can consider as to what are the offences for which accused persons have to the tried. The Magistrate is not bound to take cognizance of the offences indicated in the police report. *Anurag Rastogi* v. *State of Uttar Pradesh,* (2007) 4 SCC 771 : 2007 CrLJ 1454 (1455) : (2007) 2 Crimes 33.

[7200] ● ***Accused has no right to be heard at the time of issuance of process.***—There can be no quarrel with the proposition that at the time of issuance of process and taking cognizance the accused has no right to be heard. But in the facts of the instant case before the Revisional Court the appellants were heard. Further their names were indicated in the cause title.—*Subha Raj* v. *Shankar Sarkar,* (2007) 11 SCC 850 : 2007 CrLJ 4293.

[7201] ● ***Magistrate not bound by opinion of police.***—There is certainly no obligation, on the Magistrate, to accept the report, if he does not agree with the opinion formed by the police. Under those circumstances, if he still suspects that an offence has been committed, he is entitled, notwithstanding the opinion of the police, to take cognizance, under Section 190(1)(c) of the Code. That provision, is obviously intended to secure that offences may not go unpunished and justice may be invoked even where persons individually aggrieved are unwilling or unable to prosecute, or the police, either wantonly or through *bona fide* error, fail to submit a report, setting out the facts constituting the offence. Therefore, a very wide power is conferred on the Magistrate to take cognizance of an offence, not only when he receives information about the commission of an offence from a third person, but also where he has knowledge or even suspicion that the offence has been committed. It is open to the Magistrate to take cognizance of the offence, under Section 190(1)(c), on the ground that, after having due regard to the final report and the police records placed before him, he has reason to suspect that an offence has been committed. Therefore, these circumstances will also clearly negative the power of a Magistrate to call for a charge-sheet from the police, when they have submitted a final report. The entire scheme of Chapter XIV clearly indicates that the formation of the opinion, as to whether or not there is a case to place the accused for trial, is that of the officer in-charge of the police station and that opinion determines whether the report is to be under Section 170, being a 'charge-sheet', or under Section 169, 'a final report'. It is no doubt open to the Magistrate, as we have already pointed-out, to accept or disagree with the opinion of the police and, if he disagrees, he is entitled to adopt any one of the courses indicated by us. But he cannot direct the police to submit a charge-sheet, because, the submission of the report depends upon the opinion formed by the police, and not on the opinion of the Magistrate. The Magistrate cannot compel the police to form a particular opinion, on the investigation, and to submit a report, according to such opinion. That will be really encroaching on the sphere of the police and compelling the police to form an opinion so as to accord with the decision of the Magistrate and send a report, either under Section 169, or under Section 170, depending upon the nature of the decision. Such a function has been left to the police, under the Code." *Har Prasad* v. *Ranveer Singh,* AIR 2008 SC 1265 : (2008) 11 SCC 431 : 2008 CrLJ 1655 (1657) (SC) : (2008) 2 Crimes 5.

[7202] ● ***Taking cognizance of offence—Magistrate not bound by opinion of investigating officer.***—One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under Section 200 or Section 202 of the Code, he may order an investigation to by made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case. When such an order is made, the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. On receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under Section 190(1)(b) of the Code and issue process straight-way to the accused. However, Section 190(1)(b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes out a case against the accused. Undoubtedly, the Magistrate can ignore the conclusion(s) arrived at by the investigating officer.

It is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in his behalf, irrespective of the view expressed by the police in their report and decide whether an offence has been made out or not. This is because the purpose of the police report under Section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of the report and the material referred therein, a case for cognizance is made out or not. *Fakhruddin Ahmad* v. *State of Uttranchal*, (2008) 17 SCC 157 : 2008 CrLJ 4377 (4379, 4380) (SC).

[7203] ● *"Taking cognizance" Meaning*.—It is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of accusations and applied his mend to the allegations made in the complaint or in the police report or the information received from a source other than a police report as the occasion may be, and the material filed therewith. It is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute and offence decides to indicate proceedings against the alleged offender that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender. *Fakhruddin Ahmad* v. *State of Uttranchal,* (2008) 17 SCC 157 : 2008 CrLJ 4377 (4380) (SC).

[7204] ● *Expression "Cognizance"—Meaning.*—The expression "cognizance" is not defined in the Code but is a word of indefinite import. The word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means—"become-aware of" and when used with reference to a Court or Judge, to take notice of judicially. It indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such, offence said to have committed by someone. Taking cognizance does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking cognizance is thus a *sine qua non* or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance. *SK. Sinha, Chief Enforcement officer* v. *M/s Videocon International Ltd. and Co.,* AIR 2008 SC 1213 : (2008) 2 SCC 492 : 2008 CrLJ 1636 (1639, 1640) (SC).

[7205] ● *Magistrate deciding not to take cognizance—Notice to informant is mandatory.*—Where the Magistrate decides not to take cognizance and drop the proceedings or takes a view that there is no sufficient ground for proceeding against some persons mentioned in the FIR, notice to informant and grant of opportunity of being heard in the matter becomes mandatory—There is no provision in the Code for issue of a notice in that regard. *Sanjay Bansal* v. *Jawajaria Vats,* AIR 2008 SC 207 : (2007) 13 SCC 71 : 2008 CrLJ 428 (430).

[7206] ● *Opportunity of hearing to informant when mandatory.*—The informant is not prejudicially affected when the Magistrate decides to take cognizance. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceedings or takes the view that there is material for proceeding against some and there are insufficient grounds in suspect of others, the informant would certainly be prejudiced, and notice to the informant and grant of opportunity becomes mandatory. *Chittaranjan Mirdha* v. *Dulal Ghosh,* (2009) 6 SCC 661 : 2009 CrLJ 3430 (SC) : 2009 (3) Crimes 189 (SC) : 2009 (8) SCR 412.

[7207] ● *No case made out—Duty of Magistrate.*—Even in a case where no offence is made out, the Magistrate must apply its mind to the contents of the charge-sheet. Such application of mind by the Magistrate is to be reflected from the order. *Devendra* v. *State of Uttar Pradesh,* (2009) 7 SCC 495 : 2009 (7) SCR 872.

[7208] ● ***Power of Magistrate.***—Upon receipt of a police report under Section 173(2) CrPC, a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. *Chittaranjan Mirdha* v. *Dulal Ghosh,* (2009) 6 SCC 661 : 2009 CrLJ 3430 (3432) : 2009 (3) Crimes 189 (SC).

[7209] ● ***Informant entitled to notice and opportunity to be heard.***—The informant is entitled to a notice and an opportunity to be heard at the time of consideration of report. The position is different so far an injured person or a relative of the deceased, who is not an informant, is concerned. They are not entitled to any notice. *Chittaranjan Mirdha* v. *Dulal Ghosh,* (2009) 6 SCC 661 : 2009 CrLJ 3430 (3432) : 2009 (3) Crimes 189 (SC).

[7210] ● ***Magistrate not bound by conclusion of investigating agency.***—When a report is submitted to the Magistrate he is required to be *prima facie* satisfied that the facts disclosed therein constitute an offence. It is trite that the Magistrate is not bound by the conclusion of the investigating agency in the police report *i.e.* in the charge-sheet and it is open to him after exercise of judicial discretion to take the view that the facts disclosed in the report do not constitute any offence for taking cognizance. *K. Neelaveni* v. *State*, AIR 2010 SC 3191 : 2010 CrLJ 2819 : 2010 (2) Crimes 90 (SC).

[7211] ● ***Section 195(a)(i), CrPC is exception to rule in Section 190 CrPC.***—Section 195(a)(i) bars the Court from taking cognizance of any offence punishable under Section 188, IPC or abetment or attempt to commit the same. Unless there is a written complaint by the public servant concerned for contempt of his lawful authority. This provision has been carved out as an exception to the general rule contained in Section 190, CrPC, other provisions in the CrPC like Sections 196 and 198 do not lay down any rule of procedure, rather they only create a bar that unless some requirements are complied with, the Court shall not take cognizance of an offence described in those sections. *C. Muniappan* v. *State of Tamil Nadu*, AIR 2010 SC 3718 : (2010) 9 SCC 567.

[7212] ● ***Cognizance—Procedure to be followed by Magistrate.***—On presentation of complaint the Magistrate can after examining the complaint and his witnesses or oath, take cognizance of an offence. This procedure is not required to be followed when a written complaint is made by a public servant, acting or purporting to act in discharge of his official duties or when a Court has made the complaint or if the Magistrate makes over the case for inquiry/trial to another Magistrate under Section 192, CrPC. *Shivjee Singh* v. *Nagendra Tiwari*, AIR 2010 SC 2261 : (2010) 7 SCC 578 : 2010 CrLJ 3827 : 2010 (3) Crimes 188 (SC).

[7213] ● ***Cognizance—Scope.***—Under Section 190, a Magistrate can take cognizance of an offence either on receiving a complaint of facts which constitute an offence or a police report of such facts or upon receipt of information from any person other than a police officer or upon his own knowledge, that such an offence has been committed. *Shivjee Singh* v. *Nagendra Tiwari*, AIR 2010 SC 2261 : (2010) 7 SCC 578 : 2010 CrLJ 3827.

COLLECTIVE ACTION

[7214] ● ***Collective action vis-a-vis individual responsibility.***—In the present case, the prosecution case as unfolded before the Court indicates that the riot in Delhi broke out as a result of death of Smt. Indira Gandhi and her death appears to be symbol or web around which the violent emotion were released. The death of Smt. Gandhi became a powerful symbolic image as a result of which the crowds were perpetrating violence in the height of frenzy. It is a common experience that when people congregate in crowds normal defences are lowered so that the crowd instinct assault on the sense of individuality or transcending one's individual boundaries by offering a release from inhibitions from personal doubts and anxiety. In such a situation, one can well-imagine that a member of such a group loses one's self and the normal standard or sense of judgment and reality. The primary motivational factor in the assembly of a violent mob may result in murder of several persons.

Experts in criminology often express that when there is a collective action, as in the case of a mob, there is a diminished individual responsibility unless there are special circumstances to indicate that a particular individual had acted with any predetermination such as by use of a weapon not normally found. If, however, a member of such a crowd picks up an article or a weapon which is close by and joins the mob, either on his own volition or at the instigation of the mob responding to the exhortation of the mob playing no role of leadership, we may very well say that such a person did not intend to commit all the acts which a mob would commit left to himself but did so under the influence of collective fury. *Kishori* v. *State of Delhi*, AIR 1999 SC 382 : (1999) 1 SCC 148 : 1999 SCC (Cri) 1 : 1999 CrLJ 584 : 1998 CrLR (SC) 782.

COLLUSION

[7215] ● ***Collusion.***—One of the simplest definitions of collusion was given by MR. JUSTICE BUCKNILL in *Scott* v. *Scott*, 1913 page 52, "Collusion may be proper act done or an improper refraining from doing an act, for a dishonest purpose". Thus the mere fact that the defendant agrees with the plaintiff that if a suit is brought he would not defend it, would not necessarily prove collusion. It is only if this agreement is done improperly in the sense that a dishonest purpose is intended to be achieved that they can be said to have colluded. *Rupchand Gupta* v. *Raghuwanshi (P) Ltd.*, AIR 1964 SC 1889 (1891) : (1964) 7 SCR 760.

[7216] ● The word 'Collusion' means secret agreement for illegal purposes of conspiracy. *Subhas Chandra Das Mushib* v. *Ganga Prasad Das Mushib*, AIR 1967 SC 878 (881) : (1967) 1 SCR 331.

COLOURING MATTER

[7217] ● ***Colouring matter.***—*Prevention of Food Adulteration Act, 1954.*—There is no dispute that the coal-tar dye used in "patisa" sold by the appellant was not one of the coal-tar dyes permissible under Rule 28 of the Prevention of Adulteration Rules, 1955. That is also clear from the report of the Public Analyst, the correctness of which was not under any challenge before us. *Jai Narain* v. *Municipal Corporation of Delhi,* AIR 1972 SC 2607 : (1972) 2 SCC 637 : 1973 SCC (Cri) 52 : 1973 CrLJ 493 : 1972 CrAppR (SC) 386 : (1973) 1 SCR 923 : 1973 UJ (SC) 356.

[7218] ● ***Sale of adulterated food.***—Though there was no express evidence on the record that the use of the particular coal-tar dye in the making of the "patisa" sold at this shop was injurious to health, it must be presumed to be so from the fact that it is not one of the permitted coal-tar dyes enumerated in Rule 28 of the Prevention of Food Adulteration Rules, 1955. It is, therefore, clear that the sale of such an article of food was an anti-social activity, deleterious to the health of those who would consume them as article of food, the eradication of which is the principal aim of the Prevention of Food Adulteration Act and in particular of Section 16 thereof. *Jai Narain* v. *Municipal Corporation of Delhi*, AIR 1972 SC 2607 : (1972) 2 SCC 637 : 1973 SCC (Cri) 52 : 1973 CrLJ 49 : 1972 Cr App R (SC) 386 : (1973) 1 SCR 923 : 1973 UJ (SC) 356.

[7219] ● ***Sale of adulterated food anti-social activity.***—The evil would appear to be more pernicious when it is realised that "patisa" are more often than not purchased and consumed by children and by persons from the unaffluent sections of the society, who cannot afford to buy costlier sweets prepared by more sophisticated processes. The colouring matter was obviously used to attract customers without any regard to the injury it would cause to those who consumed them. The appellants activity being thus distinctly anti-social it would be either expedient or in consonance with the object with which the Prevention of Food Adulteration Act was passed to apply Section 4 of the Probation of Offenders Act. *Jai Narain* v. *Municipal Corporation of Delhi*, AIR 1972 SC 2607 : (1972) 2 SCC 637 : 1973 SCC (Cri) 52 (55) : 1973 CrLJ 49 : 1973 UJ (SC) 356.

[7220] ● ***Colour mixed with chillies.***—It is true that the High Court has observed that the "colour which was mixed with powdered chillies" is not mentioned in the Public Analyst's report to be injurious to human life. It does not follow that because it is not specifically mentioned to be injurious, it is non-injurious. Absence of evidence is not equal to evidence of absence. *Sharif Ahmed* v. *State of Uttar Pradesh*, AIR 1979 SC 1917 (1918) : (1979) 4 SCC 412 : 1980 SCC (Cri) 3 : 1980 CrLJ 838 : (1980) 1 SCR 312 : 1980 UJ (SC) 122 : 1980 CrLR (SC) 76.

[7221] ● ***Use of permitted coal-far food colours.***—"We shall proceed on the premise that the basic yellow coal tar dye found in the "supari" by the Public Analyst as amongst those enumerated food colours excepted from the prohibition under Rule 28 of the Prevention of Food Adulteration Rules, 1955 and is therefore permitted to be used. Then Rule 29 prohibits the use of even the coal-tar food colours permitted under Rule 28 in or upon any food other than those enumerated in Rule 29. "Fruit products" is one such item of food so enumerated under clause (f) of Rule 29. The result is that permitted coal-tar food colours *i.e.* food colours permitted by Rule 28, can be used if the food articles in question are "fruit products" as understood in Rule 29(6). But this exception from prohibition in favour of "fruit products" is further subject to such exceptions or restrictions as are otherwise made in Appendix B. There is no dispute that "supari" is derived from and prepared out of the usufruct of the Areca Palm. The fact that a particular article of food, as indeed most of the articles of food of vegetative origin are, was of plant origin did not render that article necessarily a "fruit product". Even fruit products derived from, or associated in their origin with fruits need not *ipso facto* be fruit products for purposes and within the meaning of Rule 29(6) what was envisaged as "fruit products" in Rule 29(f), will be indicated by the array of items dealt with in Appendix B under Item 16—"fruit products", though the list was in the nature of an exception to Rule 29(f). In the context of the present statute, it would be a strain on the statutory language and the statutory scheme to include "supari" in the form in which it was sold, within "fruit products" as understood in clause (f) of Rule 29". *Dineshchandra Jamnadas Gandhi* v. *State of Gujarat*, AIR 1989 SC 1011 : (1989) 1 SCC 420 : 1989 SCC (Cri) 194 : 1989 CrLJ 889 : 1989 CrLR (SC) 212.

[7222] ● ***Reduction in sentence.***—Where the colouring matter was used apparently with a view to please customers' eyes, the sentence was reduced to 3 months simple imprisonment with the direction to State Government to convert the imprisonment into fine. *Badri Prasad* v. *State of Madhya Pradesh*, 1995 Supp (4) SCC 682 : 1996 SCC (Cri) 79.

[7223] ● ***Setting aside conviction.***—In the sample of Burfi the essence of Rodhamme B which is used as ink in printing process was detected. The Food Inspector deposed that he had purchased the article from the shop of accused and had placed on a newspaper before putting it in dry plastic bags and sealing in the tin. The Court did not rule out the possibility of ink used in the newspaper getting transmitted to Burfi and set aside the conviction. *Sardarmal* v. *Nagar Nigam*, 1996 (7) SCC 307 : 1996 SCC (Cri) 397.

COMMISSION

[7224] ● ***Evidence on commission.***—It is a cardinal principle of criminal jurisprudence that the evidence against an accused shall be recorded in his presence and in open Court. The accused is thereby enabled to challenge the testimony against him by cross-examination and the Court is enabled to see the witnesses and observe their demeanour. The procedure for the examination of a witness by commission is an exception to this general rule, and the power under Section 503 must be exercised only when the conditions mentioned in the section exist, and the Court is satisfied that the attendance of a witness cannot be procured without unreasonable amount of delay, expense or inconvenience. The issue of commission should ordinarily be restricted to formal witnesses only, and when the case against an accused rests mainly on the testimony of an important witness, as far as possible the powers under Section 503 should not be resorted to. The discretion given by this section to a Court as a judicial discretion and should be exercised only sparingly and in exceptional circumstances only when the presence of the witness in Court cannot be procured without undue delay or expense. It is the inconvenience to the Court which is the factor for consideration, and not inconvenience to the accused. In the present case, the Court dispensed with the attendance of a witness without issuing a summons for his attendance and without ascertaining where the witness worked or resided. Relying on the evidence of that witness taken on commission, the Court convicted the accused. Under the circumstances, the power under Section 503 was exercised arbitrarily and without any justification, and without the conditions regarding the proper exercise of that power being satisfied. The plea of the accused that he had been prejudiced and had been denied a fair trail was upheld. Conviction was set aside and the case was remitted for re-trial according to law. *Dharmanand Pant* v. *State of Uttar Pradesh*, AIR 1957 SC 594 : 1957 CrLJ 894 : 1958 SCA 126 : 1957 SCJ 431.

[7225] ● ***Facilities of Lawyer.***—In every criminal trial the accused is entitled to have the witnesses examined in his presence and if a departure is made and witnesses cannot be brought to Court for one reason or the other whether due to the action of the appellant or the inaction or want of diligence on the part of the prosecution, and they have to be examined on Commission beyond the frontiers of this country, it is incumbent upon the prosecution and the Court in ensuring a fair and impartial trial to afford to the accused the same facilities for employment of a lawyer, the payment of his to and fro air fare to the place where the Commission will examine witnesses and his daily expenses while he is engaged in the work of the Commission. When the Court had directed the prosecution to give facilities in respect of payment of the transport charges and foreign exchange at Rupees 100 as daily allowances to accused-1, accused-3, accused-4, accused-5 and accused-7 we find little merit in the Court singling out the accused-appellant. *Ratilal Bhanji Mithani* v. *State of Maharashtra*, AIR 1971 SC 1630 : (1971) 1 SCC 523 : 1971 SCC

(Cri) 231 (236) : 1971 CrLJ 1188 : 1971 UJ (SC) 302.

[7226] ● ***Evidence on commission.***—Normally when a Commission is issued, the recording would have to be at the place where the witness is. Thus Section 285 provides to whom the Commission is to be directed. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a judicial Officer) would be required to record the evidence and to ensure/compel attendance. However new advancement of science and technology permit officials of the Court, in the city where video conferencing is to take place, to record the evidence. Thus where a witness is willing to give evidence an official of the Court, can be deported the record evidence on commission by way of video-conferencing. The evidence will be recorded in the studio/hall where the video-conferencing takes place. The Court in Mumbai would be issuing commission to record evidence by video conferencing in Mumbai. Therefore, the commission would be addressed to the Chief Metropolitan Magistrate, Mumbai who would depute a responsible officer (preferably a Judicial Officer) to proceed to the office of VSNL and record the evidence of Dr. Greenberg in the presence of the Respondent. The officer shall ensure that the Respondent and his counsel are present when the evidence is recorded and that they are able to observe the demeanour and hear the deposition of Dr. Greenberg. The officers shall also ensure that the Respondent has full opportunity to cross-examine Dr. Greenberg. It must be clarified that adopting such a procedure may not be possible if the witness is out of India and not willing to give evidence. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who, will know which is the most convenient time for video conferencing with a person in USA. The Respondent and his counsel will have to make it convenient to attend at the time fixed by the concern officer. If they do not remain present the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough do not worry about a video image/audio interruptions/distortions. Even if there are interruptions they would be of temporary duration. Undoubtedly an officer would have to be deputed, either from India or from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/ prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read into Court. Thus no question arises of the witness insulting the Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission the Court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in Court the witness has left the country. There also have been cases where foreign witness has given evidence in a Court in India and that then gone away abroad. In all such cases Court would not have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the Court. Even in those cases the Court could only ignore or disbelieve the evidence. The officer deputed will ensure that the Respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the Respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. There is no substance in this submission that it would be difficult to put documents or written materials to the witness in cross-examination. It is now possible, to show to a party, with whom video conferencing is taking place, any amount of written material. The concerned officer will ensure that once video conferencing commences, as far as possible, it is proceeded with without any adjournments. Further if it is found that Dr. Greenberg is not attending at the times fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video conferencing. If the officer finds that Dr. Greenberg is not answering questions, the officer will make a memo of the same. Finally when the evidence is read in Court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly the costs of video conferencing would have to be borne by the State. *State of Maharashtra* v. *Praful B. Desai*, AIR 2003 SC 2053 : (2003) 4

SCC 601 : 2003 SCC (Cri) 815 : 2003 CrLJ 2033 : JT 2003 (3) SC 382 : (2003) 2 Crimes 237 (SC).

COMMISSION OF ENQUIRY ACT, 1952

[7227] ● *Matter connected with criminal revision.*—The subject-matter of the inquiry before the Commission as set forth in allegation No. J-4 was whether there was any misuse of official position on the part of Shri Hasibur Rahman when he directed against the recommendation of the Law Secretary and the District Magistrate, the withdrawal of the prosecution against Kedar Prasad and Arjun Pandey. The question for decision which, however, was the subject of criminal revision petitions pending in Patna High Court was whether the order of the Magistrate dismissing the application for withdrawal of prosecution was contrary to law. The two matters were distinct and separate and not identical. It may be that some of the matters which were connected with the criminal revision petitions were the subject of inquiry by the commission of inquiry, but that would not attract liability for contempt of Court. *Sammbhu Nath Jha* v. *Kedar Prasad Sinha*, AIR 1972 SC 1515 : 1972 (1) SCC 573 : 1973 CrLJ 453 : 1972 (3) SCR 183.

[7228] ● *Quashing of complaint.*—According to the committees' own opinion formed in the light of the facts all those persons to whom notices under Section 8-B of the Commission of Inquiry Act, 1952 are issued have to be examined at the end of the inquiry. If three persons referred to above to whom notices under Section 8-B have been issued are to be examined even according to the Committee at the end of the inquiry there is no justifiable reason to deny the same treatment to the petitioners Ms. Kiran Bedi and Jinder Singh who are in the same position as those three persons. The action of the Committee in asking them to be cross-examined at the beginning of the enquiry appears to us to be discriminatory. Mere non-issue of notices to them under Section 8-B ought not to make any difference if they otherwise satisfy the conditions mentioned in Section 8-B. The issue of such a notice is not contemplated under Section 8-B of the Act. It is enough if at any stage the Commission considers it necessary to inquire into the conduct of any person. Such person would thereafter be governed by Section 8-B of the Act. The Commission should have considered whether the petitioners were entitled to be treated as persons governed by Section 8-B of the Act before asking them to get into the witness box for being cross-examined.

If the Committee had found that the petitioners were covered under Section 8-B, then perhaps they would not have been asked to get into the witness-box for being cross-examined till the end of the inquiry. The Committee would have then asked them to give evidence alongwith others who were similarly placed at the end of the inquiry. Taking into consideration all the aspects of the case we feel that the committee should not have in the circumstances of the case directed the filing of a complaint against either of the petitioners for an offence punishable under Section 178, IPC. We feel that the complaint was quashed. *Kiran Bedi* v. *Committee of Inquiry*, AIR 1988 SC 225 : (1988) 4 SCC 49 : 1988 SCC (Cri) 895 (898, 899) 1989 CrLJ 303 : 1988 CrLR (SC) 796 : JT 1988 (3) SC 372.

[7229] ● *Commission of Enquiry not a Court.*—The purpose and object of the legal fiction created by the first of sub-section (4) is reflected in the second. A Commission of Inquiry is therefore fictionally a Civil Court for the limited purpose of proceeding under Section 482 of the old Code or under Section 346 of the present Code. A *fortiori*, the legal fiction contained in sub-section (5) of Section 5 which relates to the proceedings before the Commission is necessarily confined to offences that are punishable under Section 193 and 228 of the Indian Penal Code and does not extend beyond that. A Commission of Inquiry is not a Court properly so called. A Commission is obviously appointed by the appropriate Government 'for the information of it mind' in order for it to decide as to the course of action to be followed. It is, therefore, a fact finding body and is not required to adjudicate upon the rights of the parties and has no adjudicatory functions. The Government is not bound to accept its recommendations or act upon its findings. The mere fact that the procedure adopted by it is of a legal character and it has the power to administer an oath will not impart to it the status of a Court. *Baliram* v. *Justice B. Lentin*, AIR 1988 SC 2267 : (1988) 4 SCC 419 : 1988 SCC (Cri) 941 : 1989 CrLJ 306 : 1988 CrLR (SC) 799 : (1988) 3 Crimes 655.

[7230] ● *Use of previous statement at trial.*—A perusal of Sections 145, 155 and 151 of the Evidence Act clearly indicates that there are two purposes for which a previous statement can be used. One is for cross-examination and contradiction and the other is for corroboration. The first purpose is to discredit the witness by putting to him the earlier statement and contradicting him on that basis. So far as corroboration is concerned it could not be disputed that it is none of the purposes of the defence to corroborate the evi dence on the basis of the previous statement. Section 145 therefore, is the main section under which relief was sought by the accused. The use for which the previous statement was asked for was to contradict him if necessary and if it was a contradiction then the earlier statement was necessary so that contradiction be put to the witness and that part of the statement can be proved. Contradiction could be used either to impeach his credit or discredit him or to pull down or bring down the reliability of the witness. These purposes for which the previous statements are required could not be said to be purposes which were not against the witness. The two aspects of the restrictions which Section 6 of the Commission of Inquiry Act contemplates are only two aspects which could be the result of the use of these statements. It is, therefore, clear that without going into the wider questions even a plain reading of Section 6 will prohibit the use of the previous statements at the trial either for the purposes of cross-examination to contradict the witness or to impeach his credit. *Kehar Singh* v. *State* (*Delhi Admn.*), AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 (748, 749) : 1989 CrLJ 1 : 1988 CrLR (SC) 536 : JT 1988 (3) SC 191 : (1988) 3 Crimes 209.

COMMISSION OF SATI (PREVENTION) ACT, 1988

[7231] ● ***Glorification of Sati.***—Under the Commission of Sati (Prevention) Act, 1987, glorification of *Sati* is strictly prohibited and that act has been declared as an offence. Dr. Singhvi by referring to different dictionaries has tried to impress upon us that *Chunri* as such is not connected with glorification of *Sati* and is a ceremony connected with the traditional form of offering worship known as Sodash upachar while the counsels of the State do not accept the submission made by Dr. Singhvi and have maintained that in the State of Rajasthan *Chunri* ceremony is always associated with glorifying *Sati* and the celebration is a part of the traditional process of religious offerings in *Sati* temples. This certainly is not the stage in the proceedings for a final view of the question as to whether performance of *Chunri* ceremony amounts to glorification of *Sati* and the determination must be left to the final stage. *All India Democratic Women's Association and Janwadi Samiti* v. *Union of India*, AIR 1989 SC 1280 : (1989) SCC (Cri) 385 : 1989 CrLJ 1128 : 1989 CrLR (SC) 623.

COMMITTAL PROCEEDINGS

[7232] ● ***Sufficient grounds.***—The Magistrate in committal proceedings has to ascertain if there are sufficient grounds to commit the accused to trial. He is not required to ascertain if on appreciation of evidence and other material including the witnesses for the defence, the charge against the accused is proved or not. *Tara Singh* v. *State*, AIR 1951 SC 441 : 1951 CrLJ 1491 : 1951 SCR 729.

[7233] ● ***Certificate of committing—Magistrate.***—The certificate of the Committing Magistrate endorsed on the deposition sheet states that the deposition was read out to the witness and that the witness admitted it to be correct. The Court is bound to accept this as correct under section 80 of the Indian Evidence Act until it is proved to be untrue. The burden is on the person, seeking to displace the statutory presumption and if he chooses to rely on the testimony of a witness which the Court is not prepared to believe the matter ends there. The duty displacing the presumption lies on the person who questions it. The Court is, of course, bound to consider such evidence as is adduced but it is not bound to believe such evidence nor is there any duty whatever on the Court to conduct an enquiry on its own. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214 : 1952 CrLJ 1131 : 1952 SCR 812 : 1952(1) MadLJ 816.

[7234] ● ***Elimination of committal proceedings.***—Elimination of committal proceedings is not a substantial departure from normal procedure. *Syed Qasim Rizvi* v. *State of Hyderabad*, AIR 1953 SC 156 : 1953 CrLJ 862 : 1953 SCR 589.

[7235] ● ***Cases instituted upon police report and private complaint.***—Chapter XVIII (now XVI) of the Code which relates to inquiries into cases triable by the Court of Session, as it now stands after the amendments introduced by Act 26 of 1955, provides two distinct and separate procedures depending upon whether the case is instituted upon a police report or upon a private complaint. There is no doubt that the difference in the two procedures is material and that the procedure prescribed for cases instituted upon private complaints is more elaborate and affords to the accused more advantages and facilities than the one prescribed for cases instituted on police report. The main difference lies in the fact that whereas, (*a*) under Sections 208 and 210 which apply to private cases the prosecution is required to examine all its witnesses, and the accused has the right to produce and examine all his defence witnesses, in the committal Court before the charge is framed and the case is committed to the Sessions Court, (*b*) under section 207-A which applies to cases instituted by the State, the charge can be framed only on the documents containing the police record of the investigation of the case referred to in Section 173 which have been placed before the Court under that section and the evidence of such material witnesses whom the prosecution in its discretion has produced for examination.

This difference in procedure is founded upon a sound principle. Primarily it is the function of the State to prosecute offenders. In the first class of cases, the State investigates the accusation made against any person through its police officers, and then, as provided in Sections 169 and 170, it has to decide whether or not there is sufficient evidence or reasonable ground of suspicion to justify the prosecution of that person, and the case is forwarded to a Magistrate for further proceedings against him only when the State is satisfied through its investigating officer that such evidence or ground of suspicion exists in the case; if not, there is no further proceeding in the matter. Thus, in a case instituted on a police report, the case comes before the Magistrate only when the State is satisfied that a *prima facie* case exists against the accused, and that is why in Section 207-A a more expeditious and less elaborate procedure is provided for the proceeding in inquiry which precedes the committal of the accused for his trial.

On the other hand, when an accused is prosecuted on a private complaint, there has been no previous investigation for the purpose of the satisfaction of the State in the interests of administration of justice that a *prima facie* case which would justify the prosecution of the accused does in fact exist, or if such investigation has at all been made, it has ended in favour of the accused. In such a case, it is therefore necessary that the Magistrate who holds the inquiry must be vigilant to see that the processes of law are not set into motion against an innocent person for reasons or considerations other than those of vindicating justice. It is for this reason that the Legislature has provided in Section 208 and onwards that the accused shall get greater facilities in procedure at the initial stage of an inquiry into the serious offence which is alleged against him, and before he is sent up for his trial for that offence, so as to give him a full opportunity at that very stage of establishing his innocence, if he so desires.

It is this basic difference which exists between prosecution by the State and by private individuals which forms the basis for the different procedures provided in the Code for the inquiry into the charge against the accused, and it cannot be contended that the difference in procedure is not founded upon a just and sound principle. The question which then remains is whether that difference can be said to amount to a denial of the right to equality before the law guaranteed under Article 14 of the Constitution.

Section 30 empowers the State Government to appoint Special Magistrates in specified areas and to invest them with the power to try 'as a Magistrate' all offences punishable with imprisonment for a term extending upto 7 years. The effect is that accused persons committing such offences in those areas are triable by a Special Magistrate appointed under section 30 under the warrant-procedure laid down in Chapter XXI (now XIX) of the Code, though accused persons committing the same offences outside those areas are triable by a Court of Session under the procedure laid down in Chapter XXIII (now XVIII) of the Code. In *Budhan Choudhry* v. *State of Bihar*, it was contended that by providing for such trials of a Special Magistrate under a special procedure different from the procedure provided under the Code for the trial of such offences a discrimination was created between offenders committing the same offence in different parts of the State. This contention was repelled and it was held, (*a*) that the Constitution does not guarantee to offenders the right to a particular kind of procedure, and (*b*) that Section 30, CrPC, does not infringe the fundamental right to equality before the law guaranteed under Article 14 of the Constitution. *Macherla Hanumantha Rao* v. *State of Madhya Pradesh*, AIR 1957 SC 927 : 1957 CrLJ 1463 : 1957 SCJ 129.

[7236] ● ***Prosecution by state and private person.***—The classification made in Chapter XVIII of the Code between prosecutions by the State and by private persons, and the provision of two different procedures for the inquiry into the offences to which that Chapter applies, is based upon an intelligible differentia founded upon sound considerations, namely, whether or not there has been a previous investigation into the alleged offence by a responsible officer on behalf of the State. The classification has a reasonable relation to the object of the legislation, namely, that an alleged criminal should be placed on his trial as soon as is possible and without any delay which is avoidable. Section 207 and the sections which follow in Chapter XVIII do not create any inequality before the law and do not deny the right guaranteed under Article 14. *Macherla Hanumantha Rao* v. *State of Madhya Pradesh*, AIR 1957 SC 927 : 1957 CrLJ 1463 : 1957 SCJ 129.

[7237] ● ***Sanction for prosecution not violative of Article 14.***—It was Section 197, CrPC, which came under challenge on constitutional grounds in

Matajog Dobey v. *H.C. Bhari*, AIR 1956 SC 44 and there it was contended that the section is violative of Article 14 because it vests in the Executive arbitrary and discriminatory powers to grant a sanction for the prosecution of one public servant for a particular offence while it could refuse such sanction for the prosecution of another public servant for the same offence. There too the contention was rejected and it was held that Section 197 was not an infringement of Article 14 because the discretion in question had to be exercised after looking into the facts of each case which were bound to be different from the facts of another case though the charge might be under the same penal section. *Macherla Hanumantha Rao* v. *State of Madhya Pradesh*, AIR 1957 SC 927 : 1957 CrLJ 1463 : 1957 SCJ 129.

[7238] ● ***Existence of prima facie case.***—Though it is easy to say that a Magistrate should commit the accused for trial if he is satisfied that sufficient grounds for doing so, have been made out, it is difficult to apply those crucial words "sufficient grounds" to individual cases. Apparently conflicting observations about the powers of a committing Magistrate, have been made in the reported cases, but those observations have to be read in the light of the facts and circumstances disclosed in the case then before the Court.

In our opinion, the law in India and the law in England, on the question now under consideration, appears to be the same.

When all the evidence has been heard, the examining justices then present who have heard all the evidence must decide whether the accused is or is not to be committed for trial. Before determining this mater they must take into consideration the evidence and any statement of the accused. If the justices are of opinion that there is sufficient evidence to put the accused upon trial by jury for any indictable offence they must commit him for trial in custody or on bail.

In each case, therefore, the Magistrate holding the preliminary inquiry, has to be satisfied that a *prima facie* case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit, and unless he is so satisfied, he is not to commit. *Ramgopal Ganpatrai Ruia* v. *State of Bombay,* AIR 1958 SC 97 : 1958 CrLJ 244 : 1958 SCR 618.

[7239] ● ***Absence of legal evidence and reliable evidence.***—The distinction must always be drawn between absence of legal evidence and absence of reliable evidence. If it could be said with justification that there was no legal evidence at all in support of the prosecution case, it may lead to the inference that the commitment was bad in that it was not based on any legal evidence at all. But on the other hand where circumstances are relied upon to show that the evidence may perhaps not be delivered, they do not lead to the inference that there is no legal evidence on the record. *Khushi Ram* v. *Hashim*, AIR 1959 SC 542 : 1959 CrLJ 777 : 1959 Supp (1) SCR 940.

[7240] ● ***Propriety of committal order.***—A provision in a Special Act which authorised a Magistrate to impose particular sentence which is heavier than the one which he has the power to impose under the general law is only an enabling provision, and it cannot be construed as a disabling provision which alone can take away a Magistrate's powers conferred under the Criminal Procedure Code. The discretion vested in a Magistrate under Sections 207 and 347 of the Code to commit for trial to the Sessions Court any case which is ordinarily triable by himself but which in his opinion ought to be tried by that Court remains with him even though he is empowered under any Special Act to impose the sentence provided under it for the offence of which the accused is prosecuted, and it could not be said that an order of commitment is illegal or improper merely because the Magistrate could have imposed the sentence laid down in the Act if he had tried the case himself.

Apart from that, the jurisdiction of a Court of Session depends upon the Code, and under it (see Section 193) the Court of Session has the jurisdiction to try any case which has been committed to it 'by a Magistrate duly empowered in that behalf'. If in the exercise of his powers under the Code, a case has been committed to a Sessions Court by a Magistrate who has the power to commit it [see Schedule III, Part III, Item (8)], and who has territorial jurisdiction so to commit, the Sessions Court has jurisdiction to try that offence, irrespective of whether the case is or is not one which ought to have been committed to it for trial.

Section 21 of the Act of 1954 does not affect the provisions of Sections 207 and 347 of the Code and does not make an order of commitment made by a competent Magistrate a nullity merely because the Magistrate had the power to award the full sentence prescribed by the Act.; nor does it affect or interfere with the jurisdiction of a Court of Session to try and dispose of a case committed to it by a competent Magistrate. The Sessions Judge had full jurisdiction to try the present case.

In the result, the appeal was allowed, the order of the High Court was set aside, and the case was sent back to the High Court for being heard on merits. *State of Uttar Pradesh* v. *Khushi*

Ram, AIR 1960 SC 905 : 1960 CrLJ 1378 : (1960) 2 SCA 212 : (1961) 1 SCJ 78.

[7241] ● ***Holding joint trial and consolidating charges.***—The question whether one trial of persons committed under different committal orders with respect to distinct offences is competent or not, depends upon whether such joint trial is warranted by the provisions of Sections 234, 235 and 239, and not upon the number of committal orders. If a single trial is warranted under these provisions, it is competent to the Sessions Judge to consolidate the separate cases and try the accused at one trial in respect of all such offences even when there had been separate committal orders.

However, in a case in which the accused are committed to the Sessions Court under three separate committal orders and separate cases are registered on charges in respect of distinct offences, and three separate trials are conducted, evidence must be recorded in each case, and it is improper procedure to record evidence only in one of the three cases. The procedure of recording evidence, with respect to the different offences which are the subject of different sessions trials, in the proceedings of one sessions trial alone is not warranted by the provisions of the Code. Every separate trial must proceed separately, and every proceeding in each trial, including the recording of evidence, should be separate, and even in a case in which consolidation of separate trials into one trial is warranted, the procedure of recording evidence only in one case is irregular unless the Sessions Judge has made an order consolidating the trials.

Section 234 allows the joint trial on a person accused of 3 offences of the same kind committed within the space of twelve months. Two offences under section 302 Penal Code, with respect to the murder of two persons are offences of the same kind within the meaning of Section 234(2), and under the proviso to the section, the offence of attempt to murder under section 307, Penal Code, is of the same kind as the offence of murder under section 302. Section 239, CrPC, provides that persons accused of three offences of the same kind committed by them jointly within a period of 12 months could be charged and tried together at one trial. Since the three offences of which the two accused in this case were charged were of the same kind, and were committed by them jointly on the same day, one joint trial of the accused on charges in respect of all those offences would have been justified under Sections 234 and 239 of the Code, and it would have been open to the Sessions Judge to consolidate all the three cases registered against the accused.

In the present case, the procedure adopted was wrong as the proceedings in each separate trial were not kept separate. However, in view of the fact that the separate offences of which the accused were convicted could have been tried together at one trial under the provisions of Sections 234 and 239, after consolidating the separate cases against the accused, there was no question of want of competency, and the wrong procedure did not vitiate the trial, and in the absence of any prejudice shown to have been caused to the accused, the irregularity was cured under section 537 of the Code. *Banwari* v. *State of Uttar Pradesh*, AIR 1962 SC 1198 : (1962) 2 CrLJ 278 : 1962 ALJ 469.

[7242] ● ***False evidence before committing magistrate.***—The committal proceedings are a stage of the judicial proceedings before the Sessions Judge. It seems to us therefore that where false evidence is given before the Committing Magistrate by a person who was later examined at the trial, the evidence given by him before the Committing Magistrate cannot properly be said to have been given in an independent proceeding.

No doubt the evidence recorded before the Committing Magistrate is not deemed to be evidence recorded at the trial but the fact remains that the evidence recorded by the Committing Magistrate can be transferred in certain circumstances to the record of the trial and taken into consideration in the same way in which evidence tendered at the trial can be taken into consideration. In view of these features which characterise the commitment proceedings we are of opinion that those proceedings can be regarded as part of the same judicial proceeding which culminated in the decision of the Court of Session. Upon that view it would follow that even when the Sessions Judge is unable to say which of the two contradictory statements is false or even where he is of opinion that the statement before the Committing Magistrate is false it is for him and him alone to act under Section 479-A(1). *Shabir Hussain Bholu* v. *State of Maharashtra*, AIR 1963 SC 816 : 1963 (1) CrLJ 803 : 1963 Supp (1) SCR 501.

[7243] ● ***Jurisdiction to examine accused and explain oral and documentary evidence.***—The Magistrate has jurisdiction to examine the accused to explain not only oral evidence but also documentary evidence. *Ramnarayan Mor* v. *State of Maharashtra*, AIR 1964 SC 949 : 1964 (2) CrLJ 44 : 1964 (1) SCR 1064 : 1964(2) Andh LT 13 : 1964 All LJ 678 : 66 Bom LR 714.

[7244] ● ***Presumption of explaining circumstances.***—We are unable to hold that because the accused in an enquiry for committal declines to avail himself of the opportunity to explain circumstances appearing against him from oral or documentary evidence, a presumption may be raised against him. Declining to avail himself of such an opportunity and reserving his right to make a defence at the trial do not amount to refusal to answer a question. *Ramnarayan Mor* v. *State of Maharashtra*, AIR 1964 SC 949 : 1964 (1) SCR 1064 : 1964 (2) CrLJ 44.

[7245] ● ***Failure to examine accused.***—Failure to examine the accused before commitment does not amount to material irregularity to vitiate the order of commitment. *State of West Bengal* v. *Tulsidas Mundhra,* 1964 (1) CrLJ 443.

[7246] ● ***Quashing committal order on question of law.***—The order of commitment once made final can be quashed by High Court only on question of law. Challenge to commitment order after trial and correction is not permissible. *Mahinder Singh* v. *State of Punjab*, AIR 1965 SC 79 : 1965 (1) CrLJ 112.

[7247] ● ***Examination of witnesses.***—The prosecutor is expected ordinarily to examine in the Court of the committing Magistrate all witnesses to the actual commission of the offence: if without adequate reasons he fails to do so, the Magistrate is justified and in enquiries on charges for serious offences is under a duty to call witnesses who would throw light upon the prosecution case.

Exercise of that discretion must be judicial : it is not to be governed by any set rules or standards, but must be adjusted in the light of circumstances of the case. The Magistrate is again not to be guided by the attitude of the prosecutor. He must of course consider the representation relating to the examination of witnesses by the prosecutor, but in considering whether it is necessary in the interest of justice to take evidence of any one or more of the other witnesses for the prosecution, he must have due regard to the nature and gravity of the offence, the interest of the accused and the larger interest of the public, and the defence if any disclosed by the accused. A Magistrate failing to examine witnesses to the actual commission of the offence because they are not produced, without considering whether it is necessary in the interest of justice to examine such witnesses, in our judgment, fails in the discharge of his duties. *Kirpal Singh* v. *State of Uttar Pradesh*, AIR 1965 SC 712 : 1965 (1) CrLJ 636 : 1964 (3) SCR 992 : 1964 Mad LJ (Cri) 229 : 1963 BLJR 864.

[7248] ● ***Successive applications for commitment.***—The provisions of Section 437, however, do not make it obligatory upon a Sessions Judge or a District Magistrate to order commitment in every case where an offence is exclusively triable by a Court of Session. The law gives a discretion to the revising authority and that discretion has to be exercised judicially. One of the factors which have to be considered in this case is whether the intervention of the revising authority was sought by the prosecution at an early stage. It would be seen that an attempt to have the case committed failed right in the beginning and was repeated not earlier than 15 months from that date. The second attempt also failed. Instead of filing an application for revision against the order of the Magistrate refusing to pass an order of commitment the prosecution chose to make a second application upon the same facts. It may be that successive applications for such a purpose are not barred but where a later application is based on the same facts as the earlier one the Magistrate would be justified in refusing it. Where the Magistrate has acted in this way the revisional Court ought not to interfere with propriety unless there are strong grounds to justify interference. While rejecting the application on January 25, 1962, the ground given by the learned Judge was that the case had already entered the defence stage and the attempt to have the committal was very belated. Matters had advanced still further when a third attempt failed on March 30, 1962. By that date not only had the defence been closed and arguments heard, but the case was actually closed up for judgment. It would be a terrible harassment to the appellants now to be called upon to face a fresh trial right from the beginning which would certainly be the result if the Magistrate were to commit the appellants for trial by a Court of Session. It is further noteworthy that after the last attempt failed it was not the prosecution which went up in revision before the Sessions Judge but the informants and, as pointed out earlier, in the matter concerning the appellants before us it was not even the informant Shyam Lall but one Sagarmal, the informant in another case, who preferred a revision application. In a case which has proceeded on a police report a private party has really no *locus standi*. No doubt the terms of Section 435 under which the jurisdiction of the learned Sessions Judge was invoked are very wide and he could have taken up the matter *suo motu*. It would, however, not be irrelevant to bear in mind the fact that the Court's jurisdiction was invoked by a private party. The criminal law is not to be used as an instrument of wreaking private vengeance by an aggrieved party against the person who, according to that party, had caused injury to it. Barring a few exceptions, in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of social interest of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book. In our opinion it was injudicious for the learned Sessions Judge to order the commitments of the appellants, particularly so without giving any thought to the aspects of the matter to which we have adverted. For all these reasons, we allow the appeals, quash the order of the Sessions Judge as affirmed by the High Court and direct that the trials of each of the appellants shall proceed before the Magistrate according to law from the stages at which they were on the date on which the stay order became operative. *Thakur Ram* v. *State of Bihar*, AIR 1966 SC 911 : 1966 CrLJ 700 : (1966) 1 SCA 679 : (1966) 2 SCJ 438

[7249] ● *Discretion to weigh evidence to decide existence of prima facie case.*—There was nothing in the prosecution or the defence case which made the prosecution case inherently improbable, and there could be no justification for the Magistrate to hold that no Court could reasonably come to a conclusion on this material that the prosecution case had been established. It is clear that in these circumstances, what the Magistrate did was to appropriate to himself the function of judging whether the prosecution evidence was to be believed, or whether the defence evidence was to be believed in preference, and consequently, the evidence of the prosecution witnesses who gave eyewitness account of the offence was unreliable. No doubt a Magistrate enquiring into a case under Section 209, CrPC, is not to act as a mere Post Office, and has to come to conclusion whether the case before him is fit for commitment of the accused to the Court of Session; but in arriving at that conclusion, it is not the function of an enquiring Magistrate to weigh the pros and cons of the prosecution and defence evidence and to discharge the accused merely because in his view the defence evidence was better than the prosecution evidence.

It cannot be said that the Magistrate has no discretion to weigh the evidence at all. He must clearly do so to some extent in order to decide whether a *prima facie* case has been made out and whether a conviction is possible. But these are the limits of his discretion and it is not his duty nor is it necessary for this purpose for him to examine the prosecution evidence with meticulous care, balance the evidence of one witness against the evidence of another, consider the probabilities a conviction, or come to a conclusion on doubtful points. *K.P. Raghavan* v. *M.H. Abbas,* AIR 1967 SC 740 : 1967 CrLJ 653.

[7250] ● *Express order of discharge.*—In the instant case there is no express order of the Magistrate discharging the appellant of the charge under Section 307, Indian Penal Code, but in his order, dated March 19, 1960 the Magistrate has given reasons for holding that no case is made out under Section 307, Indian Penal Code in order to justify an order of commitment. It is manifest that the order of the Magistrate is tantamount to an implied order of discharge and the Additional Sessions Judge had, therefore, jurisdiction, under Section 437, Criminal Procedure Code, to set aside the order of the Magistrate and to order that the accused should be committed to trial in the Court of Session on the major charge under Section 307, Indian Penal Code. There is nothing in the language of Section 437, Criminal Procedure Code from which it could be said that the power of the Sessions Court under that section can be exercised only when the Magistrate has made an express order of discharge. It is apparent from the language of Section 209(1), Criminal Procedure Code that an express order of discharge is only contemplated in a case where the Magistrate comes to the conclusion that the allegations against the accused do not amount to an offence at all and, therefore, no question arises of trying him either by himself or by any other Court. But the section does not contemplate that an express order of discharge should be made in a case where upon the same facts it is possible to say that though no offence exclusively triable by a Court of Session is made out, an offence triable by a Magistrate is nevertheless made out and the Magistrate thereafter proceeds with the trial of that offence. *Ramekbal Tiwary* v. *Madan Mohan Tiwary,* AIR 1967 SC 1156 : 1967 CrLJ 1076 : 1967 (2) SCR 368.

[7251] ● *Sufficient evidence for commitment.*—A Magistrate holding an enquiry is not intended to act merely as a recording machine. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no *prima facie* evidence or the evidence is totally unworthy of credit, it is his duty to discharge the accused: if there is some evidence on which a conviction may reasonably be based, he must commit the case. The Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before the Magistrate at that stage is whether there is some credible evidence which would sustain a conviction. We do not agree with counsel for the appellants that there was no evidence on which a charge could be framed against the appellants or that the evidence was so totally unworthy of credit that an order recording the conviction against the accused could not be made thereon. *Alamohan Das* v. *State of West Bengal*, AIR 1970 SC 863 : 1970 CrLJ 860 : 1969 (2) SCR 520.

[7252] ● ***Magistrate to sift evidence to see if there is sufficient evidence for commitment.***—Though a Magistrate holding an inquiry under Chapter XVIII is not intended to act merely as a recording machine and is entitled to sift and weigh the materials on record, he is to do so only for the purpose of seeing whether there is sufficient evidence for commitment and not whether there is sufficient evidence for conviction. If there is no *prima facie* evidence or the evidence is totally unworthy of credit it is his duty to discharge the accused. But, if there is some evidence on which a conviction may reasonably be based he must commit the case. But the Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before him at that stage would be whether there is some credible evidence which would sustain a conviction. *Rajpal Singh* v. *Jai Singh,* AIR 1970 SC 1015 : (1970) 2 SCC 206 : 1970 CrLJ 903.

[7253] ● ***Committal proceedings without holding inquiry.***—From the mandatory language of Section 328, the first thing that the Magistrate has to do is to decide, when an accused person is brought before him who is suspected or alleged to be a person of unsound mind and before he proceeds with the inquiry, whether such person appears to him to be of unsound mind. The words "reason to believe" indicate that when an accused person is presented before a Magistrate for inquiry, who is alleged to be suffering from unsoundness of mind, the Magistrate has, on such materials, as are brought before him, to inquire before he proceeds with the inquiry whether there are reasons to believe that the accused before him is suffering from any such infirmity. The next step is that if he has such reasons to believe, he is to institute an inquiry into the fact of unsoundness of mind and cause him to be examined by the civil surgeon or such other medical officer as the State Government directs. Therefore, when such question arises the Magistrate is bound to institute such inquiry whether the accused is or is not incapacitated by the unsoundness of mind from making his defence. Such a provision is clearly in consonance with the principles of fair administration of justice. Where the Magistrate failed to make such an inquiry which it was incumbent upon him to make at the very threshold, the committal proceedings as also his order committing the accused to Sessions Court for trial were both vitiated and the Magistrate was directed for a *de novo* committal proceedings. *Jai Shankar* v. *State of Himachal Pradesh*, AIR 1972 SC 2267 : 1972 CrLJ 1526 : (1973) 3 SCC 83.

[7254] ● ***Directions for separation of case for commitment.***—Where there was delay in proceedings on account of non-production of some other accused, directions were given to separate the case of accused and proceed with the committal expeditiously. *M. Sambasiva Rao* v. *Union of India*, AIR 1973 SC 850 : 1973 CrLJ 663 : 1973 UJ 104.

[7255] ● ***Evidence of single witness, if substantive evidence.***—The evidence of the Investigating officer PW-24 which has been discussed by both the Courts below that at the time of trial, Vasu had left for Coorg and he was not available. It was not possible to serve summons on him and even a non-bailable warrant issued by the Court was returned with the endorsement "not available". Under these circumstances, the learned Sessions Judge brought on record the statement made by Vasu before the committal Court as substantive evidence. Similarly regarding Krishnan, it was in evidence that he was laid up with paralysis at the relevant time and was not in a position to attend the Court and give evidence. The learned Sessions Judge marked his deposition before the committal Court as Ex P-26 and treated it as substantive evidence. The contention that the Courts have committed an error in law in treating the evidence given by Vasu and Krishnan in the committal Court as substantive evidence at the trial cannot be accepted. *Jose* v. *State of Kerala*, AIR 1973 SC 944 : (1973) 3 SCC 472 : (1973) SCC (Cri) 372 (374, 375) : 1973 CrLJ 687 : 1973 CrLR (SC) 167.

[7256] ● ***High Court has no power to reappreciate evidence in commitment proceedings.***—The Magistrate conducting the inquiry proceedings can discharge the accused only if he is of the opinion that the evidence produced before him and the documents referred to in Section 173 of the Code "disclose no grounds for committing the accused person for trial". The jurisdiction of the inquiring Magistrate is thus of a limited character. He has, undoubtedly got to sift and weigh the evidence but that exercise is solely directed to finding whether the prosecution has made out a *prima facie* case. So long as there is evidence which, if believed, would sustain the conviction of the accused, it is the duty of the Magistrate to commit the accused to the Court of Session, unless he comes to the conclusion that the offence disclosed by the evidence is such as may be tried by himself or by some other Magistrate. This limitation stems from the fact that a Magistrate acting under Chapter XVIII of the Code does not try the accused but merely inquires into the case against him. Sifting and weighing evidence to determine the guilt is the function and privilege of the Court which tries the accused.

Acting in the exercise of its revisional powers, the High Court could have quashed the order of commitment if it came to the conclusion that the prosecution had failed to make out a *prima facie* case or that there was no evidence at all on which the conviction of the accused could rest. Rather than examine the evidence from this limited point of view, the High Court embarked upon a full-fledged appraisal of the evidence as if it was hearing an appeal against an order of conviction recorded by the Magistrate.

As the High Court forestalled the decision of the Sessions Court and appreciated evidence led by the prosecution in the committing Court for determining the guilt of the accused we set aside its judgment and restore the order of commitment passed by the learned Magistrate. *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Md. Samsuddin*, AIR 1975 SC 146 : (1975) 3 SCC 390 : 1975 CrLJ 233.

[7257] ● ***Justification of order of discharge.***—Where the High Court set aside the order of the Magistrate discharging the appellant and directed his commitment to the Court of Session and when it is obvious that the High Court has applied its mind to the facts and circumstances of the case, it is not for the Supreme Court in appeal by special leave to go into the sufficiency or otherwise of the material before Magistrate which may afford a justification for passing an order of discharge. *M.R. Dhavan* v. *Pratab Bhanu*, AIR 1978 SC 1011 : (1978) 2 SCC 184 : (1978) SCC (Cri) 186 : 1978 CrLJ 769 : 1978 CrLR (SC) 163 : (1978) 3 SCR 488 : (1978) 2 SCWR 39 : 1978 UJ (SC) 308 : (1978) 5 CrLT 302.

[7258] ● ***Maintainability of application for quashing proceedings.***—The trial in the second case had not started. There was therefore no justification for taking the view that evidence in both the cases was similar. Moreover, it is not the requirement of law that if one case has ended in acquittal, prosecution in another case would be illegal. It cannot also be said that it would be illegal to commence the trial in a case after a period of 10 years or so. So also, it cannot be said that the High Court's opinion that the charge was not "likely to stand" the trial, was on a point of law within the meaning of Section 215 of the Code of Criminal Procedure. The High Court therefore lost sight of its limitation under Section 215 of the Code of Criminal Procedure, and quashed the "proceedings" for reasons which were extraneous to that section. Its order does not conform to the requirement of the law and cannot be sustained. *S.P.E. Madras* v. *K.V. Sundaravelu*, AIR 1978 SC 1017 : (1978) 2 SCC 514 : 1978 CrLJ 775 : 1978 CrLR (SC) 176.

[7259] ● ***Power of Committing Magistrate.***—Under the new Code in cases where the offence is triable exclusively by the Court of Session, the committing Magistrate has no power to discharge the accused. Nor has he power to take oral evidence save where a specific provision like Section 306 enjoins. It is also not open to the committal Court to launch on a process of satisfying itself that a *prima facie* case has been made out on the merits. The jurisdiction once vested in him under the earlier Code has been eliminated now under the present Code. The narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect. If made-up facts unsupported by any material are reported by the police and a Sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227, CrPC, to discharge the accused. *Sanjay Gandhi* v. *Union of India*, AIR 1978 SC 514 : (1978) 2 SCC 39 : (1978) SCC (Cri) 172 : 1978 CrLJ 642.

[7260] ● ***Power of special Judge to take cognizance without commitment.***—Section 8 of the Criminal Law Amendment Act specifically empowers the Special Judge to take cognizance of the offence without the accused being committed to him. The provisions of the CrPC are not excluded unless they are inconsistent with the Criminal Law (Amendment) Act. The CrPC is applicable when there is no conflict with the provisions of Criminal Law Amendment Act. If a special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail it will lead to an anomalous situation. *State of Tamil Nadu* v. *Krishnaswami Naidu*, AIR 1979 SC 1255 : (1979) 4 SCC 5 : (1979) SCC (Cri) 887 (891) : (1979) 3 SCR 928.

[7261] ● ***Power to discharge or acquit.***—The Court competent to discharge or acquit the accused under some other provisions of the Code can exercise the power under Section 321. Criminal Procedure Code. The power conferred by Section 321 is itself a special power conferred on the Court before whom a prosecution is pending and the exercise of the power is not made dependent upon the power of the Court to acquit or discharge the accused under some other provision of the Code. The power to discharge or acquit the accused under Section 321 is a special power founded on Section 321 itself, to be exercised by the Court independently of its power of enquiry into the offence or to try the accused. Again, the expression 'judgment' in the context may be understood to mean the judgment which may be ultimately pronounced if the case were to be committed to a Court of Session. *Rajendra Kumar Jain* v. *State Through Spl. Police Establishment*, AIR 1980 SC 1510 : (1980) 3 SCC 435 : 1980 SCC (Cri) 757 : 1980 CrLJ 1084.

[7262] ● ***Committing magistrate not performing judicial function.***—It may not be accurate to say that the Committing Magistrate has no judicial function to perform under the 1973 Code of Criminal Procedure. Section 209 of the Criminal Procedure Code 1973 obliges the Magistrate to commit the case to the Court of Session when it appears to the Magistrate that the offence is triable exclusively by the Court of Session. Therefore, the Magistrate has to be satisfied that an offence is *prima facie* disclosed and the offence so disclosed is triable exclusively by the Court of Session. If no offence is disclosed the Magistrate may refuse to take cognizance of the case or if the offence disclosed is one not triable exclusively by the Court of Session he may proceed to deal with it under the other provisions of the Code. To that extent the Court of the Committing Magistrate does discharge a judicial function. *Rajendra Kumar Jain* v. *State Through Spl. Police Establishment*, AIR 1980 SC 1510 : (1980) 3 SCC 435 : (1980) SCC (Cri) 757 : 1980 CrLJ 1084.

[7263] ● ***Two cases on same transaction to be tried separately by same Court.***—Two cases exclusively triable by Court of Session, one instituted on a police report and the other by a criminal complaint, arose out of the same transaction. Both cases should be tried separately but by the same Court to obviate the risk of two Courts coming to conflicting findings. At the stage of Sections 203 and 204, in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether or not there is "sufficient ground for proceeding". The Magistrate is not to weigh the evidence meticulously as if he were the trial Court. *Kewal Krishan* v. *Suraj Bhan*, AIR 1980 SC 1780 : (1981) SCC (Cri) 521 : 1980 Supp SCC 499 : 1980 CrLJ 1271 : 1980 CrLR (SC) 534.

[7264] ● ***Statement of witnesses in committal Court.***—Police officer sometimes feels it expedient to have the statement of a witness recorded under the section when the witnesses to a crime are clearly connected with the accused or where the accused are very influential which may result in the witnesses being gained over. Such statement has the endorsement of the Magistrate that it had been made by the witness. Statements thus recorded would not make them tainted. If the witness sticks to it in the committal Court, no problem arises. If he resiles, he can be cross-examined on his earlier statements. But if he sticks to it before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed under Section 288, CrPC, (old) will have to be observed. It is for the Court to consider, taking into account all the circumstances including the fact that the witness had resiled, in coming to the conclusion as to whether the witness should be believed or not. *Dhanabal* v. *State of T.N.*, AIR 1980 SC 628 : (1980) 2 SCC 84 : 1980 SCC (Cri) 340 : 1980 CrLJ 439 : 1980 CrLR (SC) 90 : (1980) 2 SCR 491.

[7265] ● ***Power to release on bail or remand to custody.***—*Note:*—Under the CrPC of 1973, committal Court enquiry in police cases has been abolished. As such, there is no question of treating the evidence of a witness given in the committal Court being brought on record in the sessions trial under the provisions of Section 288, CrPC of 1898 arises. However, the case is given hearing since in other types of cases before Magistrates or in the Sessions Court statements of witnesses recorded under Section 164, CrPC (under both the Codes) come up and their evidentiary value is considered.

From the time the accused appeared or was produced before the Magistrate with the police report under Section 170 and the Magistrate proceeded to enquire whether Section 207 had been complied with and then proceeded to commit the accused to the Court of Session, the proceeding before the Magistrate would be an inquiry as contemplated by Section 2(g) of the Code. It is difficult to agree with the High Court that the function discharged by the Magistrate under Section 207 is something other than a judicial function and while discharging the function the Magistrate is not holding an inquiry as contemplated by the Code. If the Magistrate is holding the inquiry obviously Section 309 would enable the Magistrate to remand the accused to the custody till the inquiry to be made wan complete. Sub-section (2) of Section 309 is clear, and would enable the Magistrate to remand the accused to custody. The High Court committed an error in holding otherwise. The view taken by the High Court introduced a stage of compulsory bail not envisaged by the Code, and, therefore, the view of the High Court cannot be upheld. According to the High Court after the accused was brought before the Court along with the police report, the Magistrate should forthwith commit the accused to the Court of Session because the Magistrate would have no jurisdiction in the absence of any provision to remand the accused to custody till the order committing the case to the Court of Session was made. The view is wholly untenable and should be set aside. The appeal is, therefore, allowed and the order of the High Court granting bail to the respondents on the short ground that they could not be remanded to the custody before the order committing them to the Court of Session was made, is set aside, However, if in the meantime, the trial was over, no question of taking the respondents into custody pursuant to the order would arise.

On the expiry of 60 days from the date of the arrest of the accused, his further detention did not become *ipso facto* illegal or void, but if the charge-sheet was not submitted within the period of 60 days, then, notwithstanding anything to the contrary in Section 437(1), CrPC, the accused would be entitled to an order for being released on bail if he was prepared to and did furnish bail. *State of Uttar Pradesh* v. *Lakshmi Brahman*, AIR 1983 SC 439 : 1983 SCC (Cri) 489 : (1983) 2 SCC 372 : 1983 CrLJ 839.

[7266] ● ***Cognizance of offence by Court of Session upon commitment by Magistrate.***—If the Magistrate took cognizance of an offence upon a complaint which appears to be exclusively triable by Court of Session, he has to proceed according to Sections 202(2), 208 and 209. Chapter XVIII incorporates provisions prescribing procedure for the trial before a Court of Session.

Section 226 of the CrPC says that the case comes to the Court in pursuance of a commitment of the case under Section 209. Section 209 caters to a situation where the case was instituted before the Magistrate on a Police report or otherwise. In both the cases, if it appears to him that the offence which is alleged against the accused is exclusively triable by the Court of Session, there is no option but to commit the case to the Court of Session. The Court of Session, thus, takes cognizance of the offence upon commitment by the Magistrate. And any other mode of taking cognizance is specifically barred under Section 193 of the CrPC. *A.R. Antulay* v. *Ramdas Sriniwas Nayak*, AIR 1984 SC 647 : (1984) 2 SCC 500 : (1984) SCC (Cri) 277 (294) : 1984 CrLJ 647 : 1984 CrLR (SC) 206 : (1984) 2 SCR 914 : (1984) 1 Crimes 547.

[7267] ● ***Examination of approver at committal stage.***—The learned Chief Judicial Magistrate committed the case to the Court of Session for trial without examining the approver as a witness in his Court. But the learned Additional Judicial Commissioner to whom the case was committed for trial noticed this defect that the approver was not examined as a witness in the Court of Magistrate taking cognizance of the case and committed it for trial before him and, therefore, learned Additional Judicial Commissioner remanded the case back to the Court of Chief Judicial Magistrate with a direction to record the statement of the Approver as required by clause (a) of subsection (4) of Section 306 of the Code. After receiving the records with the aforesaid direction, learned Magistrate examined the approver and then again committed it for trial to the Court of Additional Commissioner. Thus in any case the provisions of clause (a) of sub-section (4) of Section 306 were ultimately complied with. If the defect of not examining the approver at the committal stage by the committing Magistrate is rectified later, no prejudice can be said to be caused to an accused person and, therefore, the trial cannot be said to be vitiated on that account. Since, in the present case, the defect was rectified, the argument that the trial was vitiated cannot be accepted. *Suresh Chandra Bahri* v. *State of Bihar*, AIR 1994 SC 2420 (2435) : 1994 CrLJ 3271 : 1994 CrLR (SC) 725 : JT 1994 (4) SC 309 : (1994) 2 Crimes 1027.

[7268] ● ***CJM having no jurisdiction to grant of pardon after commitment of proceeding.***—The Chief Judicial Magistrate no doubt was authorised under Section 306 of the Code to tender pardon in course of an investigation, inquiry or trial before the committal of the proceedings to the Court of Session. But after commitment of the proceedings, he does not have jurisdiction to grant pardon and in such a case if the said Chief Judicial Magistrate tenders pardon then that would not be a curable irregularity within the ambit of cl. (g) of Section 460 of the CrPC. *A. Devendran* v. *State of Tamil Nadu*, AIR 1998 SC 2821 : (1998) 11 SCC 720 : 1998 SCC (Cri) 220 : 1998 CrLJ 814 : JT 1997 (8) SC 619.

[7269] ● ***Grant of pardon by CJM after commitment of case not curable irregularity.***—Under the 1898 Code, the corresponding provision to Section 460(g) of the 1973 Code was Section 529(g). In the said provision it was specifically stated that if any Magistrate not empowered by law to tender pardon under Section 337 or 338, the same would not vitiate the proceedings. But under Section 460(g) of the new Code, the Legislature have omitted Section 307 which is corresponding to Section 338 and, therefore, such irregularity committed by the Magistrate cannot be said to be a curable irregularity under clause (g) of Section 460. *A. Devendran* v. *State of Tamil Nadu*, AIR 1998 SC 2821 (2831) : (1998) 11 SCC 720 : 1998 SCC (Cri) 220 : 1998 CrLJ 814 : (1997) 4 Crimes 181.

[7270] ● ***Object of holding inquiry.***—It is only if the Magistrate decides to hold the inquiry the proviso to sub-section (2) of Section 202 would come into operation. If the offence is triable exclusively by the Court of Session, the Magistrate himself has to hold the inquiry and no direction for investigation by the police shall then be made. Inquiry can be held for recording evidence on oath and if he thinks fit, sub-section (2) of Section 202 gives discretion to the Magistrate to record the evidence of the witnesses on oath. To this discretionary power, the proviso carves out an exception. It provides that for the offence triable exclusively by the Court of Session, the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. Then the next stage after holding inquiry is passing of appropriate order of either dismissal of the complaint or issue of process. That is provided under Sections 203 and 204 of the Code. Hence, on receipt of the complaint, the Magistrate by following the procedure prescribed under Section 200 may issue process against the accused or dismiss the complaint. Section 203 specifically provides that after considering the statement on oath, if any, of the complainant and witnesses and the result of the inquiry or investigation, if any, under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. For dismissal of complaint, he is required to briefly record his reasons for so doing. In other cases, he had to issue process *i.e.* either summons or warrants as the case may be as provided under Section 204. However, no summons or warrant is to be issued against the accused until a list of the prosecution witnesses has been filed. Therefore, the question of complying with the proviso to sub-section (2) of Section 202 would arise only in cases where the Magistrate before taking cognizance of the case decides to hold the inquiry and secondly in such inquiry by him, if he decides to take evidence of witnesses on oath. But the object and purpose of holding inquiry or investigation under Section 202 is to find out whether there is sufficient ground for proceeding against the accused or not and that holding of inquiry or investigation is not an indispensable course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. *Rosy* v. *State of Kerala*, AIR 2000 SC 637 : (2000) 2 SCC 230 : 2000 SCC (Cri) 379 (387, 388) : 2000 CrLJ 930.

[7271] ● ***Nature and scrutiny of evidence.***—It is settled law that the inquiry under Section 202 is of a limited nature. Firstly, to find out whether there is a *prima facie* case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202, CrPC the accused has no right to intervene and that it is the duty of the Magistrate while making an inquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. *Rosy* v. *State of Kerala*, AIR 2000 SC 637 : (2000) 2 SCC 230 : 2000 SCC (Cri) 379 (388) : 2000 CrLJ 930.

[7272] ● ***Standard of proof in scrutinizing evidence.***—The instant case dealt with the case where instead of finding out a *prima facie* case made out against the accused, the Magistrate passed an order by meticulously appreciating the evidence in a case exclusively triable by a Sessions Court, at the stage of Sections 203 and 204. The Magistrate committed an irregularity by exceeding his jurisdiction.

"At the stage of Sections 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202, Criminal Procedure Code, there is *prima facie* evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is 'sufficient ground for proceeding' against the accused." At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial Court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges....The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of framing charges. A *fortiori*, at the stage of Sections 202/204, if there is *prima facie* evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session." *Rosy* v. *State of Kerala*, AIR 2000 SC 637 : (2000) 2 SCC 230 : 2000 SCC (Cri) 379 (389) : 2000 CrLJ 930.

[7273] ● ***Order of discharge not challenged, subsequent application for trial not maintainable.***—On a complaint case was registered for offences under Sections 498-A and 313 of the IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1971. After investigation, charge-sheet was filed. However, Dr. (Mrs.) Snehlata Mukherjee was discharged. The remaining accused filed an application to delete Section 313 of the IPC from the charge-sheet as no case was made out for the said offence. The learned Magistrate, allowed the application and the charge against the accused under Section 313 of the IPC was deleted. The petitioner did not challenge the order discharging the accused for offence under Section 313 of the IPC. An application was filed on behalf of the petitioner to proceed for the trial of the accused under Section 313 of the IPC. The said application was dismissed against which order a Criminal Revision Petition was preferred by the petitioner before the High Court. The High Court disposed of the said revision petition in the following terms:—"In the result, I find no reason to interfere with the impugned order except that the previous order of the Chief Judicial Magistrate discharging the accused persons of the offence under Section 313, IPC would be no bar to the committal of the case in accordance with the provisions of Section 323 of the Code. With this observation, this application is dismissed. However, it is made clear that if on examination of the remaining witnesses and on looking to the relevant documents brought on the record in course of the trial, the Sub-Divisional Judicial Magistrate finds that the accused persons before him, or any of them is shown to have committed offence under Section 313 of the IPC or for that matter, even of its abetment, he may commit the case to the Court of Session either on application made for the purpose by the prosecution, or *suo motu*." Thereafter, the learned Magistrate, having already recorded evidence of two witnesses, continued the trial and recorded the evidence of six more witnesses. In compliance with the directions given by the High Court as extracted above, he passed a detailed order holding that it was not necessary to commit the case to the Court of Session and posted the case for recording the statements of the accused. It is this order, which was challenged before the High Court and the High Court, by the impugned order, dismissed the revision petition filed by the petitioner. Hence, this petition. The main thrust of the argument of the learned Counsel for the petitioner was that the learned Magistrate committed a manifest error in appreciating the evidence produced by the prosecution as required for final disposal of the case either to convict or acquit the accused instead of considering only as to whether there was *prima facie* material to constitute a charge for offence under Section 313 of the IPC. Looking to the narration of facts made above, it is clear that the order discharging Dr. Snehlata for the offence under Section 313 of the IPC was not challenged. The order made by the High Court on an earlier occasion was also not challenged. The learned Magistrate complied with the directions given by the High Court in the said revision petition. No fault can be found with the order of the learned Magistrate when he proceeded to record the evidence of six more witnesses and thereafter passed the order holding that no case was made out to commit the accused for trial under Section 313 of the IPC by the Sessions Court. The learned Magistrate was bound to follow the directions given by the High Court in the aforementioned revision petition. When the petitioner did not challenge the order of the High Court, she cannot now say that the learned Magistrate should not have taken into account the evidence of 8 witnesses examined in passing the detailed order holding that it was not necessary to commit the case to the Court of Session. *Harjinder Kaur* v. *State of Jharkhand*, AIR 2001 SC 3716 : (2001) 8 SCC 394 : 2002 SCC (Cri) 88 (89, 90) : 2002 CrLJ 78 : 2001 CrLR (SC) 856.

[7274] ● ***Committal proceedings—Offence found to be exclusively triable by Sessions Court.***—Proviso to Section 202(1) lays down that direction for investigation shall not be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or where the complaint has not been made by a Court unless the complainant and the witnesses have been examined on oath under Section 200. Under Section 202(2), the Magistrate making an inquiry under sub-section (1) can take evidence of the witnesses on oath. If the Magistrate thinks that the offence complained of is triable exclusively by the Court of Sessions then in terms of proviso to Section 202, he is required to call upon the complainant to produce all his witnesses and examine them on oath. *Shivjee Singh* v. *Nagendra Tiwary*, AIR 2010 SC 2261 : (2010) 7 SCC 578 : JT 2010 (7) 271 : 2010 CrLJ 3827 : 2010 (3) Crimes 188 (SC).

[7275] ● *Duty of Magistrate in committal proceedings.*—The Magistrate is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no *prima facie* evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused, on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. *Sajjan Kumar* v. *Central Bureau of Investigation*, (2010) 9 SCC 368 : JT 2010 (10) 413.

COMMON INTENTION
(S. 34, IPC)

[7276] ● *Sharing common intention.*—In a case in which the only evidence against the accused is that they were present and standing together at the time when one of them fired a fatal shot at the deceased, the possibility remains that the one who fired did so without the others having shared with him the intention to cause death, and unless that possibility is eliminated by some evidence indicative of a meeting of the minds between them all, the mere presence of the other accused on the spot cannot be sufficient to hold them guilty with the aid of Section 34. Before conviction with the aid of Section 34 can be sustained there must be some evidence from which a reasonable inference can be drawn that the accused shared the intention of the one who fired the shot to kill the deceased, but such evidence may be either of a pre-arranged plan to murder, or may be of some act or circumstance on the spot which is indicative of the common intention. In the absence of any such evidence the mere fact that all the accused were seen by witnesses at the place and at the time of the firing, is not sufficient to prove common intention.

In such a case if it cannot be proved, who fired the fatal shot, none of the persons present can be convicted of murder and all of them would be entitled to the benefit of doubt and must be acquitted. In such a case if the evidence as to a previous conspiracy between the accused has been rejected and the accused are acquitted under Section 120-B, that evidence must be held to be equally insufficient to establish the charge of common intention under Section 34. *Ram Nath Madhoprasad* v. *State of Madhya Pradesh*, AIR 1953 SC 420 : 1953 CrLJ 1772.

[7277] ● *Sudden consensus of mind.*—For the applicability of Section 34, a pre-concert in the sense of a distinct previous plan is not necessary. Common intention to bring about a particular result may well develop on the spot of a sudden, and may be established from proof of circumstances showing that after some persons gathered at the scene of occurrence there developed a sudden consensus of their minds to bring about a particular result.

In other words, the common intention to bring about a particular result can be proved from the conduct of the accused and the circumstances of the case, and it is a question of fact to be determined from the attendant circumstances whether what developed on the spot was only simultaneous conduct under different intentions, or was a consensus of minds to bring about a particular result.

In the present case three accused *A, B* and *C* were charged under Section 302/34 Penal Code. The evidence on record accepted by both the Courts below was as under. There was a long-standing dispute over land between them and the deceased *X*. One morning the accused who were working in their field saw two labourers going to the field of *X* for working there. The accused shouted at them not to do so, but they did not listen and walked on. Thereupon the accused rushed at them and began belabouring them with the handles of their spears. In the meantime *X* arrived there and intervened, which set the accused attacking him. First *B* and *C* attacked him on his legs and he fell down. Then *A* stabbed *X* with his spear on the head, and then putting his leg on *X*'s chest, he extracted the spear blade from the jaw where it had stuck. The blow went through the skull and injured the brain, so that *X* died on the spot.

(i) So far as *A* was concerned, the blow was given with deliberate intention on the head of a fallen and helpless man lying on the ground, and was given with much force so as to penetrate the skull with a sharp and pointed instrument. Therefore, the case did not fall under Exception 4 to Section 300, even though *A* may have acted without premeditation in a sudden quarrel in the heat of the moment. Conviction under Section 302 and sentence of death were maintained.

(ii) So far as *B* and *C* were concerned, in view of the circumstances of the case, it could not be said that what developed between all the accused, on the spot was a common intention to kill *X*. The only common intention which could be attributed to them was intention to beat *X* with weapons which were likely to produce grievous injuries. Therefore, they were not guilty under Section 302/34. But even though the injuries they themselves had caused were simple, they were guilty under Section 326/34, because of the common intention of all to attack *X* with sharp cutting weapons. *Kripal* v. *State of Uttar Pradesh*, AIR 1954 SC 706 : 1954 CrLJ 1755.

[7278] ● ***Object and intention.***—'Object' is a different state of mind from "intention", and though the object of the members of an unlawful assembly may be common, their intentions may differ. In Section 34 the principal element is the common intention of several persons to commit a crime, and it provides that if in furtherance of the common intention several acts are done by several persons which result in a crime, each one of those persons is liable for that crime in the same manner as if all those acts had been done by him alone. On the other hand, in Section 149 there is no question of common intention and what is required is only a common object. It provides that if any one member of an unlawful assembly commits an offence, then all the other members of that assembly are liable for it, even though there was no common intention between him and them to commit it, provided that the conditions of that section are fulfilled, namely, (*a*) that the offence was committed in prosecution of the common object of that assembly, or (*b*) that it is of such a nature that the other members knew it to be likely to be committed in prosecution of that object. Thus, the community of intention required by Section 34 is replaced in Section 149 by community of object, which is quite a different element. *Nanak Chand* v. *State of Punjab*, AIR 1955 SC 274 : 1955 CrLJ 721 : 1955 SCR 1201 : 1955 SCA 272.

[7279] ● ***Essential feature, participation in action.***—The essential feature of Section 34 is participation in action, and unless the Court is satisfied that an accused has participated, that is, taken some part in the actual commission of an offence, he cannot be held guilty by the application of Section 34. On the other hand, Section 149 does not require any participation in the commission of an offence, and this element is replaced by the requirement as to membership of the unlawful assembly at the time of its commission by another member of that assembly. *Nanak Chand* v. *State of Punjab*, AIR 1955 SC 274 : 1955 CrLJ 721 : 1955 SCR 1201 : 1955 SCA 272.

[7280] ● ***Criminal act jointly done by several persons.***—Section 34 only explains that when a criminal act is jointly done by several persons who are actuated by a common intention in furtherance of that intention, each of them is liable for it as if the whole of it had been done by him alone. On the other hand, Section 149 creates constructive criminal liability for an act done entirely by another person, provided the conditions of that section are fulfilled. It creates a specific offence and provides the punishment for the offence. *Nanak Chand* v. *State of Punjab*, AIR 1955 SC 274 : 1955 CrLJ 721 : 1955 SCR 1201.

[7281] ● ***Distinction between S. 34 and S. 149, IPC.***—There is a clear distinction between the elements of Section 34 and Section 149, and the application of these sections is not to be confused. The facts of a case may be such that the elements of both Section 34 and Section 149 may exist, in which case the accused may be charged and convicted under both. But cases do arise in which the elements of one of these two sections exist but not of the other. The distinction becomes important in cases in which the charge under Section 149 fails in respect of some of the accused only, and as a result even the remaining accused cannot be convicted under that section because of their number falling below five. In such cases the question still remains whether the remaining accused can be convicted under Section 34, and in such cases the Court has to examine the facts and circumstances of the case before it for determining whether the elements of Section 34 exist or not. *Nanak Chand* v. *State of Punjab*, AIR 1955 SC 274 : 1955 CrLJ 721 : 1955 SCA 272 : 1955 SCJ 241 : 1955 SCR 1201 : 1955 1 MLJ (SC) 141 : 1955 MWN 326 : 1955 AWR (Sup) 59 : ILR (1955) Punj 154.

[7282] ● ***Evidence indicating sharing common intention.***—Common intention requires a prior meeting of the minds, and presupposes some prior concert. For the purpose of establishing common intention it is not enough to show that several persons simultaneously attacked a man and each inflicted a blow. It is also not enough to prove that each of the assailants had the intention to kill. The mere fact that each had the *same* intention is not sufficient for invoking Section 34, because each may have entertained the same intention independently of the others.

Some evidence indicative of a common intention shared by each is essential before there can be a conviction with the aid of Section 34, and in the absence of any evidence from which a prior meeting of the minds of the assailants could be reasonably inferred, none of the accused could be convicted with the use of that section for the acts of the others. In such a case, even if it be clearly proved against any accused that he had the intention to kill, he could not be convicted of murder if it has not been established that it was he who delivered the fatal blow.

Further, it is not enough to show that all the accused had shared some common intention other than that to kill the deceased, because for the purpose of Section 34 what is required is some proof of a common intention to commit the *very* offence of which the accused are sought to be convicted with its aid. *Pandurang Tukea* v. *State of Hyderabad*, AIR 1955 SC 216 : 1955 CrLJ 572.

[7283] ● ***In furtherance of common intention of all.***—However, in order to establish a common intention it is not necessary that there should have been an elaborate or a pre-arranged plan between the accused some time before the assault. The common intention could develop suddenly and on the spot. But some indication of the development of the common intention on the part of the others to join in a fatal assault in which only one of them has given the fatal blow, before the fatal blow has been given, is absolutely necessary before it could be said that such blow was given "in furtherance of the common intention of all." *Pandurang Tukea* v. *State of Hyderabad*, AIR 1955 SC 216 : 1955 CrLJ 572.

[7284] ● ***Proof by circumstantial evidence.***—It is not necessary that there should be direct proof of a pre-arranged plan in every case, and common intention can be gathered even from evidence which is purely circumstantial. For example, when one of the assailants shouts to the others to join in the assault and they indicate their assent by some word or act.

But when the prosecution case as to common intention rests only on circumstances from which that intention has to be inferred, the circumstances which are proved must be such as necessarily lead to that inference. In other words, the inference of common intention should not be drawn unless the circumstances leading up to that inference are such as to be incompatible with the innocence of the accused, and incapable of explanation on any hypothesis except that of his guilt. But to say this is no more than to repeat the normal rule about circumstantial evidence, since there is no special rule of evidence for proof of common intention. Each case must rest on its own facts for the purpose of any conclusion which can be drawn as to common intention inferrable from those facts. *Pandurang Tukea* v. *State of Hyderabad*, AIR 1955 SC 216 : 1955 CrLJ 572.

[7285] ● ***Question of fact—Cumulative effect.***—Circumstances such as under are relevant for the purpose of establishing common intention:

(*a*) Common motive or enmity or ill-will which is shared by all the accused, or the fact that they all belong to a faction or family which is on terms of rivalry with the faction or family to which the deceased belonged, or

(*b*) previous conduct of the assailants, immediately before the occurrence, such as, that they had met together and came in a body to the spot where the incident occurred, or

(*c*) subsequent conduct of the assailants, such as, that they all ran away after the attack in a body or in the same direction, or that they were all absconding after the happening of the incident.

However, the question whether any set of circumstances established against the accused in any case is or is not sufficient for the purpose of establishing their common intention, is a question of fact which depends upon the particular facts and circumstances of each case, and no general rule can be laid down in that behalf which is universally applicable. All that can be said in this connection is that though any one or more of the facts so established may not be sufficient by itself or themselves for the purpose of proving common intention, yet the cumulative effect of several such facts happening together may be such in its nature as to justify the inference as to the common intention of the accused. *Pandurang Tukea* v. *State of Hyderabad*, AIR 1955 SC 216 : 1955 CrLJ 572 : 1955 SCR 1083.

[7286] ● ***Circumstantial evidence.***—In the present case it was proved—

(*a*) that *A, B* and *C* were armed with axes,

(*b*) that each of them gave a blow to the deceased,

(*c*) that the blows given by *A* and *B* were fatal, but the blow given by *C* was not fatal and was not such as could be called 'likely to cause death',

(*d*) that two other persons armed with sticks were present at the occurrence,

(*e*) that all the eye-witnesses had arrived only after the assault had started, and none of them knew what had happened on the spot before the assault, (*f*) that a witness stated that when she tried to remonstrate, some of the five accused had raised their weapons, but she could not say which of them did it,

(*g*) that all the accused ran away after the villagers had gathered, but not together or in the same direction,

(*h*) that all the accused were absconding for some days after the occurrence,

(*i*) that *C* was of a different caste, and that there was no enmity against the deceased which he shared with *A* or *B*

On this evidence it was held that *A* and *B* were guilty under Section 302. The two other persons who were merely present with sticks were acquitted, being given the benefit of doubt. The question was whether Section 34 or Section 149 could be invoked against *C,* and if so, in connection with what offence.

(1) On these facts it had not been proved that the fatal injuries caused by *A* and *B* had been caused in furtherance of the common intention of all, or that *C* had shared with them a common intention to murder.

(2) On these facts it had not been proved beyond doubt that there was an unlawful assembly of five persons or that *C* knew it to be likely that *A* or *B* would commit a fatal assault.

(3) The facts established were, therefore, not sufficient for the conviction of *C* either under Section 302/34 or Section 302/149 and he could be convicted only under Section 326 for the blow which he had himself given to the deceased. *Pandurang Tukea* v. *State of Hyderabad*, AIR 1955 SC 216 : 1955 CrLJ 572.

[7287] ● ***Participation in action.***—In Section 34, the emphasis is on the word ‘done’, and the section applies only when several persons join in the actual ‘doing’ of a criminal act, and not merely on their planning its commission. In other words, participation in action is the basis of the offence, and before the section can apply, participation in action must be established by evidence, to show some active or passive part taken in the crime, or by evidence of presence at the place in such circumstances as clearly indicate the intention of participation. *Shreekantiah Ramayya Munipalli* v. *State of Bombay*, AIR 1955 SC 287 : 1955 CrLJ 857 : 1955 SCJ 233.

[7288] ● ***Abetment not amounting to participation.***—In the present case, the accused who was a public servant was charged and convicted under Section 409/34, Penal Code, the prosecution case was that the accused who was in charge of a Government Depot and his companions had permitted Government stores to pass out of the Depot and had thus ‘wilfully suffered another person to convert those stores to his own use’. There was evidence on record that the accused had abetted the removal by planning it with his companions, and there was also clear evidence that the goods had been loaded in a truck and had been passed out of the gates. However, there was no evidence to show that the accused was present at the time when goods were so removed, and the defence of the accused was that in fact he was not present at the depot at the time of the removal. On the facts proved the accused could have been convicted on the charge of abetment, but the charge under Section 409/34 must fail in the absence of any proof of his presence during the removal of the goods from the depot under his charge. Evidence as to planning the removal could have established abetment of the offence under Section 409, but such planning could not amount to participation. Conviction was set aside. *Shreekantiah Ramayya Munipalli* v. *State of Bombay*, AIR 1955 SC 287 : 1955 CrLJ 857 : 1955 SCJ 233.

[7289] ● ***Inference from surrounding circumstances and conduct of parties.***—“Common intention” under Section 34 presupposes a prior concert, that is a prior meeting of the minds, but such pre-concert can develop on the spot and without any long interval of time between it and the doing of the act commonly intended.

Direct evidence of a prior plan to commit an offence is not necessary in every case, and in fact such a plan may not in fact have existed. In such a case the common intention can be inferred from the surrounding circumstances and the conduct of the parties. If, from the evidence on record as to the existence of circumstances from which the common intention of the accused can well be inferred, the trial Court comes to the conclusion that the common intention of the accused was established, and on appeal the High Court accepts that inference as correct, the Supreme Court will not ordinarily interfere with the concurrent finding of fact by both the Courts below, unless the facts and circumstances relied upon, in support of the finding are clearly capable of an explanation establishing the innocence of the accused.

In the present case the evidence of prosecution witnesses was that they saw the two accused *A* and *B,* who were brothers, standing near the cot of the victim who had been sleeping, that *A* was armed with a gandasa and *B* with lathi, and that on a hue and cry being raised they both ran away together. The medical evidence was that the deceased died of an incised wound on the neck which was necessarily fatal.

On these facts the Sessions Court was justified in coming to the conclusion that *B* shared with *A* the common intention to cause death, and there was no reason to interfere with his conviction under Section 302/34. *Rishi Deo Pande* v. *State of Uttar Pradesh*, AIR 1955 SC 334 : 1955 CrLJ 873.

[7290] ● ***Participation in action essential.***—The decision in *Shreekantiah's* case does not lay down, that physical presence is essential for a conviction with the aid of Section 34 in every case. In that case the Court was dealing with the antithesis between the preliminary stages of agreement and planning covered by Section 109 and the final stage of the actual commission of the offence covered by Section 34, and what the Court held was that mere previous planning was not participation, that participation in action was an essential condition of the application of Section 34, and that participation in action required presence of the accused at the scene of occurrence.

The observations of the Court were made in a case in which the offence was of such a character, that it could be committed only by a person who was physically present at the spot of the offence, and they can have no application where the offence is of such a nature, that participation in its commission by two or more accused is possible, though they may not be together in the same place and one who is in a different place could join in its commission.

The facts established in the present case showed that the accused himself committed the offence of cheating, though he did so not by himself but with the aid of others. He himself was the principal offender, and hence he could have been charged and convicted under Section 420 substantive. Under these circumstances there would be nothing illegal if the Court convicted him under Section 420, though the charge was under Section 420/34, because no possible prejudice would be caused by so doing. Such a course was, however, not necessary because the offence of cheating is of such a nature, that the offence can be committed in one place though the offender may be residing in another, and a person can be convicted with the aid of Section 34 though he may not be physically present at the place where the offence is committed. *Mobarak Ali Ahmed* v. *State of Bombay*, AIR 1955 SC 287 : 1955 CrLJ 857 : 1955 SCJ 233.

[7291] ● ***Physical presence essential.***—Physical presence at the place of offence is essential for the application of Section 34 if the offence is such as can be committed only on the spot.

It is of the essence of Section 34 that the accused must be physically present at the actual commission of the offence. He need not be present in the very room in which the offence is committed, but he must be present somewhere nearby, say, standing guard at the gate of the house, or remaining on watch on the road outside. What is essential is that he must be physically present at the scene of occurrence, and the presence must be such as to indicate his actual participation in the commission of the offence in one way or another say, by keeping guard outside in readiness for warning his companions of any approaching danger or interference, or by posting himself so as to facilitate quick escape. *Shreekantiah Ramayya Munipalli* v. *State of Bombay*, AIR 1955 SC 287 : 1955 CrLJ 857 : 1955 SCA 283 : 1955 SCJ 233 : 1955 SCR 1177 : 1955 MWN 317 : 57 BomLR 632 : 1955 AWR (Sup) 65.

[7292] ● ***Agreement, preparation and planning.***—The antithesis between Section 109 and Section 34 lies in this that Section 109 covers the preliminary stages of agreement, preparation and planning, while Section 34 covers the last stage of actual commission of the offence when those plans are put into effect and carried out. *Shreekantiah Ramayya Munipalli* v. *State of Bombay*, AIR 1955 SC 287 : 1955 CrLJ 857 : 1955 SCJ 233.

[7293] ● ***Common intention and common object.***—No doubt, participation can be passive as well as active, but in one form or another participation is essential for the application of Section 34, and there cannot be any participation unless the participant is physically present at the scene of occurrence.

To a certain extent Sections 34 and 149 overlap each other, but there is an essential difference between the two sections as regards their constituent elements. The basic element of Section 149 is membership of an unlawful assembly in which every member shares with the other members the common unlawful object of that assembly. The basic element of Section 34 is the sharing of a common unlawful intention in furtherance of which they all join in committing an offence. Under Section 149 participation in the commission of an offence is not required, and the liability under it is only a constructive liability for an offence committed by one or more of the other members of that assembly.

It follows that when several accused are charged in any case under Section 302/149 and that charge fails, it is not open to the Court in every case to convict the accused under Section 302/34. In cases in which the facts are such as to establish common intention as well as common object, and further if those facts show the participation of all or some of the accused in the commission of the murder, conviction with the aid of Section 34 may be justified when the charge under Section 149 fails by reason of the acquittal of some of the accused and the number of the remaining accused falling below five. But in cases in which either of the two ingredients of Section 34, namely, common intention and participation in action, is lacking, conviction under Section 34 is a clear illegality and must be set aside.

In such a case, the question of considering the effect of any irregularity in procedure arising from the omission to frame a charge under Section 302/34 does not at all arise, and the conviction is bad whether such a charge has or has not been framed, In other words, when any essential element of Section 34 is missing, the conviction is illegal, not because of any mere defect in procedure, but because the very accusation against the accused has not been proved. The question of considering the effect of any irregularity in procedure arises only in those cases in which on the evidence on record the elements of Section 34 are proved to exist, but a contravention of Section 233, CrPC has occurred by reason of the charge under Section 34 not having been framed. *Chikkarange Gowda* v. *State of Mysore*, AIR 1956 SC 731 : 1956 CrLJ 1365 : 1957 KerLT 25 : ILR (1956) Mys 377.

[7294] ● *Offence committed jointly with unidentified persons.*—In the present case, there accused persons who had been jointly tried before a Sessions Court were found guilty under Section 302/34. On appeal, the High Court acquitted two of them by giving them the benefit of doubt as to their identity, but it confirmed the conviction of the remaining accused because, after carefully considering the evidence, it was satisfied that his identity was clearly established, and that he had committed the offence jointly with two other unidentified persons. There was no illegality in such a conviction. *Wasim Khan* v. *State of Uttar Pradesh*, AIR 1956 SC 400 : 1956 CrLJ 790 : 1956 SCA 549 : 1956 SCJ 437 : 1956 SCR 191 : ILR (1956) 2 All 127 : 1956 ALJ 457.

[7295] ● *Sharing common intention with other offenders.*—A charge under Section 34, IPC can be sustained only when it is proved that an accused shared the common intention to commit an offence with one or more others and that he joined in the commission of that offence in furtherance of the common intention of all. It is not necessary for the application of Section 34 that the other persons with whom he joined in the commission of the offence should be known to the prosecution or that they must be put up as co-accused. Thus, when a person is charged under Section 34, the charge can be in either of the following two forms, (*a*) that *A* committed the offence jointly with specified and named persons *B, C* and *D,* who are co-accused at the same trial, or (*b*) that *A* committed the offence jointly with some persons who are unknown and whose identity cannot be traced. But in either case, before conviction of *A* under Section 34 could be upheld, common intention to commit an offence jointly with at least one other person, known or unknown, would have to be proved either by direct evidence or by legitimate inference from circumstances.

When, therefore, the whole gravamen of the charge and of the evidence is that an accused *A* committed an offence jointly with specified and known persons who are co-accused at the trial, and not with some others who are unknown, and all the other accused are acquitted, the element of sharing a common intention, which is of the very essence of a charge under Section 34, disappears, and the charge must fail.

On the other hand, when the other accused are acquitted, not because there is any doubt, as to their participation in the commission of the offence, but because there is a doubt as to their identity as the actual assailants, the conviction of even a single accused under Section 34 would be justified, because in such a case there is no doubt that he shared the common intention with other offenders, though it cannot be proved beyond doubt who they were. *Prabhu Babaji Navle* v. *State of Bombay*, AIR 1956 SC 51 : 1956 CrLJ 147.

[7296] ● *"Common intention" and "common object".*—The expressions 'common intention' and 'common object' have been used in different senses in the Penal Code, and they should not be confused as having the same meaning or import. 'Common intention' under Section 34 requires a pre-concert, that is, a prior meeting of the minds of the offenders who jointly do a criminal act, though such pre-concert may develop on the spot and may not be the result of a prior plan. On the other hand, 'common object' under Section 149 does not require any such meeting of the minds, and for the purpose of that section it is enough that each accused has the same unlawful object in mind, provided that the number of the persons who share that object is at least five. *Sukha* v. *State of Rajasthan*, AIR 1956 SC 513 :

1955 CrLJ 923 : 1956 SCJ 503 : 1956 SCR 288 : 1956 SCA 781 : 1956 ALT 583 : 1956 AWR (Sup) 83.

[7297] ● *"Common intention" and "common object".*—It may happen in any case that both "common intention" and "common object" may be present and may overlap, and the members of the unlawful assembly might not only share the same unlawful object, but might also have held the common intention to commit an offence and might have participated in its commission. It is only in such cases that the accused can be charged both under Section 34 and Section 149. *Sukha* v. *State of Rajasthan*, AIR 1956 SC 513 : 1955 CrLJ 923 : 1956 SCJ 503 : 1956 SCA 781.

[7298] ● *Actuated with common intention.*—Conviction with the aid of Section 34 can be justified only when it is proved beyond doubt that the accused were actuated with the common intention to commit a crime. It is not enough to show merely that they entertained the same or similar intention.

However, for the purpose of establishing that the accused shared a common intention, it is not necessary to prove in every case that there was any prior or prearranged plan or a prior meeting between the accused. All that is required for the purpose of establishing common intention is that there was a meeting of the minds of the accused before the offence was committed.

A meeting of the minds of the accused may have developed some time *before* the commission of the offence, in which case, evidence of a prior plan or meeting between the accused would certainly furnish evidence of common intention. However, a meeting of the minds of the accused may well develop *on the very spot* of the incident after the accused have gathered there, in which case, in the very nature of things a prior plan or meeting has not existed, and yet common intention could be established from circumstances indicating that all the accused consciously shared a common unlawful intention of committing the crime.

In the present case, it was proved that several accused jointly attacked a man with lathis when he was passing through a field, and that when he had run away after eluding them, they all attacked him again.

These facts were sufficient to prove that the accused had been actuated with the common intention to assault the victim. Conviction under Section 326 read with Section 34 was sustained. *Khacheru Singh* v. *State of Uttar Pradesh*, AIR 1956 SC 546 : 1956 CrLJ 950.

[7299] ● *Proof by direct evidence, circumstantial evidence or conduct of parties.*— Common intention to commit an offence can be proved either by direct evidence of a pre-arranged plan or by evidence of circumstances or conduct from which such intention can be legitimately inferred.

If the only evidence on record is that the accused were armed with sticks and that at the time, when the deceased was attacked by one person others rushed to the spot, that evidence in itself cannot prove the common criminal intention. If there is no evidence, that they did something or said something (such as shouting to others to attack, or rushing in after receiving an order to attack, or pursuing a man who was attempting to escape) from which a reasonable inference of sharing a common intention to attack can be drawn, common intention must be held to have remained unproved.

In such a case the possibility remains that their presence at or their rushing to the spot, might be the result of an innocent intention, and if the accused explain their conduct by saying that they acted with a view to prevent the crime, the explanation must be accepted, particularly if they are relatives or otherwise interested in the deceased.

The mere fact that blood is found on the dhoti of an accused at one spot is not necessarily corroboration of the fact of participation in the attack, but is only corroboration of his presence, because blood can soil a clothing on the person of a man whether he goes close to an injured man for rescue or for attack, and in the absence of any other evidence, it is not definite proof of participation in crime. *Prabhu Babaji Navle* v. *State of Bombay*, AIR 1956 SC 51 : 1956 CrLJ 147.

[7300] ● *Prior instigation and actual presence at the commission of offence amount to participation.*—A mere direction from one person to another to commit a particular offence does not amount in every case, also to participation with a common intention falling under Section 34 of the Code, and may amount only to 'abetment' arising out of instigation. But when several persons who are all armed with deadly weapons, go to a particular place for the set purpose of committing a serious offence, and when resisted, the leader gives an order to one of his band to fire as a result of which the follower fires shots which kill a man, while the leader keeps himself in readiness on the spot to see that his order is carried out, it must be held that the murder committed was a joint criminal act done in furtherance of the common intention of both which makes the man who gave the order liable under Section 302 read with Section 34. In such a case the order to shoot is much more than a mere instigation to commit an offence, and common intention to kill must be attributed to both. However, even if the order to shoot be held to be abetment only, if the instigator is present at the time of the commission of the offence committed in consequence of his order, the instigator shall be "deemed" to have committed the murder, by reason of Section 114 of the Code which says that if an abettor is present at the time when the offence abetted is committed "he shall be deemed to have himself committed such offence". Section 114 raises an irrebuttable presumption of law, namely that, prior instigation plus actual presence at the commission of an offence amounts to participation, and when both these ingredients exist, a given case can well fall also under Section 34 of the Code.

In the present case, the accused was charged under Section 302 and the charge read "On...., you *A* along with one *B,* since dead, murdered X by fire from gun shots, and you thereby committed the offence punishable under Section 302, Penal Code". The prosecution case was that a band of communists went in a body, to a village at night time and that when they were dragging a man outside the village, a crowd of villagers gathered on the spot. Fearing resistance *A,* who was the leader of the band, ordered one of his men, *B,* who had a gun, to fire at the crowd and some time later, in the presence of *A, B* fired shots which killed a man. The trial Court convicted *A* under Section 302 and on appeal the conviction was confirmed by the High Court.

On these facts the case fell both under Section 302/34 and under Section 302/114, and in either view *A* who had given the order to shoot was guilty of the offence of murder, though he had not caused death by his own hands. Conviction under Section 302 was confirmed. *Mathurala Adi Reddy* v. *State of Hyderabad*, AIR 1956 SC 177 : 1956 CrLJ 341.

[7301] ● ***Common intention sharing of.***—For the application of Section 34 it is essential that the Court must find that the accused shared with others, a common intention to commit a crime and participated in its commission. If there is no clear and acceptable evidence on record of circumstances from which a previous concert between him and other persons, known or unknown, and his participation in a joint criminal act, can be reasonably inferred, conviction with the aid of Section 34 is not justified.

In the present case three accused *A, B* and *C,* were charged under Section 302 for having participated in the murder of a person by shooting. The dying declaration of the deceased did not mention *B* and *C* at all and stated that one *D* fired the shot in *A*'s presence. On the other hand two eye-witnesses stated that it was *A* who fired the shot while *B* and *C* were standing nearby armed with lathis.

The Sessions Judge discarded the dying declaration and relying upon the testimony of the eye-witnesses convicted all the three accused under Section 302. On appeal, the High Court accepted the dying declaration as true, and acquitted *B* and *C,* but convicted *A,* though it modified the conviction under Section 302 substantive to one under Section 302 read with Section 34.

In view of the fact that though the prosecution case was that it was *A* who fired the fatal shot, the High Court had not come to the finding that *A* fired it, and that in view of the omission in the dying declaration as to the names of *B* and *C,* they were acquitted because there was an element of doubt as to whether they were associates of the man who fired the fatal shot, and that there was nothing on record to show that *A* participated in the offence in any other manner the conviction of *A* also could not be sustained and he had to be set at liberty. *Zabar Singh* v. *State of Uttar Pradesh*, AIR 1957 SC 465 : 1957 CrLJ 581.

[7302] ● ***Common intention—Inference from presence at the spot.***—Mere presence even with a weapon, does not necessarily make a man, a participator in a joint crime. Common intention can be inferred from presence at the spot only when there is some circumstance to show that it was for the purpose of lending weight to the active participants in the crime.

In the present case, there was a long-standing enmity between two rival factions in a village, and chapter proceedings under the CrPC were pending against members of both factions. On a day fixed for hearing in a Magistrate's Court in a neighbouring town, members of both factions left their village armed with sticks and lathis. While one faction was waiting for the bus on the roadside, the other faction came up, and a fight developed in which severe injuries were caused on both sides as a result of which one man died. The members of the opposite faction were charged and convicted under Section 302/34. The mere fact that an accused was proved to have been carrying a lethal weapon and was present on the spot when the fight took place did not establish common intention to commit murder or any other offence. Carrying of a weapon, under these circumstances may well be ascribed to a natural desire to protect oneself in case a trouble developed.

Mere presence of a person at the spot of the crime armed with a deadly weapon does not necessarily make a man a participator in a joint crime in every case, because for the purpose of Section 34, only such presence makes a man a participant in a joint crime as is established to be with the intention of lending weight to the commission of a joint crime. *Jumman* v. *State of Punjab*, AIR 1957 SC 469 : 1957 CrLJ 586.

[7303] ● *Common Intention question of fact.*—Intention is a question of fact and has to be determined from all the circumstances of the case and the conduct of the accused. When persons join in a fatal assault with deadly weapons, and in course of that assault, a large number of injuries are inflicted on the deceased, many of which are on vital parts, there can be no question that the assailants were actuated with a common intention to cause death.

The inference as to the common intention to murder is strengthened in such a case if it is proved that the accused, not only attacked the deceased at the place where they first met him, but they chased him when he was trying to run away and continued the assault till he fell down as a result of the injuries he had received on vital parts of his body.

In the present case it was proved that several accused had jointly attacked the deceased with lethal weapons, as a result of which he received as many as 24 incised wounds on the head, shoulders and forearms, which were of varying degrees of seriousness, and which 'taken as a whole were fatal'. Of these injuries one was an incised wound on the neck which had cut the artery and was 'sufficient to cause death', but it was not established which of the accused had given the blow which caused that injury. On these facts common intention to murder was proved and conviction for the offence under Section 302 read with Section 34 of all the accused who had participated in the assault was justified. *B.N. Shrikantiah* v. *State of Mysore*, AIR 1958 SC 672 : 1958 CrLJ 1251 : 1958 SCJ 918.

[7304] ● *In furtherance of common intention.*—In the present case, twelve persons were charged under Section 302/34. The case against them was that they were all members of a hostile mob which had attacked and killed three brothers working in a field. Eight of the accused were acquitted on the ground that their identity was not clearly established, but the remaining four were convicted under Section 302/34, though it was not clearly established who gave the fatal blows. It was contended that the fatal blows might have been given, not by any one of the four convicted accused, but by some unknown persons in the mob or by some of the acquitted accused, and that even assuming that the convicted four had the necessary common intention of killing, in the absence of a clear finding that the convicted accused alone caused the fatal injuries, none of them could be held liable for murder with the aid of Section 34, unless it was alleged and proved by the prosecution, that whoever gave the fatal blows gave them in furtherance of the common intention of themselves and the convicted accused. In other words, it was contended, that when twelve named persons are said to have committed murder in furtherance of the common intention of all those twelve only and none else, and then eight of them are acquitted, it is not open to the prosecution to say that the remaining four committed the murder, merely on the finding that they had a common intention to murder, but without any proof whatsoever that they or any of them gave the fatal blows, or that the persons who gave the fatal blows, did so, in furtherance of the common intention of themselves and the convicted accused. The contentions raised were without any substance. The legal position as to the application of Section 34 does not admit of any doubt or difficulty and is as stated above. In the present case, it had been clearly found that the four convicted persons had participated in the assault in furtherance of the common intention to commit murder, and that the common intention was achieved by committing the intended murder. As soon as these facts were proved the application of Section 34 was attracted, and hence the conviction of the four accused whose identity was clearly established under Section 302/34 was perfectly justified. No doubt the prosecution was unable to show who gave the fatal blows, or what exact part each assailant played, but that is exactly the circumstance which Section 34 is intended to meet, and once the conditions for the application of that section are satisfied, conviction, with its aid of those of the accused who were amongst the assailants is clearly sustained. *Bharwad Mepa Danna* v. *State of Bombay*, AIR 1960 SC 289 : 1960 CrLJ 424 : 1960 SCJ 478.

[7305] ● *Tests for determining common intention.*—When some of the accused charged at a joint trial under Section 34, IPC are acquitted, the test for determining whether the remaining accused could be convicted under Section 34 is this—did the remaining accused share a common intention to commit a crime, and did they participate in its commission. If on the evidence on record such intention and participation are established, there is nothing illegal in their conviction under Section 34. If after the acquittal of the other accused for want of evidence as to their identity, only a single accused remains whose identity is clearly established, in the very nature of things, his conviction under Section 34 can be upheld only when it is proved beyond doubt, that he shared the common intention to commit the offence committed, with some persons other than the acquitted accused. If conditions for the application of Section 34 do exist, it is immaterial in such a case whether the prosecution has or has not succeeded in proving who gave the fatal blow or blows. *Bharwad Mepa Danna* v. *State of Bombay*, AIR 1960 SC 289 : 1960 CrLJ 424 : (1960) 2 SCR 172.

[7306] ● ***In furtherance of common intention of all.***—Once it is found that a criminal act was in furtherance of the common intention of all, Section 34 applies and each of such persons is liable for the act done as if it were done by him alone. The section is intended to meet cases in which it may be difficult to distinguish between the acts of different members of a party who act, in furtherance of the common intention of all, or to prove exactly what part was taken by each of them. The principle which Section 34 embodies is participation in action with a common unlawful intention. Once participation with such intention is established, the application of Section 34 is attracted.

In a case in which several persons are charged under Section 302/34, even if some of the accused are acquitted because their identity is not established, the rest of the accused whose identity is clearly established, could be convicted of murder with the aid of Section 34, provided that the Court arrives at a clear finding that all of them shared the common intention of committing murder, that they participated in the assault in furtherance of such intention, and that the deceased died of a fatal blow given by some one of the assailants. *Bharwad Mepa Danna* v. *State of Bombay*, AIR 1960 SC 289 : 1960 CrLJ 424 : (1960) 2 SCR 172 : 1960 SCJ 478.

[7307] ● ***Application of S. 34, IPC.***—The essence of the liability under Section 34 lies in the existence of a common intention animating the offenders which leads to the doing of a criminal act in furtherance of the common intention. The presence of the offender sought to be made liable under Section 34 at the scene of the offence is not, on the words of the statute, one of the conditions of its applicability. Participation in action is the leading feature of Section 34, and to establish joint responsibility for an offence, what needs to be established is that a criminal act was 'done' by several persons in furtherance of the common intention. The participation required for the purpose of Section 34 is participation in *doing* the act, and not merely in its planning. 'Common intention' means a meeting of the minds, and the two conditions which invite the application of Section 34 are, (*a*) a common intention to commit an offence, and (*b*) participation in the commission of the intended offence in furtherance of that common intention. If both these conditions are satisfied, the application of Section 34 is invited, and nothing more is wanted for a conviction with the aid of that section, if on the evidence on record it is proved beyond doubt, that the accused shared the common intention to do an offence and participated in its commission. *Jaikrishnadas Manohardas Desai* v. *State of Bombay*, AIR 1960 SC 889 : 1960 CrLJ 1250 : 62 BomLR 893 : 1960 NagLJ 750 : 1961 MLJ (Cr) 28 : (1961) 1 SCJ 42 : (1960) 3 SCR 319.

[7308] ● ***Essential conditions for application of S. 34, IPC.***—The two conditions essential for the application of Section 34 are, (*a*) a common intention to commit an offence shared by all the accused, and (*b*) participation in the commission of that offence in furtherance of that common intention. If both these conditions are satisfied, the application of Section 34 is invited and nothing more is wanted for a conviction. The presence at the scene of offence of the offender sought to be made liable under Section 34 is not, on the words of the statute, one of the conditions of its applicability, and it cannot be contended that such physical presence is essential in every case before Section 34 can be invoked for the purpose of convicting an accused on the principle of joint liability. No doubt, participation in the doing of a crime can be established in many cases by showing that the accused was physically present, but it need not in every case be by physical presence. In offences involving physical violence, presence of the offender at the scene of offence may be necessary for the application of Section 34, but such is not the case when there *can* be participation without such presence, as when the offence consists of diverse acts done at different times and places, as in the present case, (or when the offence is one of cheating by false representation made from another place, as in *Mabarik Ali's* case). The observations in *Shreekantiah's* case regarding the need for physical presence can have no application when the offence is of such a nature that it can be participated in without the offender being at any particular place, and they must be read as applying only to cases in which the offence cannot possibly be committed, without the physical presence of the offender at the scene of the offence, and not as laying down a principle of universal application to Section 34.

In the present case, the Directors of a company, who were entrusted with certain goods belonging to the Government, failed to account for those goods, and were convicted under Section 409/34. The prosecution was unable to prove exactly where the accused were during the long period during which the goods could have been misappropriated. The conviction under Section 409/34 was not illegal merely on that account. *Jaikrishnadas Manohardas Desai* v. *State of Bombay*, AIR 1960 SC 889 : 1960 CrLJ 1250 : 62 BomLR 893 : (1961) 1 SCJ 42 : (1960) 3 SCR 319 : 1960 NagLJ 750 : 1961 MLJ (Cr) 28 : 1961 AWR (HC) 54 : 1961 ACrR 17.

[7309] ● ***Inference of common intention from preparation for fight.***—The common object to commit an offence within the meaning of Section 149 and the common intention to commit an offence within the meaning of Section 34 can be inferred from the fact that the members of the party had prepared themselves for a fight by arming themselves and had gone to the scene of offence armed for a fight. In such a case, if fight takes place and injuries are caused to the persons of the opposite party, Section 149 would apply if the party consists of five or more persons, and if not, Section 34 would apply, and all the persons composing the party are guilty of the offences arising from the injuries caused by the application of Section 149 or Section 34. In such a case, it is wholly immaterial as to who were the aggressors or who attacked first, and it cannot be contended that each accused is liable only for his own individual acts. *Kartar Singh* v. *State of Punjab*, AIR 1961 SC 1787 : 1961 (2) CrLJ 853.

[7310] ● ***Once 'preparation' is established, right of private defence cannot be claimed.***—Once it is established that a party was prepared for a fight and had the intention to fight and causes injuries to the other party; no member of that party can claim the right of private defence, and as their common object is to commit an offence, their common object constitutes them into an unlawful assembly. In such a case, it cannot be contended that Section 149 does not apply, and it cannot be urged that each of the accused can be convicted only for his own individual acts. In such a case, if they cause injuries to the opposite party in furtherance of their common object, Section 149 applies and each member of the unlawful assembly is liable constructively for the acts of the other persons of the unlawful assembly by reason of the application of Section 149. Further, even if in such a case it is proved that the number of the persons taking part in the assault was less than five, and hence Section 149 does not apply, Section 34 would apply and each member of the party is liable for the offences committed by the injuries caused to the opposite party by the application of Section 34. *Kartar Singh* v. *State of Punjab*, AIR 1961 SC 1787 : 1961 (2) CrLJ 853.

[7311] ● ***Going to scene of offence proves common intention.***—In the present case, it was clearly established that the convicted accused and their companions had gone to the scene of the offence armed and determined to fight. This showed that they had the common intention to attack the other party and to cause injuries which may result in death. Of the persons attacked, the one who had died had received two incised wounds, and another had one punctured wound. The mere fact that the appellant was not connected with the dispute about the plot of land as a result of which the fight took place, could not be urged as a ground for holding that he could not have formed a common intention with the other members of his party. Such common intention is established by the fact that he went with them and was armed. In such a case, even if the accused cannot be convicted under Section 302 and 307 read with Section 149 because of their number being less than five, the charge can be converted into one under Sections 302 and 307 read with Section 34, Penal Code. *Kartar Singh* v. *State of Punjab*, AIR 1961 SC 1787 : 1961 (2) CrLJ 853.

[7312] ● ***Common intention not proved.***—*R* did nothing at any of the three incidents, and his conduct in running with *B* throughout could not lead to any conclusion, that he had common intention with *B* to commit murder or attempt to murder. It was not the prosecution case that the two accused had any enmity with any of the victims or that they had pre-arranged between themselves, to pick up any quarrel with the victims and then to shoot them. All the three incidents had happened by accident, and the lower Courts had erred in imputing common intent to *R* on account of his not dissociating himself from the activities of *B*. The question of disassociation cannot arise against an accused unless it is first shown, that he had associated himself with the activities of the other accused. It cannot be said that *R* participated in the murder of *M* merely because after *B* had fired shots at *L*, *R* proceeded with *B* in the same direction. Such conduct might be result of bewilderment, and *R* could not have anticipated the second incident. Further, common intention could not be assumed merely from the fact that after *M* was shot down, *B* and *R* ran away simultaneously on being pursued by the villagers, because such running away could have been motivated by the instinct of saving himself from his pursuers. Finally, possession of an axe at the time of the incidents was not a circumstance against *R*, as possession of such a weapon is often a matter of course with villagers, for doing their daily work. Under the circumstances, it must be held that it was not proved, that *R* had common intention with *B* in his three acts of shooting, and his conviction under Section 302/34 or 307/34 could not be sustained on his mere presence with *B* throughout the three incidents in the case. R's appeal was allowed and his conviction was set aside. *Banwari* v. *State of Uttar Pradesh*, AIR 1962 SC 1198 : 1962 (2) CrLJ 278.

[7313] ● ***Other evidence satisfactory and cogent.***—Cases sometimes arise where persons are charged with being members of an unlawful assembly and other charges are framed against them, in respect of offences committed by such an unlawful assembly. In such cases, if the names of persons constituting the unlawful assembly are specifically and clearly recited, in the charge and it is not suggested, that any other persons known or unknown also were members of the unlawful assembly, it may be that if one or more persons specifically charged are acquitted, that may introduce a serious infirmity in the charge in respect of the others against whom the prosecution case may be proved. If out of the six persons charged under Section 149 of the Penal Code along with other offences, two persons are acquitted, the remaining four may not be convicted because the essential requirement of an unlawful assembly might be lacking. Where, however, four persons are prosecuted under Section 302 read with Section 34 Penal Code, failure of the prosecution to prove, that one of them took part in the commission of the offence does not introduce any infirmity in its case against the remaining accused at all. Even if he is held not to be present at the scene of the offence, that in law, cannot prevent the prosecution from presenting its case against the remaining accused if the evidence adduced by it is otherwise satisfactory and cogent. *Sunder Singh* v. *State of Punjab*, AIR 1962 SC 1211 : 1962 (2) CrLJ 290 : (1963) 1 SCJ 97.

[7314] ● ***Common intention in chance meeting.***—Common intention to commit murder may develop in the spot after a chance meeting with the opposite party. Proof of it depends upon the conduct of the accused, the manner of infliction and the nature of the injuries caused. Circumstances in which common intention can and cannot be ascribed to the companion of the actual murderer.

Even when it is held that the meeting between the party of the accused and the party of the deceased was in the nature of a chance meeting, it is open to the Court to come to the conclusion that a common intention to commit murder developed in the minds of the accused on the spot. The conduct of the accused after the chance meeting, the manner in which the fatal injuries were inflicted, and the nature of the injuries may, in a given case, lead irresistibly to the inference that even if the accused did not start with the common intention of killing their victims, that such common intention developed between the accused as soon as they met the opposite party by chance.

Even upon a chance meeting between opposite parties, if it is proved beyond doubt that the party of the accused were the aggressors and that they began an attack on the opposite party which resulted in deaths, no member of the party of the accused can claim the right of private defence, and it must be held that the members of the party of the accused who participated in the assault were actuated by the common intention to commit murder. In such a case, if an accused armed with a lathi begins the attack after provoking a controversy, he must be taken to have known that his companion behind him who is armed with a gun would follow up the attack by firing shots at the opposite party, and it must be held that he shared the common intention to commit murder.

However, in a case in which, following upon a chance meeting at which there was a hot exchange of words, one member of a party who was armed with a gun causes deaths by firing shots at the members of the opposite party, the common intention to commit murder cannot necessarily be inferred against all the companions of the man who fired the fatal shots. In such a case, if the evidence against any accused as to his participation in the attack is of a doubtful character or is not reliable, or suffers from grave infirmities, it must be held that the case against that accused as to his sharing the common intention, is not established beyond a reasonable doubt, and he being entitled to the benefit of doubt, must be acquitted. *Sunder Singh* v. *State of Punjab*, AIR 1962 SC 1211 : 1962 (2) CrLJ 290.

[7315] ● ***Common intention implies pre-arranged plan.***—It is well settled that common intention within the meaning of Section 34 implies a pre-arranged plan, and the doing of the criminal act in pursuance of that plan. The said plan may develop on the spot during the course of the commission of the offence, but the crucial circumstances necessary for the application of Section 34, is that, the plan must precede the act constituting the offence.

That being the position in law, before a Court can convict an accused person under Section 302 read with Section 34 of the Penal Code, it must come to a definite conclusion that the accused has a prior concert with one or more other persons, named or unnamed, for committing the said offence.

Where the charge is that the four accused and other unnamed persons were the participants in the assault, or even where the charge is only that the four accused persons only were participants in the assault, if the evidence of the prosecution eye-witnesses is that the accused persons along with others, named or unnamed had participated jointly in the commission of the offence, even if the Court acquits the other three named accused persons, it is open to it to come to the conclusion that the single remaining accused is guilty of murder under Section 302 read with Section 34, if it accepts the evidence that he acted in concert with persons, named or unnamed, other than the co-accused who are acquitted, in the commission of the offence. Provided that where the charge names only the four accused and the Court has relied upon the evidence that other persons, named or unnamed were actually participants in the offence, the conviction of one accused on the basis of such evidence would be justified only if the Court is satisfied that no prejudice has been caused to the accused by the defect in the charge.

However, where the evidence given by the witnesses is directed only to establish that the four persons, named in the charge who are the accused persons before the Court, and none others, had taken part in the commission of the offence, if the Court acquits three of the four accused either because it rejects the prosecution evidence, or because it gives them the benefit of doubt, it is not open to the Court to convict the one accused who remains on the ground, that though the other three accused are acquitted, some other unidentified persons acted jointly with him in the commission of the offence. In such a case, the conviction is clearly wrong because it amounts to making out a new case for the prosecution, and is contrary to the evidence adduced in the case and without any foundation or basis in the evidence. Conviction must always be based upon evidence and where there is no basis for a finding that the accused had jointly committed the offence with some other persons, the conviction is bad in law. *Krishna Govind Patel* v. *State of Maharashtra*, AIR 1963 SC 1413 : (1963) 2 CrLJ 351 : (1963) 2 SCJ 1718.

[7316] ● ***Common intention inferred from facts.***—The existence of common intention has always to be inferred from facts. Here it was established that all the three accused came together, that two of them, *R* and *J* had guns with them, that the chowkidar *A* was giving information about the movements of the accused to the police and that *R* nursed a grievance against him on that account, that as soon as *A* and *M* came out of the chowky, all the three surrounded them and catching them took them down the road away from the chowky, and at that time *R* said *A* was responsible for the arrest of his servant Motia, and *J* said "Where is your police to-day."

These facts were sufficient to lead to the inference, that *R* had come with the intention of taking revenge on *A* by killing him and that *B* and *J* who accompanied him shared that intention. In the circumstances, it must be held, that the common intention to commit murder was established against both *B* and *J*. *Baleshwar Rai* v. *State of Bihar*, (1963) 2 SCR 433 : (1964) 1 CrLJ 564.

[7317] ● ***S. 34 excludes intention to cause death or fatal bodily injury.***—Conviction under Section 304, second part, read with Section 34 is not illegal. Section 34 applies where several accused have assaulted the victim with the common intention of doing the criminal act of giving a beating. What Section 34 excludes is only the intention to cause death or fatal bodily injury. It does not exclude common intention shared by all the accused to do a criminal act. *Afrahim Sheikh* v. *State of West Bengal*, AIR 1964 SC 1263 : 1964 (2) CrLJ 350 : 1964 (2) SCWR 344 : 1964 ALJ 437 : 1964 AWR (HC) 275 : 1964 BLJR 361 : 1964 CurLJ (SC) 152 : 1964 ACrR 187.

[7318] ● ***Criminal act done in furtherance of common intention of all.***—It cannot be said, that a charge under Section 307 read with Section 34 of the Penal Code is not sustainable in law. Under Section 34 a criminal act done by a number of persons in furtherance of the common intention of them all, shall be held to be the act of each one of those persons as if it were done by him alone. It may be that, in many cases it is difficult to decide whether the criminal act in question had been done by several persons, in furtherance of the common intention of them all. But once it is established that the act has been so done in furtherance of the common intention of all, the legal position that results is that each person shall be held to have committed the entire criminal act.

Thus, where the case against several accused persons, is that in furtherance of the common intention of them all to kill the victim of the assault, some of them held him down while one of them used the dagger on him, each one of them in law is considered to have done the entire act. In such a case, if the injury caused, results in the death of the victim, all the assailants are guilty of murder under Section 302/34. It follows that if in such a case, the victim escapes death, each of the assailants is guilty of the offence of attempt to murder under Section 307/34 as if the entire act of holding the victim down and using the weapon upon him was done by him alone. That being the position in law, it cannot be contended that a charge under Section 307 read with Section 34 is not sustainable in law. *Matiullah Sheikh* v. *State of West Bengal*, AIR 1965 SC 132 : 1965 (1) CrLJ 126 : 1964 SCD 966.

[7319] ● ***Meaning of "Criminal Act" and in furtherance of "Common intention".***—It is clear that the criminal act mentioned in Section 34 of the Indian Penal Code is the result of the converted action of more than one person; if the said result was reached in furtherance of the common intention, each person is liable for the result as if he has done it himself. The question is, what is the meaning of the expression "in furtherance of the common intention." The dictionary meaning of the word "furtherance" is "advancement or promotion".

The shooting of the wrong man is in furtherance of the common intention and so Section 34 applies. When the accused were shooting at Rama believing him to be Madha, they were certainly doing a criminal act in furtherance of the common intention which was to kill Madha. They killed Rama because they believed that they were shooting at Madha. It was argued how could a mistake committed by one of the accused be considered in furtherance of the common intention, since to commit a mistake was not part of the common intention of the accused. But the question is not, as we have pointed out, whether the committing of a mistake was a part of the common intention, but whether it was done in furtherance of the common intention. It the common intention was to kill and if one of the accused kills *B* to wreak out his private vengeance, it cannot possibly be in furtherance of the common intention for which others can be constructively made liable. But, on the other hand, if he kills *B bona fide* believing that he is A, we do not see any incongruity in holding that the killing of *B* was in furtherance of the common intention. We, therefore, hold that without the aid of Section 301 of the Indian Penal Code, it can be held that when accused 1 to 4 shot at Rama they shot at him in furtherance of their common intention to kill Madha.

Section 301 Penal Code deals with a different situation. It embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under this section if A intends to kill *B* but kills *C*, whose death he neither intends nor knows himself to be likely to cause, the intention to kill *C* is by law attributed to him. If A aims his shot at *B*, but it misses *B* either because *B* moves out of the range of the shot or because the shot misses the mark and hits some other person *C*, whether within sight or out of sight, under Section 301, A is deemed to have hit *C* with the intention to kill him. What is to be noticed is that to invoke Section 301 of the Indian Penal Code, *A* shall not have any intention to cause a death or the knowledge that he is likely to cause the death of *C*. In the instance case, this condition is not complied with. The accused shot at a particular person with the intention of killing him though under a misapprehension of his identity. In that case, all the ingredients of Sections 299 and 300 of the Indian Penal Code are complied with and the aid of Section 301 of the Indian Penal Code is not called for. We are, therefore, of the opinion that Section 301 of the Indian Penal Code has no application to the present case. *Shankarlal Kancharbhai* v. *State of Gujarat*, AIR 1965 SC 1260 : 1965 (2) CrLJ 266 : 1965 SCD 1041.

[7320] ● ***Accused Nos. 2 and 3 not present when various offences by accused No. 1.***—A consignment of iron parts was sent under a railway receipt from Gobindgarh to Raypuram. The labels on the wagon were changed at Itarsi railway station and it was diverted to Wadi Bunder at Bombay under a label showing that the consignment had been despatched from Baran to Wadi Bunder under railway receipt No. 43352. When this wagon reached Wadi Bunder, Accused No. 1 obtained delivery of the consignment from the railway on a presentation of the forged receipt No. 43352, signing the railway delivery book in a false name of Shri Datta. The iron parts were then stored in the godown of the National Transport Company at Bombay in the name of Accused No. 3. Thereafter, on receipt of a chit from Accused No. 1 saying that the goods be entered in the name of Accused No. 2, a further entry was made in the receipt book of the company showing the goods to be received in the account of Accused No. 2. Two days later, Accused No. 1 obtained delivery of the goods from the godown of the company on producing an application signed by Accused No. 2 addressed to the company for delivery of the goods. On these facts the three accused were prosecuted on charges under Section 467, Penal Code, and other offences. The charges were framed in the alternative. In the first part of each charge all the three accused, were charged with the specified offence read with Section 34, and in the second part of each charge accused No. 1 was charged with the commission of the specified offence and accused Nos. 2 and 3 were charged with the same offence read with Section 109 for having abetted accused No. 1 in the commission of that offence.

The various acts of accused No. 1 taking delivery of the goods from the railway on a forged railway receipt and signing the delivery book in a false name which constituted the offences of which he was convicted were done solely by him alone. Accused Nos. 2 and 3 had not taken any part in the actual commission of those acts nor were they present at the time when they were done. Whatever they might have done prior to the doing of those acts did not form an ingredient of the offence committed by accused No. 1, and therefore, they could not be said to have participated in the commission of the criminal acts which amounted to those various offences. Accused Nos. 2 and 3 could not be held to be liable by virtue of Section 34 for the criminal acts committed by accused No. 1 alone, even if those acts had been committed in furtherance of the common intention of all the three accused. In the circumstances, the conviction of accused Nos. 2 and 3 for the various offences read with Section 34 was not justified and had to be set aside.

From the various circumstances and facts in the case, it was established that accused No. 3 had abetted the commission of the substantive offences by accused No. 1 of which he had been convicted. However, the complicity of accused No. 2 in the commission of the various offences by Accused No. 1 was not established beyond reasonable doubt. The conviction of accused Nos. 2 and 3 for the various offences committed by Accused No. 1 of which they are charged under Section 34 are set aside. *Shiv Prasad Chuni Lal Jain* v. *State of Maharashtra*, AIR 1965 SC 264 : 1965 (1) CrLJ 249 : (1964) 2 SCJ 465.

[7321] ● *Common intention—Proof of participation.*—(*Note :* The effect of the present decision is that application of Section 34 is justified only when both the ingredients of the section are established by the proved facts, namely, common intention to do a criminal act, and participation in the commission of that act in furtherance of the common intention. For the purpose of establishing participation in the commission of the offence, physical presence of the accused charged under Section 34 at the place where the other accused actually committed the offence is not necessary in every case. But participation in the offence must be proved in every case where the accused is charged under Section 34 and it is not enough merely to show that he shared the common unlawful intention to commit that offence. The result is that in a case in which there is no evidence at all of an accused having participated in the offence committed, he cannot be convicted under Section 34, even though the evidence indicates that he shared the common intention to commit that offence.)

When two accused are convicted by the Sessions Court under Section 302 read with Section 34, IPC, and one of them is acquitted by the High Court in an appeal, the other accused cannot be convicted under Section 302 *simpliciter* in the absence of the proof of the exact nature of injuries caused by each accused. When common intention is not proved, the prosecution must establish the exact nature of the injury caused by each accused and more so when one of the accused had got the benefit of doubt and had been acquitted. In such a case the remaining accused can safely be convicted under Section 325, IPC, instead of Section 302. *Baul* v. *State of Uttar Pradesh*, AIR 1968 SC 728 : 1968 CrLJ 872 : (1968) 2 SCR 450 : (1968) 2 SCJ 340 : 1968 SCD 599.

[7322] ● *Common intention implies acting in concert.*—The dominant feature of Section 34 is the element of participation in actions. It need not in all cases be by physical presence. Common intention implies acting in concert. There is a prearranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in Section 34. The existence of common intention is to be the basis of liability. That is why the prior concert and the pre-arranged plan is the foundation of common intention to establish liability and guilt. The appellants were charged under Sections 302 and 323 read with Section 34, IPC. The evidence established that the accused were related, that all the three of them made sudden appearance on the scene of occurrence, that they started assault as soon as the carts of the prosecution party arrived at the scene, and that the way in which the deceased was attacked by A-1 and A-2 and the stab wounds inflicted on him, and the manner in which A-3 held up another person would show that the three accused were lying in wait under some pre-arranged plan to attack them when they were returning. The contention for the appellant was that there was no common intention to kill the deceased as A-1 and A-2 did not intend to kill the deceased but wanted to attack one Vaghji, but by mistake they had attacked the deceased.

In view of the pre-arranged plan, all the three accused were lying in wait to attack the party of Amarji, Vaghji and two others. Amarji was in the forefront. The accused attacked him. The plea that Amarji was mistaken for Vaghji would not take away the common intention established by the pre-arranged plan and participation of all the accused in furtherance of their common intention. The act might be done by one of the several persons in furtherance of the common intention of them all without each one of them having intended to do the particular act, in exactly the same way as an act might be done by one member of an unlawful assembly in prosecution of the common object, which the other members of the unlawful assembly did not each intend to be done. Hence all the three appellants were guilty of murder. *Hethubha* v. *State of Gujarat*, AIR 1970 SC 1266 : 1970 CrLJ 1138 : 1970 SCD 404 : 1970 SC CrR 418 : (1970) 2 SCJ 635 : 1970 MLJ (Cr) 814 : 11 Guj LR 863.

[7323] ● ***Common object of preventing theft.***—Where a person was in possession of a plot and the Mahua trees standing thereon and he went to the plot along with his party with the object of preventing the commission of theft of Mahua fruits by the prosecution party, in the exercise of their right of private defence of property, some of the accused party were armed with bhalas but it was not possible to say who were so armed and which of them inflicted the fatal wounds on the deceased. Though it was found that the persons who caused the two deaths exceeded the right of private defence, none of the accused could be convicted under Section 302, IPC, or under Section 302/149 or 302/34, IPC, as there was no common object or common intention to kill the two deceased persons. *State of Bihar* v. *Nathu*, AIR 1970 SC 27 : 1970 CrLJ 5 : 1969 SCD 743 : (1969) 2 SCJ 858 : 1970 SCC CrR 235 : (1970) 1 SCA 370 : (1970) 1 SCR 358 : 1970 ALJ 1 : 1969 PatLJR (SC) 66A : 1969 MLJ (Cr) 856 : 1970 MPWR 1 : 1970 BLJR 91.

[7324] ● ***Bona fide assertion of right of way through uncultivated portion of private land by villagers not amount to common intention to criminal act.***—Where the villagers used to pass through the uncultivated portion of a private land whenever the road was submerged as on the day of occurrence, it cannot be said in the absence of any other evidence that the villagers had a common intention to commit a criminal act within the meaning of Section 34, IPC.

From the fact that one villager had a spade with him and two others had sticks in their hands, it is not safe to draw the inference that they intended to commit any offence. Even if it was the common intention of those villagers to force their way through the uncultivated land by using force, if necessary, they could not have been convicted under Section 304, IPC, in the absence of a finding that they intended to cause any injury to any person. *K.N. Virji* v. *State of Gujarat*, AIR 1970 SC 219 : 1970 CrLJ 363 : 1970 SCD 244 : 1970 SC CrR 311 : 1970 ACrR 281.

[7325] ● ***Interference with order of acquittal.***—Where the trial Court specifically ruled out the application of Sections 34 and 149, IPC, after considering the facts the High Court when reversing that order of acquittal should have discussed the matter and given adequate reasons for holding the accused guilty under Section 149, IPC. The High Court should not have interfered with the order of acquittal passed by the Sessions Court, when it had not recorded any finding as to what was the common object or the common intention of the appellants or recorded any finding as to what was the criminal act done by the appellants in furtherance of their common intention. *M. Venkatadri* v. *State of Andhra Pradesh*, AIR 1971 SC 1467 : (1971) 3 SCC 254 : 1971 CrLJ 1145.

[7326] ● ***Common Intention—Participation in commission of offence necessary.***—Section 34 embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention, invites its application. Section 109 on the other hand may be attracted even if the abettor is not present, when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence, and pursuant to that conspiracy, some act or illegal omission takes place or has intentionally aided the commission of an offence, by an act or illegal omission. Criminal conspiracy is a substantive offence and it postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. Criminal conspiracy differs from other offences in that, mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment, the substantive offence of criminal conspiracy is somewhat wider in amplitude, than abetment by conspiracy, as contemplated by Section 107, IPC. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases, proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact, because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence, then anything done by any one of them in reference to their common intention after the same is entertained becomes, according to law of evidence, relevant for proving both conspiracy and the offence committed pursuant thereto. *N.M.M.Y. Momin* v. *State of Maharashtra*, AIR 1971 SC 885 : (1970) 1 SCC 696 : 1971 CrLJ 793 : (1971) 1 SCJ 43.

[7327] ● ***Common intention—Constructive liability.***—Where the High Court found that there were the appellants along with several other persons at the scene, there was a fight between the two parties and several persons were injured in the course of that fight, that the appellants were not members of an unlawful assembly and that it was not possible to ascertain from the records whether any particular accused caused any particular injury, the question of constructive liability has to be ruled out and a particular accused would have to be convicted for the offence committed by him only. *Halim Mian* v. *State of Bihar*, AIR 1971 SC 1826 : (1972) 3 SCC 64 : 1971 CrLJ 1299 : 1971 UJ (SC) 627.

[7328] ● ***No common intention to murder.***—Four persons were tried for causing death by inflicting lathi blows to the deceased, who along with some others had engaged in re-ploughing the paddy field which was in the cultivating possession of the accused. No individual injury could be attributed to any individual assailant and the High Court found that no common intention to murder the deceased was found but the accused had a right to defend their property. While defending it, if one or two out of them took into their heads to inflict more bodily harm than was necessary, the others could not be attributed the common intention of inflicting the injuries which resulted in the death of the deceased. No overt acts had been proved on the part of the accused which showed that they share the intention of the person or persons who inflicted the injuries on the head of the deceased resulting in his death. Hence, they cannot be held guilty of an offence under Section 304, Part II read with Section 34, IPC. *Joginder Singh* v. *State of Bihar*, AIR 1971 SC 1834 : (1971) 3 SCC 449 : 1971 CrLJ 1285.

[7329] ● ***Pre-meditated attack and sharing common intention.***—Where the pre-meditated attack on the deceased with knives commenced at the instance of the accused, who shouted "kill, kill" and the ghastly attack in the narrow space, where the incident took place could not by combination of circumstances be preceded by any commotion, even though the accused was not armed with any weapon, it is beyond any doubt that he shared the common intention to commit the murder of the deceased. *Gaya Prasad* v. *State of Maharashtra*, AIR 1971 SC 1112 : 1971 CrLJ 824 : (1971) 2 SC CrR 345 : 1971 UJ (SC) 436 : 1971 CrAppR (SC) 145.

[7330] ● ***Common intention means pre-arranged plan.***—Under Section 34 when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The words "in furtherance of the common intention of all" are the most essential part of Section 34, IPC. It is common intention to commit the crime actually committed. This common intention means a pre-arranged plan. On the other hand, Section 149 of the Code speaks of an offence being committed by any member of an unlawful assembly in prosecution of the common object of that assembly. The distinction between "common intention" under Section 34 and "common object" under Section 149 is of vital importance. The Sessions Court erred in convicting the appellants under Section 302 read with Section 34, IPC, holding that if a number of persons assaulting another with a stick mercilessly, their intention can only be to murder that man or at least they should know, that they are likely to cause death of the person concerned. This aspect of their being likely to cause death would be relevant under Section 149 and not under Section 34. Under Section 34 it has to be established that there was the common intention before the participation of the accused. In the present case, the Sessions Court held that if a number of persons assaulted another with a stick mercilessly, their intention could only be to murder that man or at least they should know, that they were likely to cause death of the persons concerned. The Sessions Court fell into the error of convicting the appellants under Section 302/34, IPC, by holding so. That aspect of their being likely to cause death would be relevant under Section 149 and not under Section 34, IPC, for the obvious reason that under Section 34 it had to be established that there was the common intention before the participation by the accused. *Devilal* v. *State of Rajasthan*, AIR 1971 SC 1444 : (1971) 3 SCC 471 : 1971 CrLJ 1132.

[7331] ● ***Common intention to be anterior in time.***—A common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert. Though it is difficult in most cases to prove the intention of an individual, it has to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene, and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence, for instance, that all of them had left the scene of the incident together and other acts which all or some may have done as would help in determining the common intention. In other words, the totality of the circumstances must be taken into consideration, in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted. The pre-arranged plan may develop on the spot during the course of the commission of the offence, but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a Court can convict a person under Section 302 or Section 304 read with Section 34 of the IPC, it should come to definite conclusion that the said person had a prior concert with one or more persons named or unnamed for committing the offence.

Before vicarious or constructive criminal liability under Section 149, IPC, can be called in aid, the Court must find with certainty that there were at least five persons sharing the common object. In some cases though five persons were unquestionably there, the identity of one or more may be in doubt, in which case a conviction of the rest with the aid of Section 149 would be good. *Ram Tahal* v. *State of Uttar Pradesh*, AIR 1972 SC 254 : (1972) 1 SCC 136 : 1972 CrLJ 227 : (1972) 2 SCJ 303 : 1972 SCD 76.

[7332] ● ***Evidence of common intention.***—Where there is no evidence to show any prior concert or preparation or a common intention of all in the furtherance of which the several acts of a different accused were committed, Section 34 does not apply and each one of the accused is liable for his own act, even though common intention can develop during the fight for which there must be evidence to draw such inference. *Amrik Singh* v. *State of Punjab*, 1972 CrLJ 465 (SC).

[7333] ● ***Assault common intention.***—Where the High Court came to the conclusion regarding the attack on the deceased, that the appellant and two others assaulted him with lath is or sticks and also to the conclusion, that their common intention was not to cause death but only grievous hurt, the conviction of all of them could have been only under Section 325 read with Section 34, IPC. When there were two injuries on the head, it was quite possible that one of them only might have been responsible for the death or both of them. The appellant was found to have given only one blow and not more than one. Hence, it is difficult to say whether the blow given by him was the one which ultimately proved to be fatal. Hence, conviction under Section 302 was not correct and conviction under Section 325 read with Section 34 was substituted. *Ram Lal* v. *Delhi Administration*, AIR 1972 SC 2462 : (1973) 3 SCC 466 : 1973 CrLJ 17.

[7334] ● ***Common intention—Development of during course of occurrence.***—It was contended on behalf of the State that even if the conviction of Sheoram Singh for the offence under Section 302, read with Section 149, IPC, could not be sustained, he was guilty of the offence under Section 302 read with Section 34, IPC, because the circumstances of the case showed that Arjun Singh fired the shot at the deceased in furtherance of the common intention of Arjun Singh and Sheoram Singh. That submission was not well founded. There was nothing to show that there was any exhortation by Sheoram Singh to Arjun Singh to fire at the deceased. Even the High Court had not accepted the evidence of exhortation to Arjun Singh by any of the other accused before Arjun Singh fired at the deceased. On the there hand, it was Arjun Singh who told the deceased that, if he did not turn out Ram Dularey Singh from his house, it would be bad for him (deceased) also. Those words indicated the attitude of Arjun Singh. It was difficult to infer from that exclamation of Arjun Singh that Sheoram Singh shared the intention of Arjun Singh and that in furtherance of common intention of both of them Arjun Singh fired the shot at the deceased. Though common intention could develop during the course of an occurrence, there had to be cogent material on the basis of which the Court could arrive at that finding and hold an accused vicariously liable for the act of the other accused by invoking Section 34, IPC. The appeal of Sheoram Singh was allowed so far as his conviction and sentence for the offence under Section 302, read with Section 149, IPC, was concerned. *Sheoram Singh* v. *State of Uttar Pradesh*, AIR 1972 SC 2555 : (1973) 3 SCC 110 : 1973 CrLJ 26.

[7335] ● ***Common intention implies pre-arranged plan.***—The common intention within the meaning of Section 34, IPC, implies prearranged plan. If there is no evidence of a prior meeting of minds and any prearranged plan or of participation of the accused in the fight, they could not be convicted with the aid of Section 34. Where no criminal act has been done in concert pursuant to the pre-arranged plan, several persons can simultaneously attack a man and each can have the same intention, namely, the intention to kill and if each can individually inflict a separate fatal blow and yet none would have the common intention required by Section 34 because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others. And if the prosecution cannot prove that his separate blow was a fatal one, he cannot be convicted of murder. *Parichhat* v. *State of Madhya Pradesh*, AIR 1972 SC 535 : (1972) 4 SCC 694 : 1972 CrLJ 322 : 1971 SCD 1158.

[7336] ● ***Murder—Common intention as to.***—If the facts to be proved and the evidence to be adduced with reference to the charge under Section 149, IPC, would be the same if the charge were under Section 34, IPC, then the failure to charge the accused under Section 34 cannot result in any prejudice and in such cases the substitution of Section 34 for Section 149 must be held to be a formal matter. *Amarsingh* v. *State of Haryana*, AIR 1973 SC 2221 : (1974) 3 SCC 81 : 1973 SCC (Cri) 769 : 1973 CrLJ 1409.

[7337] ● ***Murder constructive liability.***—Where the High Court confirmed the conviction of A-2 under Section 302 read with Section 34 on the basis of the evidence of 2 PWs who deposed that while A-1 had a thenga with which he inflicted blows on the head of the deceased while the appellant was catching hold of the deceased, it meant that the High Court had not accepted the evidence of those witnesses regarding A-1 who inflicted the fatal injuries but nevertheless found the appellant guilty for the substantive offence of murder. After A-1 was acquitted, there was no further scope for invoking against the appellant any constructive liability under Section 34. To convict him under Section 302, there should be evidence that he caused the fatal injuries. No attempt was made by the High Court to find out the nature of the offence, if any, committed by the appellant. The evidence of those two witnesses could not be accepted against the appellant also when their evidence had been rejected by the Sessions Court so far as A-3 was concerned and by the High Court when it acquitted A-1. Hence the conviction of the appellant could not be sustained. *B. Nath* v. *State of Orissa*, AIR 1973 SC 2337 : (1973) 2 SCC 432 : 1973 SCC (Cri) 880 : 1973 CrLJ 1585.

[7338] ● ***Proof of common intention—Prior concert or pre-arranged plan.***—To convict a person for offence applying Section 34, IPC, it is necessary to establish that the criminal act was done in concert, pursuant to a prearranged plan and it is also to be borne in mind that it is difficult, if not impossible, to procure direct evidence to prove the intention of a person. Therefore, Courts, in most cases, have to infer the intention from the act or the actual conduct of a particular person or from the other relevant circumstances of the case. Such inference of common intention within the meaning of Section 34, IPC should never be reached unless the necessary inference is deducible from the circumstances of the case. The complicity of the accused could be decided under Section 34, IPC only on the basis of facts of each case. *State of U.P.* v. *Iftikhar Khan*, AIR 1973 SC 863 : (1973) 1 SCC 512 : 1973 SCC (Cri) 384 : 1973 CrLJ 636 : 2005 (1) Crimes 393.

[7339] ● ***Murder—Common intention.***—Where there were constant quarrels between the deceased and the appellants, the way the appellants had been making a common cause with one of them, the manner in which they responded to the call of one other appellant and emerged together from the house of one of them suggested, that there could have been even a plan to teach a lesson to the prosecution party. When that appellant gave that shout, he should have known that the appellants were there. The way in which one of them emerged with a spear indicated preparation to kill. The other two appellants had enabled him to commit murder by preventing the escape of the deceased. There could be no doubt that they had a common intention with the actual assailant to kill the deceased. *S.N. Dubey* v. *State of Uttar Pradesh*, AIR 1974 SC 541 : (1974) 3 SCC 771 : 1974 SCC (Cri) 247 : 1974 CrLJ 475.

[7340] ● ***Joint responsibility for criminal act.***—Mere distance from the scene of the crime cannot exclude culpability under Section 34, IPC, which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. Criminal sharing, overt or covert by active presence, or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of Section 34. Even assuming that presence at the scene is a pre-requisite to attract Section 34 and that such propinquity is absent, Section 107 which is different in one sense, still comes into play to rope in the accused.

Tukaram Ganapath v. *State of Maharashtra*, AIR 1974 SC 514 : (1974) 4 SCC 544 : 1974 SCC (Cri) 580 : 1974 CrLJ 469 : 1974 SCD 258.

[7341] ● ***Acquittal of two out of three no bar to conviction of third under Section 302 read with Section 34, IPC.***—The conviction of the appellant under Section 302/34, IPC, was affirmed even though the acquittal of the other two named accused is no bar to his conviction, as the prosecution led evidence to show that the fatal shot was fired by one of the two other persons besides the appellant. *Sukh Ram* v. *State of Uttar Pradesh*, AIR 1974 SC 323 : (1974) 3 SCC 656 : 1974 SCC (Cri) 186 : 1974 CrLJ 354.

[7342] ● ***Common intention to murder—Inference of.***—On the question of common intention, the time of murder, the place of murder, the weapons carried by the accused, the relationship and finally their concerted conduct in the wake of murder are all relevant. Where the offence took place in the house of the deceased at about 10.30 P.M., the facts that the other accused did not participate in the assault on the deceased but he played his part truly by his behaviour by carrying spear so as to overcome any outside interference with the attainment of their object and lastly, immediately after the deceased was murdered both the accused ran away together, these facts are sufficient to hold the existence of common intention in committing murder. *Lalai* v. *State of Uttar Pradesh*, AIR 1974 SC 2118 : (1975) 3 SCC 273 : 1974 CrLJ 1393.

[7343] ● ***Vicarious liability—Principle of.***—The principle of vicarious liability does not depend upon the necessity to convict a required number of persons. It depends upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. *Dharam Pal* v. *State of Uttar Pradesh*, AIR 1975 SC 1917 : (1975) 2 SCC 596 : 1975 SCC (Cri) 704 : 1975 CrLJ 1666.

[7344] ● ***Common intention to commit particular crime.***—The common intention must be to commit the particular crime, although the actual crime may be committed by any one sharing the common intention. Then only others can be held to be guilty. The view that even the person not committing the particular crime could be held guilty of that crime with the aid of Section 34 if the commission of the act was such as could be shown to be in furtherance of the common intention not necessarily intended by every one of the participants, is not correct. *Hardev Singh* v. *State of Punjab*, AIR 1975 SC 179 : (1975) 3 SCC 761 : 1975 SCC (Cri) 186 : 1975 CrLJ 243 : (1975) 1 SCJ 459 : 1975 MLJ (Cr) 369.

[7345] ● ***Common intention—Companion of accused if liable.***—Where the companion of the accused had not known the injured and there was no previous enmity between them nor any motive for the assault, the mere fact that the companion continued to pedal the cycle after the accused fired his pistol at the injured and also ran away with the accused, would not necessarily go to show that the shot has been fired by the accused in furtherance of the common intention of both of them. There may be cases wherein innocent persons of the actual culprit have also tried to escape along with him after an incident. Hence, no vicarious liability can be fastened on the companion of the accused. *Malkhan Singh* v. *State of Uttar Pradesh*, AIR 1975 SC 12 : (1975) 3 SCC 311 : 1974 SCC (Cri) 919 : 1975 CrLJ 32 : 1975 MLJ (Cr) 450.

[7346] ● ***Prosecution of several accused persons under Section 302 read with Section 34, IPC conviction of one alone legality.***—Where the charge disclosed only the named persons as co-accused and the PWs. confined their evidence to them, even then it will be permissible to come to the conclusion that others named or unnamed, besides those mentioned in the charge or the evidence of the PWs, acted conjointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise. *State of Andhra Pradesh* v. *K.V. Reddy*, AIR 1976 SC 2207 : (1976) 3 SCC 454 : 1976 SCC (Cri) 448 : 1976 CrLJ 1723 : 1976 CrLR (SC) 210 : 1976 SC CrR 277 : 1976 CrAppR (SC) 298.

[7347] ● ***Murder—Common intention—Sharing of.***—The mere fact that the members of the mob came together, that Birkha Singh and the appellant came together armed with rifles as per the judgment of the trial Court, was not sufficient to indicate that they had come having shared a common intention to commit the murder. Only one shot was fired on the head of Ajit Singh by Birkha Singh. No shot was fired on him by the appellant and he had no grudge against him. Ajit Singh was not residing in the Haveli wherein the occurrence took place. It was perchance that he happened to be there. It could not, therefore, be said that the appellant and Birkha Singh had any pre-arranged plan to kill Ajit Singh. It might be that he had such common intention though on the facts found it was not possible to be drawn. But it was difficult to fill the gap between "may" and "must" and to say that the appellant "must" have shared the common intention for causing the death of Ajit Singh was difficult to infer. His conviction under Section 302/34, IPC, was not correct. *Gajjan Singh* v. *State of Punjab*, AIR 1976 SC 2069 : (1976) 3 SCC 391 : (1976) SCC

(Cri) 414 : 1976 CrLJ 1640 : 1976 CrLR (SC) 139 : 1976 SCCrR 208 : 1976 Chand LR (Cr) SC 122 : 1976 CurLJ (Cr) 61 : 1976 ACrC 104.

[7348] ● ***Common intention to commit murder of deceased.***—Where there is nothing to indicate that the four accused had arrived at the scene with a preplanned common intention of causing the death of the deceased and two of them alone were armed with lathis and caused injuries on his head, it cannot be said that the two accused who were not armed had a common intention with the other two to commit murder of the deceased while the former two were guilty under Section 302 r/w Section 34, IPC. *Ram Prasad* v. *State of Uttar Pradesh*, AIR 1976 SC 199 : (1976) 1 SCC 406 : 1976 SCC (Cri) 24 : 1976 CrLJ 201.

[7349] ● ***Application of Section 34, IPC—Essential for.***—Section 34 was to be read along with the preceding Section 32 which made it clear that the 'act' spoken of in Section 34 included a series of acts as a single act. It followed that the words "when a criminal act is done by several persons" in Section 34 should be construed to mean "when criminal acts are done by several persons". The acts committed by different confederates in the criminal action might be different but all should in one way or the other participate and engage in the criminal enterprise; for instance, one might only stand guard to prevent any person coming to the relief of the victim or otherwise facilitate the execution of the common design. Such a person also committed an "act" as much as his co-participants actually committing a planned crime. In the case of an offence involving physical violence, however, it was essential for the application of Section 34 that the person who instigated or aided the commission of the crime should physically be present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which was the aim of the joint criminal venture. Such presence of those, who, in one way or the other facilitated the execution of the common design was itself tantamount to actual participation in the 'criminal act'. The essence of Section 34 was simultaneous consciences of the minds of persons participating in the criminal action to bring about a particular result. Such conscience could be developed at the spot and thereby intended by all of them. In the instant case, A-2 obviously was acting in concert with A-3 and A-4 in causing the murder of the deceased, when he prevented PW-1 from going to the relief of the deceased. Section 34 was, therefore, fully attracted and under the circumstances A-2 was equally responsible for the murder of the deceased. His conviction was, therefore, justified. *Ramaswami* v. *State of Tamil Nadu*, AIR 1976 SC 2027 : (1976) 3 SCC 779 (1976) SCC (Cri) 518 : 1976 CrLJ 1563.

[7350] ● ***High Court correct in altering convic tion from Section 304/34 to 302/34, IPC.—*** Where the trial Court convicted the accused unde Section 304/34, IPC, the High Court was of the view, that since the injuries caused by the appellants were sufficient in the ordinary course of nature to cause death and the appellants did intend to cause those injuries, and took the view that the offence was one under Section 302/34, the High Court was right in taking that view. *Ram Murti* v. *State of Haryana*, AIR 1976 SC 2455 : (1976) 4 SCC 308 : 1976 CrLJ 1888 : 1976 CrLR (SC) 462 : 1976 UJ (SC) 822.

[7351] ● ***Common intention to cause simple hurt—Inferences to.***—Where two of the four accused were unarmed, the 3rd accused had a knife but he was not brandishing it, as it was in his pocket and there was no reason to believe that the other accused knew about the knife with him, the 4th accused was carrying a danda and the High Court did not accept his participation as established beyond reasonable doubt, the Court has to proceed on the basis that the 4th accused was not present and if that were so, no common intention could be attributed to the accused to cause simple hurt. *Mitter Sen* v. *State of Uttar Pradesh*, AIR 1976 SC 1156 : (1976) 1 SCC 723 : (1976) SCC (Cri) 190 : 1976 CrLJ 857.

[7352] ● ***Common intention to cause death—Sharing of.***—Where one of the three accused armed with a kulhari inflicted serious injury on the head of the deceased, while the other two were merely armed with lathis and dealt blows on the head of the deceased, the latter two accused shared the common intention with the other accused to cause death of the deceased and hence each of them is guilty of the offence under Section 302 r/w Section 34, IPC. *Dashrath Singh* v. *State of Madhya Pradesh*, AIR 1977 SC 1084 : (1977) 1 SCC 197 : 1977 SCC (Cri) 94 : 1976 CrLJ 664 : 1977 CrLR (SC) 326 : 1977 CrAppR (SC) 22.

[7353] ● ***Pre-concert—Evidence as to—Appreciation of.***—Where one accused caused one grievous injury to a victim and two simple injuries to another victim, while another accused caused an injury to the deceased on his finger and also caused two simple injuries to one of the victims, in the course of the same incident in which the deceased received fatal injuries from two other accused, it is difficult to hold in the totality of circumstances that there was any pre-concert between these two accrued and the other two.

who killed the deceased, to kill him. *Jaspal Singh* v. *State of Haryana*, AIR 1977 SC 1821 : (1976) 4 SCC 303 : (1976) SCC (Cri) 615 : 1977 CrLJ 1457 : 1977 CrLR (SC) 52 : 1977 UJ (SC) 62.

[7354] ● ***Common intention to commit murder.***—The evidence does not show that she was present throughout when the beating was given to the deceased. From the evidence it also appears that at the time when Vijaya was inciting her brother Ashok to assault Shubhangi she believed that she had been possessed of some spirit and was shouting slogans. As the deceased had recently given birth to a child and there was nothing to show that in her presence any other weapon excepting a stick was used it will be impossible to attribute to Vijaya a common intention to murder which she shared along with appellant No. 1. Moreover, it is quite likely that after having uttered a few words and after having incited her brother to beat the deceased she might have either left the room or ceased to be in possession of the spirit. At any rate in the present state of the evidence it cannot be said that Vijaya shared a common intention to murder the deceased along with appellant No. 1. For these reasons, therefore, we would alter the conviction of Vijaya from one under Section 302, read with Section 34, IPC to that under Sections 325/34, IPC and reduce her sentence from life imprisonment to that of two years' rigorous imprisonment. As Vijaya has already served out the sentence of two years she is directed to be set at liberty forthwith. *Ashok Laxuman Sohani* v. *State of Maharashtra*, AIR 1977 SC 1319 : (1977) SCC (Cri) 243 : 1977 CrLJ 829 : 1977 CrLR (SC) 158.

[7355] ● ***Common intention to cause Murder of deceased.***—In the instant case, Shingara Singh, Chain Singh and Surat Singh were said to have gone to the house of the deceased, and Shingara Singh raised a lalkara and instigated Chain Singh to kill the deceased whereupon Chain Singh gave a spear blow on the left chest of the deceased. After the deceased fell down Surat Singh gave two hatchet blows on the left arm of the deceased causing simple injuries. All the three were put up on trial for causing the murder of the deceased. The trial Judge acquitted them. On appeal, the High Court gave benefit of doubt to Shingara Singh and maintained his acquittal but convicted the other two appellant for murder under Section 302, r/w Section 34, IPC. After acquittal of Shingara Singh, the words said to have been spoken of by him could not be made use of and had not been used by the High Court for finding the element of common intention. The only fact then remained that Chain Singh gave a spear blow near the chest of the deceased, which according to the opinion of the doctor, was sufficient in the ordinary course of the nature to cause his death. Hence, he was guilty under Section 302 *simpliciter*. As regards Surat Singh he was guilty only under Section 324, IPC. The appeal was partly allowed. *Surat Singh* v. *State of Punjab*, AIR 1977 SC 705 : (1976) 4 SCC 311 : (1976) SCC (Cri) 605 : 1977 CrLJ 347 : 1977 CrLR (SC) 53 : 1977 UJ (SC) 76.

[7356] ● ***Accused causing two simple injuries—Whether share common intention of causing death of deceased.***—Where the accused caused only two simple injuries on the arm of the deceased and did not give any blow on any vital part of the body, goes against the view that he had shared the common intention of causing the death of the deceased with the other accused who was guilty of causing the death of the deceased by giving the fatal blow with his spear on his chest. *Surat Singh* v. *State of Punjab*, AIR 1977 SC 705 : (1976) 4 SCC 311 : (1976) SCC (Cri) 605 : 1977 CrLJ 347 : 1977 CrLR (SC) 53 : 1977 UJ (SC) 76.

[7357] ● ***Common intention—Victim assaulted by three accused.***—Where two out of three persons attacked the deceased, they were found guilty under Section 302, r/w Section 34, IPC, while the third accused who caught hold of both the hands of the deceased from behind was convicted under Section 304, Part II, IPC, by the application of the principle under Section 38, IPC, as he had intentionally joined in the commission of an act with the knowledge that the assault on the deceased was likely to result in his death. *Bhaba Nanda* v. *State of Assam*, AIR 1977 SC 2252 : (1977) 4 SCC 396 : (1977) SCC (Cri) 602 : 1977 CrLJ 1930 : 1977 CrLR (SC) 472 : 1977 UJ (SC) 725 : 1977 CrAppR (SC) 360.

[7358] ● ***Murderous assault by more than one person—Plea of extrication.***—When murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others, and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstance that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplished their purpose cumulatively, Section 34, IPC, fixing constructive liability conclusively silences such a refined plea of extrication. Even if some out of several accused are acquitted but the participating presence of a plurality of assailants is proved, the conjoint culpability for the crime is inescapable. Not that the story of more than one person having attacked the victim is false, but that the identity of the absolved accused is not firmly fixed as criminal participant. It follows that such of them, even if the number dwindled to one as having knifed the deceased, should be convicted for the principal offence read with the constructive provision. *Harshad Singh* v. *State of Gujarat*, AIR 1977 SC 710 : (1976) 4 SCC 640 : (1977) SCC (Cri) 26 : 1977 CrLJ 352 : 1976 CrLR (SC) 481 : 1977 SCCrR 33 : (1977) 1 SCR 626 : 1976 CrAppR (SC) 318 : 1976 UJ (SC) 891.

[7359] ● ***Common intention to murder.***—Where the evidence was clear and cogent and established that A1 and A3 suddenly emerged out of darkness, A2 gave an axe blow on the left arm of the deceased and A1 gave an axe blow on his abdomen and the latter injury resulted in his death, these facts clearly show that there was common intention between A1 and A3 to cause the death of the deceased.

A2 was talking to the deceased when A1 and A3 attacked the deceased and he neither had any weapon with him nor did he participate in the attack. The only thing attributed to A2 was that after A1 and A3 had given axe blows to the deceased, A2 said "leave him, kill him" after A1 and A3 had given axe blows on the deceased, there was no reason why A2 should have instigated A1 and A3 after blows were delivered by them and not in pursuance of his alleged instigation. A2 cannot be said to be a party to their common intention. *N.B. Dhayagude* v. *State of Maharashtra*, AIR 1977 SC 381 : (1976) 4 SCC 441 : (1977) SCC (Cri) 10 : 1977 CrLJ 238 : 1976 CrLR (SC) 409.

[7360] ● ***Attack by several accused—Constructive liability of companion of principal culprit—Common intention proof of.***—It might be that when some persons started with a prearranged plan to commit a minor offence, they might in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding might appear from the conduct of the persons, sought to be made vicariously liable, for the act of the principal culprit, or from some other incriminatory evidence, but the conduct or the other evidence should be such as not to leave any room for doubt in that behalf. A criminal Court fastening vicarious liability should satisfy itself as to the prior meeting of the minds of the principal culprit and his companion who were sought to be constructively made liable in respect of every act committed by the former. There was no law which laid down that a person accompanying the principal culprit shared his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depended upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel, should be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions could not justifiably be held guilty for every offence committed by the principal offender. In this case, there was no evidence to justify the occlusion that Surta and Samme Singh shared the common intention with Dharam Pal to commit the murder of Sardara Singh or to make an attempt on the life of Singh Ram, and that the said acts were committed by Dharam Pal in furtherance of the common intention of all the appellants. The common intention denoted action in concert and necessarily postulated a pre-arranged plan or prior meeting of minds, and an element of participation in action. The common intention to commit an offence, graver than the one originally designed, might develop during the execution of the original plan, *e.g.*, during the progress of attack on the person, who was intended to be beaten, but the evidence in that behalf should be clear and cogent, for, suspicion, however strong, could not take the place of proof which was essential to bring home the offence to the accused. The prosecution evidence disclosed clearly, that appellant Surta administered a blow on the head of Singh Ram with Pharsa as a result of which the latter slumped on the ground and sustained a fracture of the right parietal bone. After he had fallen down on account of the head injury, Samme Singh appellant gave 4 or 5 blows on his thighs. In those circumstances it was clear that Samme Singh shared a common intention with Surta of causing grievous injury on the person of Singh Ram. Hence, the conviction and sentence of Surta under Section 326 and that of Samme Singh under Section 326/34, IPC, were confirmed. As there was nothing in the prosecution evidence to show, that it was in the contemplation of Surta and Samme Singh not only to give a thorough beating to Hari Ram but also to deal with any other person who might choose to intervene on his behalf, it was difficult to hold that they accompanied Dharam Pal with the common intention of murdering the deceased or with the intention of attempting to murder Singh Ram. Hence the appeals were dismissed to the extent indicated above. *Dharam Pal* v. *State of Haryana*, AIR 1978 SC 1492 : (1978) 4 SCC 440 : 1978 CrLJ 1538 : 1978 CrLR (SC) 373.

[7361] ● *Common intention to cause death of deceased.*—Where the evidence showed that the appellant knew well that A-1 and others were armed and that A-1 had caused sword injuries on vital parts of the body of the deceased in the courtyard, and he himself aided A-1 by giving blows to the deceased on some vital parts of the body like the chest, and not content with that the appellant also participated in chasing the deceased, where further injuries were given to the deceased after a call by A-2 to kill the deceased, the appellant clearly shared the common intention to cause the death of the deceased along with A-1 and A-3. *Sivam* v. *State of Kerala*, AIR 1978 SC 1529 : (1978) 3 SCC 141 : 1978 SCC (Cri) 364 : 1978 CrLJ 1609 : 1978 CrLR (SC) 149 : 1978 SCCrR 216 : 1979 CrAppR (SC) 204.

[7362] ● *Common intention to kill—Sharing of.*—Where the four appellants had been lying in ambush, to pounce upon the deceased in order to assault him, there is no doubt that all the four appellants had shared the common intention to kill the deceased. The fact that no overt act was committed by one of them against the deceased does not distinguish his case from that of the others. *Karamat Ali* v. *State of Assam*, AIR 1978 SC 1392 : (1978) 3 SCC 132 : 1978 SCC (Cri) 356 : 1978 CrLJ 1412 : 1978 UJ (SC) 217 : 1978 ACrR 342.

[7363] ● *Common intention Evidence of prior concert.*—Appellant reached the place of occurrence along with the other accused who were all armed with deadly weapons. They caught hold of the deceased as soon as he knocked at the 'khirki' of his house, dragged him to the bamboo grove and dealt as many as 11 blows including 3 fatal blows of great intensity. There is evidence, that the appellant was standing outside the house of the deceased with a pistol in his hand and held out threats, in order to prevent the eye-witnesses from coming to the help of their brother, and that the assailants shouted that they had killed the 'police agent' and the appellant fired one shot before they left the place of occurrence. It was, therefore, proved beyond doubt that there was not only ample opportunity for a pre-concert, but that the assailants, including the appellant, committed the murder of the deceased in pursuance of a pre-concerted plan, in a cold blooded manner. *Nitya Sen* v. *State of West Bengal*, AIR 1978 SC 383 : (1978) 2 SCC 382 : (1978) SCC (Cri) 191 : 1978 SC CrR 63 : 1978 CrLJ 481 : 1978 CrLR (SC) 39 : 1978 UJ (SC) 123.

[7364] ● *Circumstances not indicating that accused shared common intention or took any active part.*—Where the circumstances did not indicate that the appellant shared the common intention to murder the deceased or took any active part therein, mere finding of the lot of blood stains on the floor, wall and the stool where the deceased was said to have been attacked, does not implicate the appellant in the offence of murder and there is no reliable evidence to connect her directly with the crime of actual murder. Decision of the Orissa High Court convicting her under Section 302/34, IPC, was reversed. *Suryamani Devi* v. *State of Orissa*, AIR 1979 SC 1534 : 1984 Supp SCC 767 : 1979 SCC (Cri) 497 : 1979 CrLJ 959.

[7365] ● *Common intention—Murder preplanned.*—Both the Courts below found that the murder of the deceased was a pre-planned one in which all the three accused including the appellant participated equally. To begin with, the appellant gave a challenge to the deceased and after returning to their house the accused reappeared on the scene variously armed, two of them with guns and the appellant with a gandasi. They remained present at the time when the fatal blow was given to the deceased by one of the accused. Immediately thereafter, the appellant assaulted another person with gandasi. Thereafter, the three accused left together. These circumstances clearly disclosed that there was a prior meeting of minds between the three accused in which it was decided to kill the deceased, and in pursuance of that plan all the three went away together, armed themselves, arrived at the scene of occurrence together and none of them delivered a gunshot injury. Thus, all the essential conditions for the presence of the common intention were clearly proved. *Kashmere Singh* v. *State of Punjab*, AIR 1979 SC 1435 : (1979) 3 SCC 428 : 1979 SCC (Cri) 496 : 1979 CrLJ 1093.

[7366] ● *Common intention—Each and every accused need not have inflicted serious injury.*—Each and every accused need not have inflicted serious injury. In this case the three accused persons came together. One of them was armed with a gun, the other two were armed with iron rods. One of them challenged the deceased. The person with the gun opened fire and after the deceased fell down, the other two accused were not content, but went forward to inflict injuries on the deceased person with the iron rods in their hands. Thereafter all of them went away together. The irresistible inference from these circumstances is that the three of them were actuated by the common intention to cause the death of the deceased. Merely, because the injuries inflicted by two of them were not serious injuries, it cannot be said that they were not actuated by common intention to cause the death of the deceased. In order to attract the applicability of Section 34 read with Section 302, IPC, it is not necessary that each and every one of the accused persons must have inflicted a serious injury. *Tehal Singh* v. *State of Punjab*, AIR 1979 SC 1347 : (1979) SCC (Cri) 722 : 1979 CrLJ 1031 : 1978 CrLR (SC) 660 : (1979) 1 SCWR 301 : 1979 SCCrR 323 : 1978 CurLJ (Cr) 295.

[7367] ● ***Common intention to kill deceased.***—The Sessions Court convicted the respondents under Section 302/149, IPC, along with others. In appeal the High Court altered the conviction of the 3 respondents to that under Section 326/34. In appeal by the state against respondents 1 and 2, findings of the High Court are legally erroneous. Evidence established that both respondents had a common intention to kill the deceased, which is manifest from the fact that they were armed with sticks, participated equally in the actual assault on the deceased as also in the abuses hurled on him, having come together and having gone together. It clearly leads no room for doubt about the common intention of respondents 1 and 2 to cause the murder of the deceased. Section 34 clearly applied to the facts of the case. Where common intention to kill is established, question of, as to who gave the fatal blow is wholly irrelevant, and once the medical evidence shows that the injuries caused by one or the other of the accused were sufficient in the ordinary course of nature to cause death, that is sufficient to bring the case of the accused within the purview of Section 302/34, IPC. Decision of the Bombay High Court was reversed and respondents were convicted under Section 302/34, IPC. *State of Maharashtra* v. *Kalu Shivram*, AIR 1980 SC 879 : 1980 Supp SCC 224 : 1980 CrLJ 570.

[7368] ● ***Common intention to commit murder.***—Though one of the two brothers accused of murdering the deceased were armed with a lathi, as they made concerted attack on the deceased causing no less than 15 injuries resulting in his death on the spot, the person armed with a lathi is also liable under Section 302/34, IPC.

Two accused who are brothers were alleged to have murdered the deceased by attacking him with a sharp edged weapon and a lathi respectively at midnight. They made a concerted attack on the deceased, causing no less than 15 injuries resulting in his death on the spot. Trial Court convicted both the accused under Section 302 r/w Section 34. The High Court maintained the conviction of the accused armed with a sharp-edged weapon but acquitted the other who was armed with a lathi. The High Court was in error in acquitting the other accused. Acquittal was set aside and the judgment of the trial Court restored. Judgment of the Punjab & Haryana High Court was reversed. *State of Haryana* v. *Tej Ram*, AIR 1980 SC 1496 : 1980 CrLJ 1057 : 1980 CrLR (SC) 514.

[7369] ● ***Murder—Common intention—Sharing of.***—In this case of murder, the appellant Kehar Singh, his father and brother and one Hukum Singh were tried. Hukum Singh was acquitted. Relying on the evidence of three eye witnesses, the other three were sentenced for the offences of Section 302/34, IPC. Kehar Singh was a boy of 15 years of age and he was ascribed the role in vague terms.

The meeting at a place where the incident was alleged to have occurred was purely accidental because there was no evidence to show that the accused knew in advance that the deceased and his companions were to pass by that route. It was reasonable to believe that Kehar Singh might have been present at the time of occurrence but mere presence in the circumstances of this case was not indicative of sharing the intention of the father and the brother. Therefore, there was no convincing and reliable evidence to hold that Kehar Singh shared the common intention of his father and brother and participated in the assault on the deceased, and that the charges had been brought home to him. The conviction and sentence were set aside. *Ghanshyam* v. *State of Uttar Pradesh*, AIR 1983 SC 293 : (1982) 2 SCC 400 : (1982) SCC (Cri) 449 : 1983 CrLJ 439 : 1982 CrLR (SC) 139 : 1982 AWC 24 : 1983 ALJ 819 : 1982 SCCrR 195 : (1983) 1 ChandLR (Cr) 549 : 1982 CrAppR (SC) 102 : 1982 UJ (SC) 289.

[7370] ● ***Murder—All accused animated by common intention.***—The accused was released on parole, while undergoing sentence of life imprisonment in an earlier murder case. Accompanied by 3 others, he assaulted the deceased at midnight only with blunt side of gandasa. All the accused were animated by common intention. All of them including the accused released on parole were liable to be sentenced to life imprisonment. *Surjit Singh* v. *State of Punjab*, AIR 1983 SC 838 : (1983) 3 SCC 565 : (1983) SCC (Cri) 745 : 1983 CrLJ 1111 : 1983 CrAppR (SC) 377 : 1983 Chand CrC (SC) 136.

[7371] ● ***Murder by several accused— Common intention.***—The evidence showed that all the four appellants were acting in concert in dragging the deceased inside the Deli and that all the four persons were concerned in the act of throwing the victim on the road in front of the Deli after the assault. Though no PW could have witnessed what transpired inside the Deli, because the doors of the Deli were closed after the deceased was dragged inside, appellants were acting in concert and were associated with each other in initially dragging the deceased inside the Deli as also in throwing him out on the road. The circumstances which had been established by satisfactory evidence coupled with the circumstance that as many as 20 injuries were inflicted on the deceased, left no room for doubt, that all the appellants had shared the common intention to cause the death of the deceased. The appeal was dismissed. *Aher Bitha Vajshi* v. *State of Gujarat*, AIR 1983 SC 599 : 1983 CrLJ 1049 : 1983 CrLR (SC) 231 : (1983) 1 Crimes 1067.

[7372] ● ***Common intention proof.***—Common intention is a question of fact. It is subjective. But it could be inferred from facts and circumstances. In the present case, the appellants were related, they were armed with deadly weapons and they were together. There was an order by some one 'kill, kill' when all of them simultaneously attacked the deceased and some of the PWs. After the occurrence, they left together; they were later arrested from the same place. The High Court, therefore, rightly held that the appellants caused the injuries with the common intention and was, therefore, justified in convicting the appellants under Section 302/34 of the Penal Code. *Maqsoodan* v. *State of Uttar Pradesh*, AIR 1983 SC 126 : (1983) 1 SCC 218 : (1983) SCC (Cri) 176 : 1983 CrLJ 218 : 1983 CrLR (SC) 50 : 1983 SCC CrR 312 : 1982 ALJ 1524 : 1983 UJ (SC) 175 : 1983 (1) CrLC 181 : (1983) 1 SCJ 184 : 1983 MLJ (Cr) 405.

[7373] ● ***Common intention—Requisite ingredient.***—The three circumstances relied upon by the respondent in support of the conviction were: (i) that the three accused came together; (ii) that the three accused had a common motive to avenge the incident that occurred at the festival; and (iii) that when the victim of assault tried to escape all the three of them chased the deceased. If the three shared the common intention to commit murder of the deceased, obviously appellants Nos. 2 and 3 would not come unarmed. It would be contrary to common sense to hold that appellants 2 and 3 accompanied appellant No. 1 with the avowed object of committing murder and yet came unarmed. Their intention by that very tell-tale circumstances was contradicted. It should be made clear that in order to attract Section 34 it was not sufficient to prove that each of the participating culprits had the same intention to commit a certain act. The requisite ingredient of Section 34 was that each must share the intention of the other. The second circumstances was that all the three of them had a common motive to avenge the incident at the festival. But there was no evidence that appellant No. 1 who was charged with the substantive offence of murder participated in the quarrel. Hence. all the three of them had no common motive. The last circumstance relied upon was that appellants 2 and 3 along with appellant 1 chased the deceased when he tried to escape from the scene of occurrence. But in the evidence no one deposed whether the stones pelted by appellants 2 and 3 hit the deceased. If appellant 1 had some motive other than the one which the prosecution tried to infer, he had nothing to avenge. All the circumstances when viewed in their cumulative effect would not permit an inference that appellants 2 and 3 shared common intention to commit murder. Therefore, the conviction of appellants 2 and 3 for an offence under Section 302 read with Section 34 of the Penal Code could not be sustained. But they were guilty of an offence under Section 326 read with Section 34 of the Penal Code. *Dajya Moshya Bhil* v. *State of Maharashtra*, AIR 1984 SC 1717 : 1984 Supp SCC 373 : 1984 CrLJ 1728 : (1984) 2 Crimes 368.

[7374] ● ***Murder common intention.***—The Doctor who conducted the post-mortem found on the deceased only five injuries and out of them injuries Nos. 1 and 2 are found to be sufficient in ordinary course of nature to cause death. The other injuries are simple. The other circumstance also would show that all the four accused did not use their weapons indiscriminately. No doubt by virtue of the application of Section 34, IPC, all of then are convicted. *Jayaram Shiva Tagore* v. *State of Maharashtra*, AIR 1991 SC 1735 (1737) : 1991 Supp (2) SCC 677 : (1992) SCC (Cri) 62 : 1991 CrLJ 2192 : 1992 CrLR (SC) 189.

[7375] ● ***Murder—Involvement of accused in incident and his giving barchhi blow established—Sufficient to convict him with aid of Section 34, IPC.***—Even if it is assumed that PW-3 was not present and that the story regarding the appellant having given the blow on the back of Santa Singh is a subsequent improvement not found in the FIR. The involvement of the appellant in the incident and his giving of a barchhi blow to PW-4, Nanak Singh, when the latter tried to go to the rescue of his grandfather is sufficient to convict him with the aid of Section 34, IPC. *Banta Singh* v. *State of Punjab*, AIR 1991 SC 1379 (1381) : (1991) Supp (2) SCC 403 : (1991) SCC (Cri) 1051 : 1991 CrLJ 1342 : JT 1991 (5) SC 182 (2).

[7376] ● ***Murder—Common Intention.***—Both Sections 149 and 34, IPC deal with a combination of persons who become liable to be punished as sharers in the commission of offences. The non-applicability of Section 149, IPC is, therefore, no bar in convicting the appellants under Section 302 read with Section 34, IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. Keeping in view the manner of attack as disclosed by the eye-witnesses and the number and nature of injuries, we have no hesitation in holding that the appellants made the murderous attack on the deceased and caused his instantaneous death. We are satisfied that the appellants acted in furtherance of their common intention of murdering the deceased." *Nethala Pothuraju* v. *State of Andhra Pradesh*, AIR 1991 SC 2214 (2215) : (1992) 1 SCC 49 : (1992) SCC (Cri) 20 : 1991 CrLJ 3133 : 1992 CrLR (SC) 9 : JT 1991 (4) SC 135 : (1991) 3 Crimes 418.

[7377] ● ***Murder—Conviction of appellant with aid of Section 34, IPC.***—The prosecution evidence does not disclose that the fatal blow which caused injury No. 1 was given by the appellant. Inherent of this submission is the assumption that the fatal blow was given by someone else. That establishes the fact that more than one person participated in the commission of the crime. We have also on an independent appreciation of evidence of eye-witnesses PW-1, PW-3 and PW-4 come to the conclusion that several persons had participated in the commission of the crime. We are convinced from the evidence of PW-1, Komal Chand, that some of the co-accused, particularly, Gunda, Parsu and Gopal had participated in the commission of the crime. It is another matter that in the absence of a State appeal, the High Court could not interfere with their acquittal, but as rightly pointed in *Brathi*'s case AIR 1991 SC 318, this Court is not bound by the facts found proved on the appreciation of evidence by the Courts below and is, in law, entitled to reach its own conclusion different from the one recorded by the Courts below on a review of the evidence. In the present case we feel it safe to confirm the conviction of the appellant with the aid of Section 34, IPC. *Khujji alias Surendra Tiwari* v. *State of Madhya Pradesh*, AIR 1991 SC 1853 (1865) : (1991) 3 SCC 627 : (1991) SCC (Cri) 916 : 1991 CrLJ 2653 : 1991 CrLR (SC) 605 : JT 1991 (3) SC 151 : (1991) 3 Crimes 86.

[7378] ● ***Common intention to cause grievous hurt.***—The crux of the prosecution case is that on 25.11.80 while the appellants caught hold of the left and right hands of the Kailash Nonia (deceased herein), Shyambali Nonia on being instigated by his father Sita Ram Nonia, gave one stab with a dagger and inflicted a stab wound, with the result of which the deceased died. Admittedly the appellants did not have any weapon and attacked the deceased. Nor did they even by words express their intention to cause the death of the deceased. The father of Shyambali Nonia who instigated the offence deed even before the committal proceedings of the case. Shyambali Nonia who actually stabbed and murdered the deceased is not before the Court. Further there is no evidence indicating that there was any pre-concert of mind of all the four accused persons including these two appellants in perpetrating the offence of murder.

At the same time it is, however, absolutely impossible to relieve them of any liability whatsoever in connection with the stab injury which was facilitated by their catching hold of the deceased when Shyambali Nonia was inflicting the stab wound. Hence there is no escape from the conclusion on the evidence available that the appellants shared at least the common intention with Shyambali Nonia to cause grievous hurt punishable under Section 326 read with Section 34, IPC. *Harbans Nonia* v. *State of Bihar*, AIR 1992 SC 125 (125) : 1993 Supp (1) SCC 485 : (1993) SCC (Cri) 257 : 1992 CrLJ 105.

[7379] ● ***Murder—Common intention.***—Admittedly there was a dispute regarding the claim over the land between the parties. On account of this dispute, there was a long standing and deep-rooted animosity between them. Therefore we have to approach the evidence in the back ground of such hostility that existed between them. Except a general statement that all the appellants dragged the deceased from the railway apartment, it is not the case of the prosecution that anyone of the appellants 1, 3 and 4 either was armed with any weapon or assaulted the deceased. Had these three appellants (appellants 1, 3 and 4) shared the common intention on account of any prior concert and pre-arranged plan, each of the appellants would have carried some weapon and attacked her or at least fisted or kicked her. But in the present case, there is absolutely no evidence that except appellant No. 2, none of the other appellants assaulted the deceased nor any of these three appellants exhorted the appellant 2 to attack the deceased. The evidence let in by the prosecution and the circumstances attending the case do not unfold any prior concert or meeting of minds of the appellants in sharing the intention of the appellant 2, the perpetrator of the murderous assault on the victim. *Ram Lal Singh* v. *State of Haryana*, AIR 1992 SC 59 : (1992) 2 SCC 746 : (1992) SCC (Cri) 904 (906) : 1992 CrLJ 1 : JT 1992 (4) SC 473.

[7380] ● ***Common intention sharing of.***—As regards the other two accused there is no reason to interfere with the finding of the High Court that these appellants did share the common intention of appellant No. 1. They had no doubt come armed with weapons but none of them caused any injury on any vital part of the deceased. The finding of the High Court that the common intention of the appellant was to chastise Kesar Singh and not to kill him, appears to be well founded. *Gurdeep Singh* v. *Jaswant Singh*, AIR 1992 SC 987 (988) : 1992 Supp (3) SCC 103 : (1993) SCC (Cri) 278.

[7381] ● ***Common intention to beat up or assault victim.***—The motive for the commission of the crime is stated to be the incident which had taken place on the previous day *i.e.,* April 5, 1975 between Munna and the deceased. On the next day, when the deceased was seen sitting at the Baithak of Islamullah, the two brothers went there and abused the deceased. Thereafter, they caught hold of him and took him to the nearby lane. Ayyia though armed with a razor did not choose to use the same. Ayyia had no idea that his brother would take out the knife and cause the fatal injury to the deceased. In the circumstances, it is difficult to attribute to him a common intention to kill the deceased and convict him with the aid of Section 34. At the most since he knew his brother was carrying a weapon and was smarting under an insult, he could be said to be aware of the fact that there was a possibility of Munna causing injury. In the circumstances his conviction under Section 302/34, IPC needs to be altered to Section 326/34, IPC. *Munna and Ayyia* v. *State of Uttar Pradesh*, AIR 1993 SC 278 : (1993) SCC (Cri) 798 (799-800) : 1993 CrLJ 45.

[7382] ● ***Murder—Common intention.***—In the instant case Sheo Karan and his wife, the appellant went to Har Lal's room to question him as to why he has transferred his lands in favour of the son of Sardara to which he replied that it was his will and pleasure. This caused provocation to Sheo Karan and he started beating Har Lal till then no part was attributed to the appellant. At this juncture, according to the eye-witnesses the deceased and his sons and the other people intervened and Sheo Karan dealt blows on the head of the deceased and it is alleged that the appellant also caused one injury on the left side of the face of Sardara. It can thus be seen that in cases, where large number of persons are involved and in the commotion injuries are caused to the prosecution witnesses and others, it becomes the duty of the Court to determine the common intention which could be attributed to those accused who stand convicted, where some of their co-accused stand acquitted and the State chooses not to file any appeal against their acquittal. With a view to determine the common intention, the nature of injuries, the background of the incident and the nature of the weapons used to cause the injuries besides other factors are required to be properly considered and appreciated. *Nadodi Jayaraman* v. *State of Tamil Nadu*, AIR 1993 SC 777 : (1992) 2 SCC 28 : (1993) SCC (Cri) 184 (198) : 1993 CrLJ 426 : JT 1992 (3) SC 222 : 1992 Cr App R (SC) 317.

[7383] ● ***Causing disappearance of evidence—Murder.***—It may be correct that the process of digging a grave of five feet deep, the filling of the grave and then erasing the traces, *etc.* may not have been done by Sardar Singh alone but there is not an iota of evidence on the record not even a whisper to the effect that it was Saraswati who helped him in concealing or causing the evidence of the commission of the offence to disappear. Simply because she is the wife of appellant Sardar Singh and as such is supposed to be living in the same house, it cannot be assumed that she was guilty of the offence under Section 201/34 of the IPC. *Sardar Singh* v. *State (Delhi Administration, Delhi)*, AIR 1993 SC 1696 : (1993) Supp (2) SCC 393 : (1993) SCC (Cri) 564 (566) : 1993 CrLJ 1489 : JT 1993 (4) SC 534 : (1993) 2 Crimes 13.

[7384] ● ***Overt act.***—Section 34, IPC is applicable even if no injury has been caused, by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused. *Chinta Pulla Reddy* v. *State of A.P.,* AIR 1993 SC 1899 : 1993 Supp (3) SCC 134 : 1993 SCC (Cri) 875 : 1993 CrLJ 2246.

[7385] ● ***Intention to cause death—Inference.***—According to the prosecution witness, who have been believed by both the Courts below injuries were caused to the deceased only by kicks and fist blows keeping in view the ocular testimony and the medical evidence, it is difficult to hold that the accused had intended to cause the injuries on the deceased which were sufficient in the ordinary course of nature to cause his death. Had the accused shared the common intention to cause the death of the deceased, nothing prevented them from using the pistol. The Courts have to take into consideration all the attendant circumstances while considering the question of offence. The fact that neither the knife nor the *lathi* nor the pistol was used, even though the deceased was lonesome and was attacked by four young persons, would go to show that in all probabilities the respondents did not intend to cause death of the deceased and that they wanted to severely assault him only. However, in causing the injuries, as have been noticed in the post-mortem report, the respondents must be attributed the knowledge that by their acts they were likely to cause the death of the deceased, though without any intention to cause his death or to cause such bodily injury as is likely to cause his death. The offence, in this case, would, therefore, be "culpable homicide not amounting to murder" as per the third clause of Section 299, IPC punishable under Section 304, Part II/Section 34, IPC. *Ramesh Kumar* v. *State of Bihar*, AIR 1993 SC 2317 (2319) : 1994 Supp (1) SCC 116 : 1993 CrLJ 3137 : JT 1993 (4) SC 463 : (1993) 2 Crimes 491.

[7386] ● ***Common intention to cause death not established.***—If common intention to cause death had been established in the case, the prosecution would not have been required to prove which of the injuries was caused by which accused to sustain the conviction of the accused with the aid of Section 34, IPC but in a case like this, where five of the co-accused stand acquitted and the common intention to cause death is not established beyond a reasonable doubt, the prosecution must establish the exact nature of the injuries caused to the deceased by the accused with a view to sustain the conviction of that accused for inflicting that particular injury. The evidence on the record does not lead to the conclusion that A-2 and A-3 alone caused all the injuries to the deceased with the intention to cause his death. The broad circumstances of the case impel us to hold that the common intention of A-2 and A-3 was not to cause the death of the victim and therefore, neither of them could be held guilty of the offence under Sections 302/34, IPC. *Nadodi Jayaraman* v. *State of Tamil Nadu*, AIR 1993 SC 777 : 1992 Supp (3) SCC 161 : 1993 SCC (Cri) 184 (200, 201) : 1993 CrLJ 426 : JT 1992 (3) SC 222.

[7387] ● ***Murder—Common intention.***—The only part attributed to the appellant was that when Sardara intervened Sheo Karan dealt blows on the head and the appellant dealt one blow on the mandible. It can, thus, be seen that there was no common intention on the part of the appellant to kill Sardara. The prosecution version is that their intention was only to question Har Lal as to why he parted his lands to the sons of Sardara instead of giving equally to both the sons. Because of his reply Sheo Karan enraged, it is only at that stage Sardara entered into the picture and the attack on him took place. Viewed from this angle we find it difficult to hold that the appellant had intention to cause the death of the deceased or that she shared the same with her husband Sheo Karan. Both have to be held responsible for their individual acts. In that view of the matter the offence committed by the appellant would be one punishable under Section 326, IPC, *simpliciter*. *Tripta* v. *State of Haryana*, AIR 1993 SC 948 : (1993) SCC (Cri) 843 (845, 846) : 1992 CrLJ 3944.

[7388] ● ***No common intention to cause death.***—Now coming to the nature of the offence, according to the eye-witnesses the three accused came together armed with sharp edged weapons and inflicted injuries which resulted in the fracture of the skull bones. The fracture of the tibia, fracture of the metacarpal bone and some other injuries were also caused. However, if their intention was to cause death, they should have inflicted some more injuries on any vital part of the body but they have given one blow only with the blunt side of the axe and the deceased died only six days later. Therefore, in these circumstances, it cannot be said that they had a common intention for causing the death. But they must be attributed that by inflicting such injuries they were likely to cause the death of the deceased, in which case the offence will amount only to culpable homicide and not murder. *Babu Lal* v. *State of Madhya Pradesh*, AIR 1993 SC 1941 : (1993) SCC (Cri) 1026 (1028) : 1993 CrLJ 2667.

[7389] ● ***Accused sharing common intention to beat deceased violently.***—Taking the evidence of the witnesses as a whole it emerges that all these four accused inflicted injuries and without knowledge of A-1 the deceased could not have been detained in custody. Therefore no separate case can be made out so far A-1 is concerned. All the four accused shared the common intention to beat the deceased violently and they must have knowledge that by inflicting such injuries, they were likely to cause the death of the deceased. *Dalip Singh* v. *State of Haryana*, AIR 1993 SC 2119 : (1993) Supp (3) SCC 336 : (1993) SCC (Cri) 1005 (1011-1012) : 1993 CrLJ 2092 : 1993 CrLR (SC) 335 : JT 1993 (3) SC 682.

[7390] ● ***Common intention—Inference of from circumstances.***—Common intention is to be inferred from the circumstances particularly the part played by the accused and the surrounding circumstances, namely, nature of the weapon used and the injury inflicted as well as the meeting of the minds among the accused who are being held constructively liable. The facts, would reveal that the appellant tried to pick the pocket of PW-5 who called the deceased and the deceased tried to catch hold of the appellant and it was a sudden act on the part of the William who picked out a knife from his pocket and inflicted a single injury on the deceased. Under those circumstances, it cannot be held that the appellant and Sukhchain Singh had prior knowledge that Willaim was armed with a knife and the part played by William cannot be said to be a conjoint act so as to attract the element of common intention on the part of the appellant as well as Sukhchain Singh. *Kashmira Singh* v. *State of Punjab*, AIR 1994 SC 1651 (1652) : 1995 Supp (4) SCC 558 : 1994 CrLJ 1974.

[7391] ● ***Common intention—Constructive liability.***—For assuring at a conclusion of constructive liability what the Courts have to see is whether they had common intention or common object and the ingredients are to be considered in convicting by application of Section 149 or Section 34, IPC. The Court has to look into the proved circumstances like the formation of the unlawful assembly, the weapons with which they were armed and the active role played by them. The witnesses have consistently deposed that the members of the unlawful assembly of which these three appellants were members, chased the deceased armed with spears. While chasing they surrounded the deceased and inflicted injuries with their respective weapons and these three accused also inflicted injuries with these sharp edged weapons. At that juncture, the deceased managed to escape and ran into the nearby house. The witnesses have consistently deposed that the members of the unlawful assembly chased the deceased and went into the house and inside the house only PW-13 was there, but he turned hostile. However, the proved circumstances established that they were members of the unlawful assembly, chased the deceased and necessarily they must have also inflicted injuries which ultimately proved fatal. These circumstances are enough to invoke Section 34 or Section 149, IPC even against these three appellants taking the transaction as a whole into consideration. *Balineedi Venkataramaiah* v. *State of Andhra Pradesh*, AIR 1994 SC 76 : 1994 Supp (3) SCC 732 : 1994 CrLJ 61.

[7392] ● ***Murder—Common intention.***—If this be the factual position it is not known how Section 34 will cease to apply once this conclusion is arrived at then it matters little as to what part Joginder Singh played. No doubt he gave only a lathi blow on the right arm of the deceased. That by itself may not be sufficient to convict him under Section 302, IPC but when he is charged under Section 34, the necessary, corollary is to convict him also under Section 302, IPC. *Joginder Singh* v. *State of Haryana*, AIR 1994 SC 461 (462, 463) : (1995) SCC (Cri) 178 : 1994 CrLJ 134.

[7393] ● ***Common intention—Anterior in time to commission of crime.***—It is one of the settled principle of law that the common intention must be anterior in time to the commission of the crime. It is also equally settled law that the intention of the individual has to be inferred from the overt act or conduct or from other relevant circumstances. Therefore, the totality of the circumstances must be taken into consideration in order to arrive at a conclusion whether the accused had a common intention to commit the offence under which they could be convicted. *Joginder Singh* v. *State of Haryana*, AIR 1994 SC 461 (462) : 1995 SCC (Cri) 178 : 1994 CrLJ 134.

[7394] ● ***Common intention—Pre-arranged plan develop on spot.***—The pre-arranged plan may develop on the spot. In other words, during the course of commission of the offence, all that is necessary in law is the said plan must proceed to act constituting the offence. In this case, it is clear that there was enmity between Hari Singh and deceased Gurbachan because of the dispute relating to the tenancy. The appellant, Joginder, is none other than the son of Hari Singh. The other two accused, Dara Singh and Bir Singh, had given evidence for Hari Singh in an ejectment case. If Hari Singh was entertaining an idea of getting rid of Gurbachan, certainly he could not have chosen better persons than the three or four accused for carrying out his plan. In the first instance, the accused abused Gurbachan Singh, then went inside the house of Hari Singh, brought deadly weapon and pounced upon Gurbachan. Thereafter, the injuries were caused with those deadly weapons on the deceased. In the ordinary course of events, the head injury caused by Hari Singh with iron pipe was sufficient to bring about his death. Therefore, it is clear that the four accused had the common intention to do away with Gurbachan Singh because only in the event of he being done away with, it would be possible to put further pressure on Hari Singh (sic) to vacate the demised portion of the house. From this, the only inference possible is that all these four accused had a common intention to kill Gurbachan. Not only that even PWs 2 and 3 the son and daughter of Gurbachan also received injuries which brings us closer to the inference in relation to common intention. *Joginder Singh* v. *State of Haryana*, AIR 1994 SC 461 (462) : 1995 SCC (Cri) 178 : 1994 CrLJ 134.

[7395] ● ***Murder—Conviction of accused order Section 302/34—Not under Section 302/149.***—"Seven out of nine injuries were incised, and as per Doctor's view, could have been caused by sharp cutting weapon like gandasa. In coming to injury Nos. 8 and 9, the Doctor, no doubt, stated that there may have been some blunt object also. But if the assailants used the weapons in the manner as described by the witnesses, the same could have been resulted also in contusions. It is common knowledge that abrasions also could be caused by coming into contact with rough sickle or even by falling on the ground. Injury No. 8 is only a small abrasion with a width of 1" x 1/10". The injury No. 9 was due to fall on the rough surface. Admittedly, the occurrence had taken place in the field. Even otherwise, the prosecution version that three assailants armed with lathis attacked indiscriminately is not supported by the medical evidence since we find superficial abrasions described in injury Nos. 8 and 9. Therefore participation of the accused Nos. 1 to 3 becomes doubtful. In the result, appellant/accused Nos. 1 to 3 are given the benefit of doubt and they are acquitted, and their conviction under Section 302/149, IPC and the sentence of imprisonment for life thereunder, are set aside. Insofar as accused Nos. 4 to 6 are concerned, they were also convicted under Section 302/140, IPC. The evidence is clearly to the effect that all the three accused used gandasa and inflicted injuries, and they were convicted under Section 302/34, IPC...." *Jadu Yadav* v. *State of Bihar*, AIR 1994 SC 957 (958) : 1994 CrLJ 1209.

[7396] ● ***Intention to cause injury sufficient to cause death in ordinary course of nature not established.***—It was submitted by the learned counsel for the appellant that the intention to cause injury which was found sufficient to cause the death in the ordinary course of nature was not established. In support of this submission, he relied on the circumstances namely that the whole incident took place because of a trivial incident which resulted in a quarrel and that the weapon used was only a lathi and in the circumstances, it cannot be said that the accused intended to cause the death by inflicting that particular injury which objectively was proved by the medical evidence to be sufficient in the ordinary course of nature to cause death. In other words, he submits that clause 3 of Section 300, IPC is not attracted in this case. We find considerable force in the submission.

The weapon used is not a deadly weapon as rightly contended by the learned Counsel. The whole occurrence was a result of a trivial incident and in those circumstances, the accused dealt two blows on the head with a lathi, therefore, it cannot be stated that he intended to cause the injury which is sufficient, at the most it can be said that by inflicting such injuries he had knowledge that he was likely to cause the death, in which case the offence committed by him would be culpable homicide not amounting to murder.

The accused has committed offence under Section 304, Part II, IPC. *Joseph* v. *State of Kerala*, AIR 1994 SC 34 (35-36) : 1995 SCC (Cri) 165 : 1994 CrLJ 21.

[7397] ● ***Murder—Common intention.***—According to the learned counsel for respondents there was no independent charge under Section 302, IPC either against the husband or against the wife. Both were charged under Section 302 read with Section 34, IPC. He states that the element of sharing the common intention by husband and the wife was the core of the charge. The husband having been acquitted and there being no independent charge under Section 302, IPC against the wife she cannot be convicted for the said offence. We see force in the argument advanced by the learned counsel.

Both husband and wife were charged with an offence under Section 302 read with Section 34, IPC. The charge which was based on the common intention of the two failed with the acquittal of the husband and there being no charge under Section 302 *simpliciter* against the wife, she could not be convicted. In any case there is no evidence on the record to show that she independently committed the offence. *State of West Bengal* v. *Vindu Lachmandas Sakhrani*, AIR 1994 SC 772 (773) : 1995 SCC (Cri) 175 : 1994 CrLJ 919.

[7398] ● ***Common intention to cause death.***—To draw an inference under Section 34, IPC, the circumstance should be such as to show that a clear common intention was there and it was shared by all the appellants at least these two, who are before the Court.

If the common intention was to cause the death, it cannot be understood as to why Gian Chand gave only one blow. In view of the fact that the deceased died after two weeks, the death may be because of the intervening cause. So it is difficult to hold that the common intention was to commit the murder. In that view of the matter, the applicants have to be found guilty for their individual acts. *Kishan Chand* v. *State of Punjab*, AIR 1994 SC 32 (34) : 1994 CrLJ 19.

[7399] ● ***Murder—Intention to cause death not spelt out.***—It is not even clear whether the other accused were aware that the appellant was even armed with a knife during the quarrel at 9.30 p.m. or 10 p.m. when the occurrence took place. The Doctor found only one stab injury which unfortunately was on the neck because of the blow landing there. Under these circumstances, it becomes very difficult to hold that he intended to cause that particular injury which was found to be sufficient in the ordinary course of nature to cause death by the Doctor. The cause of death was due to shock and haemorrhage because of the cut cartoid and other surrounding arteries. PW-2's evidence namely that there was a quarrel is also supported by the evidence of PW-3. The evidence of these two witnesses indicate that there was a sudden quarrel. Therefore, the intention to cause that particular injury cannot be spelt out from the act committed by the appellant. *Ranjitsinh Chandrasinh Atodarea* v. *State of Gujarat*, AIR 1994 SC 1060 (1062) : 1994 CrLJ 1425.

[7400] ● ***Common object/intention to cause death—Sharing of.***—The appellants and others were lying in wait; on seeing deceased, A-1 and PW-1 and PW-3 coming in Tonga, exhorted others to attack the deceased. A-1 shot at and A-4 and A-5 attacked fallen deceased with knives and inflicted 5 incise injuries. They shared the common object/intention and they left together. The injuries are very grave injuries which are sufficient to cause death in the ordinary course of nature. Therefore the offence comes within the four corners of Section 300, IPC. The conviction under Section 302 read with Section 149, IPC at any rate read with Section 34 is sustained. *Malkhan Singh* v. *State of Uttar Pradesh*, AIR 1994 SC 1443 (1445) : 1995 Supp (4) SCC 560.

[7401] ● ***Murder—Common intention.***—Having regard to the fact that it was a sudden affair and that A-2 inflicted only a simple injury, it is difficult to hold that he had the common intention with A-1 to commit the murder of the deceased. It would be unsafe to convict A-2, for the offence of murder under Section 302/34, IPC and sentence of imprisonment for life awarded thereunder are set aside. Instead he is convicted under Section 326, IPC and sentenced to undergo rigorous imprisonment for five years. *Babubhai Ranchodbhai Patel* v. *State of Gujarat*, AIR 1994 SC 1400 (1403) : (1994) 1 SCC 410 : (1994) SCC (Cri) 265 : 1994 CrLJ 2099 : 1994 CrLR (SC) 6 : JT 1993 (6) SC 549.

[7402] ● ***Common intention to kill.***—So far as A-3 is concerned, the overt act attributed to her is that she alongwith A-2 caught hold of Ramaswamy and fell him down. The High Court held that she would not have shared the common intention. In our view the same reasoning applies to A-2 so far as the murder charge is concerned. It is only A-1 who inflicted the two fatal blows one on each of the deceased and, therefore, a clear case of murder is made out against him. So far as A-2 is concerned, he inflicted simple injuries with the stick on PW-2 and one on the deceased Ramaswamy. Therefore, common intention to kill the two deceased cannot be made out against him. *Rajagopalaswamy Konar* v. *State of Tamil Nadu*, AIR 1994 SC 1621 : 1995 SCC (Cri) 184 : 1994 CrLJ 2195.

[7403] ● ***Sharing of common intention to commit murder—Inference as to.***—There was no injury which can be attributed to a *lathi* blow on the deceased. It is only on PW-4 that some contusions and swelling could be found by the Doctor and there could not be any doubt that these injuries were caused due to the *lathi* blows. In these circumstances, particularly, having regard to the fact that no *lathi* injury was found on the deceased, then it must be inferred that Rajendra did not cause any injury to the deceased. At the most, it can be said that he inflicted *lathi* blows on PW-4. In the facts and circumstances, it is unsafe to convict Rajendra also under Sections 302/34, IPC holding that he also shared common intention to commit murder with A-1 and A-2, his conviction under Section 325/34, IPC is altered to one punishable under Section 325, IPC and the sentence of one year's rigorous imprisonment is confirmed. *Dharam Pal* v. *State of Uttar Pradesh*, AIR 1995 SC 1988 (1991) : 1995 CrLJ 3642.

[7404] ● ***Common intention to cause injuries to deceased.***—Besides the evidence of PW-1 of their having assaulted the deceased with lathis—which we have found to be unacceptable—there is no other evidence to indicate that they wanted the deceased to be done away with. It cannot be gain said, however, that their acts facilitated the stabbing of the deceased by Badri Narain but there is nothing whatsoever to indicate that the appellants knew that he intended to kill him though they must have anticipated that he would assault the deceased with the spear that he was carrying. In that view of the matter we conclude that though the common intention of the appellants to cause the death of Shyam Narain has not been established beyond all reasonable doubts, it has been conclusively established that their common intention was to cause injuries to the deceased with a deadly weapon namely, spear. In the result the conviction of the appellants under Section 302 read with Section 34, IPC are set aside and instead they are convicted under Section 324 read with Section 34, IPC and sentenced to rigorous imprisonment for a period of two years each. *Jagannath* v. *State of Uttar Pradesh*, AIR 1995 SC 712 : 1995 Supp (1) SCC 564.

[7405] ● ***Common intention to kill.***—On the day of occurrence, Gaya Ram is said to have exhorted the appellants to kill the deceased and it is at his behest that the appellants opened the attack on the deceased killing him mercilessly by brutally causing him 17 injuries more than half of which were serious and two of them fatal on the head of the deceased resulting in extensive fractures of the scalp and injury to the brain tissues. Other injuries were on vital as well as non-vital parts and since some of them were fractures they were grievous. The common intention of the appellant was, thus, more than manifest from the result could achieve. They beat the deceased to pulp. There is no room to entertain the view that the appellants could be guilty of a lesser offence. *Juthel* v. *State of Madhya Pradesh*, AIR 1995 SC 1455 (1456) : (1996) 11 SCC 282 : 1995 CrLJ 2909.

[7406] ● ***Murder—Common intention.***—So far as the three eye-witnesses are concerned, their evidence is quite consistent and acceptable. Their presence in the house was natural. PW-4 immediately after the incidence, contacted Tarsem Singh, went to police station, and lodged the FIR, within an hour. She has stated all the material facts in the FIR. The conduct of this witness and promptness with which the FIR was lodged make her evidence trustworthy. The evidence of PW-5 and PW-7 does not suffer form any serious infirmity and no good reason could be urged by the learned counsel for not relying upon their evidence. Their evidence establishes beyond any reasonable doubt that appellant No. 2 had given blows to the deceased and he died as a result thereof. Appellant No. 2 has been rightly convicted under Section 302, IPC. So far as appellant No. 1 is concerned, there is no sufficient evidence to sustain her conviction under Section 302/34, IPC. What the evidence of the three eye-witnesses establish is that immediately before the incident she had whispered something in the ears of her husband, appellant No. 2, had given him a bundle of new clothes, and had told him as to what he was looking for. From their evidence it cannot be inferred, that she had incited him to commit the murder of his brother. Therefore, her conviction under Section 302/34 is not at all proper and that she deserves to be acquitted. *Jaswinder Kaur* v. *State of Punjab*, AIR 1995 SC 2327 : 1995 CrLJ 3982 : (1995) 3 Crimes 396.

[7407] ● ***Common intention—Circumstance and evidence of eye-witness sufficient to infer.***—"Senior counsel appearing for accused, however contended that when there was only one gun shot wound on the deceased and the prosecution evidence is to the effect that Tej Pal also used a gun and in the absence of any second injury it cannot be said definitely as to which one of them caused the fatal injury to the deceased and that the circumstance that only one empty cartridge was recovered from the scene of occurrence shows that one shot was fired and since it cannot be attributed to Dharampal specifiedly, it is unsafe to convict him under Section 302/34, IPC. We have examined this submission carefully. We find from the evidence of the eye-witnesses that both of them fired guns. May be that one of the shots fired by either of them might have missed the target. For inferring common intention, the fact that both of them used their guns and fired at the deceased by itself is a circumstance which is sufficient to draw an inference that there was a common intention." *Dharam Pal* v. *State of Uttar Pradesh*, AIR 1995 SC 1988 (1990) : 1995 CrLJ 3642.

[7408] ● ***Murder—Proof—Common intention.***—The appellant was tried with other accrued persons under Section 302 read with Section 34, IPC. The other accused have been acquitted. The doctor found four injuries on deceased caused by firearm collectively sufficient in ordinary course of nature to cause death. The doctor refused to opine that two injuries attributed to appellant's firing were sufficient to cause death, the appellant cannot be convicted under Section 302, IPC. He can be convicted under Section 326, IPC. *Gurdial Singh* v. *State of Punjab*, AIR 1995 SC 2468 : 1995 Supp (3) SCC 451 : (1995) SCC (Cri) 947 : 1995 CrLJ 4171 (SC) : (1995) 3 Crimes 615 (SC) : JT 1995 (6) SC 140 : 1995 (4) Scale 837 : 1995 (4) CCR (SC) 37.

[7409] ● ***Common intention of unlawful assembly to cause single hurt.***—If really a mob of 50-60 persons wanted to commit murders nothing prevented them from inflicting severe injuries on the persons of Govindbhai and the two victims, more so, when some of them were armed with sharp cutting and dangerous weapons the fact that the accused appellants Nos. 1 and 2 used blunt edges of the weapons and not their sharp-edges, goes a long way to show that they did not also share a common intention to kill Govindbhai when they assaulted him. The facts and circumstances of the case particularly the fact that most of the members of the assembly only carried ordinary sticks, a few of which, according to the prosecution were recovered from the houses of the accused-appellants clearly indicated that the common object of the unlawful assembly was only to cause simple hurt. *Bharwad Jakshibhai Nagjibhai* v. *State of Gujarat*, AIR 1995 SC 2505 : (1995) 5 SCC 602 : 1995 CrLJ 4176.

[7410] ● ***Common intention conviction sustainability.***—In *Willie (William) Slaney* v. *State of M.P.*, AIR 1956 SC 116 : (1955) 2 SCR 1140, this Court spelt out the scope of Sections 34 and 149, IPC. There the charge was under Section 302/34, IPC but the only co-accused having been acquitted, the conviction of the left out accused, who was the appellant, was challenged on the ground that the element of common intention having got dropped out, the conviction of the appellant was not sustainable. That the omission to frame a charge or the departure from the charge cannot invalidate conviction unless prejudice has been caused. We would say the same about alternative charge in the present case. *Jai Singh alias Bandu* v. *State of Maharashtra*, (1996) SCC (Cri) 672 : JT 1996 (4) SC 728 : (1996) 2 Crimes 127.

[7411] ● ***No material showing accused having common intention to cause death.***—Amrik Singh was an intervenor and as such Section 34 of the IPC would not be attracted against Roor Singh. It was Baldev Singh alone who caused injuries to Amrik Singh resulting in his death.

The injuries inflicted on the thigh of Amrik Singh by Baldev Singh have not been proved to be serious or fatal and Amrik Singh died nearly 8 days after the incident on account of cumulative effect of the injuries. The passage of time should have its impact in taking an over all view of the matter. The appellants have served the sentence of imprisonment for more than two years.

That the appellants are found guilty and sentenced under Section 299 read with Section 304, Part 1 of the IPC to a term of imprisonment, which will be limited to the period they have already undergone for causing the death of Balbir Singh and Amrik Singh. *Baldev Singh* v. *State of Punjab*, AIR 1996 SC 372 : (1995) 6 SCC 593 : (1995) SCC (Cri) 1132 : JT 1995 (7) SC 286.

[7412] ● ***Common intention sharing of with main perpetrators of crime.***—If the Court enters upon a finding that any of the remaining persons who participated in the crime had shared common intention with the main perpetrators of the crime, the Court is not helpless in seeking the aid of Section 34, IPC to enter a conviction against such persons arraigned as accused. This is despite the difference between the scope of Section 34 and Section 149, IPC, yet this have some resemblance between each other and are to some extent overlapping. *Dhanna* v. *State of Madhya Pradesh*, AIR 1996 SC 2478 (2480) : (1996) 10 SCC 79 : (1996) SCC (Cri) 1192 : 1996 CrLJ 3516 : JT 1996 (6) SC 652.

[7413] ● ***Court to take recourse to Section 34 even if Section not specifically mentioned in charge.***—It is open to the Court to take recourse to Section 34 of the IPC even if the said section was not specifically mentioned in the charge and instead Section 149, IPC has been included. Of course, a finding that the assailant concerned had a common intention with the other accused is necessary for resorting to such a course. *Dhanna* v. *State of Madhya Pradesh*, AIR 1996 SC 2478 (2480) : (1996) 10 SCC 79 : (1996) SCC (Cri) 1192 : 1996 CrLJ 3516 : JT 1996 (6) SC 652.

[7414] ● ***Murder—Common intention.***—In the context of the evidence of PWs-4 and 6 that the appellant had fired on the back of the deceased Sukhdev Singh, the appellant can, therefore, be said to have caused injuries Nos. 2 and 3 and the other injury which according to the Doctor was fatal, was caused by the shot fired by Sukhwinder Singh. Since, however, Sukhwinder Singh stands acquitted, Section 34, IPC would have no application whatsoever and the appellant will be liable only for his act, namely, causing injuries Nos. 2 and 3, which was the result of one shot and by themselves, did not cause the death of Sukhwinder Singh. Resultantly, the appellant cannot be convicted for the offence under Section 302, IPC but as he had fired at Sukhdev Singh with rifle he cannot escape his conviction for the attempt to commit his murder. *Jarnail Singh* v. *State of Punjab*, AIR 1996 SC 755 (757) : (1996) 1 SCC 527 : (1996) SCC (Cri) 146 : JT 1995 (8) SC 279.

[7415] ● ***Murder common intention—Sharing of.***—The evidence of PW-1 as to the manner in which D-1 and D-2 were done to death is also corroborated by the evidence of PW-2 in all material particulars including the individual roles that were played by A-2 to A-6 in the murder of D-2. In cross-examination however, it was elicited from him that he did not mention in his statement made under Section 161, CrPC, that D-2 was made to lie down on the log of wood and also did not state that A-3 to A-6 caught hold of him when A-2 struck him with billhook. If in view of the omissions—which, obviously are material and, therefore, amount to contradictions—we proceed on the basis that the evidence of PW-2 and also PW-3—about whose similar omissions—regarding individual roles of the appellants in the murder of D-2 cannot be relied upon, still the fact remains that there is no such contradictions so far as their testimonies seek to prove that A-3 to A-6 chased D-2 and PW-2 when they were rushing for their lives, with billhooks, that A-1 and A-2 joined them and that thereafter A-1 to A-6 caught hold of D-2 and A-2 assaulted him. The consistent evidence of the three eyewitnesses in this regard, coupled with the uncontroverted fact that D-2 met with his death there with a number of injuries unmistakably proves, independent of the actual role of the six appellants in the assault itself, that all of them shared the common intention to commit the murder. To put it differently, even if it is assumed that the prosecution has failed to conclusively prove as to the actual manner in which the appellants brought about the death of D-2, still the circumstances as appearing in the evidence of the three eyewitnesses establishes that all of them shared the common intention to commit the murder. *Golla*

Jalla Reddy v. *State of Andhra Pradesh*, AIR 1996 SC 3244 : (1996) 8 SCC 565 : (1996) SCC (Cri) 713 (720-721) : 1996 CrLJ 2470 : JT 1996 (4) SC 587.

[7416] ● ***Murder—Common intention.***—Once it is found that appellants entered the "baithak" of witness Ram Pal armed with lathis in company of accused Chandgi and Likhi and facilitated the attack by Likhi and Chandgi on the witnesses and the two deceased, it cannot be urged that they did not share the common intention of murdering the concerned victims of their assault. Section 302 read with Section 34, IPC would squarely get attracted against the present appellants alongwith accused Likhi and Chandgi who actually mounted the assault on these victims in company of the present appellants. *Hari Chand* v. *State of Delhi*, AIR 1996 SC 1477 (1483) : (1996) 9 SCC 112 : (1996) SCC (Cri) 950 : 1996 CrLJ 1701 : JT 1996 (2) SC 140.

[7417] ● ***Common intention—Murder— Establishment of commission of overt act.***—Establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch as this section gets attracted when a criminal act is done by several persons in furtherance of common intention of all. What has to be, therefore established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when overt act is established *qua* each of the accused. But then there may be a case where the proved facts would themselves speak of sharing of common intention. In the instant case, the appellant was a school teacher. He was supposed to be armed with a pen and not a knife. He would be normally found in his school and not on a road at night, and that too in the company of another who was also armed with knife. Not only this, seeing the deceased coming, the appellant and the co-accused came out from behind a tree and proclaimed to the deceased they were waiting for him. Thereafter, the deceased was belaboured, and let it be conceded, only by the co-accused. Question is whether the appellant had also the intention which had animated the co-accused in causing the death? It would definitely be permissible to draw the inference that both the accused had shared a common intention and the criminal act in question had been done in furtherance of the intention. Section 34 does not require anything more to get attracted. *Krishnan* v. *State of Kerala*, AIR 1997 SC 383 : 1996 (10) SCC 508, 613 : (1996) SCC (Cri) 1375 : 1996 CrLJ 4444 : JT 1996 (7) SC 613 : 1996 (3) SCJ 173 : 1996 (4) CCR 58 (SC) : 1996 (6) Scale 362.

[7418] ● ***Assault—Common intention.***—The very nature of the assault and the injuries sustained by Bakhtawar Singh (deceased) unmistakably prove the common intention of the assailants. The common intention is to be gathered from the proved facts/circumstances. The evidence of PW-7 and PW-8 clearly indicate that Pritam Singh (A-4) held Bakhtawar Singh from his waist which facilitated A-1 to A-3 to cause assault on him with sticks. Even after Bakhtawar Singh fell down, A-1 to A-3 continued to assault him. In these circumstances there could not be better evidence of common intention. In the facts and circumstances of this case the High Court was totally wrong in altering the conviction of A-1 to A-4 from Section 302/34, IPC to Section 325/34, IPC. *State of Punjab* v. *Amarjit Singh*, AIR 1997 SC 167 (169) : (1996) 11 SCC 524 : (1997) SCC (Cri) 321 : 1997 CrLJ 67 : 1997 CrLR (SC) 54 : JT 1996 (9) SC 581.

[7419] ● ***Murder—Common intention.***—According to PWs-3 and 8 at the time of assault A-4 was standing with a knife From the cross-examination of PW-3, we, however, find that before the Investigating Officer he did not state that A-4 was holding a knife in his hand though he spoke of his presence. Even if we proceed on the assumption that A-4 was there with knife still we feel that we will not be justified in reaching the firm conclusion that he shared the common intention with A-1 to A-3 to commit the murder. As earlier noticed, the deceased had sustained 55 incised injuries on his person which indicates that A-1 to A-3 had given repeated blows upon him for sometime. Considered in that context, it was expected of A-4, if really he was sharing the common intention of the other three to commit the murder, to assault the deceased with the knife he was allegedly carrying. He is, therefore, entitled to at least the benefit of reasonable doubt. *Chhota* v. *State of Maharashtra*, AIR 1997 SC 3501 (3505) : (1997) SCC (Cri) 1143 : 1997 CrLJ 4394 : JT 1997 (7) SC 565 : (1997) 3 Crimes 259.

[7420] ● ***Common intention to kill—Sharing of with co-accused.***—The evidence on record unmistakably proved that while discharging his duties at the cinema hall the Head Constable asked the accused persons not to misbehave with the ladies who were enjoying the movie. Inspite repeated requests the accused persons did not desist from behaving in an objectionable manner. The Head Constable along with another Head Constable whose service he requisitioned tried to apprehend the accused person, one of the accused jumped into the lorry tanker and brought out the wooden lathi obviously to assault the Head constable, simply because he did not assault the deceased with the lathi but another accused did after snatching it from him it cannot be said that he was not a party thereto : he was held to have shared the common intention. *Bhuupinder Singh* v. *State of Haryana*, AIR 1997 SC 642 : 1997 CrLJ 958 : JT 1996 (11) SC 720 : 1997 (1) Crimes 89 (SC).

[7421] ● ***Common intention—Murderous assault.***—Appellant No. 2, according to the evidence of the eye-witnesses, had given sticks blows on the legs of the deceased. Though the eye-witnesses have also stated that some more blows were also given by him to Babu after he had fallen down, they have not stated on which part of the body those blows were given. Thus, there is no clear evidence on record to show that appellant No. 2 had caused a fatal injury. Therefore, conviction of appellant No. 2 under Section 302 cannot be sustained. However, his participation in the murderous assault on Babu along with appellant No. 1 is proved beyond any doubt and, therefore he would be guilty under Section 302 read with Section 34, IPC. Therefore, his conviction will have to be altered from Section 302 to Section 302 read with Section 34, IPC. However, the order of sentence imposed upon him is confirmed. *Hari Singh* v. *State of Rajasthan*, AIR 1997 SC 1505 (1508) : (1996) 11 SCC 551 : 1997 CrLJ 733 : JT 1996 (9) SC 335.

[7422] ● ***Unlawful assembly—Common object to commit murder.***—It is no doubt true that the eye-witnesses had deposed that A-34, A-35 and A-36 were the members of the unlawful assembly/riotous mob which was chasing the deceased and the other injured persons of the Vankar community from the bus stand until they reached Vankarvas but when the mob came near the house of Vinobhai, these three accused persons went to the house of Vinobhai and thereafter set his house on fire and other members of the riotous mob continued to chase Vankars and thereafter they heard the firing sounds coming from that direction. The question that needs to be answered on these proved facts is as to whether A-34, A-35 and A-36 could be said to have shared the common object of committing murders with A-19, A-20 and A-21 who fired from their fire-arms killing Prabhudas and Pochabhai as also other appellants who caused an assault on Khodabhai and Mohanbhai with the deadly weapons as a result of which they also died on the spot. On the evidence on record, we find, it cannot be said to be conclusively established that A-34, A-35 and A-36 also shared the common object to commit the murders of four persons. The time factor in this behalf assumes great importance because when A-34, A-35 and A-36 were engaged in setting the house of Vinobhai on fire, the other appellants committed the murders of four persons by using fire arms and other deadly weapons. The Trial Court convicted A-34, A-35 and A-36 for committing the murders of Prabhubhai, Pochabhai, Khodabhai and Mohanbhai with the aid of both Section 149/34, IPC. The conviction and sentence of A-34, A-35 and A-36 under Section 302/149 or 34, IPC is quashed. However their conviction and sentences under Section 436/34, IPC is upheld. *State of Gujarat* v. *Chandubhai Malubhai Parmar*, AIR 1997 SC 1422 (1428, 1429) : (1997) 9 SCC 485 : (1997) SCC (Cri) 661 : 1997 CrLJ 1909 : JT 1997 (4) SC 481.

[7423] ● ***Dacoity with murder—Proof of common intention or common object of all not necessary.***—Under Section 396, if any one of the dacoits commits murder in so committing dacoity every one of the dacoits is liable to be punished either with death or imprisonment for life or rigorous imprisonment for a term which may extend to 10 years. If a dacoit in the process of and in pursuance of, the commission of a dacoity commits a murder, all of his companions who are participating in the commission of the same dacoity may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity. It is not necessary that the murder should have been within the contemplation of all or some of them when the dacoity was planned nor is it necessary that they should have actually taken part in or abetted, its commission indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be or had in fact been committed. But nonetheless they all will be liable for enhanced punishment provided a person is in fact murdered by one of the members of the gang in commission of the dacoity. *Kalika Tewari* v. *State of Bihar*, AIR 1997 SC 2186 : 1997 (4) SCC 445 : 1997 CrLJ 2531 : 1997 (2) Crimes (SC) 15 : 1997 (3) Scale 282 : 1997 (3) Supreme 397.

[7424] ● ***Common intention implies pre-arranged plan.***—Usually the common intention implies a pre-arranged plan which in turn press possess a prior meeting of mind. But in a given case such common intention may develop at the spur of moment in course of the commission of offence. But such intention which develops at the spur of moment is different from a similar intention. The distinction between a common intention and a similar intention may be fine but is nonetheless a real one and if overlooked may lead to miscarriage of justice. Unless such common intention is established as a matter of necessary inference from the proved circumstances of the case, then the accused could be individually liable for their respective overt attacks and not for the act done by any other person. The mere fact that the accused persons were armed with some weapons itself would not be sufficient to attribute common intention of all of them to commit murder. In the instant case the accused persons came to prevent the labours from continuing the transplantation operation but at the spur of moment on account of certain lalkara being given by some of the accused persons, person armed with weapon started assaulting the deceased. But from mere assault even not on vital parts of the body which ultimately resulted in causing some minor injuries, it may not be sufficient to establish beyond reasonable doubt that they also shared a common intention of causing murder. The conviction of accused under Sections 302/34 could not, therefore, be sustained and they were held liable under Sections 325/34. The accused who fired in their hands first whereafter all others assaulted with the respective weapons in their hands were held liable under Sections 302/34, IPC. *Dukhmochan Pandey* v. *State of Bihar*, AIR 1998 SC 40 : (1997) 8 SCC 405 : 1998 CrLJ 66 (SC).

[7425] ● ***Accused while firing not acting in furtherance of common intention.***—There was nothing in the evidence of the eye-witnesses on the basis of which the respondents could have been held guilty for causing the murders of those five persons, on the contrary their evidence supported the defence version. The respondents had merely stated in the statements under Section 313, CrPC that they had fired shots in self-defence without admitting that any of their shots had hit anyone from the opposite party. There was no material before the Court on the basis of which it was possible to say who had caused whose death. There was no material before the Court on the basis of which it could have been said that while firing shots from the guns, they were acting in furtherance of their common intention. Thus, in absence of any reliable evidence, it was not proper to convict the respondents in this case for causing the deaths of those five persons. *Harjinder Singh* v. *Karnail Singh*, AIR 1998 SC 1936 (1937) : (1998) SCC (Cri) 1598 : 1998 CrLJ 2556 : 1998 CrLR (SC) 286 : JT 1998 (2) SC 437 : (1998) 1 Crimes 281.

[7426] ● ***Murder—Common intention.***—'*H*' had not only come out of the house of '*T*' along with him but had also taken part in the assault on '*B*' even though he was not attacked either by '*B*' or any other person accompanying him. It was not '*H*' that he had intervened in that manner to stop '*T*' and '*B*' from fighting. Moreover from the words uttered by '*H*' namely, that '*T*' should not wait any more and fire at '*B*' it becomes apparent that both '*T*' and '*H*' share the common intention that a shot be fired by '*T*' at '*B*'. It was in pursuance of this common intention that '*T*' had fired the shot which killed '*B*'. Both the Courts were, therefore, right in drawing an inference from these facts that both '*H*' and '*T*' had entertained a common intention to cause death of '*B*'. *Harpal Singh* v. *State of Haryana*, AIR 1998 SC 1553 : 1998 CrLJ 1563 at p. 1564 (SC) (P&H) : 1997 (7) Scale 625 : 1997 (10) Supreme 404.

[7427] ● ***Murder committing of in furtherance of common intention.***—Coming first to the evidence of PW-1 this Court finds that he has narrated the entire prosecution case detailed earlier. Next, the unimpeachable evidence of PW-10, who examined him at the Kakinada Hospital at 10.50 p.m. on July 31st, 1992 proves that he had six injuries on his person. PW-10 opined that all the injuries were fresh and one of them (injury No. 6) was grievous. According to him some of the injuries could be caused by axe and knife. The injuries found on the person of PW-1 fully supports his claim of having been present at the scene of offence. Then again, in view of the concurrent finding of the learned Courts below that the evidence adduced by the tow doctors who were examined as defence witnesses, namely DW-4 and DW-5 could not be relied upon a finding with which we are in complete agreement it must be said that the FIR was lodged at the earliest available opportunity. This is another circumstance to corroborate the evidence (of) PW-1. The evidence of other three witnesses, namely PWs-2, 3 and 4 fully support that of PW-1 and in spite of searching cross examination the defence could not make a dent in their evidence to discredit them. The evidence of the four eye-witnesses clearly establishes that the accused persons came there armed with various weapons and all of them participated in the murder of Buchi Reddy. 18 injuries of different nature, shapes and sizes all over his body, which resulted in his immediate death, as testified by PW-9, go a long way to support the version of all the eye-witnesses as to the manner in which the assault took place. *Kovvuri Surya Bhaskara Reddy* v. *State of Andhra Pradesh*, AIR 1998 SC 1570 : 1998 (9) SCC 504 : 1998 CrLJ 1628 at p. 1632, 1633 (SC) : JT 1998 (2) SC 275 : 1998 (1) Crimes 260 (SC) : 1998 (3) SLT 391 : 1998 (1) CCR 375 (SC) : 1998 (2) Supreme 407 : 1998 (2) Scale 178.

[7428] ● ***Common intention—Inference that persons kidnapping killed victim be drawn.***—The prosecution case against the appellants was that they alongwith six other accused had committed the offences. There is no evidence to show that any of the appellants had himself killed any of the deceased. Therefore, the Designated Court in stead of convicting under Section 302, should have convicted them for the offence punishable under Section 302 read with Section 34, IPC. *Gurnam Singh* v. *State of Punjab*, AIR 1998 SC 2673 (2676) : (1998) 7 SCC 722 : 1998 CrLJ 4024 : 1998 CrLR (SC) 597 : JT 1998 (5) SC 444.

[7429] ● ***Common intention murder.***—A-1 gave a gandasa blow from sharp side on the right side of the head of 'K'. A-2 then assaulted 'K' with his gandasa on the backside near the shoulder of 'K' and when he fell down, A-1 gave another gandasa blow near his right ear. These circumstances, therefore, unmistakably indicated that both the accused had a common intention to teach a lesson to 'K' who had slapped A-1 on the previous night. From these proved facts, the only inference that must follow is that A-2 also shared a common intention to teach a lesson to 'K' and in pursuance thereof assaulted him with a gandasa. A strong reliance was placed on the fact that no blood-stains was found on the gandasa recovered at the instance of A-2 but there is positive evidence on the record that the gandasa was washed before the recovery was effected. If this be so, in considered view of the Apex Court was rightly convicted under Section 302/34 of IPC. *Charan Singh* v. *State of Punjab*, AIR 1998 SC 323 : 1998 CrLJ 657 at 661 (SC) : (1997) 4 Crimes 147.

[7430] ● ***Accused acting in concert in furtherance of common intention.***—The evidence of four witnesses, clearly establishes that Mahmood died as a result of the shots fired by Ali Ahmad and Mahmod Sher and that Jameelan and Nanhey received injuries as a result of the shots fired by those two accused. The manner in which the appellants had assaulted Nathu initially and chased him right up to the house of Mahmood, their entering the house of Mahmood and then firing shots at him and his wife and child, when Mahmood had protested, clearly indicate that both Ali Ahmad and Mahmod Sher had acted in concert and it was in furtherance of their common intention that they had caused death of Mahmood and bodily injuries to Jameelan and Nanhey. The High Court was, therefore, right in convicting Ali Ahmad and Mahmod Sher for the offences punishable under Section 302 read with Section 34, IPC and Section 307 read with Section 34, IPC. The other three accused were rightly convicted under Section 324 read with Section 149, IPC only. *Ali Ahmad* v. *State of Uttar Pradesh*, AIR 1998 SC 1232 (1233) : 1998 CrLJ 1637 : 1998 CrLR (SC) 527 : JT 1998 (2) SC 241 : (1998) 1 Crimes 211.

[7431] ● ***Murder—Charge.***—The evidence clearly establishes that both the appellants had gone together to the Haveli and had fired shots at the deceased. Gajjan Singh was charged with an offence punishable under Section 302 read with Section 149, IPC. Therefore, the Courts below have not committed any illegality or impropriety in convicting him under Section 302 read with Section 34, IPC. *Gajjan Singh* v. *State of Punjab*, AIR 1998 SC 2417 (2418) : (1998) SCC (Cri) 1603 : 1998 CrLJ 3609 : 1998 CrLR (SC) 466 : JT 1998 (4) SC 520 : (1998) 3 Crimes 34.

[7432] ● ***Common intention—Proof.***—In the instant case, it is stated that the deceased alone was assaulted by Nizamuddin with knife and Siddiqui with jathi. The appellant dealt blows with *lathi* not to the deceased but to other witnesses. There is no direct evidence of common intention. There is no case nor evidence of exhortation by him or of the fact that with a view to keep the said witnesses away from interfering and to facilitate Nizamuddin to kill the deceased, the appellant assaulted the said witnesses. Having regard to the facts and circumstances of the case, it is not possible to arrive at the conclusion that the appellant and others shared common intention to kill the deceased-Shaukat Ali. Consequently, we are unable to sustain the conviction of the appellant for the offence under Section 302/34, IPC. However, on the facts, we confirm the conviction and sentence under Section 323/34, IPC awarded by the Courts below. *Badruddin* v. *State of Uttar Pradesh*, AIR 1998 SC 3243 (3244) : (1998) 7 SCC 300 : (1998) SCC (Cri) 1619 : 1998 CrLJ 4591 : 1998 CrLR (SC) 674 : JT 1998 (6) SC 488 : (1998) 3 Crimes 256.

[7433] ● ***Murder—Common intention.***—The graveness of the charge against the appellant and two others, namely, Daljeet Singh and Ganeshi was that the said three persons came on motorcycle; Ganeshi and the other caught hold of Kailash Soni and exhorted Daljeet Singh to strike him on that Daljeet Singh have 2-3 blows with his Kripan to Kailash Soni which resulted in his instantaneous death. From the averments on the FIR as well as from the statement of PW-1, it cannot be said that the appellant had shared common intention to kill the deceased. The appellant might not have been known that Daljeet Singh was having a kripan under his stockings. The instigation was only "to strike" and as such his conviction under Section 302 read with Section 34, IPC is not sustainable. See *Jai Narain Mishra* v. *State of Bihar*, AIR 1972 SC 1764 and

Mata Din v. *State of Maharashtra*, JT 1998 (5) SC 264. The conviction of the appellant under Section 302/34, IPC is, therefore, set aside; instead he is convicted under Section 324 read with Section 110, IPC and sentenced to the period already undergone. *Ajay Sharma* v. *State of Rajasthan*, AIR 1998 SC 2798 (2799) : (1999) 1 SCC 174 : 1998 CrLJ 4590 : 1998 CrLR (SC) 667 : JT 1998 (6) SC 378.

[7434] ● ***Common intention—Murder.***—For an inference of common intention to be drawn for the purposes of Section 34 the evidence and circumstances of the case should establish, without any room for doubt that a meeting of minds and a fusion of ideas had taken place amongst different accused and in prosecution if the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence there is doubt as to the involvement of a particular accused in the common intention, the benefit of the doubt should be given to the said accused persons. There is no dispute with the proposition that a common intention can develop at the spur of the moment. *Brijlala Prasad Sinha* v. *State of Bihar*, AIR 1998 SC 2443 (2453) : (1998) 5 SCC 69 : (1999) SCC (Cri) 1382 : 1998 CrLJ 3611 : 1998 CrLR (SC) 512 : JT 1998 (4) SC 534.

[7435] ● ***Common intention to kill victims.***—At least there is nothing in the evidence of PWs-7 and 8 to indicate that the police personnel left the Police station on being informed that miscreants are speeding up in a Maruti Van with the intention of killing the miscreants. All the accused persons excepting Brijlala Prasad left together in a vehicle with their arms and ammunitions on being informed that some miscreants are speeding up in a Maruti Van. The police personnel chased the vehicle and fired indiscriminately on vehicles and killed three occupants of the vehicle. However as per available evidence the two accused police persons had fired at the occupants of the vehicle when it came to stop due to traffic jam. The accused had developed common intention to kill the victims and were convicted under Section 302/34, IPC. It is, of course, true that when the Police party came, Brijlala Prasad also came together and the three dead bodies had been brought by them. The only evidence which possibly can be said to have been established, so far as accused-Brijlala Prasad is concerned, is that there was some shortage of cartridges which had been supplied to him and no explanation had been offered by him. But merely for such shortage of 9 rounds of cartridges, which had been supplied to Brijlala Prasad, a year before the date of occurrence, it is difficult to come to the conclusion that at 71 Mile Post, Brijlala Prasad who left the Police station half-an-hour after Dudh Nath Ram and others had left, had at all used his revolver and, therefore, from the circumstances established against Brijlala Prasad it is difficult to hold that he also shared the common intention which developed at 71 Mile Post. *Brijlala Prasad Sinha* v. *State of Bihar*, AIR 1998 SC 2443 : (1998) 5 SCC 699 : (1999) SCC (Cri) 1382 : 1998 CrLJ 3611 : 1998 CrLR (SC) 512 : JT 1998 (4) SC 534.

[7436] ● ***Common intention inference of.***—To apply Section 34, IPC, apart from the fact that there should be two or more accused, two factors must be established:

(i) common intention, and

(ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of common intention. It has to be inferred from the facts and circumstances of each case. *Jai Bhagwan* v. *State of Haryana*, AIR 1999 SC 1083 : (1999) 3 SCC 102 : (1999) SCC (Cri) 388 (393) : 1999 CrLJ 1634 : 1999 CrLR (SC) 118 : JT 1999 (1) SC 386.

[7437] ● ***Co-accused intended to cause grievous hurt not death.***—Undoubtedly, the appellants had gone together to the house of the deceased armed with deadly weapons and attacked him, but according to the evidence of the two eye-witnesses, Jagtar Singh assaulted Naib Singh on his left ankle with the weapon he was carrying. From this circumstance and the other attending facts and circumstances appearing on record, it can only be said that Jagtar Singh intended to cause grievous hurt to Naib Singh and not to cause his death. *Jagtar Singh* v. *State of Punjab*, AIR 1999 SC 75 : (1999) 2 SCC 174 : 1999 SCC (Cri) 120 (122) : 1999 CrLJ 20 : 1998 CrLR (SC) 758 : JT 1998 (7) SC 442.

[7438] ● ***Common intention—No sharing of.***—It was submitted that there was no meditation no enmity and Matadin never intended to cause death. It was submitted that when he exhorted his fellow by saying "maro sale ko" he did not intend that the deceased should be killed. Reliance was placed on the statement of the deceased recorded by the police and the Magistrate. The version of the prosecution that he gave blow with "*gupti*" on the back of the deceased had been disbelieved. But then Matadin would be aware of the fact that Ramsingh was wearing button knife on his waist and on this exhortation, he used the same by stabbing the deceased. He might not be sharing a common intention with Ramsingh to cause death of Ashok but the circumstances of the case and particularly when the Trial Court itself found that by his words "*maro sale ko*" instigated Ramsingh and others to assault Ashok, he could nevertheless be guilty for abetment of an offence under Section 324 in view of Section 110, IPC.

The prosecution has failed to prove that the other two accused were also with the appellant and had participated in commission of the offence. In absence of any reliable evidence whether any one else was with the appellant and under what circumstances and by whom further blows were given to the deceased, it cannot be said that the appellant had killed the deceased in furtherance of common intention of himself and some others. Therefore, in view of the facts and circumstances of the case, it was not proper and legal to confirm the conviction of the appellant under Section 302 read with Section 304, IPC. *Ramchandra Ohdar* v. *State of Bihar*, AIR 1999 SC 998 : (1999) SCC (Cri) 462 (463) : 1999 CrLJ 1449 : 1999 CrLR (SC) 135 : JT 1999 (1) SC 450.

[7439] ● ***Murder—Accused not having common intention.***—The learned Counsel for the appellant rightly pointed out that the prosecution version with regard to the part played by A-2, A-3 is inconsistent. Some witnesses deposed that the deceased informed that accused Nos. 2 and 3 surrounded him while other witnesses deposed that the deceased told that they gave fist blows or slaps while some witnesses state that the deceased told that Tulsi Sonar and Satan Yadav caught hold of the deceased. Considering the aforesaid inconsistencies in the dying declaration with regard to the part played by A-2 and A-3, it cannot be said that prosecution has proved beyond reasonable doubt that A-2 and A-3 are guilty for the offence punishable under Section 302 read with Section 34, IPC. *Paras Yadav* v. *State of Bihar*, AIR 1999 SC 644 : (1999) 2 SCC 126 : (1999) SCC (Cri) 104 (108) : 1999 CrLJ 1122.

[7440] ● ***Common intention implies acting in concert.***—The common intention implies acting in concert, existence of pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it pre-supposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be a pre-arrangement or pre-meditated concert. From the mere fact that accused 'Ram Pravesh and Ramanand came from behind and caught hold of Tapeshwar whereafter Samunder Yadav and Sheo Layak Yadav came with *gandasa* in their hands and gave blows by means of '*gandasa*', it cannot be said that the accused Ram Pravesh Yadav and Ramanand shared the common intention with accused Samundar Yadav and Sheo Layak Yadav. *Ramashish Yadav* v. *State of Bihar*, AIR 1999 SC 3830 (3832) : (1999) 8 SCC 555 : (2000) SCC (Cri) 9 : 2000 CrLJ 12 : 1999 CrLR (SC) 665 : JT 1999 (6) SC 560.

[7441] ● ***Necessary ingredients of common intention.***—On the own showing of the Trial Court, the appellants were merely standing when the act of murder was committed by the other four. Indeed no evidence was laid by the prosecution to prove that any of the appellants committed any criminal act which resulted in the death of the victim. The reliance of the Trial Court on *Mer Dhana Sida*, 1985 SCC (Cri) 54 was wholly misplaced for in that case the persons who were convicted under Section 304 (II)/34, IPC committed a criminal act, in that, they assaulted the deceased. We do not, however, find any such infirmity in the conviction of some of the appellants under Section 323/34, IPC as their participation in the assault of one of the prosecution witness stands fully established. We, therefore, allow the appeal in part by setting aside the conviction and sentence of the appellants under Section 304 (II)/34, IPC, while maintaining the conviction and sentence for the offence under Section 323/34, IPC. *Chandrakant Murgyappa Umrani* v. *State of Maharashtra*, AIR 1999 SC 1557 : (1998) SCC (Cri) 698 (699).

[7442] ● ***Common intention sharing of with other accused—Inference as to.***—It was the definite case of the prosecution that Debjani died as a result of beating. Neither Jagdish (PW-19) nor Shanti (PW-20) have deposed that Sumitra had taken part in beating Debjani. What they have stated is that about 4 O'clock when Debjani was being beaten by her husband and father-in-law Sumitra was also seen standing outside that room alongwith other family members. This was the only evidence laid by the prosecution to prove the involvement of Sumitra. Mere presence of these persons near the place of the incident cannot lead to an inference that they shared the common intention with the other two accused as they were also residing in that house. They had not entered the room of Debajni at 4 O'clock when the beating took place or thereafter. They had remained standing outside the room. As something was happening in the room of Debajani, it was quite natural for the other family members to go near that place and see what had happened. Merely because they did not try to prevent the other two accused from beating Debjani, no inference of sharing the intention of beating her to death can be inferred in view of their relationship with them and their indifferent attitude toward Debajani. The only positive act alleged against Sumitra is that she had told Jagdish and Shanti to go away from that place. On the basis of this circumstance it would not be reasonable to jump, to the conclusion that she also intended that Debjani be killed on that day. *Sumitra Banik* v. *State of West Bengal*, AIR 1999 SC 2594 : (1999) 9 SCC 24 : 1999 CrLJ 4057 : 1999 CrLR (SC) 496 : JT 1999 (5) SC 362.

[7443] ● ***Common intention—Inference as to.***—It was contended by the learned Counsel for the appellant that even if the evidence of the three witnesses is believed, it does not constitute an offence punishable under Section 302, read with Section 34 of the IPC so far as the appellant is concerned. Learned Counsel submitted that in the case regarding possession of a fire-arm by the appellant, he has been acquitted, but that by itself cannot lead to an inference that he did not have common intention with the other accused in respect of what they did on that night. In this behalf learned counsel for the appellant drew our attention to the omission that PW-2 had not stated to the police that the accused Pal Singh had instigated Suba Singh to open fire on Mukhtiar Singh when he refused to part with his tractor. The evidence clearly establishes that both the accused had gone together to the house of Mukhtiar Singh. They had scaled the wall of the courtyard and gone inside his house. At that time Suba Singh was armed with a firearm—an A.K. 56 rifle. They had gone there to take away the tractor of Mukhtiar Singh. When Mukhtiar Singh refused to give it Suba Singh fired a shot and killed him. Both the accused then started running away. This evidence clearly establishes the presence and participation of the applicant in the commission of the crime and sharing of common intention. He has therefore, been rightly convicted for the offence punishable under Section 302 read with Section 34, IPC. *Pal Singh* v. *State of Punjab*, AIR 1999 SC 2548 : (1999) SCC (Cri) 100 (102) : 1999 CrLJ 3962 : 1999 CrLR (SC) 511 : JT 1999 (5) SC 224 : 1999 (3) Crimes 196.

[7444] ● ***Cheating.***—In the instant case it is alleged that an agreement was signed between the complainant respondents and the appellant whereby some land was agreed to be sold by the appellant to the complainants on a consideration and allegedly, a part thereof was paid as earnest money, the balance being payable in the manner indicated in the deed. The most important term in the deed was that possession of the plot would stand transferred to the complainants and possession in fact was delivered to the complainants over which they have made certain constructions. The complaint was laid down on the basis that the appellant had cheated the complainants of the sum of money they had paid as earnest money as his subsequent conduct reflected that he was not willing to complete the bargain for which the complainants had to file a suit for specific performance which was pending in the Civil Court. Section 415, IPC which defines the offence of cheating illustrates it well in providing statutory illustrations. Illustration (g) is relevant in this case. The later part thereof illustrates that at the time when agreement for sale was executed, it could have in no event been termed dishonest so as to hold that the complainants were cheated of the earnest money, which they passed to the appellant as part consideration, when possession of the total land involved in the bargain was passed over to the complainant-respondents, and which remains in their possession. Now, it is left to imagine who would be interested in delaying the matter on completing the bargain when admittedly the complainants have not performed their part on making full payment. We, therefore, allow this appeal, and set aside not only the impugned orders of the High Court, but quash the proceedings too which are pending before the Magistrate. The complainant respondents shall pay compensatory costs to the appellant for this vexatious proceedings which we assess at Rs. 10,000 which the respondents are directed to pay to the appellants within six weeks from today. *Nageshwar Prasad Singh alias Sinha* v. *Narayan Singh*, AIR 1999 SC 1480 : (1998) 5 SCC 694 : (1998) SCC (Cri) 1378 : 1999 CrLJ 598 : 1999 CrLR (SC) 670 : JT 1998 (6) SC 414.

[7445] ● ***Criminal conspiracy to cheap state exchequer.***—There is no evidence, direct or circumstantial in support of the charge of conspiracy amongst the accused persons to cheat the State exchequer and with that object having entered inflated quantities of scabbed apple brought by the growers. It was the duty of the non-official members of the team to certify about the genuineness of the growers and the stock of scabbed apple brought by them having been grown in their orchards. There is no stipulation in the modalities to show that the public servants who are strangers to the area had no role to play in this matter. *State of Himachal Pradesh* v. *Jai Lal*, AIR 1999 SC 3318 : (1999) 7 SCC 280 : (1999) SCC (Cri) 1184 : 1999 CrLJ 4294 : 1999 CrLR (SC) 652 : JT 1999 (6) SC 548 : (1999) 4 Crimes 4.

[7446] ● ***Common intention to cause miscarriage.***—To apply Section 34, IPC apart from the fact that there should be two or more accused, two factors must be established (i) common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 with be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case. In the present case Sharma was certainly not competent to terminate the pregnancy of Alpana nor his clinic had the approval of the Government. Even basic facilities for abortion were not available in his clinic. Chauhan took Alpana to the clinic of Sharma with intent to cause her miscarriage and then her death was caused by Sharma while causing abortion, which act was done by Sharma in furtherance of the common intention of both Sharma and Chauhan. There is no escape from the conclusion that Chauhan had been rightly convicted under Section 314/34, IPC. *Surendra Chauhan* v. *State of Madhya Pradesh*, AIR 2000 SC 1436 (1439, 1440) : (2000) 4 SCC 110 : (2000) SCC (Cri) 772 : 2000 CrLJ 1789.

[7447] ● ***Common intention—Existence of.***—Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. *Surendra Chauhan* v. *State of Madhya Pradesh*, AIR 2000 SC 1436 (1439) : (2000) 4 SCC 110 : (2000) SCC (Cri) 772 : 2000 CrLJ 1789.

[7448] ● ***Common intention—Causing death.***—From the evidence on record, it is established that they came together armed with fire-arms and A-1 fired from the pistol and A-2 from the country made gun. From the seizure memo it is found that from the place of occurrence, two 9 mm. empty cartridges and one 12 bore empty cartridge were recovered. From the evidence, we find that A-1 was holding a pistol and other accused were carrying country-made gun. Both pistol and the country-made gun were used and this fact is established from the empty cartridges covered from the place of occurrence. The very fact that accused A-1 to A-3 came together to the place of occurrence with fire arms would prove that there was a pre-arranged plan amongst them to cause death. As there was participation of A-2 and A-3 in furtherance of the common intention of causing death, conviction under Section 302, IPC read with Section 34, IPC can be sustained. *Sheelam Ramesh* v. *state of Andhra Pradesh*, AIR 2000 SC 118 (120) : (1999) 8 SCC 369 : 2000 CrLJ 51 : 2000 CrLR (SC) 30.

[7449] ● ***Common intention and similar intention—Distinction between.***—It is further established that in the course of the occurrence accused Rajender sustained a grievous injury. The said evidence of PW-8 also indicates that Kameshwar himself was armed with a farsa while Ramdev Singh, Surender, Kishun Pandit and Rudal Singh were armed with *lathis* and when Rajender Singh gave a lalkara, Prabhunath, Jagnarain and Kishun Pandit assaulted PW-8. It is under these circumstances that Triloki Singh has been ascribed to have given a blow on the leg of the deceased. It is difficult to hold that he also shared the common intention with Rajender for causing murder of the deceased which developed at the spur of the moment. There has a distinction between the common intention and similar intention and question whether there exists common intention in all the persons who made some overt act resulting in death is a question of fact and can be inferred only from the circumstances. The distinction between a common intention and a similar intention may be fine, but is nonetheless a real one and if overlooked, may lead to a miscarriage of justice. *Rajender Singh* v. *State of Bihar*, AIR 2000 SC 1779 (1784) : (2000) 4 SCC 298 : (2000) SCC (Cri) 796 : 2000 CrLJ 2199 : JT 2000 (4) SC 293.

[7450] ● ***Common intention—No direct evidence necessary.***—No pre-meditation or previous meeting of mind is necessary for the applicability of Section 34 of the IPC. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purposes of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. The circumstances of the present case clearly show that the accused persons had come on spot with deadly weapons and inflicted injuries on Joy Kutty, obviously with the intention of causing his death. The eye-witnesses ran from the spot to save their lives. *Rajesh Govind Jagesha* v. *State of Maharashtra*, AIR 2000 SC 160 (164) : (1999) 8 SCC 428 : 2000 CrLJ 380 : 2000 CrLR (SC) 1.

[7451] ● ***Assault—Conviction of assailant.***—The assailants, who had participated in the occurrence in which the deceased was killed so brutally, cannot escape from conviction under Section 302 at least with the help of Section 34, if not with Section 149 of the IPC. The conviction of the assailant or assailants who inflicted grievous injuries which resulted in the death of the victim cannot be limited to Section 326 of the IPC. *Malempati Pattabi Narendra* v. *Ghattamaneni Maruthi Prasad*, AIR 2000 SC 2195 (2196) : (2000) 5 SCC 226 : (2000) SCC (Cri) 953 : 2000 CrLJ 3449 : 2000 CrLR (SC) 563.

[7452] ● ***Common intention to cause death.***—Shakil Ahmad, appellant is the co-brother of the deceased and is stated to have caught hold of both the hands of the deceased. If the deceased was intended to be killed by setting him on fire, it could have been done while he was asleep. There was no reason of waking him up which could have necessitated catching hold of his hands by Shakil Ahmad, apparently to over-power him. The mere presence of Shakil Ahmad would have promoted the deceased to mention his name in the statement but the said appellant cannot be held to have been proved to be sharing the common intention of causing the death of Islamuddin. It cannot be excluded that the appellant might have accompanied his in-laws to see that his co-brother does not create any problem by remaining as an unwanted guest in and around their house for 7-8 days. *Gulam Hussain* v. *State of Delhi*, AIR 2000 SC 2480 (2484) : (2000) 7 SCC 254 : (2000) SCC (Cri) 1343 : 2000 CrLJ 3949 : 2000 CrLR (SC) 634.

[7453] ● ***Common intention or object of killing deceased.***—As far as motive is concerned, PW-6 deposed that Parmeshwar was on inimical terms with Lakhan Sao and Baldeo Chauhan, the first because of a land dispute and the second because of a money lending transaction. DW-1 also stated that before this incident, there were differences between Parmeshwar and both the accused. The fact that either may have had his own motive for killing Parmeshwar is not relevant in determining the common object or intention required under Section 34 of the IPC. The common intention or object in this case was the killing of Parmeshwar. Lakhan Sao's facilitating the offence by holding Parmeshwar and asking Baldeo Chauhan to shoot is sufficient to hold Lakhan Sao guilty under Section 302 read with Section 34, IPC. *Lakhan Sao* v. *State of Bihar*, AIR 2000 SC 2063 (2066) : (2000) 9 SCC 82 : (2000) SCC (Cri) 1163 : 2000 CrLJ 2959 : 2001 CrLR (SC) 497.

[7454] ● ***Unlawful assembly with common intention of murdering deceased.***—Both Sections 149 and 34, IPC deal with the vicarious liability of an accused for an offence committed by another. Under Section 34, IPC "when a criminal act is done by several persons in furtherance of the contemplation of all, each of such persons is liable for that act in the same manner as if it were done by him alone". Similarly, Section 149, IPC provides for the guilt of every member of an unlawful assembly if in prosecution of a common object, an offence is committed, or which the members know would be likely to be committed in prosecution of that object. The similarity of the sections lies in the requirement of a common object or intention or a pre-arranged plan in furtherance of which the act is done. The difference lies in the degree of actual participation required in the criminal enterprise. The nature of participation under Section 34, IPC has been considered in the case of *Ramaswami Ayyangar* v. *State of Tamil Nadu*, AIR 1976 SC 2022 : (1976) 3 SCC 779 : 1976 CrLJ 1563. The emphasis is on physical presence, and promotion or facilitation of the crime. As far as Section 149, IPC is concerned, in addition to the common object, merely being a member of an unlawful assembly within the meaning of Section 141, IPC may be sufficient. Section 149, IPC makes a member of the unlawful assembly responsible as a principal for the acts of each & all merely because he is a member of the unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten criminal liability under Section 149. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly with the requisite common object or knowledge. Thus, the accepted evidence was that there was an unlawful assembly of all the accused, which, with the common object or premeditated plan of murdering Kulwant Singh and Bidhi Shankar, waylaid, chased and attacked them resulting in their death. All the elements of both Sections 149 and 34, IPC were there. This should have been sufficient to hold all the accused guilty under Sections 34 and 149, IPC. And yet the High Court acquitted Gurnam Singh and Iqbal Singh. The order of High Court cannot stand and is set aside. *Jaswant Singh* v. *State of Haryana*, AIR 2000 SC 1833 (1838, 1839, 1840, 1841) : (2000) 4 SCC 484 : (2000) SCC (Cri) 991 : 2000 CrLJ 2212 : JT 2000 (4) SC 114.

[7455] ● ***Murder—Common intention.***—It appears that role of Ms Shabnam is not such which could be made a basis of her holding a common intention with the other accused persons in committing the crime of murdering Islamuddin. Without declaring as to what was to be done with the kerosene, her father had asked her to bring it which she did apparently without knowing for what purpose the kerosene had been obtained by her father. It cannot be denied that kerosene might have been obtained to put the deceased in fear or force him to go away from the house of his in-laws where he was stated to have been staying for about 7-8 days before the date of occurrence. No other overt act is attributed to Ms Shabnam who is the unfortunate widow of the deceased. The prosecution has not proved its case beyond doubt so far as Shakil Ahmad is concerned. *Gulam Hussain* v. *State of Delhi*, AIR 2000 SC 2480 (2483) : (2000) 7 SCC 254 : (2000) SCC (Cri) 1343 : 2000 CrLJ 3949 : 2000 CrLR (SC) 634.

[7456] ● ***Murder—Common intention to Kill.***— The fact that Kapil, Muni and Maheshwar came together and chased the informant and the deceased from the scene of occurrence, and persued them even to the house, and assaulted inside the house, Kapil by means of a saif and Muni by means of barrel of the gun, which he was holding and Maheshwar Singh gave the lalkara, would make each one of them liable for action of the other. The fact that the blow given by Maheshawar was not fatal, will not be of any significance in finding out whether he shared the common intention with the other assailant Kapil, who gave the fatal blow on the occipital region of the deceased. *Muni Singh* v. *State of Bihar*, AIR 2000 SC 3640 : (2002) 9 SCC 484 : JT (1999) 10 SC 490.

[7457] ● ***Murder inflicting of dagger injuries.***—Learned counsel for the appellants contended that an equally possible room creating doubt regarding the involvement of A-4 (Tileshwar) can be found out of the circumstance pertaining to the recovery of daggers made by the Investigating Officer. It is admitted that daggers were recovered pursuant to the information elicited from A-1 (Babul), A-2 (Sarin) and A-3 (Nagen) but not from A-4 (Tileswar). If all the three persons were armed with dagger and A-4 possibly would not have been armed with daggers, it is reasonable to think that among the three persons who inflicted strikes with daggers on the deceased, would not have included A-4 (Tileswar). Of course, the dying declaration would convince us that (A-4) Tileswar was also present but to fasten him with the liability under Section 34 of the IPC, the statement contained in the dying declaration is too meagre. The possible absence of a dagger with him dissuades us from confirming the conviction passed on A-4 (Tileswar) because there is an area where there is a reasonable doubt as to the role of A-4 (Tileswar). *Babul Kalita* v. *State of Assam*, AIR 2000 SC 3592 : 2001 CrLJ 142 : JT 2000 (9) SC 15.

[7458] ● ***FIR—Quashment of.***—The graveman of the appellant's case in the FIR is that certain cheques had been given to the respondents more particularly the Commercial Manager with the specific understanding that these cheques can be presented against delivery of future vehicles and not for any past liability or dues, but the respondents presented the same which, of course, could not be encashed in view of the directions given by the appellant drawer. However, the appellant had to sustain the loss of Rs. 8,982 as commission charges. The necessary ingredients of the offence of cheating or criminal breach of trust have not been made out and on the other hand the attendant circumstances indicate that the FIR was lodged to pre-empt the filing of the criminal complaint against the informant under Section 138 of the Negotiable Instruments Act. The High Court therefore was well within his power in quashing the FIR. *Sunil Kumar* v. *Escorts Yamaha Motors Ltd.*, AIR 2000 SC 27 : (1999) 8 SCC 468 : 2000 CrLJ 174.

[7459] ● ***Quashing of complaint—Inherent power.***—The factual score depicts that the respondents approached the petitioner for the purpose of securing Ethambutol Hydrochloride drug in bulk for sale and use in various pharmaceutical drugs and products being manufactured by the respondent company. It is at this juncture that the petitioner has come out with a definite case that by reason of a promise of maintaining continuous supply of raw materials to the respondents herein for the purpose of manufacturing Ethambutol Hydrochloride and in such a way so as not to cause any interruption or hindrance to the manufacturing activity of the complaint's factory, the complainant-petitioner entered into an agreement. It is on the basis of the agreement, as noticed above and failure to comply therewith, it is stated that the petitioner herein has lost as substantial amount of money and to the extent of about one crore and the sufferance of loss has been by reason of specific assurance and representation which obviously turned out to be false. Misrepresentation on the part of the respondent-accused persons to the complainant, has been the major grievance and a definite and specific case has been made out that such a misrepresentation was intentionally effected since the accused persons were in the know of things that in the event the supplies are not effected, as per the agreement, the complainant is likely to suffer a wrongful loss which as the complaint proceeds, in the interest of the transaction between the parties, the accused persons were bound to protect. On careful reading of the complaint, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 415, 418 and 420, IPC cannot be said to be totally absent on he basis of the allegations in the complaint considering the factual aspect of the matter, we unhesitatingly state, however that the issue involved in he matter under consideration is not a case in which the criminal trial should have been short-circuited. *Medchl Chemicals and Pharma Pvt. Ltd.* v. *Biological E. Ltd.*, AIR 2000 SC 1869 : (2000) 3 SCC 269 : (2000) SCC (Cri) 615 : 2000 CrLJ 1487 : 2000 CrLR (SC) 301 : (2000) 2 SC 426.

[7460] ● ***Cheating—Ingredients of—Distinguished from mere breach of contract.***—The distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently, such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

The appellants agree to sell their land to respondent No. 2 for a consideration of Rs. 16,00,000. The respondent paid a sum of Rs. 11,00,000 to the appellants by way of drafts drawn in their favour. The appellants executed a registered sale deed in respect of the land in favour of the Society. It is the case of the appellants that on insistence of respondent No. 2, the two other brothers of the appellant signed the sale deed as witnesses. By way of a further safeguard the appellants executed a separate indemnity deed on the same day in which they undertook to indemnify any loss caused to the Society on account of any objection which may be raised by any co-sharer against transfer of the land in future. The appellants assert that they have delivered possession of the land to the Society on the same day. On registration of the sale deed, respondent 2 handed over three cheques to the appellants for the sum of Rs. 5,50,000. When the appellants presented the said cheques in the bank the same were dishonoured on account of insufficiency of amount in the account of the drawer. The respondent No. 2 had issued a separate cheque in favour of Priya Ranjan Prasad Verma which was also dishonoured for the same reason. Appellants lodged an FIR under Sections 406, 420 and 120-B, IPC. The Police after investigating into the allegations made in the FIR, filed a charge-sheet against respondent 2 and Awadesh Narayan Rai. The appellants also filed three suits for realisation of the amount due to them. Shortly thereafter, respondent 2 filed a complaint in the Court of CJM against the appellants alleging commission of offences under Sections 418, 420, 423, 469, 504 and 120-B, IPC. In the complaint respondent 2 alleged *inter alia* that by conspiring together all the accused have defaulted and cheated the Society and the complainant, by giving false, concocted and wrongful information and assurances saying to have a "soda kara" and, thus, they induced the complainant to enter into negotiations and also to advance them a heavy amount with their ulterior design to acquire wrongful gain to themselves and for wrongful loss to the society and the complainant—both monetary and reputational. Reading the averments in the complaint in entirety and accepting the allegations to be true, the ingredients of intentional deception on the part of the accused right at the beginning of the negotiations has neither been expressly stated nor indirectly suggested in the complaint. All that respondent 2 has alleged against the appellants is that they did not disclose to him that one of their brothers had filed a partition suit which was pending. The requirement that the information was not disclosed by the appellants intentionally in order to make respondent 2 part with the property is not alleged expressly or even impliedly in the complaint. Therefore the core postulate of dishonest intention in order to deceive the complainant respondent 2 is not made out even accepting all the averments in the complaint on their face value. *Hridaya Ranjan Prasad Verma* v. *State of Bihar*, AIR 2000 SC 2341 : (2000) 4

SCC 168 : (2000) SCC (Cri) 786 : 2000 CrLJ 2983.

[7461] ● ***Cheating and misappropriation.***—They are facing charges under Sections 406/420/34, IPC and are in custody for more than nine months by now. The allegation is that the appellants misappropriated to the tune of Rs. 75,000 for giving employment. Having examined the manner in which the trial is proceeding and taking into account the fact that the appellants are already in custody for more than nine months we think that a case for grant of bail has been made out. *Ram Narayan Singh* v. *State of Bihar*, AIR 2000 SC 1945 : (2000) 9 SCC 55 : (2000) SCC (Cri) 1157.

[7462] ● ***Complaint for offence of cheating.***—The petitioner is a Post-Doctoral fellow at Centre for Cellular and Molecular Biology, Hyderabad. He invited marriage proposals for himself through advertisement in newspaper. In pursuance of which respondent No. 1 approached the petitioner and furnished particulars of respondent No. 4 who in his sister. The petitioner himself gave out that he belonged to Gujala Balija community which was a forward community and, therefore, he wanted a wife from a forward community. The marriage took place. The petitioner allegedly came to know that respondents 1 to 4 belonged to Kondakapu community, which was Scheduled Tribe, and it was then that he realised that by misrepresenting themselves as members of Thurupukapu community, they had lured the petitioner into wedlock for which the petitioner would not have agreed at all, had he known that the respondents did not belong to Thurupukapu community but belonged to Kondakapu community. It was in these circumstances that he filed a complaint under Sections 415, 419, 420 read with Section 34, IPC. Section 415 has two parts. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part., the inducement should be intentional. Thus so far as second part of Section 415 is concerned, "property", at no stage, is involved. Here, it is the doing of an act or omission to do an act by the complainant, as a result on intentional inducement by the accused, which is material. Such inducement should result in the doing of an act or omission to do an act as a result of which the person concerned should have suffered or was likely to suffer damage or harm in body, mind, reputation or property. *G.V. Rao* v. *L.H.V. Prasad*, AIR 2000 SC 2474 : (2000) 3 SCC 693 : (2000) SCC (Cri) 733 : 2000 CrLJ 3487 : 2000 CrLR (SC) 416.

[7463] ● ***Murder—Common intention.***—The question is whether the appellants shared the common intention with the real killers who at the same point of time strangulated the deceased to death. The mere fact that they were also included in the crowd which followed the deceased, is not enough to credit the appellants with the common intention sharing with the real killers. The crowd which followed the deceased belonged to a political party and, therefore, running in the crowd need not necessarily be with the common intention to cause death. The intention can be different as well. If there was reliable evidence to show that the appellants inflicted to the blow, on the deceased perhaps we would have persuaded ourselves in believing that they too shared the intention to attack the victim. The post-mortem report does not show even a bruise, much less a contusion or abrasion on the dead body. *Kalachand Bhowmik* v. *State of Tripura*, AIR 2000 SC 3583 (3584) : 2001 SCC (Cri) 1585 : JT 2000 (7) SC 304.

[7464] ● ***Common intention sine qua non for Section 34, IPC.***—Participation in he crime in furtherance of the common intention is *sine qua non* for Section 34, IPC. Exhortation to other accused, even guarding the scene, *etc.* would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene, the Court has to evaluate the evidence very carefully for deciding whether that person had really done any such act. It is difficult to conclude that a person, merely because he was present at or near the scene, without doing any-thing more, without even carrying a weapon and without even marching alongwith the other assailants, could also be convicted with the aid of Section 34, IPC for the offence committed by the other accused. In the present case, the FIR shows that A-3, Pavitri Devi, was standing on the road when the incident happened. Either she would have reached on the road hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiosity since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three. *Suresh* v. *State of Uttar Pradesh*, AIR 2001 SC 1344 : (2001) 3 SCC 673 : 2001 SCC (Cri) 601 : 2001 CrLJ 1462 : JT 2001 (3) SC 330 : (2001) 2 Crimes 108.

[7465] ● *Common intention—Convert act in furtherance of.*—Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, IPC, *e.g.,* the co-accused, can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34, IPC cannot apply in the case of those two persons indicated in the illustrations. Thus, to attract Section 34, IPC, two postulates are indispensable :

1. The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person.
2. Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34, IPC, should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission in certain circumstances, amounts to an act. *Suresh* v. *State of Uttar Pradesh*, AIR 2001 SC 1344 : (2001) 3 SCC 673 : 2001 SCC (Cri) 601 (610) : 2001 CrLJ 1462 : JT 2001 (3) SC 330 : (2001) 2 Crimes 108.

[7466] ● *Co-accused—Sharing of common intention by.*—The accused who is to be fastened with liability on the strength of Section 34, IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act, it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32, I.P.C. So the act mentioned in Section 34, IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation, can amount to an act, *e.g.,* a co-accused, standing near the victim face to face, saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence, an act whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34, IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34, IPC. *Suresh* v. *State of Uttar Pradesh*, AIR 2001 SC 1344 : (2001) 3 SCC 673 : 2001 SCC (Cri) 601 : 2001 CrLJ 1462 : JT 2001 (3) SC 330 : (2001) 2 Crimes 108.

[7467] ● *Common intention—No overt act necessary.*—For the applicability of Section 34, IPC to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention. *Suresh* v. *State of Uttar Pradesh*, AIR 2001 SC 1344 : (2001) 3 SCC 673 : 2001 SCC (Cri) 601 (613) : 2001 CrLJ 1462 : (2001) 2 Crimes 108.

[7468] ● *Word "act" in Section 34—Meaning of.*—Participation in the crime in furtherance of the common intention, cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Indian Penal Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention, must be physically present at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the Court can, with judicial servitude, hold that the accused must have conceived result that ensued in furtherance of the common intention. *Suresh* v. *State of Uttar Pradesh*, AIR 2001 SC 1344 : (2001) 3 SCC 673 : 2001 SCC (Cri) 601 : 2001 CrLJ 1462 : JT 2001 (3) SC 330 : (2001) 2 Crimes 108.

[7469] ● ***Common intention, sharing of.***—A-1 called the deceased out of house, A-2 and A-3 who were standing near the house caught hold of the deceased and A-1 gave knife blow to the deceased. A-2 and A-3 intervened during that scuffle and tried to hold deceased or separate A-1 and deceased. A-2 and A-3 were unarmed. Prosecution cannot be said to have proved that A-2 and A-3 had shared common intention with A-1 particularly when medical evidence discloses only one knife blow to the deceased. *Manubhai Chimanlal Senma (Senwa)* v. *State of Gujarat,* 2001 CrLJ 3275 : JT 2001 (3) SC 482 : 2001 (3) Crimes 104 (SC).

[7470] ● ***Common intention existence of—Inference from circumstances of case.***—Section 34 of the Indian Penal Code recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. *Suresh* v. *State of Uttar Pradesh,* AIR 2001 SC 1344 : (2001) 3 SCC 673 : 2001 SCC (Cri) 601 (613) : 2001 CrLJ 1462.

[7471] ● ***Common intention—Sharing of.***—The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous. *Suresh* v. *State of Uttar Pradesh,* AIR 2001 SC 1344 : (2001) 3 SCC 673 : 2001 SCC (Cri) 601 (613) : 2001 CrLJ 1462.

[7472] ● ***Common intention—Distinguished from same or similar intention.***—To substantiate a charge under section 302 with the aid of Section 34 it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of both. Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn; the culpable liability can arise only if such inference can be drawn with a certain degree of assurance. At the worst Mithu Singh, accused-appellant, knew that his co-accused Bharpur Singh was armed with a pistol. The knowledge of previous enmity existing between Bharpur Singh and the deceased can also be attributed to Mithu Singh. But there is nothing available on record to draw an inference that the co-accused Bharpur Singh had gone to the house of the deceased with the intention of causing her death and such intention was known to Mithu Singh, much less shared by him. Simply because Mithu Singh was himself armed with a pistol would not necessarily lead to an inference that he had also reached the house of the deceased or had accompanied the co-accused Bharpur Singh with the intention of causing the death of Gurdial Kaur. In our opinion, an inference as to Mithu Singh, accused-appellant having shared with Bharpur Singh a common intention of causing the murder of the deceased Gurdial Kaur cannot be drawn. His conviction under Sections 302/34, IPC cannot be sustained and must be set aside. *Mithu Singh* v. *State of Punjab*, AIR 2001 SC 1929 : (2001) 4 SCC 193 : (2001) SCC (Cri) 668 (670) : 2001 CrLJ 1820.

[7473] ● ***Common intention—Sharing of by accused-3.***—Participation in the crime in furtherance of the common intention is *sine qua non* for

Section 34, IPC. Exhortation to other accused, even guarding the scene *etc.* would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene, the Court has to evaluate the evidence very carefully for deciding whether that person had really done any such act.

It is difficult to conclude that a person, merely because he was present at or near the scene, without doing anything more, without even carrying a weapon and without even marching alongwith the other assailants, could also be convicted with the aid of Section 34, IPC for the offence committed by the other accused. In the present case, the FIR shows that A-3, Pavitri Devi, was standing on the road when the incident happened. Either she would have reached on the road hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiosity since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three.

Counsel for the State contended that if she remained at the scene without sharing the common intention she would have prevented the other two accused from doing the ghastly acts because both of them were her husband and brother respectively. The inaction of Pavitri Devi in doing so need not necessarily lead to the conclusion that she shared a common intention with the others. There is nothing to show that she had not earlier tried to dissuade her husband and brother from rushing to attack the deceased. Thus we are unable to hold that Pavitri Devi shared common intention with other accused and hence her remaining passively on the road is too insufficient for reversing the order of acquittal passed by the High Court in order to convict her with the aid of Section 34, IPC. *Suresh* v. *State of Uttar Pradesh*, AIR 2001 SC 1344 : (2001) 3 SCC 673 : 2001 SCC (Cri) 601 (612) : 2001 CrLJ 1462 : JT 2001 (3) SC 330 : (2001) 2 Crimes 108.

[7474] ● ***Common intention to rape and in case of resistance to commit murder.***—In the instant case the proved facts are : accused were armed with knives; they entered the house of the complainant dead at night; may be to take revenge of quarrel which had taken place at day time or because they are rich and head strong persons; on a refusal to submit and satisfy their sexual lust, accused including the appellant despite resistance by the girl lifted her and brought her in Osara. At that stage when deceased was crying and resisting, her father PW-4, Mani Ram and her mother Nageshari, PW-5 got up and started raising alarm. Tahir, one of the accused, gave knife blow to the deceased and two others gave knife blows to PW-4 and PW-5. From these facts, the only reasonable inference which could be drawn is that common intention of the accused was to ravish the young girl of poor Harijan and in case of resistance to commit murder by inflicting knife blows. Their adventure in criminality cannot be watered down or nullified by contending that injuries caused by them have not resulted in death of PW-4 and PW-5. In this view of the matter, the High Court materially erred in altering the sentence of the accused from the offence punishable under section 302/34, IPC to Section 324, IPC by observing that assault by knife to Mani Ram and Nageshari were individuals act of Jhinkoo (appellant) and Deep Chand and the act of Tahir in inflicting the knife injury on the chest of the deceased appears to be his individual act and, therefore, appellant-Jhinkoo cannot be convicted for the offence punishable under section 302 read with Section 34, I.PC. Hence, the impugned order passed by the High Court cannot be sustained. *State of Uttar Pradesh* v. *Jhinkoo Nai*, AIR 2001 SC 2815 : (2001) 6 SCC 503 : 2001 SCC (Cri) 1172 (1176) : 2001 CrLJ 3965 : 2001 CrLR (SC) 509.

[7475] ● ***Abduction and murder—Common intention.***—We only reiterate the legal principle adumbrated in *State of West Bengal* v. *Mir Mohammad Omar*, (2000) 8 SCC 382 that when more persons than one have abducted the victim, who was latter murdered, it is within the legal province of the Court to justifiably draw a presumption depending on the factual situation, that all the abductors are responsible for the murder. Section 34 of the IPC could be invoked for the aid to that end, unless any particular abductor satisfies the Court with his explanation as to what else he did with the victim subsequently, *i.e.,* whether he left this associates en route or whether he dissuaded others from doing the extreme act, etc., etc. *Sucha Singh* v. *State of Punjab*, AIR 2001 SC 1436 : (2001) 4 SCC 375 : 2001 SCC (Cri) 717 (723) : 2001 CrLJ 1734 : JT 2001 (4) SC 107 : (2001) 2 Crimes 69.

[7476] ● ***Common intention—Proof of.***—"...for common intention, there could rarely be direct evidence. The ultimate decision, at any rate would invariably depend upon the inferences deducible from the circumstances of each case. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties." *State of Uttar Pradesh* v. *Jhinkoo Nai*, AIR 2001 SC 2815 : (2001) 6 SCC 503 : 2001 SCC (Cri) 1172 (1175) : 2001 CrLJ 3965 : 2001 CrLR (SC) 509.

[7477] ● ***Murder—Common intention.***—Even where some, out of several accused, are acquitted, it is open to the Court to consider whether the remaining accused were guilty of an offence by involving Section 34, IPC by reason of having committed the offence alongwith others acquitted. With a view to determine the common intention, the nature of injuries, background of the incident and the nature of weapon used to cause the injuries besides other factors are needed to be considered. There is no principle of law which prevents from adopting that course set out above by us. *Pipal Singh* v. *State of Punjab*, (2001) 2 SCC 292 : 2001 SCC (Cri) 344 (345) : 2001 CrLJ 740 : JT 2001 (1) SC 31 : 2001 CrLR (SC) 91.

[7478] ● ***Common intention—Simultaneously dealings blows by accused on victim.***—In the instant case the place of the incident is inside the house of the victims where the accused persons had reached armed with weapons. The genesis of the incident is known. The standing of Kulwant Singh outside her house was objected by Jagir Kaur and feeling enraged thereby the accused persons came armed with lethal weapons to teach the lady a lesson. On the cogent and reliable evidence coming from the mouth of three eye-witnesses, the two accused were aggressors. They reached and trespassed into the house of complainant and opened assault. They cannot claim any right of self-defence. They simultaneously assaulted the victim and in that process caused injuries. On a hue and cry being raised, they ran away together. Their coming together to the place of the incident fleeing away together therefrom, being armed and simultaneously dealing blows spell out their common intention. *Gurmit Singh* v. *State of Punjab*, AIR 2001 SC 2977 (2981) : (2001) 9 SCC 681 : 2001 CrLR (SC) 731,

[7479] ● ***Common intention to Kill deceased.***—The continuance of causing of injuries in spite of the intervention of PW-4 and refusal to give water when the deceased asked for it, as stated above, shows the predetermined mind of the accused that they had come with the intention to kill. It is true that there is no evidence of prior meeting of minds. But the sequence of events which unfolded during the course of occurrence clearly indicate the pre-determined minds of the accused persons to kill the deceased. *Ranjit Singh* v. *State of Bihar*, AIR 2001 SC 3853 (3857) : (2001) 9 SCC 528 : 2001 CrLJ 4740.

[7480] ● ***Common intention—Inference as to.***—In order to hold an accused guilty of criminal act by reference of Section 34, IPC the Court should be able to draw an inference that the result reached was the consequence of the concerted action of the person said to be held liable. Recently, this Court has held in *Mithu Singh* v. *State of Punjab*, AIR 2001 SC 1929 : (2001) 4 SCC 193 : 2001 SCC (Cri) 658 : 2001 CrLJ 1820.

[7481] ● ***Common intention—Springs up any moment.***—It is not the case of the prosecution that the appellants carried any weapon with them or that the injuries were inflicted with that weapon. There is every possibility that one of the accused picked up the stone at that moment and decided to hit the deceased in order to silence or immobilise the victim. If the idea was to murder him and take away the ornaments from his person, there was really no need to forcible snatching the ear-rings before putting an end to the victim. It seems to us that there was no pre-mediated plan to kill the deceased. True, common intention could spring up any moment and all the three accused might have decided to kill him instantaneously, for whatever reason it be. While that possibility cannot be ruled out, the possibility of one of the accused suddenly getting the idea of killing the deceased and in furtherance thereof picking up the stone lying at the spot and hitting the deceased cannot also be ruled out. Thus two possibilities confront us. When there is reasonable scope for two possibilities and the Court is not in a position to know the actual details of the occurrence it is not safe to extend the presumption under Section 114 so as to find the appellants guilty of the offence of murder with the aid of Section 34, IPC. While drawing the presumption under Section 114 on the basis of recent possession of belongings of the victim with the accused, the Court must adopt a cautious approach and have an assurance from all angles that the accused not merely committed theft or robbery but also killed the victim. *Limbaji* v. *State of Maharashtra*, AIR 2002 SC 491 : 2002 CrLJ 590 : (2001) 10 SCC 340 : (2002) 1 Crimes 63 (SC).

[7482] ● ***Common intention—Sharing of by accused persons.***—To attract Section 34, IPC, it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse. The facts of this case are eloquent and the role played by Bal Mukund Rastogi of preventing the prosecution witnesses from going to the rescue of the deceased was the role played by him with a view to achieve the ultimate objective of killing Shankar Rastogi. We therefore entertain no doubt that all the five persons who came to the shop of the informant had a common intention to commit the murder of Shankar Rastogi and they acted pursuant to a pre-arranged plan. The facts clearly are consistent only with the hypothesis of their acting in furtherance of a common intention. They have, therefore, rightly been convicted with the aid of Section 34, IPC. *Nandu Rastogi* v. *State of Bihar*, AIR 2002 SC 3443 : (2002) 8 SCC 9 : 2002 SCC (Cri) 177 : 2002 CrLJ 4698 : JT 2002 (7) SC 551.

[7483] ● ***Unlawful assembly—Ground of assailants—Common object.***—According to the prosecution case and the evidence, the accused persons arrived at the village of occurrence, pursuant to a conspiracy hatched up by them, they divided themselves into several groups, different groups went to the houses of different persons in the village, entered the houses by breaking open the door, forcibly took away inmates of the houses after tying their hands, taken them first to the temple and thereafter near the canal where their legs were also tied and there some of them were done to death at the point of firearm, but a vast majority of them were massacred by slitting their throats with pasuli. One thing is clear that all these acts were done by the accused persons pursuant to a conspiracy hatched up by them to completely eliminate members of a particular community in the village and to achieve that object, they formed unlawful assembly and different members of that unlawful assembly had played different role. In view of these facts, merely because the appellants are not said to have assaulted either any of the deceased or injured persons, it cannot be inferred that they had no complicity with the crime, more so according to the evidence they were also armed with deadly weapons, like firearms, bombs *etc.*, but did not use the same. Reference in this connection may be made to a decision of this Court in the case of *Masalti* (supra) where it was laid down that where a crowd of assailants, who were members of an unlawful assembly, proceeds to commit the crime in pursuance of the common object of that assembly, it is often not possible for witnesses to describe actual part played by each one of them and a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that of them have to take part in the actual assault as in that case several weapons were carried by different member of unlawful assembly and an accused who was member of the such an unlawful assembly and was carrying firearm cannot take any advantage from the fact that he did not use the firearms, though other members of the unlawful assembly used their respective arms. *Krishna Mochi* v. *State of Bihar*, AIR 2002 SC 1965 (2002) 6 SCC 81 : 2002 SCC (Cri) 1220 : 2002 CrLJ 2645 : JT 2002 (4) SC 186 : 2002 (2) SCR 1 : 2002 (3) SCJ 163 : (2002) 2 Crimes 236 (SC).

[7484] ● ***Common intention sharing of by Accused-1 to 3.***—A-2 alongwith other assailants alighted from the jeep together and chased deceased and PW-2 together and fired their lethal weapons together. Bullet of A-2 hit PW-2 who survived. Conviction of A-2 under section 302/34, IPC is sustainable. A-1 to A-3 shared the common intention. A-4 and A-6 had knives but they did not inflict any injury on any one. Even after deceased fell down, A-4 and A-6 did not move forward to inflict any injury on him. There is nothing to indicate that they knew about design of other assailants and they were rightly acquitted. *Pandurang Kalu Patel* v. *State of Maharashtra*, AIR 2002 SC 733 : (2002) 2 SCC 490 : 2002 CrLJ 1007 : JT 2002 (1) SC 229 : 2002 (1) Crimes 270 (SC).

[7485] ● ***Common intention different from common object.***—The common intention is different than the common object. The charge against them is not under section 149, IPC. Even otherwise, it is not shown that the ingredients of Section 149 had been established. There is total absence of evidence both in respect of Section 34 as well as Section 149, IPC. *Jhapsa Kabari* v. *State of Bihar*, AIR 2002 SC 312 (314) : (2001) 10 SCC 94 : 2002 CrLJ 587 : (2002) 1 Crimes 205.

[7486] ● ***Murder—Common intention.***—The appellant, who was a sub-inspector of police alongwith A-1 who was then a sub-divisional police officer was charged for an offence under Sections 364, 302, 201 read with Section 34, IPC for committing abduction and murder and causing disappearance of evidence. It is an admitted fact as could be seen hereafter that the appellant was found in the company of A-1 on 12-2-1988 sometime in the afternoon while travelling in the jeep driven by A-1 and searching for the deceased. To the extent that he was with A-1 on that afternoon is admitted by the appellant himself in his statement under section 313, CrPC. From the evidence of PWs 3, 5 to 9, 11 and 12, the prosecution has established that A-1 and the appellant ultimately met the deceased and took him away in the jeep driven by A-1. During that time PW-5 also accompanied these accused persons and the deceased to some distance in the jeep. It is a fact that then the appellant did not in any manner indicate that he shared the common intention of A-1 in taking the deceased away. But then if we examine the conduct of the appellant we find that if really the appellant did not know the object for which the deceased was being taken in the jeep, one would have expected as a natural conduct at least after PW-5 alighted from the vehicle, the appellant would have asked A-1 the purpose of taking the deceased with them. The appellant had done no such thing nor has the appellant given any explanation in his statement under section 313, CrPC in this regard. The explanation in this regard is only found in the argument of the learned counsel in this Court which is that the appellant being an obedient subordinate of A-1, might not have questioned the authority of his superior. We do not think such an explanation is acceptable to anybody. If really the appellant was innocent, having known that a crime is committed, any prudent person if he was innocent, would certainly have tried to dissuade A-1 from committing a crime and if he failed in his attempt, he would have certainly taken steps to see that his non-involvement is safeguarded by seeking help from others. Failure to do so makes us infer that the appellant already knew the intention of A-1 and acquiesced with the same. Here we would also note that in the normal course if the deceased was being taken for interrogation or for the purpose of keeping him away from any mischief that A-1 suspected him of planning to commit in the meeting of the Chief Minister then the normal destination would have been the police station but that was not the direction in which the vehicle was moving, therefore, it is legitimate for us to conclude that the appellant knew that the deceased was being taken towards the checkpost with certain other oblique motive. This conduct of the appellant in not trying to find out the reason for taking the deceased and the destination further strengthens our inference that the appellant knew well in advance what was the reason and the destination to which the deceased was being taken. Then again there is another factor to be taken note of in regard to the sharing of the common object of A-1 by the appellant. It has come in the evidence of PW-5 that the appellant had told him that after the body of the deceased was taken from the place where it had fallen in the first instance, the appellant had taken away certain possible identification materials like panchayat seal and some personal papers with a view to create false evidence as to the whereabouts of the deceased. This also indicates the involvement of the appellant in the crime. These circumstances and inferences drawn from such proved circumstances establish beyond all reasonable doubt that the appellant did share the common intention of A-1 in taking the deceased away in the jeep driven by A-1 and causing the murder, therefore, the hypothesis of innocence pleaded on behalf of the appellant in our opinion is not in consonance with the innocence of the appellant. *Mani Kumar Thapa* v. *State of Sikkim,* AIR 2002 SC 2920 : (2002) 7 SCC 157 : 2002 SCC (Cri) 1637 (1645, 1646, 1647) : 2002 CrLJ 4069.

[7487] ● ***Common intention formation of at spot.***—It is true that the two injuries which proved to be fatal were not specifically attributed to either of the accused. The common intention can be formed at the spot. At times it is difficult to get direct evidence of preconcert of minds. The common intention can be gathered from the circumstances and the manner in which assault is carried out. The manner in which assault was carried out leaves no manner of doubt that the appellants had come with the intention to kill the deceased. Their intention was not to cause injuries alone. All had come to the house of the accused. Finding him near the house of Bachcha Pandey, all three of them started causing injuries. When PW-4 intervened and requested them not to cause the injuries to the deceased they continued to cause the injuries. Even when PW-4 threw herself on the deceased to protect his husband the accused persons did not stop from causing further injuries to the deceased. Instead they caused injuries to Rajpati Devi, PW-4 as well. When the deceased asked for water, rather than giving water they shouted they would kill him. The continuance of causing of injuries in spite of the intervention of PW-4 and refusal to give water when the deceased asked for it shows the predetermined mind of the accused that they had come with the intention to kill. It is true that there is no evidence of prior meeting of minds. But the sequence of events which infolded during the course of occurrence clearly indicates the predetermined minds of the accused to kill the deceased. *Ranjit Singh* v. *State of Bihar,* 2002 SCC (Cri) 760 (766, 767).

[7488] ● ***Common intention—Sharing of by co-accused.***—The prosecution case itself is that there was no prior meeting of minds of all the four accused-appellants. The villagers including the prosecution witnesses and some of the accused persons were accompanying the officials of the Tubewell Irrigation Department for the purpose of surveying the irrigated fields and in this process they reached the filed of accused Ram Swarup. Feelings mounted and verbal exchange got heated resulting in wielding of weapons like lathis and guns on the spur of the moment. Villagers in our country are routinely accompanied by lathis. The guns were licensed guns and it cannot be said that Ram Swarup and Raja Ram had deliberately taken the guns with them with the previous idea of utilizing the weapons in the unfortunate incident which was certainly not preconceived and premeditated. The wielding of lathis by Babu Ram and Deshraj is the earlier part of the incident. While Babu Ram and Deshraj inflicted lathi-blows, Mangali, the deceased also wielded his lathi though in his defence as stated by Shri Krishna, PW-1. Mangali fell down. It was at a point of time when Mangali was about to fall down or was falling down or had already fallen when Ram Swarup and Raja Ram fired. The exact position in which the victim was when the guns were fired has not come in the prosecution evidence. However, what is certain is that Babu Ram and Deshraj have not dealt any blow on the person of the deceased nor are they attributed with any overt act after the guns were fired. According to PW-1 and PW-2, guns were fired at a point of time when assault by lathis was over. The two guns by the two accused persons are said to have been fired almost simultaneously. In short, so far as the assault by Babu Ram and Deshraj is concerned, it had come to an end before the guns were fired; howsoever negligible may be the intervening gap. There is no direct or circumstantial evidence available on record for drawing an inference that Babu Ram and Deshraj could have, while assaulting Mangali with lathis, anticipated that Ram Swarup and Raja Ram or any one of them would fire at Mangali and fatally injure him. We cannot hold Babu Ram and Deshraj accused-appellants sharing common intention with Ram Swarup and Raja Ram to cause the death of Mangali. They can be attributed only with the intention of causing grievous hurt to Mangali. The injuries caused by them have resulted in fractures on the body of the deceased. The medical evidence is clear and specific. None of the lathi injuries either individually or collectively were enough to cause the death of the victim. *Babu Ram* v. *State of Uttar Pradesh*, AIR 2002 SC 2815 : (2002) 6 SCC 518 : (2002) SCC (Cri) 1400 (1406, 1407) : 2002 CrLJ 3745.

[7489] ● ***Common intention distinguished from same intention.***—"Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn; the culpable liability can arise only if such inference can be drawn with a certain degree of assurance." *Babu Ram* v. *State of Uttar Pradesh,* AIR 2002 SC 2815 : (2002) 6 SCC 518 : 2002 SCC (Cri) 1400 (1407) : 2002 CrLJ 3745.

[7490] ● ***Common intention—Mere participation in crime with others not sufficient.***— Common intention is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of the crime as also prior and subsequent attendant circumstances. Mere participation in the crime with others is not sufficient to attribute common intention to one of others involved in the crime. The subjective element in common intention therefore should be proved by objective test. It is only then that one accused can be made vicariously liable for the acts and deeds of the other co-accused. *Harjit Singh* v. *State of Punjab,* AIR 2002 SC 3040 : (2002) 6 SCC 739 : 2002 SCC (Cri) 1518 (1531).

[7491] ● ***Common intention—Existence of.***— From the evidence on record it appears that when Accused 1 was not released by the complainant party, accused 2, 3, 4 and 5 formed a common intention to commit an offence, in furtherance of which they used weapons like spears and lathis and inflicted injuries on the vital parts of the body of Sotilal, deceased. The prosecution has established that the aforesaid four accused persons joined in the actual doing of the act which resulted in the death of Sotilal and the common intention though not initially in existence, was formed during the transaction on the spot. The existence of the common intention amongst the aforesaid accused persons has been established from the surrounding circumstances and from their conduct on the spot. The absence of the charge under section 34 against the aforesaid accused persons would not make any difference because on the proved facts and the evidence available on record, their intention to commit an offence has been established. Failure to charge the accused under section 34, who stood charged under section 149, IPC would not result in any prejudice to them (*Dalip Singh* v. *State of Punjab*). The aforesaid accused persons can, therefore, be convicted for the major offence read with Section 34 of the Indian Penal Code. *Malhu Yadav* v. *State of Bihar,* AIR 2002 SC 2137 : (2002) 5 SCC 724 : 2002 SCC (Cri) 1190 (1201) : 2002 CrLJ 2819.

[7492] ● ***Murder—Common intention.***—Appellant has not been attributed with any other motive to either kill the deceased or any of the members of his family, nor was there any exhortation by A-1 to kill any person other than the deceased. In such circumstances, if the appellant has not chosen to obey the exhortation of his father to kill Manir then it will be extremely difficult to hold that the appellant shared the common intention of his father and his younger brother. Even if the role attributed to this appellant in shooting PWs-4 and 7 is to be accepted even then that cannot be part of the same common intention of killing Manir. Therefore, in our opinion, the prosecution has failed to establish that the appellant had shared the common intention of his father A-1 and younger brother A-3 so as to hold him guilty of murder by invoking Section 34, IPC. *Md. Rustam* v. *State of Bihar*, 2002 (9) Scale 286.

[7493] ● ***Common intention to Kill—Inference as to.***—Assuming that the presence of all the accused persons on the date and time of the incident is fully proved but that fact alone cannot lead to an inference that all of them jointly assaulted the deceased and had common intention to kill her. Mere presence of the accused-appellants in the house cannot reasonably lead to an inference of their joint participation in physical assault and common intention on their part with the convicted accused to commit her murder. The medical evidence showing that the death was not "suicidal" but "homicidal" also does not necessarily lead to the inference of involvement of all the accused in the homicidal death of the deceased. *Vethal Tukaram More* v. *State of Maharashtra,* 2002 SCC (Cri) 1555 (1562).

[7494] ● ***Common intention—Sharing of.***—The accused with the rest of the accused armed with deadly weapons like chopper *etc.* and got inside the house and participated in the operation and he admittedly inflicted a cut injury on one of the deceased. This eloquently speaks of his sharing the common intention with the rest of the assailants. *Ochathevar* v. *State*, AIR 2002 SC 2392 : (2002) 10 SCC 203 : 2004 SCC (Cri) 468 (469) : 2002 CrLJ 2979.

[7495] ● ***Common intention—Essential element of.***—Essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. It is trite to record that such consensus can be developed at the spot. Requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused-though the same however, depends upon the fact-situation of the matter under consideration and no rule steadfast can be laid down therefor. *Lallan Rai* v. *State of Bihar*, AIR 2003 SC 333 : (2003) 1 SCC 268 : 2003 CrLJ 465 : JT 2002 (9) SC 334.

[7496] ● ***Common intention—Prior concert and pre-arranged plan foundation of.***—A charge under Section 34 presupposes the sharing of a particular intention by more than one person to commit a criminal act. Participation need not on all cases to be by physical presence. Prior concert and pre-arranged plan is the foundation of common intention to establish liability and guilt. Principle of joint liability in doing of a criminal act is embodied in Section 34. Acts of several persons whether the separate, similar or diverse, if done in furtherance of common intention, each person is liable for result of act as if he had done himself. *Krishnan* v. *State,* AIR 2003 SC 2978 : (2003) 7 SCC 56 : 2003 SCC (Cri) 1577 : 2003 CrLJ 3705 : JT 2003 (6) SC 151 : (2003) 3 Crimes 197 (SC).

[7497] ● ***Common intention to commit offence.***—A person may by constructively liable for an offence which he did not actually commit by reason of—(1) the common intention of all to commit such an offence (2) his being a member of a conspiracy to commit such an offence. He is a member of an unlawful assembly, the members whereof knew that an offence was likely to be committed. The common sense principle embodied in constructive liability that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. *Krishnan* v. *State*, AIR 2003 SC 2978 : (2003) 7 SCC 56 : 2003 SCC (Cri) 1577 : 2003 CrLJ 1705 : (2003) 3 Crimes 197 (SC).

[7498] ● ***Common intention and common object—Distinction.***—It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality *i.e.* vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Sections 34 and Section 49 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 4, IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. *Chhitarmal* v. *State of Rajasthan*, AIR 2003 SC 796 : (2003) 2 SCC 266 : 2003 SCC (Cri) 514 : 2003 CrLJ 889 : (2003) 1 Crimes 363 (SC).

[7499] ● ***Common intention—Absence of.***—It is not the case of the prosecution that all the accused persons came prepared to attack the deceased. It is their case that the fight started suddenly without pre-planning between the two ladies and the others joined in and somebody stabbed the deceased. Assuming this case of the prosecution to be true, in the absence of any material to show that there was any common intention, it will not be possible to attract Section 34. *Cherlopalli Cheliminabi Saheb* v. *State of A.P.*, AIR 2003 SC 1014 : (2003) 2 SCC 571 : 2003 SCC (Cri) 659 : 2003 CrLJ 1246.

[7500] ● ***Common intention—Murder.***—When the assailant picked up the weapons and came to assault the victims, the appellant held the hand of one of the victims so as to help the assailants assault the victims. There is no material on record to show that he either released the hand of the deceased or tried to dissuade the assailants from attacking. In such a situation, it is reasonable to conclude that the appellant also shared the intention of the assailants which is now held to be one to commit the murder of the deceased. *Major Singh* v. *State of Punjab*, AIR 2003 SC 342 : (2002) 10 SCC 60 : 2003 CrLJ 473 : JT 2002 (9) SC 576.

[7501] ● ***Act done in furtherance of common intention.***—That in a criminal act, where several persons are engaged or concerned in the commission of it, they may be guilty of different offences by means of their own acts. No doubt, when such criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. If an offence is committed by any member of an "unlawful assembly" in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. The fact that any one of them may at times even stand wrongly acquitted and no appeal was filed by the State against such acquittal does not *ipso facto* impede the conviction of the other(s) accused. Equally, the conviction of one such does not automatically result in the conviction of everyone said to be involved in the occurrence, even *dehors* their actual role, the general and basis principle of criminal liability being that only that person, who commits the crime, would be held guilty and punished, except in cases where the concept of vicarious liability is recognised under law—To that extent and that too subject to the conditions therefor being strictly shown to exist in a given case. *Surinder Singh* v. *State of Punjab*, (2003) 10 SCC 66 : 2004 SCC (Cri) 793 (799-800) : (2003) 3 Crimes 308.

[7502] ● ***Common intention to Kill—Absence of concrete evidence to prove.***—So far as the case on hand is concerned, Surinder Singh (Accused 1) and Tarsem Singh (Accused 2), since dead, were convicted under Section 302 with the assistance of Section 34 for causing the death of Santokh Singh @ Sokhal, the brother of Accused 1. The positive evidence firmly stated by PW-7 and PW-8 regarding the role of the appellant is that he was holding the hand of the deceased, when he was found lying down and Darshan Singh, Sarpanch, who was proclaimed offender, sat on the chest of the deceased and was said to be trying to throttle him. PW-7 was said to have pushed Darshan Singh away from the chest of the deceased and the appellant also seemed to have released the hands held by him. It was at that stage Darshan Singh was said to have given 3-5 kicks on the testicles of the deceased. The death does not seem to have been instantaneous and the evidence on record is that the occurrence was at 8-9 p.m., but the death occurred late in the night in his house. So far as the appellant is concerned, it could not be held that his holding the hands of the deceased facilitated Darshan Singh to inflict any of the fatal injuries and kicks on the testicles were said to have been given and could normally be possible also to be given only after Darshan Singh was pushed away from the chest of the deceased by PW-7, when it is stated by the witnesses that simultaneously the hands of the deceased also came to be released by the appellant. The appellant cannot, therefore, be indicted as having in any manner been responsible or having rendered it possible for Darshan Singh to inflict the fatal injuries. Section 34, IPC seems to have been resorted to in case mechanically and merely because the assault was by the accused in a group, in the manner spoken to by the witnesses and not on account of any other circumstance indicative of any common intention or premeditation to commit such an act. In the teeth of the acquittal of Darshan Singh, the main accused, and in the absence of any concrete evidence to prove the common intention to kill, the appellant is entitled to be extended the benefit of doubt and exonerated. *Surinder Singh* v. *State of Punjab*, (2003) 10 SCC 66 : 2004 SCC (Cri) 793 (800) : (2003) 3 Crimes 308.

[7503] ● ***Common intention to cause death.***—All that the prosecution has to establish is that there was a prior concert or meeting or minds between the accused persons and such prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. This Court in those cases also held that the common intention can also be developed at the spur of the moment but there must be prearrangement or premeditated concert. In the instant case it is the prosecution case that at the time of the incident when the deceased and PW-1 were walking towards their house the accused persons, out of which A-1 and the appellants herein were armed with deadly weapons, with the help of the acquitted accused persons, waylaid the deceased. The prosecution says that while A-1 attacked the deceased, PW-1 was prevented by the appellants herein from preventing the said attack on her father and when PW-2 came to the spot and tried to help his father, he was also assaulted with a view to thwart his effort to protect his father. This itself goes to show that when these accused persons gathered in front of the house of A-1 and proceeded to assault the deceased, all of them had shared the common intention of causing death of the deceased. Though these appellants did not assault the deceased, it is clear that the manner in which they were armed and the manner in which they prevented PWs-1 and 2 from protecting their father by causing them grievous injuries also shows that this attack on PWs-1 and 2 was aimed at ensuring that the deceased was done away with, and the deceased did not get sufficient protection, therefore, we are of the considered view that the High Court having acquitted three of the accused persons was justified in invoking Section 34 to uphold the conviction of the appellants herein. *Balram Singh* v. *State of Punjab*, AIR 2003 SC 2213 : (2003) 11 SCC 2861 : 2004 SCC (Cri) 149 (154-155)

[7504] ● ***Common intention to Kill deceased.***—In the present case, it was not possible to hold on the facts noticed that the appellant had no intention to kill the deceased. It is not possible to hold that every case of single injury would show the absence of intent to kill. It would depend on the facts of each case. The type of weapon used would also be one of the important aspects to be kept in view. The submission that is generally made in such cases that it is a case of a single injury resulting in death and, therefore, the offence deserves to be converted from one under Section 302, IPC to one under Section 304, IPC, cannot be accepted as a broad proposition of law. One may sever the head of the deceased by a single injury or may kill him by a single gun-shot on a vital part as in the present case. It cannot be said that because of a single injury, the offence under Section 304, IPC is only made out and not under Section 302, IPC. *Hari Prasad* v. *State of U.P.*, (2003) 9 SCC 60 : 2004 SCC (Cri) 1164 (1166-67) : (2003) 1 Crimes 204.

[7505] ● ***Common intention—Direct proof of seldom available.***—Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar* v. *State of Punjab*, the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under

Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy* v. *State of A.P.*, Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused. *Girja Shankar* v. *State of U.P.*, AIR 2004 SC 1808 : (2004) 3 SCC 793 : 2004 SCC (Cri) 863 (864) : 2004 CrLJ 1388. **TO THE SAME EFFECT :** (1) *Babulal Bhagwan Khandare* v. *State of Maharashtra,* 2005 SCC (Cri) 1553 (1560).

[7506] ● ***Common intention—Possibility of it having developing at spot not rule out.***—In this case, neither the trial Court nor the High Court assigned any reason for applying Section 34, IPC. On surmises and conjectures, it was observed by the trial Court that though there was no direct evidence showing preconcert or earlier meeting of minds, the possibility of it having developed at the spot cannot be ruled out. For coming to such conclusion, there was neither any direct nor circumstantial evidence. So far as the High Court is concerned, it appears that no definite finding has been recorded. The specific plea of the accused-appellant before it was that Section 34 is not applicable. *Girja Shankar* v. *State of U.P.*, AIR 2004 SC 1808 : (2004) 3 SCC 793 : 2004 SCC (Cri) 863 (867) : 2004 CrLJ 1388.

[7507] ● ***Common intention—Meaning and connotation.***—Section 34 really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well recognised canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose : as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In combination of this kind a mortal stroke, though given by one of the party, is deemed in the eye of law to have been given by every individual present and abetting. But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. Leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. The participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different time and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this section is not one of the conditions of its applicability in every case. Before a man can be held liable for acts done by another, under the provisions of this section, it must be established that (i) there was common intention in the sense of a pre-arranged plan between the two, and (ii) the person sought to be so held liable had participate in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply. *Parasa Raja Manikyala Rao* v. *State of A.P.*, AIR 2004 SC 132 (135-36) : 2004 CrLJ 390.

[7508] ● ***Common intention to cause death.***—Even though the appellants used deadly weapons like gandasis and lathis, they armed their blows only on the limbs of the deceased, even then all of them were on the limbs only. The doctor had opined that any individual injury on the appellant could not have caused, in the normal course, the death of the deceased. The appellants could neither have had the knowledge that their attack would, in the normal course, cause the death of the deceased nor would they have had the intention to cause the death. The offence committed by the appellants does not fall under Section 302, IPC but could be appropriately brought under Section 326 read with Section 34, IPC. *Jagir Singh* v. *State of Haryana*, 2004 SCC (Cri) 1162 (1163-64).

[7509] ● ***Murder—Common intention.***—In the instant case the accused-Dharamvir gave several blows on the person of deceased while accused Sunil caught hold of him to facilitate the assailants. Section 34 of the IPC is clearly attracted. *Sunil Kumar* v. *State Govt. of NCT of Delhi*, AIR 2004 SC 552 : (2003) 11 SCC 367 : 2004 SCC (Cri) 1055 : (1059) : 2004 CrLJ 819.

[7510] ● ***Murder—Common intention.***—In view of the cogent, credible and trustworthy evidence of PWs-1 to 4 about overt acts and the instigations, Section 34 has been rightly applied by the High Court. Having regard to the nature of disputes between the two families of the accused and victim, the happening of events immediately before the incident in question, the role found to have been played by them and the utterances said to have been made during the course of the assault are sufficient to provide a safe and sound basis for an inevitable inference of the existence of common intention in this case. *Parasa Raja Manikyala Rao* v. *Sate of A.P.*, AIR 2004 SC 132 (137) : 2004 CrLJ 390 : (2003) 4 Crimes 375.

[7511] ● ***Murder—Common intention.***—In this case though no charge was framed for an offence under Section 302, IPC read with Section 34, the evidence on record clearly brings out application of Section 34, Section 34 can be applied if the evidence of the eye-witness clearly establishes the role played by the concerned accused. *Ramanand Yadav* v. *Prabhu Nath Jha*, AIR 2004 SC 1053 : 2004 CrLJ 640 : (2003) 4 Crimes 399.

[7512] ● ***Common intention to cause death.***—A-1 was armed with a very dangerous weapon like *aruval*, he had also exhorted the other two accused to kill the deceased and his brother. Appellant No. 2 caused a serious injury on the deceased on a vital artery in the leg, and thereafter the first accused proceeded to attack the deceased. It indicates that all the accused persons including A-1 shared the common intention of each other to cause the death of the deceased and PW-1. *Muthusamy* v. *State of Tamil Nadu*, AIR 2004 SC 728 : (2004) 1 Crimes 122.

[7513] ● ***Common intention essentially being state of mind.***—Since common intention essentially being a state of mind and can only be gathered by inference drawn from facts and circumstances established in a given case, the earlier decisions involving almost similar facts cannot be used as a precedent to determine the conclusions on facts in the present case. *Ramesh Singh* v. *State of A.P.*, 2004 CrLJ 3354 : JT 2004 (4) SC 62.

[7514] ● ***Common intention—Development of at spot.***—The evidence on record did not show that the accused persons shared the common intention to kill the deceased. It is accepted that the first reaction after questioning the deceased and PWs-1 and 2 was that they were criminals, notorious and should be beaten. No further act is attributed. They even did not chase them. It is also accepted that after they had gone some distance, A-1 fired the gun twice. It appeared from the evidence of PWs-1 and 3 that A-1 was also armed with *lathi*. There was no evidence to show that other accused persons were aware that he was also carrying a gun or that he intended to use it. The Trial Court having accepted that there was no evidence of any type to show pre-concert came to a hypothetical conclusion that it may have developed at the spot. There was no material to support the conclusion. The High Court unfortunately did not specifically deal with this aspect. The inevitable conclusion is that the appellant cannot be convicted in terms of Section 302 read with Section 34, IPC. *Girija Shankar* v. *State of U.P.*, AIR 2004 SC 1808 : (2004) 3 SCC 793 : 2004 SCC (Cri) 863 (868) : 2004 CrLJ 1388 : JT 2004 (2) SC 140 : (2004) 1 JCC 392 : (2004) 1 Crimes 337.

[7515] ● ***Common intention of causing death.***—But question for our consideration is : what was the common intention? Was it to murder the deceased as held by the two Courts below or was it to merely assault in an attempt to take possession of the disputed land? An overall consideration of the material on record like the motive, nature of injuries caused, and the fact that there were also injuries on the accused indicates that there was a fight between the two groups of people during which fight the deceased suffered the injuries. It is difficult to come to the conclusion that the appellants went and assaulted the deceased with the intention to kill him. If that was the intention there would have been many more injuries on other vital parts of the body, as also the fact that no attempt was made to kill the other two brothers of the deceased even though they were outnumbered. The fact that the appellants had sought police help also indicates that they did not intend to take the law into their own hands in the first instance. Further, the fact that though many of the appellants carried axes the doctor who conducted the post-mortem found only one incised wound on the forehead. This also indicates that the accused persons did not really intend to kill the deceased. At the same time, it is to be noted that the prosecution has not been able to identify who really caused Injury 12 which caused the death of the deceased. In such circumstances, it is not safe to infer that the appellants shared a common intention of causing the death of the deceased, but it would be more appropriate to hold the appellants guilty of causing grievous hurt, an offence which is punishable under Section 326, IPC. *Daulat Taimbak Shewale* v. *State of Maharashtra*, 2004 SCC (Cri) 1901 (1904) : (2004) 5 Scale 285 : (2004) 4 Supreme 77.

[7516] ● ***Common intention—Development of at spur of moment.***—The common intention of the three accused developed immediately after the shots were fired at Kanhaiya Pandey, as a result thereof he fell down on the ground seriously injured. The plan to ward off attack in retaliation by the complainant-party and the other villagers present nearby and to prevent them from approaching towards place of incident and the accused persons, common intention developed at the spur of the moment at the place of occurrence during the commission of crime. The act of all the three accused persons of firing and throwing spear was in furtherance of the common intention of all of them. When the firearms were used indiscriminately in the open place, the assailants may be presumed to know that result of such use of the weapon will very likely give bodily injury to the persons and when such injuries are caused to the persons, it is the actual result from the assault made, and everyone of the persons concerned in the act will be guilty for that injury irrespective of the fact whether the prosecution has proved that a particular injury was caused by a particular accused person or not. Injury caused to the villagers by the firearm although simple in nature are caused by accused person in furtherance of the common object of all the three accused persons. This Court, therefore, hold the accused, appellants guilty of offence under Section 324 read with Section 34, IPC. *Parsuram Pandey* v. *State of Bihar*, AIR 2004 SC 5068 : (2004) 13 SCC 189 : 2005 SCC (Cri) 113 (121-122).

[7517] ● ***Common intention and participation both necessary.***—The Section 34, IPC really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well-recognised canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can they inquire even if it were possible, as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object, each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In a combination of this kind a mortal stroke, though given by one of the parties, is deemed in the eye of the law to have been given by every individual present and abetting. But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. The leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. (See *Ramaswami Ayyangar* v. *State of T.N.*) The participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different times and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this section is not one of the conditions of its applicability in every case. Before a man can be held liable for acts done by another, under the provisions of this section, it must be established that : (i) there was common intention in the sense of a prearranged plan between the two, and (ii) the persons sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply. *Dani Singh* v. *State of Bihar*, AIR 2004 SC 4570 : (2004) 13 SCC 203 : 2005 SCC (Cri) 127 (140) : 2004 CrLJ 3328.

[7518] ● ***"Common intention" implies prearranged plan.***—"Common intention" implies prearranged plan and acting in concert pursuant to the prearranged plan. Under this section a preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a prearranged plan and prior concert. (See *Krishna Govind Patil* v. *State of Maharashtra*) In *Amrik Singh* v. *State of Punjab*, it has been held that common intention presupposes prior concert. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bonds is often very thin, nevertheless, the distinction is real and substantial, and if overlooked, will result in miscarriage of justice. To constitute common intention, it is necessary that intention of each one of them be known to the rest of them and shared by them. Undoubtedly, it is a difficult thing to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But however difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. In *Maqsoodan* v. *State of U.P.*, it was observed that prosecution must lead evidence from which the common intention of the accused can be safely gathered. In most cases it has to be inferred from the act, conduct or other relevant circumstances of the case in hand. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.

From the evidence on record, it is clear that at the time when the second incident took place which led to the death of the deceased even according to the prosecution, none of the accused persons was motivated by any particular desire to attack Jhalar Mandal. The incident in question occurred on the spur of the moment without there being any intention of causing death or of causing such injury as they knew was likely to cause death, and was an act arising out of the enmity they had with the nephew of the deceased and aggravated by the unwanted questioning by the deceased. From the evidence it is clear that the act of the appellants cannot be construed as an act other than causing grievous hurt. In this background, we agree with the learned counsel for the appellants that in the absence of any motive, intention or knowledge as to their act which led to the death of the deceased, the appellants can only be held guilty for an offence punishable under Section 326 read with Section 34, IPC since there is material to show that these two appellants did wield their *lathis* out of which at least one blow, if not both, struck the head of the deceased causing him grievous injury which ultimately led to his death. *Chowa Mandal* v. *State of Bihar*, AIR 2004 SC 1603 : (2004) 13 SCC 231 : 2005 SCC (Cri) 154 (156-157) : 2004 CrLJ 1405.

[7519] ● ***Common intention—Direct proof of seldom available.***—Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantial offence. The destructive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true content of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. The section does not say "the common intentions of all" nor does it say "an intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy* v. *State of A.P.* Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused. *State of M.P.* v. *Deshraj*, AIR 2004 SC 2764 : (2004) 13 SCC 199 : 2005 SCC (Cri) 123 (126) : 2004 CrLJ 415; **TO THE SAME EFFECT :** (1) *Hari Ram* v. *State of U.P.*, 2005 SCC (Cri) 321 (325); (2) *Harbans Kaur* v. *State of Haryana,* AIR 2005 SC 2989 : (2005) 9 SCC 195 : 2005 SCC (Cri) 1213 (1216, 1217).

[7520] ● ***Common intention—Sharing of.***—All the three respondents were found guilty by the Sessions Court for the offence of murder punishable under Section 302 read with Section 34. The evidence of the three eyewitnesses proves that A-1 Saghir, s/o Zakkan Khan stabbed on the chest of the deceased whereas A-2 Amir Ahmad and A-3 Farid Khan caused injuries on the back and legs of the deceased. The post-mortem report shows that the deceased Khurshid Mian sustained two injuries on the chest whereas the injuries on the right thigh above knee joint and the inner aspect of right ankle were very small in nature and these injuries must have been caused by A-2 Amir Ahmad and A-3 Farid Khan. Having regard to the nature of the involvement of A-2 Amir Ahmad and A-3 Farid Khan, it is difficult to believe that they shared a common intention to cause the death of Khurshid Mian. If at all, they committed an offence punishable only under Section 324 read with Section 34. Conviction of A-2 and A-3 for the offence of murder under Section 302 read with Section 34, IPC is set aside. After conviction by the Sessions Court and earlier as undertrials, these accused had been in jail for some period. The imprisonment undergone by them would be sufficient to meet the ends of justice for the offence under Section 324 read with Section 34, IPC. *State of U.P.* v. *Farid Khan*, AIR 2004 SC 5050 : (2005) 9 SCC 103 : 2005 SCC (Cri) 51 (55) : 2004 CrLJ 4970.

[7521] ● ***Absence of any other accused Section 34, IPC would not apply.***—In the absence of any other accused person, question of applicability of Section 34, IPC would not arise. *Madan Pal* v. *State of Haryana*, (2004) 13 SCC 508 : (2006) 1 SCC (Cri) 357.

[7522] ● ***Common intention—Joint liability.***—Section 34, IPC enacts that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons, is liable for that act in the same manner as if it were done by him alone. The section thus lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is found in the existence of "common intention" animating the accused leading to the doing of a criminal act in furtherance of such intention. The section is intended to meet a case in which it is difficult to distinguish between the act of individual members of a party and to prove exactly what part was played by each of them. It, therefore, enacts that once it is found that a criminal act has been committed by several persons in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. It is thus an exception to the general rule of criminal jurisprudence that it is the primary responsibility of the person who actually commits a crime and only that person can be held guilty and punished in accordance with law for his individual act.

It is thus clear that the criminal act referred to in Section 34, IPC is the result of the concerted action of more than one person if the said result was reached in furtherance of the common intention and each person must be held liable for the ultimate result as if he had done it himself. *Saravanan* v. *State of Pondicherry*, 2005 SCC (Cri) 161 (164, 165).

[7523] ● ***Common intention—Doing of criminal act in furtherance of.***—It was thus a clear case of doing of a criminal act in furtherance of the common intention. It was in the evidence of Dr. Balaraman that Injury 5 was sufficient in the ordinary course of nature to cause death. Taking into consideration the concession by the learned Public Prosecutor that the case would not be covered by Section 302, IPC, Accused 1, 3 and 4 were convicted by the trial Court for an offence punishable under Section 304 Part II read with Section 34, IPC. In our opinion, by applying Section 34, IPC and convicting the appellants for an offence under Section 304 Part II read with Section 34, IPC, no error of law has been committed either by the trial Court or by the High Court. *Saravanan* v. *State of Pondicherry*, 2005 SCC (Cri) 161 (165).

[7524] ● ***Common intention—Murder.***—The facts of the case disclose that murders have taken place on both sides. While the deceased was being tried for the murder of the uncle of the appellant, Ravindra Singh was being tried for the murder of the son of the deceased. The parties are well known to each other. It so happened that on the day of occurrence, while the deceased was proceeding ahead, he was noticed by the appellant herein who was in the company of Ravindra Singh, who was carrying a loaded country-made pistol. He exhorted Ravindra Singh to kill the deceased whereafter Ravindra Singh fired at the deceased from behind and killed him. If these facts cannot be disputed, there can be no doubt about the application of Section 34, IPC. It was pursuant to the common intention of both that Ravindra Singh fired at the deceased resulting in his death. Having heard the parties and persuaded the records, we find nothing which may lead us to hold that the allegation of exhortation by the appellant is not true. *Damodar* v. *State of U.P.*, AIR 2005 SC 1247 : (2005) 1 SCC 543 : 2005 SCC (Cri) 414 (415) : 2005 CrLJ 330.

[7525] ● ***Common intention—Difficult to discern element of—Among appellants.***—In the instant case it is difficult to discern the element of common intention among the appellants. It is difficult to hold on the basis of the evidence on record that they were activated by the design to kill Kartik Rai or his son. At the most it can be said that the appellants joined the other accused to trespass into the house of the victims with a view to threaten them by show of force by using criminal force. *Mukti Prasad Rai* v. *State of Bihar*, 2005 SCC (Cri) 69 (71).

[7526] ● ***Common intention to Kill.***—On the conspectus of various relevant features including the genesis and the nature of the quarrel, the absence of motive for taking the extreme step of killing the victims, the short time gap within which the entire incident occurred pursuant to the petty quarrel amongst the women, the nature of weapons used and the part played by the appellants, the conclusion of the High Court that the appellants were prompted by the common intention to kill or that they instigated their fellow accused to kill Kartik Rai and his son is not sustainable. *Mukti Prasad Rai* v. *State of Bihar*, 2005 SCC (Cri) 69 (71).

[7527] ● ***Section 34, IPC—Applicability—Nature of liability of person acting in furtherance of "common intention of".***—The section does not say "the common intentions of all", nor does it say "an intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy* v. *State of A.P.*, AIR 1993 SC 1899 : 1993 SCC (Cri) 875. Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused. *Harbans Kaur* v. *State of Haryana*, AIR 2005 SC 2989 : (2005) 9 SCC 195 : 2005 SCC (Cri) 1213 (1217) : 2005 CrLJ 2199 : 2005 (2) Crimes 7.

[7528] ● ***Common intention—Absence of.***—There is evidence to the effect that the appellants only wanted to teach a lesson to Tara Singh. They were aggrieved by the fact that deceased Tara Singh had purchased the agricultural land which they expected to get from Gurdial Kaur. Two of the assailants were armed with axes, but they did not use the sharp edge of those weapons and the injuries sustained by deceased Tara Singh would show that there were no deep penetrating injuries. Most of the injuries were of minor nature, having possibly been caused by the blunt edge of the weapon.

Gora Singh though armed with a Kulhari used the blunt portion of that axe. Sikandar Singh was armed with a *Sotti*. He caught hold of deceased Tara Singh to enable the other assailants to cause injury to him and Sikandar Singh himself gave *sotti*-blows on the back of the deceased which resulted in causing fracture of the ribs and, in turn, piercing of the lung tissues of the deceased Tara Singh. It is clear that Sikandar Singh dealt the fatal blows which ultimately resulted in the death of the deceased. If the entire prosecution evidence is considered in the background of the so-called motive alleged, it is very difficult to discern that these appellants had any common intention to cause the death of the deceased. The *sotti*-blows dealt on the back of deceased Tara Singh proved fatal causing fracture of ribs which pierced his lung tissues.

On careful analysis of the prosecution evidence and the role played by each one of the appellants, the evidence did not show that the appellants shared a common intention to cause the death of the deceased. However, appellant Sikandar Singh caused injuries on deceased Tara Singh which proved to be fatal at the end. The act committed by Sikandar Singh would come within the offence punishable under Section 304, Part I, IPC as he could be attributed with the knowledge that the injury caused by him is likely to cause death. The grievous injuries caused by other appellants, namely, Gora Singh and Balbir Singh, would fall within the mischief of Section 326, IPC. *Balbir Singh* v. *State of Punjab*, (2005) 9 SCC 299 : 2005 SCC (Cri) 1245 (1248) : 2005 (1) Crimes 393.

[7529] ● ***Common intention—Accused-I gave gandasi blow on right hand of deceased causing grievous injury and Accused-2 gave lathi blow on left foot and also thrust blow of lathi on left side of head of deceased.***—When the deceased near the house of Janta Singh A-1, A-2 armed with *gandasi* and *lathi* respectively were present there, A-2 made an absence gesture. At this A-2 and deceased exchanged that words and abused each other, A-1 gave a gandasi blow on the right hand of the deceased which caused a grievous injury. A-2 gave a lathi blow on the left foot of the deceased and also gave a thrust-blow of *lathi* on the left side of his head. When PW-6 and PW-7 raised alarm, both the accused ran away from the spot. Doctor found injury, which was incised wound in the middle phalanx of the index finger of right hand. The second injury was abrasion on the lateral side of upper 1/3rd part of left leg and the patient complained of pain on different parts of the body and expired next day. It was held that Section 34 was rightly applied and both the accused were convicted for offences under Sections 323, 325 and 326 r/w Section 34, IPC. *Harbans Kaur* v. *State of Haryana*, AIR 2005 SC 2989 : (2005) 9 SCC 195 : 2005 SCC (Cri) 1213 (1215) : 2005 CrLJ 2199 : 2005 (2) Crimes 7.

[7530] ● ***Common intention if shared—Deceased way laid to extort money from him.***— In the instant case the incident happened in the agricultural field where these persons apparently came for their agricultural work. It is true that the accused were armed with weapons but that by itself is not sufficient to hold that all the persons had come there with the intention of causing death of Ran Veer. The evidence in the case only disclosed that the accused persons came in a group and first accused Lakshman Singh fired at deceased Ran Veer. It is also important to note that the deceased Ran veer had sustained one more injury which is incised in nature and the same is alleged to have been caused by the second accused Kirtan Singh who was armed with a "*farsa*". This injury was not grievous and the second accused was found guilty of offence punishable under Section 307, IPC for having caused grievous injury to PW-2. The fact that the second accused did not cause any grievous injury even though he was armed with deadly weapon, was also taken note of by the High Court for convicting him rather than holding that he shared the common intention to cause the death of the deceased.

When the matter came before the Supreme Court, it was held that it could not be said that the High Court had taken perverse view and the finding of the High Court could not be said to be reasonable. *Sukhbir Singh* v. *Kirtan Singh*, (2005) 10 SCC 567 : 2005 SCC (Cri) 1624 (1626).

[7531] ● ***Common intention, sharing of.***—The three persons were alleged to have gone to the shop of the deceased. They asked the shop-owner to come out. On the deceased going out of the shop, two of the assailants (one of them is the appellant) held two revolvers to the heard of the victim and the third one had a dagger with him. Keeping the victim in that form they asked him to pay Rs. 5000 plus the entire collection in the shop for that day. As the victim could not pay the said amount he expressed his helplessness. Keeping the victim in this form they asked his son PW-4 Anil Kumar to meet the demand. PW-4 also expressed helplessness to oblige the assailants. Then A-1 plunged the dagger into the abdomen of the victim. Thereafter, all the three ran away from the scene. The deceased succumbed to the injury thereby sustained.

The counsel for appellant's submitted that it was possible that the two persons who held the victim with revolvers would not have intended him to murder because if they had so intended they would have used the revolvers. Second was an alternative contention that they would have caused and shown only toy-revolvers. *Held*, "Either of the said alternatives is not enough to dispel the possibility of the three persons entertaining common intention to commit the murder of the deceased. Our reasons are the following : if the two persons carried only toy revolvers, that would explain why those two persons could not kill the deceased. If the revolvers were genuine, why one of them at least did not use it need not be countenanced by us because the third one had plunged his dagger which itself was a lethal weapon. If the three persons had decided to go for committing extortion they would have thought of what should be done in case they failed to extract the money. It is unthinkable that the three would have decided to walk back coolly on failure of their mission to commit extortion." *Raju Ram* v. *State of Bihar*, (2005) 10 SCC 571 : 2005 SCC (Cri) 1627 (1628).

[7532] ● ***Common intention—Absence of.***— The only evidence on the part played by the appellant-accused is the exhortation made by him not to allow the deceased to go away. There was no exhortation to kill or there is no other overt act attributed to him which can possibly lead to the reasonable inference that the appellant was keen that Kaka Singh should deal a fatal blow on Dildar Singh. In this fact situation as disclosed by the evidence of the eyewitnesses themselves, it is difficult to come to the conclusion that the appellant intended to kill the deceased taking the aid of Kaka Singh. The necessary nexus between the exhortation attributed to the appellant and the act done by the main accused is not, in our opinion, established. At any rate, there is a considerable doubt whether the appellant entertained such intention pursuant to an incident that took place one year earlier, that too when it ended in a compromise. At the same time the conduct of the appellant in exhorting Kaka Singh not to allow him to escape and in not stopping the accused Kaka Singh from attacking with knife more than once would unmistakably indicate that by his exhortation, the appellant wanted his companion Kaka Singh to cause harm to the deceased. Thus the reasonable inference that could be drawn from the proved facts is that the appellant at least instigated Kaka Singh to cause hurt to Dildar Singh and in pursuance of such instigation Kaka Singh acted instantaneously, though the magnitude of injuries inflicted on the deceased was something that was, in all probability, unintended by the appellant. *Paramjit Singh* v. *State of Punjab*, (2005) 10 SCC 143 : 2005 SCC (Cri) 1493 (1494).

[7533] ● ***One of the accused having abrasions—Highly doubtful whether he had shared common intention.***—According to the counsel for the appellants, these abrasions could have been caused on account of fall on the ground as stated by PW-6 (Dr. Malik). In any case, it is contended that the second appellant cannot be said to have common intention with the first appellant. If at all they can be convicted for the individual acts. There is force n the contention of the counsel for the appellant as regards the second appellant (A-2) is concerned. PW-5 did not find any injury at all on the knees. May be, that it was so minimal that it could have escaped the attention of PW-5. The other possibility is that this mild abrasion could be caused by reason of fall. In any case, the version of PW-8 that lathi-blow was given with such a force that as a result of its impact, the victim fell to the ground cannot be accepted. That apart, even according to the prosecution case, attack took place suddenly in a public place when PWs-8 and 9 were returning to their home from Palwal. It is highly doubtful whether Appellant 2 shared his common intention with Appellant 1 and both of them wanted to kill PW-8 (Sukhbir). The conviction and sentence of the second appellant (Accused 2) is, therefore, set aside and the appeal is allowed insofar as the second appellant is concerned. He shall be released forthwith from the jail if he is not required in any other case. *Jagdish* v. *State of Haryana*, AIR 2005 SC 2576 : (2006) 1 SCC (Cri) 96 (98) : 2005 CrLJ 3073 : JT 2005 (5) SC 579 : 2005 (2) Crimes 220.

[7534] ● ***Sharing common intention.***—From the prosecution evidence it becomes clear that the accused shared the common intention. With Tileshwar Rai to cause the death of the deceased. Therefore there is no difficulty in holding that if the accused Tileshwar Rai would not have died, on the basis of evidence adduced by the prosecution, which is unimpeachable he was liable to be convicted under Section 302 with the aid of Section 34, IPC, but merely because he died before the commencement of his trial and could not be tried the accused cannot take any advantage therefrom. *Rajani Rai* v. *State of Bihar*, AIR 2006 SC 433 : (2006) 1 SCC (Cri) 209 : 2006 CrLJ 163 : JT 2005 (9) SC 518 : 2005 (4) Crimes 206.

[7535] ● ***On the fact of case no common intention was proved.***—In the instant case since the original quarrel was between PW-1 and A-5, in our view, it is difficult to say that there was common intention either premeditated or formed on the spot with regard to the murder of Ranjit Das. Ranjit Das was an intervenor to save PW-1 and in such a situation the incident appeared to have occurred on the spur of the moment. By no stretch of imagination can it be said that the murder of Ranjit Das was with the common intention of A-1 and A-5. From the evidence on record it clearly appears that the dao-blow was dealt by only A-1. If at all a conviction under Section 302, IPC is maintained, the death resulted by an independent act of A-1. In such a situation, A-5 cannot be roped in with the aid of Section 34, IPC. We are clearly of the view that the conviction of A-5 under Section 302, IPC with the aid of Section 34, IPC is not sustainable and, therefore, conviction *qua* A-5 under Sections 302/34, IPC is set aside. *Abani K. Debnath* v. *State of Tripura*, AIR 2006 SC 518 : (2005) 13 SCC 422 : (2006) 2 SCC (Cri) 257 (259) : 2006 CrLJ 314 : 2005 (4) Crimes 279.

[7536] ● ***Circumstances showing that offence was committed in furtherance of common intention.***—In the present case, the conviction recorded by the Trial Court was under Section 302 with the aid of Section 34. The two accused armed with country-made pistols accompanied by the other accused armed with SBBL gun and DBBL gun respectively went to the place of occurrence, waylaid the deceased and partly and attacked the deceased. It cannot be said that they accompanied the other accused as an idle curiosity. The aforesaid circumstances would clearly infer the intention of the present two accused for committing an offence in furtherance of common intention. Their conviction under Section 302 with the aid of Section 34 cannot be said to be unjustified. *State of U.P.* v. *Ganga Ram*, AIR 2006 SC 20 : (2005) 13 SCC 239 : (2006) 2 SCC (Cri) 154 (160) : 2005 CrLJ 4643 : 2005 (4) Crimes 198 : 2005 (8) Scales 603.

[7537] ● ***Common intention does not require positive overt act on party of person concerned.***—The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof. The law in this behalf is no longer *res integra*. There need not be a positive overt act on the part of the person concerned. Even an omission on his part to do something may attract the said provision. But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case. *Vijayant* v. *State of Maharashtra*, (2005) 13 SCC 134 : (2006) 1 SCC (Cri) 790 (794).

[7538] ● ***Common intention can be formed even on spot.***—No evidence has been brought on record by the prosecution to show that the accused persons met prior to the date of occurrence for the purpose of commission of the said offence. It is true that common intention can be formed even on the spot but for the said purpose, it is essential to consider the role played by the accused. The victim was the appellant's sister's daughter. She may have become enraged because her modesty was outraged. But it is difficult to arrive at a conclusion that she would be a party to the murder. Had she shared the common intention, she could have armed herself with a weapon and she would have played a more active role than what had been attributed to her by the prosecution. *Vijayanti* v. *State of Maharashtra*, (2005) 13 SCC 134 : (2006) 1 SCC (Cri) 790 (797, 798).

[7539] ● ***Common intention proved.***—In the instant case, it cannot be said that the accused persons were prejudiced merely because charge was framed under Section 302 IPC simpliciter and no charge was framed under Section 302 read with Section 34 IPC. From the evidence of two eyewitnesses, namely, PWs. 2 and 3 it would appear that the accused persons shared the common intention to cause death of the victim. They were cross-examined at length from all possible angles and from the suggestions that were put forth to the eyewitnesses, we are fully satisfied that the accused persons were not in any manner prejudiced in their defence. The apart, in their examination, under Section 313 CrPC, the appellants were specifically told that they along with other accused persons armed with *Kirpan* came to the place of occurrence and assaulted the deceased whereafter they fled away which shows that appellants shared the common intention to cause death of the deceased. *Gurpeet Singh* v. *State of Punjab,* AIR 2006 SC 191 : (2005) 12 SCC 615 : 2006 CrLJ 126 (133) : 2005 (4) Crimes 230 (SC).

[7540] ● ***No evidence showing that appellant helped accused in murder***.—Where there was no evidence to show that the appellant helped the co-accused in committing murder, it was held that the appellant did not share the intention and, therefore, his conviction under Section 302/34 IPC was set aside and he was convicted under Section 326, IPC. *Palanisamy* v. *State of Tamil Nadu,* (2006) 10 SCC 297 : (2006) 3 SCC (Cri) 341.

[7541] ● ***Accused helping co-accused in murder.***—Where the appellant threatened and prevented PW 3 by causing knife injury when the accused was attacking deceased, it was held that the appellant acted in furtherance of common intention and thus his conviction under Section 302/34 IPC was proper. *Kishore Eknath Nikam* v. *State of Maharashtra,* (2006) 10 SCC 666 : 2007 (1) SCC (Cri) 62 : 2007 CrLJ 1007 : (2006) 4 Crimes 88.

[7542] ● ***Essentials of offence.***—Before a person can be held liable for acts done by another, under the said provision, it must be established that : (i) there was common intention in the sense of a pre-arranged plan between the two; and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. *Prakash* v. *State of Madhya Pradesh,* 2006 (13) SCC 508 : 2007 CrLJ 798 (800) (SC) : 2006 (Supp-9) SCR 907 : 2007 (1) Supreme 1025 : 2006 (9) SLT 581 : 2007 (2) Crimes 74 (SC) : 2006 (12) Scale 635.

[7543] ● ***Accused preventing PWs to intervene in matter.***—A perusal of the statements of all PWs 1, 2 and 3 shows that there is no manner of doubt that accused appellant in furtherance of the common intention of the A1-Jagdish tried to prevent PWs 2 and 3 from intervening in the matter. So much so that PW 3 who wanted to intervene, effectively was prevented by causing knife injury by accused appellant. Therefore, this conduct of the accused appellant is sufficient to attract Section 34 because he acted in furtherance of common intention of accused A-1. Looking to the facts of the present case there remains no manner of doubt that accused appellant was acting in furtherance of common intention and prevented PWs 2 and 3 to save deceased. He facilitated the commission of the offence in furtherance of common intention of A1-Jagdish in committing the murder of the deceased Parshant. Therefore, Section 34 is attracted in the present case and the accused appellant was rightly convicted under Section 302 read with Section 34 of IPC.—*Kishore Eknath Nikam* v. *State of Maharashtra,* (2006) 10 SCC 666 : 2007 (1) SCC (Cri) 62 : 2007 CrLJ 1007 (1008, 1009) : 2006 (4) Crimes 88 (SC).

[7544] ● ***Common intention—Inference from injuries by deceased.***—Where a number of injuries suffered by the deceased clearly point out that it could not have been inflicted by one person, common intention on the part of one of the accused persons together with others to commit the murder of the deceased can be inferred. *Rotash* v. *State of Rajasthan,* 2007 (2) SCC (Cri) 382 : 2007 CrLJ 758 (761) : 2007 (1) Crimes 236.

[7545] ● ***Direct proof of common intention seldom available—It can only be inferred from circumstances.***—Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case. However, in order to bring home the charge of common intention the prosecution has to establish by evidence whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34. *Laxman Anaji Dhundale* v. *State of Maharashtra,* AIR 2007 SC 1876 : 2007 AIR SCW 3369 : (2007) 10 SCC 771 : 2007 CrLJ 3191 (3192, 3193) (SC) : (2007) 2 Crimes 225.

[7546] ● ***Common intention proved.***—All the accused came at the same time. Each one of the was variously armed. They evidently came with an intention to commit some crime. Their target was known. They did not think of not committing the crime of murder of a son infront of his mother. He was assaulted indiscriminately. The common intention on the part of accused persons stood established. *Rotash* v. *State of Rajasthan,* 2007 AIR SCW 44 : (2006) 12 SCC 64 : 2007 (2) SCC (Cri) 382 : 2007 CrLJ 758 (763) : 2007 (1) Crimes 236 :.

[7547] ● ***Common intention to be inferred from totality of facts and circumstances.***—The inference of common intention is to be drawn from totality of facts *Rotash* v. *State of Rajasthan,* (2006) 12 SCC 64 : 2007 SCC (Cri) 382 : 2007 CrLJ 758 (761).

[7548] ● ***Intention may be inferred from surrounding circumstances.***—Counsel for the appellants submitted that since the appellants had not attacked the deceased Abdul Qayum, they could only be convicted under Section 324 IPC and not under Section 302. *Held,* Section 34 IPC clearly applied to the facts of the case as found by the High Court. There is no doubt that all the accused came armed with spears and lathies. It has also come in evidence that all the twelve accused surrounded deceased Abdul Qayum as well as the injured person Mustakin (PW 3). The appellants who were armed with spears had inflicted a spear wound on Mustakin in his ileum. Hence, Section 34 clearly applies in this case. It is well settled that common intention may develop on the spot among a number of persons and hence pre-concert in the sense of distinct previous plan is not necessary to attract Section 34 IPC. Also, it is not necessary to adduce direct evidence of common intention. The intention may be inferred from the surrounding circumstances and the conduct of the parties. In the present case, the Court found no reason to disagree with the High Court that Section 34 IPC was attracted to the facts of the case. *Imtiaz* v. *State of Uttar Pradesh,* 2007 CrLJ 1663 (1666, 1667) (SC) : 2007 (2) SCR 698 : 2007 (3) JT 484 : 2007 (2) Supreme 285 : 2007 (4) SRJ 336 : 2007 CrLJ 1663 : 2007 (2) Crimes 159 (SC) : 2007 (1) JCC 757 : 2007 (3) Scale 204.

[7549] ● ***Conviction under Section 304. Part read with 34 IPC set aside.***—A common intention may be developed on the spot. Although a person may not be held guilty for having a common object, in a given situation, he may be held guilty for having a common intention, but such common intention must be shared with others. The recital made in the first information report which has been noticed by us herein clearly goes to show that the appellant had sought to attack the deceased while he was on motor cycle. The attack was warded off by PW-4. He suffered an injury. The deceased thereafter ran to the school building. The dead body of deceased was found only on the stair case of the school. The FIR as also the Evidence of PWs 4 and 5 revealed that the deceased was chased by all the accused. He was assaulted by all the accused. The specific role played by the appellant has not been disclosed. Whether the appellant alone was responsible for causing the death has also not been stated.

The deceased suffered as many as 19 injuries, some injuries were inflicted on vital parts of the body and some only on the hands and legs. There is nothing on record to show that the appellant inflicted any injury on a vital part of the body of the deceased. In the afore mentioned situation, Section 34 IPC would not be attracted. The conviction of accused under Section 34 was set aside. His conviction under Section 324, IPC only was maintained. *Noor* v. *State of Karnataka,* (2007) 12 SCC 84 : 2007 CrLJ 4299 (4303) : 2007 (3) Crimes 231 (SC).

[7550] ● ***Accused was seen firing shot at deceased and also leaving spot—No common intention.***—When only accused appellant was armed with gun, PWs saw him firing shot at the deceased and also saw him leaving the spot, appellant accused cannot be said to have entertained common intention with other accused persons for the murder of the deceased. The conviction of the accused under Section 302 and acquittal of the other co-accused under Section 302 read with Section 34 was held proper. *Anil* v. *State of Haryana,* (2007) 10 SCC 274 : 2007 (3) SCC (Cri) 641 : 2007 CrLJ 4294 (4297) : 2007 (3) Crimes 15 (SC) :.

[7551] ● ***No Common intention.***—The prosecution case was that the accused police man entered the house of the deceased with intention to commit rape but he could not succeed in committing rape. On suggestion of the accused that if Harbans Kaur remained alive she would implicate all the accused and hence she should be killed, another accused killed the deceased. It is alleged that thereupon the accused gave a brick bat blow on the head of the deceased, as a result of which she died. As no role was assigned to the appellants, no common intention could be inferred. There was no evidence that the appellants had any role to play in the killing of deceased. The conviction of the two accused appellants under Section 302 was set aside. *Surjit Singh* v. *State of Punjab,* 2007 CrLJ 2766 (2769) (SC).

[7552] ● ***No credible evidence of any common intention.***—There is no credible evidence showing that the accused Nos. 2 and 3 (appellants in this appeal) caused the death of the deceased. There is also no credible evidence of any common intention of the appellants along with their son Rajendra to cause the death of the deceased Kalpana. There is no doubt evidence that accused No. 1 Rajendra demanded ornaments from his wife Kalpana for selling the same for the purpose of purchasing tins and wooden ballies for making a roof of his house. However, we are not dealing with the case of accused No. 1 Rajendra in this appeal. We are only concerned with the question whether the guilt of the appellants who are the parents of Rejendra, is proved beyond reasonable doubt. We are of the opinion that it is not. The present case there is no credible evidence, direct or circumstantial, that there was such a plan or meeting of minds of all the accused persons to commit the offence in question. Hence, in our opinion, the charge under Section 34 IPC has not been established. *Laxman Anaji Dhundale* v. *State of Maharashtra,* AIR 2007 SC 1876 : (2007) 10 SCC 771 : 2007 SCC (Cri) 675 : 2007 CrLJ 3191 (3192, 3193) : 2007 (2) Crimes 225 (SC).

[7553] ● ***Applicability and scope of Section 34, IPC.***—Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself.

The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. *Hemchand Jha* v. *State of Bihar,* 2008 (11) SCC 303 : 2008 CrLJ 3203 : 2008 (9) SCR 1171 : 2008 (9) Scale 211 : 2008 (4) Supreme 570 : 2008 (3) Crimes 57 (SC). **TO THE SAME EFFECT** : (1) *Rajesh Kumar* v. *State of Himachal Pradesh,* 2008 (4) Crimes 252 (SC) : JT 2008 (11) SC 160. (2) *Hardeep Singh* v. *State of Haryana,* AIR 2008 SC 3113 : 2008 (3) Crimes 28 (SC) : JT 2008 (10) SC 593.

[7554] ● ***Concept.***—If two or more persons intentionally, do an get jointly, the position in law is just the same as if each of them has done if individually by himself. *Sewa Ram* v. *State of Uttar Pradesh,* AIR 2008 SC 682 : 2008 CrLJ 802 : 2008 (1) Crimes 78 (SC). **TO THE SAME EFFECT** : *Sachin Jana* v. *State of West Bengal,*

(2008) 3 SCC 390 : 2008 (1) Crimes 342 (SC) : 2008 (2) SCR 14.

[7555] ● ***Applicability of Section 34, IPC.***—For applying Section 34 IPC, it is not necessary to show some overt act on the part of the accused. The section applies even if no injury is caused by the particular person. *Rajesh Kumar* v. *State of Himachal radesh,* 2008 (4) Crimes 252 (SC) : JT 2008 (11) SC 160. **To the same effect** : (1) *Shashi Mohan* v. *State of Madhya Pradesh,* AIR 2008 SC 2961 : 2008 (3) SCC (Cri) 439 : 2008 CrLJ 3863. (2) *Hardeep Singh* v. *State of Haryana,* AIR 2008 SC 3113 : 2008 (3) Crimes 28 (SC). (3) *Hemchand Jha* v. *State of Bihar,* (2008) 11 SCC 303 : 2008 CrLJ 3203 : 2008 (3) Crimes 57 (SC). (4) *Sewa Ram* v. *State of Uttar Pradesh,* AIR 2008 SC 682 : (2008) 15 SCC 705 : 2008 CrLJ 802 : 2008 (1) Crimes 78.

[7556] ● ***No evidence of common intention and presence of accused on the spot.***—Where the presence of accused A2 to A6 an spot was doubtful as they did not assault or cause injuries to any one and there was no evidence to common intention, the accused were acquitted if the charge under Section 302 and 307 etc. *Sambhaji Hindurao Deshmukh* v. *State of Maharashtra,* 2008 AIR SCW 823 (835).

[7557] ● ***Common intention and common object—Distinction.***—"Common object" is different from "Common intention" as it does not require a prior concept and a common meeting of minds before the attack. It is enough if each has the same object in view and there is fire or more and that they act as an assembly to achieve that object. *Maranadu* v. *State,* (2008) 16 SCC 529 : 2008 CrLJ 4562 : 2008 (4) Crimes 16. **To the same effect** : *State of Karnataka* v. *Chikkahotappa,* AIR 2008 SC 2692 : (2008) 15 SCC 299 : 2008 CrLJ 3495 : JT 2008 (7) SC 395.

[7558] ● ***Ingredients.***—The essential conditions for the application of Section 34, IPC are (i) common intention to commit an offence and (ii) participation of all the accused persons in doing act or acts in furtherance of that common intention. *Shaik China Brahmam* v. *State of Andhra Pradesh,* AIR 2008 SC 616 : (2007) 14 SCC 457 : (2007) 11 SCC 442 : 2008 (1) Crimes 105.

[7559] ● ***Essence of liability.***—For the applicability of Section 34 IPC, the act may be different but these acts must be actuated by one and the same common intention. *Sewa Ram* v. *State of Uttar Pradesh,* AIR 2008 SC 682 : (2007) 15 SCC 75 : 2008 CrLJ 802 : 2008 (1) Crimes 78 (SC).

[7560] ● ***Essence of liability.***—The essence of liability under Section 34 IPC is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention.—The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. *Aizaz* v. *State of Uttar Pradesh,* (2008) 12 SCC 198 : 2008 CrLJ 4374 : 2008 (3) Crimes 352. **To the same effect** : *Shashi Mohan* v. *State of Madhya Pradesh,* AIR 2008 SC 2961 : (2008) 8 SCC 145 : 2008 (3) SCC (Cri) 439 : 2008 CrLJ 2961.

[7561] ● ***Common Intention—Development.***—Under Section 34, IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a pre-arranged plan and prior concert. *Aizaz* v. *State of Uttar Pradesh,* (2008) 12 SCC 198 : 2008 CrLJ 4374 (4376) : 2008 (3) Crimes 352.

[7562] ● ***Overt act need not be proved.***—To attract the applicability of Section 34, IPC, proof of overt act on the part of accused is not necessary. *State of Punjab* v. *Bakhshish Singh,* 2008 (14) Scale 183.

[7563] ● ***Common intention—Accused going together with arms and fatal injuries are caused to deceased.***—When persons go together armed with deadly weapons and fatal injuries are caused to the deceased all of them are equally liable in view of Section 34, IPC. *Balwant Singh* v. *State of Pubjab,* AIR 2008 SC 1243 : (2008) 12 SCC 237 : 2008 CrLJ 1648 (1650) : (2008) 1 Crimes 392.

[7564] ● ***Common intention.***—In the instant case the prosecution case was that the accused persons assaulted the deceased with lathis and kanta. Litigation enmity was pending between the parties. *Held,* the accused appellants had common intention to commit the murder of the accused. The conviction of the accused appellants concurrently recorded by the Sessions Judge and High Court under Section 302 read with Section 34 IPC was not interfered. *Sewa Ram* v. *State of Uttar Pradesh,* (2007) 15 SCC 75 : 2008 CrLJ 802 (805) (SC) : (2008) 1 Crimes 78.

[7565] ● ***Common intention—Proof.***—To bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused person to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. *Sachin Jana* v. *State of West Bengal,* 2008 (3) SCC 390 : 2008 (2) SCC (Cri) 45 : 2008 (2) SCR 14 : 2008 (1) Supreme 540 : 2008 (1) Crimes 342 (SC). **TO THE SAME EFFECT** : (1) *Sewa Ram* v. *State of Uttar Pradesh,* AIR 2008 SC 682 : (2007) 15 SCC 75 : 2008 CrLJ 802 : 2008 (1) Crimes 78 (SC) : JT 2008 (1) (SC) 136. (2) *Hardeep Singh* v. *State of Haryana,* AIR 2008 SC 3113 : (2008) 12 SCC 39 : 2008 (3) Crimes 28. (3) *Rajesh Kumar* v. *State of Himachal radesh,* AIR 2009 SC 1 : (2008) 15 SCC 705 : 2009 CrLJ 335 : 2008 (4) Crimes 252 (SC) : JT 2008 (11) SC 160.

[7566] ● ***Common intention—Meaning.***—Section 34, IPC really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well recognized canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. *Aizaz* v. *State of Uttar Pradesh,* (2008) 12 SCC 198 : 2008 CrLJ 4374 (SC) : 2008 (11) Scale 465 : 2008 (6) Supreme 268 : 2008 (3) Crimes 352.

[7567] ● ***Common intention.***—The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit offence for which they can be convicted. The prosecution must prove facts to justify an inference that all the participants of the acts had shared a common intention to commit the criminal act which was finally committed by one or more of the participants. Mere presence of a person at the time of commission of an offence by the confederates is not in itself sufficient to bring his case with in the purview of Section 34, unless community of designs is proved against him. *Aizaz* v. *State of Uttar Pradesh,* (2008) 12 SCC 198 : 2008 CrLJ 4374 : 2008 (3) Crimes 352. **TO THE SAME EFFECT** : *Shaik China Brahmam*, AIR 2008 SC 610 : (2007) 14 SCC 457 : 2008 (1) Crimes 105.

[7568] ● ***Murder—Common intention—Sections 300/34, IPC.***—The accused persons, as per the charges, were charged with the offence under Section 302 substantively. In addition to that all the accused were also charged with the aid of Section 149, IPC. Both the appellants had specifically taken part in the assault, their presence was established, their overt acts were also established. It is further established that while Heera had given the blows with the aid of a sharp edged weapon, Murli had assaulted the deceased with lathi on the head. They have also been individually charged with the offence under Section 202, IPC. They came together on the spot, they also gave abuses to the deceased and, thereafter, acted along with each other. Therefore, conviction of bath the accused was upheld but not with the aid of Section 149, IPC but with the aid of Section 34, IPC. *Murli* v. *State of Rajasthan*, (2009) 9 SCC 417 : 2010 CrLJ 2228 (2234).

[7569] ● ***Common intention—A question of fact.***—The existence of common intention is a question of fact. Since intention is a state of mind, it is, therefore, very difficult, if not impossible, to get or procure direct proof of common intention. Therefore, Courts, in most cases, have to infer the intention from the act or conduct of the accused or other relevant circumstances of the case. However, an inference as to the common intention shall not be readily drawn; the criminal liability can arise only when such inference can be drawn with a certain degree of assurance. *Bengai Mandal* v. *State of Bihar*, AIR 2010 SC 686 : (2010) 2 SCC 91 : 2010 CrLJ 1420 (1422) : (2010) 1 Crimes 49.

[7570] ● ***Common intention—Section 34, IPC —Scope and applicability.***—Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-mediation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34. *Virendra Singh* v. *State of Madhya Pradesh*, (2010) 8 SCC 407 : JT

2010 (8) 319 : 2010 (4) Crimes 136 (SC). **To the same effect** : *Abdul Sayeed* v. *State of Madhya Pradesh*, (2010) 10 SCC 259 : 2010 (4) Crimes 86 (SC).

[7571] ● *Common intention—Direct evidence.*—Intention being a state of mind its direct proof, through not impossible is very difficult to procure. Therefore, the Courts in most cases have to infer the intention from the act(s) conduct of the accused or other relevant circumstances of the case. However, an inference as to common intention shall not be readily drawn, the criminal liability can arise only when such inference can be drawn with a certain degree of assurance. *Bengai Mandal* v. *State of Bihar*, AIR 2010 SC 686 : (2010) 2 SCC 91 : 2010 CrLJ 1420. **To the same effect :** *Ashok Basak* v. *State of Maharashtra*, (2010) 10 SCC 660 : JT 2010 (11) SC 123.

[7572] ● *Common intention—May develop on spot.*—Common intention to bring about a particular result may develop at the spur of moment the spot, with reference to the facts of the case and circumstances existing thereto. *Abdul Sayeed* v. *State of Madhya Pradesh*, (2010) 10 SCC 259 : 2010 (4) Crimes 86 (SC). **To the same effect :** (1) *Asoke Basak* v. *State of Maharashtra*, (2010) 10 SCC 660. (2) *Maharashtra State Electricity Distribution Co. Ltd.* v. *Datar Switchgear Ltd.*, (2010) 10 SCC 479. (meeting of mind must be prior to the commission of offence).

[7573] ● *"Similar intention".*—Persons having similar intention which is not the result of the pre-arranged plan cannot be held guilty with the aid of Section 34, IPC. *Abdul Sayeed* v. *State of Madhya Pradesh*, (2010) 10 SCC 259.

[7574] ● *Evidence of common intention.*—In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under Section 34, IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinized by the Court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver, then, the one originally designed, during execution of the original plan, should be clear and cogent. *Virendra Singh* v. *State of Madhya Pradesh*, (2010) 8 SCC 407 : JT 2008 (8) 319 : 2010 (4) Crimes 136 (SC).

[7575] ● *Proof of existence of common intention.*—Undoubtedly, it is difficult to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. Therefore, in order to find whether a person is guilty of common intention, it is absolutely necessary to carefully and critically examine the entire evidence on record. The common intention can be spelt out only from the evidence on record. *Virendra Singh* v. *State of Madhya Pradesh*, (2010) 8 SCC 407 : 2010 (4) Crimes 136 (SC).

[7576] ● *Section 134, IPC—Implication.*—Section 34, IPC implies pre-arranged plan and acting in concert pursuant to pre-arranged plan. *Asoke Basak* v. *State of Maharashtra*, (2010) 10 SCC 660. **To the same effect :** *Abdul Sayeed* v. *State of Madhya Pradesh*, (2010) 10 SCC 259 : 2010 (4) Crimes 86 (SC).

[7577] ● *Common intention—Implication.*—The words "common intention" imply a pre-arranged plan and acting in concert pursuant to the plan. It must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Common intention comes into force prior to the commission of the act in point of time, which need not be a long gap. Under this section a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of the crime showing a pre-arranged plan and prior concert. The common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference. *Virendra Singh* v. *State of Madhya Pradesh*, (2010) 8 SCC 407 : 2010 (4) Crimes 136 (SC).

[7578] ● *Common intention must be proved in the sense of pre-arranged plan.*—Section 34 is not a substantive offence. It is imperative that before a man can be held liable for acts done by another under the provisions of this section, it must be established that there was common intention in the sense of a pre-arranged plan between the two and the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply. *Virendra Singh* v. *State of Madhya Pradesh*, (2010) 8 SCC 407 : JT 2010 (8) 319 : 2010 (8) Scale 27.

[7579] ● *Section 34 and 249, IPC—Distinction.*—(i) Section 34 does not by itself create any specific offence, whereas Section 149 does so;

(ii) Some active participation, especially in crime involving physical violence, is necessary under Section 34, but Section 149 does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime;

(iii) Section 34 speaks of common intention, but Section 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention; and

(iv) Section 34 does not fix a minimum number of persons who must share the common intention, whereas Section 149 requires that there must be at least five persons who must have the same common object. *Virendra Singh* v. *State of Madhya Pradesh*, (2010) 8 SCC 407 : JT 2010 (8) 319 : 2010 (8) Scale 27 : 2010 (4) Crimes 136 (SC).

[7580] ● ***Charge under Section 149—Conviction with aid of Section 34.***—There is no bar in law on conviction of the accused with the aid of Section 34, IPC in place of Section 149 IPC of evidence exists on record to show that such accused shared common intention to commit the crime and no injustice a prejudice is caused. *Abdul Sayeed* v. *State of Madhya Pradesh*, (2010) 10 SCC 259 : 2010 (4) Crimes 86 (SC).

[7581] ● ***Vicarious liability under Section 134, IPC when arises.***—The vicarious or constructive liability under Section 34, IPC arises when two conditions are fulfilled *i.e.* the mental element or the intention to commit the act conjointly with another or others; and the other is the actual participant in one form or the other in commission of act. *Virendra Singh* v. *State of Madhya Pradesh*, (2010) 8 SCC 407 : 2010 (4) Crimes 136 (SC).

COMMON OBJECT

[7582-83] ● ***Common object.***—[*Note*:—In cases in which several accused are tried together at one trial under section 147 and under section 302/149 for the offences of rioting and murder, and the charge under these sections fails against some of them by reason of a doubt as to their identity, if the number of the remaining accused falls below five as a result of the acquittal of the others, the charge under sections 147 and 149/302 or for any lesser offence with the use of Section 149 can yet be sustained, if it is established that they formed an unlawful assembly of five or more persons together with some persons unknown or unidentified, and that those remaining accused must be taken to have known that the offence was likely to be committed in prosecution of the common object of the assembly. In such a case, the conviction of less than five person under section 143 or 147 or 149 is not illegal, merely, because their number is less than five. However, the above principle has no application in cases in which the charge and the evidence led is that, the unlawful assembly was constituted by certain specified known persons only, and by none others, and the charge fails against some of them, not because of any doubt as to their identity, but because it is not clearly established that they were members of the assembly. In such cases, if upon the acquittal of some of the accused, the number of the remaining accused falls below five, the charge under Sections 143, 147 and 149 necessarily fails against the remaining accused also, and it is an illegality if they are convicted under these sections or any of them.

In such cases, however, the question still remains, whether the remaining accused could be convicted with the use of Section 34 for murder or any other lesser offence which has been committed but as to which there is no clear evidence as to who dealt the fatal blows and caused the fatal injuries. The question may arise in two ways, (*a*) when some of the accused charged under Sections 147 and 149 are acquitted of those charges in the Sessions Court itself, or (*b*) when the Sessions Court has convicted five or more accused on the charge under section 149/302 or 149/326, but the High Court acquits some of them, with the result that the number of the remaining convicted accused falls below five. In either case the principle is the same, and after putting aside the question whether those remaining accused were members of an unlawful assembly, the Court is required to examine the facts and circumstances of the case before it for the purpose of determining its nature, that is, whether it is or is not such as to fulfil the conditions of Section 34, though the conditions of Section 149 have failed. In other words, the question which has to be determined is whether, though the ingredient of 'common unlawful object' shared by at least five persons has failed to be established, it has or has not been established that the fatal injuries were caused by one or more of the remaining accused, and that with a common intention they all participated in the commission of the offence.

If on the examination of the facts of the case, the Court finds them to be of such a nature, that either of the two elements of Section 34, namely, common intention or participation in action, is absent, then, the remaining accused whose number has fallen below five have to be acquitted not only under section 149 but also under section 34. In such a case, conviction under section 34 for murder or even for any minor offence is an illegality, not because of any defect in procedure; but because the very element of the offence of which the accused are being tried has not been established. All that the Court has to do in such a case is to sort out and scrutinize the evidence against each accused separately for the purpose of finding whether it is sufficient to establish that he has committed the murder or any lesser offence with his own hands; if he has, he can be convicted of such offence only, and if he has not, he has to be altogether acquitted.

However, even in a case in which the Court finds that the facts proved in the case are of such a nature that Section 34 can be applied against the remaining accused, or that any one or more of the accused, whether they be those who have been acquitted of the charge under section 149 or those who remain after the others are acquitted of that charge, has committed the murder or any lesser offence with his own hands, the matter does not rest just there, and the Court cannot straightaway proceed to record an order or conviction. The question still remains, whether the charge was properly framed and the accused had a fair trial, that is, whether alternatively to the charge under section 149, each accused has also been charged under section 34 and under the specific offence as to which his guilt has been established, or even when there has been an omission in the charge, the accused have received a clear notice of the accusation against him. It follows that, when a charge under section 149 fails, before the Court can convict any of the accused with the aid of Section 34, both the following conditions must exist, (*a*) that the case must be of such a nature that the elements of Section 34 are clearly established, and (*b*) that the charge gives to the accused a clear notice that the accusation against him is that, he has participated in the commission of the offence in furtherance of the common intention of all. If both these conditions are satisfied, there is no difficulty, and it is open to the Court to convict the remaining accused under section 34, whether the other accused have been acquitted by the trial Court itself, or whether they have been acquitted by the High Court in appeal after setting aside their conviction by the trial Court. However, even when a contravention of Section 233 of the Criminal Procedure Code has occurred, and an accused has been convicted of an offence under section 34 without proper charge in respect of that offence having been framed, such omission does not vitiate the trial straightaway. The Court has to consider whether, as a result of the omission, the accused has been deprived of a substantially fair trial. The test for determining this question has been laid down in Sections 225, 232, 535 and 537 of the CrPC and it is this—was the accused misled and prejudiced in this defence as a result of such omission or whether in spite of such omission the accused had otherwise received proper and clear notice of the accusation against him and had not in any way been misled in his defence by such omissions. If the appellate Court is satisfied that such omission has in fact prejudiced the accused, the conviction under section 34 has to be set aside, even though on the evidence on record the elements of Section 34 are clearly established, and the case has to be remanded for a re-trial according to law after framing proper charges against the accused. On the other hand, if the appellants are unable to satisfy the Court, that the omission has occasioned any prejudice to them in their defence, the conviction under section 34 will be sustained and the irregularity in the charge will be treated as having been cured by Section 537, CrPC (Now Section 464). Conviction of less than five persons on a charge under section 143 or 147 or 149 is justified, when it is certain that at least five persons composed the unlawful assembly, and the uncertainty is only as to the identity of some of its members.]

Before Section 149 can apply, the Court must find with a certainty that at least five persons were present at the place of the offence who shared the common unlawful object. That, however, is not to say that five persons must always be convicted before the application of Section 149 is invited. If the Court comes to the conclusion that the total number of persons who being present at the place of the occurrence shared a common unlawful object was unquestionably at least five if not more then even when as result of the acquittal of some of the accused, by reason of their identity not having been established, the number of the accused who are left falls below five, their conviction under section 149 is definitely permissible. However, when the Court comes to such a conclusion, the judgment must clearly state it to be so, particularly in cases in which the offence of which the accused are charged is a grave one like murder and heavy sentences are imposed on the accused. When, however, the uncertainty is as to the very number of the persons who took part in an attack, and not merely as to their identity, and on an examination of the evidence of the prosecution witnesses the Court is of the view that there is a possibility; that the names of some of the accused were falsely included among the assailants for the purpose of swelling the number and bringing it to five, conviction of the remaining accused under section 143 or 147 or with the use of Section 149 is clearly unjustified. *Dalip Singh* v. *State of Punjab*, AIR 1953 SC 364 : 1953 CrLJ 1465 : 1953 SCA 709 : 1953 SCJ 532 : 1954 SCR 145 : 1953 MWN 642.

[7584] ● ***Murder—Common object—Conviction of three.***—In the present case twenty-four accused were charged under section 302/149 for rioting and murder. The Sessions Court convicted eight of them and acquitted the rest. On appeal, the High Court acquitted five of them on the ground that their identity had not been established beyond doubt, but it came to a finding that eight persons were involved in the attack in the course of which the deceased had received the fatal injuries. On this finding the High Court confirmed the conviction of the remaining three convicted accused under section 302/149. On the facts of the case, the finding of the High Court was justified, and that being so, there was nothing illegal in the conviction of only three accused on the charge under section 302/149. *Nar Singh* v. *State of Uttar Pradesh*, AIR 1954 SC 457 : 1954 CrLJ 1167 : 1955 SCR 238.

[7585] ● ***Unlawful assembly—Common object—Conviction of two under Sections 302 and 149, IPC.***—Before Section 149 can be invoked, the Court must find with certainty that at least five persons shared the common unlawful object and were present. If the Court concludes that five persons were unquestionably present, conviction of less than five persons is legal, even though the rest are acquitted because their identity is in doubt. When, however, the uncertainty is not as to identity but as to the very number taking part in the offence committed, conviction of any one with the aid of Section 149 is illegal. For a conviction of less than five persons to be legal it is not necessary in every case that the charge should state that they "along with some persons unknown" committed the offence. When the prosecution case is that at least five named persons took part in the offence, the charge cannot possibly refer to "unknown person." In such a case there is nothing illegal if the Court convicts less than five persons with the aid of Section 149, provided on the facts of the case the Court concludes with positive certainty that five or more persons composed the unlawful assembly, but as a result of the evidence against some of the accused being of a doubtful nature and their identity not having been established, the Court gives them the benefit of that doubt and acquits them. In such a case it could not be contended, that conviction of less than five persons on the charge under section 149 is bad, either because their number is less than five, or because the charge does not refer to "unknown persons". In the present case, seven accused were charged under section 302/149. The Sessions Court found all of them guilty. On appeal, the High Court acquitted five of them because it felt a doubt as to their identity but confirmed the conviction of the remaining two accused under section 302/149. On the evidence on record the High Court had erred in giving the benefit of doubt to the five acquitted accused, but the acquittal had to be allowed to stand in the absence of any appeal by the State. However, such acquittal could not be of any assistance to the two accused, whose conviction had been confirmed on the charge under section 302/149, because, on the facts on record, there was no reason to interfere with the concurrent findings of both the Courts below, that seven persons had actually taken part in the offence. *Marachalil Pakku* v. *State of Madras*, AIR 1954 SC 648 : 1954 CrLJ 1668.

[7586] ● ***Rioting—Common object—Evidence of participation not satisfactory.***—In a case in which a large number of persons are put up on the charge of rioting, and the prosecution case is that a large mob gathered at a particular place and committed various acts of violence, the Court must be careful to scrutinise and arrange the whole evidence on record, first to obtain a correct picture of the whole incident and the various events which may have happened in course of it, and then to sort out the evidence against each accused separately, for the purpose of finding the exact part played by him in each of the several incidents which have occurred. When there is evidence on record to show, that at least some of the accused have participated in the rioting in the course of which serious offences including murder have been committed, the Court will be clearly in error if it makes no effort to disengage the evidence which is true and acceptable from that which has got to be discarded, and rejects the whole evidence by damning it as false and untrue. The duty lies upon the Court to separate what is false from what is true, even when it finds that the witnesses have not spoken the whole truth and have not given an absolutely correct version of the whole incident. It is not open to it to take an easy course and throw away the whole evidence on record, by saying that it is full of discrepancies and it is impossible to find out the truth. After a careful scrutiny, if the Court finds as to any accused that the evidence against them is sufficiently convincing and their guilt has been established, they must be convicted, while those accused against whom evidence of participation in the riot is not satisfactory must be given the benefit of doubt and acquitted. *Abdul Gani* v.

State of Madhya Pradesh, AIR 1954 SC 31 : 1954 CrLJ 323.

[7587] ● *Unlawful assembly free fight common object.*—Where there is a clash between rival groups, both sides can be convicted of rioting only when it is established, that from the start both sides intended to fight and were determined to have a trial of strength. Once such intention is established, it does not need to be determined who gave the first blow or which side began the fight.

On the other hand, if it is found that the members of one group had no intention to enter upon a fight and were peacefully employed before the fight began, they cannot be convicted of rioting or even of being members of an unlawful assembly, merely because they are proved to have resisted force by force, or because some members of the other party also received injuries during the ensuing fight. *Gajanand* v. *State of Uttar Pradesh*, AIR 1954 SC 695 : 1954 CrLJ 1746.

[7588] ● *Unlawful assembly—Prosecution of common object.*—In the present case it was proved that there was acute rivalry between two groups of Pandas who used to attend to the needs of pilgrims and receive their offerings. On the day of the incident men of group A were busy performing puja when men of group B came up and demanded a share of the offering. When this was refused, group B started an attack which developed into a free fight between the members of the two groups in course of which one man received incised wounds of which he died, and several others of both groups received injuries of varying nature. Members of both groups were separately tried and convicted of rioting under section 147, and further the accused in group A were also convicted under section 324/149, and the accused in group B were convicted under section 302/149. Their conviction cannot be sustained on either charge. So far as the charge under section 147 is concerned, it has been found by both the Courts below that they were peacefully employed before the fight commenced and were attacked when they resisted an unlawful demand. If they joined in the fight and caused injuries, that in itself could not make them guilty of rioting, and their plea that they did so in the course of giving resistance to an unprovoked attack on themselves had to be accepted. So far as the charge under section 149 was concerned, conviction under that section can be legal only when membership of an unlawful assembly is first established, and if a charge under section 143 or 147 fails, there cannot be conviction with the aid of Section 149. Since the accused were being acquitted of the charges under Sections 143 and 147, their conviction under section 324/149 also had to be set aside. *Gajanand* v. *State of Uttar Pradesh*, AIR 1954 SC 695 : 1954 CrLJ 1746.

[7589] ● *Unlawful assembly—Sharing of common object.*—Section 149 creates a specific offence, and a conviction on a charge under section 149 read with some other offence under the Code, can follow only upon conviction under section 143 or 147. If the charge of being a member of an unlawful assembly fails against any accused, by reason of absence of sufficient evidence to show that he shared that common unlawful object of the assembly, his conviction under section 149 for any offence committed by any other members of the assembly is illegal. In other words, conviction under section 143 or 147 is a condition precedent to conviction under section 149. *Gajanand* v. *State of Uttar Pradesh*, AIR 1954 SC 695 : 1954 CrLJ 1746.

[7590] ● *Assembly lawful at inception— Common object.*—An assembly which is lawful when it assembled, can subsequently become unlawful in its character by reason of the actions of its members, but before it can be held that such assembly, which was originally lawful became unlawful in its character at a later stage, the Court must be satisfied on the facts of the case that both the following conditions have been fulfilled, namely,

(*a*) that one or more members of that assembly subsequently did an unlawful act, or exhorted the others to do an unlawful act, *and*

(*b*) that the other members acquiesced in that unlawful act.

In the absence of evidence proving such acquiescence, the mere fact that one or more members of an assembly which was originally lawful, suddenly committed an offence is not in itself, enough to hold that the assembly subsequently became unlawful. There must in addition be something which shows, beyond doubt, the intention on part of the others to acquiesce in that offence.

In other words, for an offence under Section 143, previous concert is not necessary, as it is for an offence with the aid of Section 34, but what is necessary is a sharing of a common unlawful object, whether originally when the members assembled or at a later stage, and that can be proved either by evidence of participation in the commission of an offence or by proof of conduct establishing acquiescence in that offence. In the absence of evidence proving either active participation or passive acquiescence, the charge under section 143 must be held to have failed.

Held : An assembly lawful at its inception, becomes unlawful if one of its members call upon his companions to assault a man, and they rush at him and start pursuing him when he begins to run away. In such a case even if that man escapes unhurt, the pursuers are guilty of being members of unlawful assembly. *Moti Das* v. *State of Bihar*, AIR 1954 SC 657 : 1954 CrLJ 1708.

[7591] ● ***Common object of unlawful assembly—Conditions to be satisfied.***—For a conviction with the aid of Section 149 it is essential, that *both* the following conditions are satisfied:—

(*a*) it must be established that the accused was guilty either of rioting or being a member of an unlawful assembly, that is, he must be convicted either under section 147 or under section 143, and

(*b*) it must further be established, that the offence committed was such as he knew to be likely to be committed in prosecution of the common object of the assembly.

If either of these two conditions is absent, the charge under section 149 must fail. Knowledge of the likelihood of the commission of the offence which has been committed can be gathered from the circumstances such as, (*a*) the nature of the assembly, (*b*) the weapons openly carried and used, (*c*) the conduct of the offenders, and (*d*) the shouts raised. If the established circumstances are not sufficient for concluding that the members knew it to be likely that one of them would commit the offence which has been committed, constructive liability under section 149 for the commission of that offence cannot be attached to the other members. *Gajanand* v. *State of Uttar Pradesh*, AIR 1954 SC 695 : 1954 CrLJ 1746.

[7592] ● ***Fight between rival groups—Common object.***—In the present case there was a fight between rival groups of Pandas and a member of one group received incised wound and died and other members received injuries of various descriptions which could be caused by lathis. The accused who all belonged to the opposite group were charged and convicted under Sections 302/149 and 325/149. In view of the fact that members of both groups were openly armed only with lathis and it was possible, that the accused may not have known that one of them was armed with a knife which he was likely to use in the fight, conviction under section 302/149 could not be sustained. Conviction under section 325/149 was confirmed. *Gajanand* v. *State of Uttar Pradesh*, AIR 1954 SC 695 : 1954 CrLJ 1746.

[7593] ● ***Unlawful assembly—Prosecution of common object.***—Section 149 creates a specific offence and declares that if a person is proved to be a member of an unlawful assembly, he shall be liable for any offence committed by any other member of that assembly provided that offence is such as he knows to be likely to be committed in prosecution of the common object of that assembly.

The constructive liability under section 149 can arise only against a man proved to have been a member of an unlawful assembly, and if any accused is given the benefit of doubt, and is acquitted on the charge under section 143 or 147, his conviction with the aid of Section 149 for an offence committed by another member of that assembly is illegal.

It cannot be contended, that Section 149 does not create, a specific offence and does not provide any punishment for that offence. Merely because the section prescribes a punishment which is not uniform but is made dependant upon the punishment prescribed for the offence committed by another member of the assembly it cannot be said that the section does not prescribe any punishment. *Nanak Chand* v. *State of Punjab*, AIR 1955 SC 274 : 1955 CrLJ 721.

[7594] ● ***Common unlawful object of attacking deceased.***—In the present case, five accused, *A, B, C, D,* and *E,* were charged under section 302. It was established that *A* gave a blow which caused only a grievous injury, and that *B* and *C* each gave a blow which was necessarily fatal. As to *D* and *E,* they were acquitted on the ground that though they were present they did not participate in the attack, and no overt act was proved against them which could show that they shared with *A, B* and *C* the common unlawful object of attacking the deceased. It was not the prosecution case that any person other than the five accused took part in the attack. Under these circumstances, the prosecution had failed to prove that there was an unlawful assembly of five persons and *A* could not be convicted under section 302/149. He could be convicted only under section 326 for his own act. *Pandurang, Tukia and Bhilia* v. *State of Hyderabad*, AIR 1955 SC 216 : 1955 CrLJ 572 : 1955 SCA 228 : 1955 SCJ 106 : 1955 SCR 1083 : 1955 AWR (Sup) 34 : 1955 MWN 161.

[7595] ● ***Unlawful assembly—Mere presence of person at scene of offence.***—Mere presence of a person at the scene of offence does not make him a member of an unlawful assembly. Even when a grave act of rioting takes place, persons proved to have been present can be convicted either under section 147 or with the aid of Section 149 only when it is further proved that they did something or omitted to do something which would show that they shared the common object to commit an offence with those who had actively participated in the riot.

When feelings are running high, and the evidence on record is only to the effect that a man was seen at the place of the occurrence armed with a weapon, that evidence has to be carefully scrutinized in order to eliminate the possibility of a false or mistaken implication, and conviction can be sustained only when the Court is satisfied beyond doubt that the man was not a mere spectator. Otherwise, it may happen that a man who has not joined an unlawful assembly may get falsely or mistakenly branded as an offender, merely because of his presence at the scene of occurrence. *Baladin* v. *State of Uttar Pradesh*, AIR 1956 SC 181 : 1956 CrLJ 345.

[7596] ● ***Common object of unlawful assembly.***—Section 149 is not confined to offences committed in the actual prosecution of the common object of an unlawful assembly, and applies equally to offences committed by any one of its members which are such as the members knew to be likely to be committed in prosecution of that object. If use of violence is implicit in the object of an unlawful assembly armed with deadly weapons, and in the course of an attack by that assembly upon persons employed in their lawful avocations, murder is actually committed, then every member of that assembly is guilty under section 149/302 even though the common object could not be placed as high as murder, provided on the facts and circumstances of that case it can be held that the members of that assembly knew that murder was a likely consequence of the armed raid if resistance was encountered, and that the implements carried by the raiders would be used with deadly effect if occasion arose.

In such circumstances it is not a good defence to a charge under section 149/302, that the accused did not know the exact nature of the weapon carried by each attacker, and it is enough for the purpose of the application of Section 149 that the circumstances of the case are such as to justify the inference that the members of that assembly had the knowledge, that in case of resistance, it was likely that the implements carried by the members of that assembly would be used for overpowering and killing any man offering resistance.

In the present case, the accused were the members of an armed band which attacked a police-station with deadly weapons for the purpose of rescuing their comrades who had been previously arrested and placed in a lock-up. In the course of the attack the police-station was broken open and two police constables who resisted the attack were killed. Even though it was found that the common object of the assembly was not murder and was only to rescue by use of force, persons lawfully placed in the police lock-up, conviction of the accused who were proved to have taken part in the armed raid for the offence of murder under section 149/302 was fully justified. Even assuming that murder was not the common object, use of violence was implicit in the object of forcible rescue. Armed mobs which go and attack a police-station with implements strong enough to break down police resistance, must be presumed to know that they would encounter resistance, and that those implements would be used with deadly effect in putting down that resistance, and if murder is in fact committed in course of the attack, each accused proved to have been a member of the raiding party is guilty under section 149/302. *K.C. Mathew* v. *State of Trav. Cochin*, AIR 1956 SC 241 : 1956 CrLJ 444 : 1956 SCA 175.

[7597] ● ***Common unlawful object—Sharing of.***—In the present case, it was proved that a violent mob assembled before a house in a village, and then having broken into that house subjected its inmates to a murderous attack in course of which as many as six persons were killed either inside the house or after being dragged outside it, and then the house was set fire to and the dead bodies were removed to a remote place. On these facts, a large number of accused were jointly tried of the offences of rioting and murder. On the facts proved in the case, conviction under section 147 or under section 149/302 could be sustained only in respect of those accused who were seen to have broken into the house or attacked the inmates, or dragged them outside, or to have removed the dead bodies, and of those accused who were seen inciting others to these activities. As to all other accused who had not been seen by any reliable witness in any riotous activity or in inciting others to such activities, and as to whom there was only evidence of a general character to the effect that they were seen among the mob armed with weapons, so that no specific conduct indicative of their intention to share the common unlawful object was established, all such person had to be given the benefit of doubt and had to be acquitted of both the said charges, because the possibility remained that they might have been mere spectators who got mixed up in the crowd. *Baladin* v. *State of Uttar Pradesh*, AIR 1956 SC 181 : 1956 CrLJ 345.

[7598] ● *Common object—Developing of after people gather on spot.*—Common object can develop after people gather on a spot on hearing an uproar at night. In such circumstances, if there is sufficient evidence on record for the Court to deduce that an unlawful object developed after the people got there, and that more than five persons shared it, and that persons who had come there quite lawfully in the first instance suddenly developed an intention to beat up the members of the opposite faction found there, and that five persons or more who shared the object joined in the beating; then each of those persons becomes the member of an unlawful assembly.

In other words, if persons come together at a spot on hearing a disturbance, law demands that they must be presumed to have gone there lawfully for some lawful purpose. and this is so even if they go armed. The presumption of innocence ceases only when circumstances proved by the prosecution show that the original innocent object changed at a later stage.

Apprehension of thieves or marauders, and defence of person and property, are lawful objects, and they require the carrying of arms, because private defence of person or property can hardly be effective with empty hands. But if it is established that thereafter an unlawful object suddenly developed on the spot, and some five or more of the persons who had so gathered started beating up some innocent man found on the spot, or even a thief for that matter, and thus shared a common object which was unlawful, then every one of such persons becomes a member of an unlawful assembly. This is so because a charge of unlawful assemblage, unlike a charge under section 34, does not require any pre-concert or a prior meeting of the minds.

In principle, there is no difference whatsoever between a case like this, and a case in which the object is from the beginning unlawful. The only difference between the two kinds of cases lies only in the approach which is required of the Court, and the greater degree of care demanded in the scrutiny of the evidence, lest an innocent man who came on the scene with some lawful object, and who did not participate in the attack, may become implicated, merely on the strength of his having been seen by witnesses at the time when the incident occurred. *Sukha* v. *State of Rajasthan*, AIR 1956 SC 513 : 1956 CrLJ 923 : 1956 SCJ 503 : 1956 SCA 781 : 1956 SCR 288 : 1956 AWR (Sup) 83 : 1956 ALT 583.

[7599] ● *Unlawful assembly—Common object of.*—When a number of persons who are armed with weapons, join in an attack after suddenly gathering at the scene of occurrence, it may be that the original object of those persons when they first gathered there may have been innocent. But the original innocent object ceases to be of any importance in considering the guilt of the accused, once it is established that they joined in the attack with the weapons in their hands. Participation in a murderous attack, particularly after seeing that an injured man has fallen on the ground, indicates beyond doubt a unity and continuity of an unlawful purpose even though it may have suddenly developed on the spot without any premeditation or any previous plan. In such a case it is the unity in a suddenly developed unlawful purpose which makes all the participating members of an unlawful assembly, and it is entirely immaterial whether they joined in the attack of their own accord or at the instigation from someone. *Sukha* v. *State of Rajasthan*, AIR 1956 SC 513 : 1956 CrLJ 923 : 1956 SCJ 503.

[7600] ● *Murder—Common object of unlawful assembly.*—If persons armed with lathis join and continue in the attack as a result of which death is caused, unlawful assembly is proved, but the question that yet remains is whether the accused are all liable for murder under section 302/149 or only under section 325/149. That question is not answered merely by showing that the common object of all of them was not murder, because even assuming it to be so, the case may yet fall under the second part of Section 149. When a number of persons join in an attack in which arms are used, each one of them must be presumed to know that any one of them is likely to deal a fatal blow, or at least that the cumulative effect of a number of blows inflicted with lathis is likely to cause death from shock. Any man of reasonable intelligence must know that in a joint attack with weapons, some blow might become fatal or that the victim might succumb to the rain of blows he received. Therefore, in such cases each one of the attackers must be held to have had the knowledge that death was a likely result of the joint attack, and if the attack in fact ends in death of the victim, each must be convicted under section 302/149 and not only under section 325/149. *Sukha* v. *State of Rajasthan*, AIR 1956 SC 513 : 1956 CrLJ 923 : 1956 SCJ 503.

[7601] ● *Dispute between two rival factions—Common object of unlawful assembly.*—In the present case the prosecution case was that, there was a dispute in a village between two rival factions over a field. One *P* was returning to his village from the fields and at that time *A* and *B* who belonged to the opposite faction ran into him. *A* fired a gun at *P* and the shots hit him on his legs, and then *B* hit him with a sword. Hearing the sound of the gun-fire a large crowd which included members of both factions gathered on the spot, and then three more persons who all belonged to *P's* party were attacked with lathis and were so beaten, that they all died. As a result, the accused who were proved to be among the attackers were all charged under section 302/149 and put up at a joint trial. The Sessions Judge convicted them under section 325/149. The accused as well as the State appealed against this order and the High Court allowed the appeal, made by the State and altered the conviction of all the accused to one under section 302/149. Under the above circumstances conviction under section 302/149 had to be sustained. *Sukha* v. *State of Rajasthan*, AIR 1956 SC 513 : (1956) SCC 355 : 1956 CrLJ 923.

[7602] ● ***Offence committing of in prosecutions of common object of assembly.***—Constructive liability under section 149 for an offence committed by another member of an unlawful assembly can arise either when that offence is committed in prosecution of the common object of the assembly or when the offence committed is such as the other members of the assembly knew to be likely to be committed in prosecution of that object. *Mizaji* v. *State of Uttar Pradesh*, AIR 1959 SC 572 : 1959 CrLJ 777 : 1959 SCJ 554.

[7603] ● ***Offence committal of to accomplish common object of assembly.***—The first part of Section 149 means, that the offence committed must be committed with a view to accomplish the common object of the assembly. For that it is not necessary that there should be a pre-concert in the sense of a previous meeting of the members of the unlawful assembly with reference to the common object. It is enough if the common object is adopted by all the members and is shared by all of them. In order that the case may fall under the first part of Section 149 the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even when the offence committed is not so connected and is not in direct prosecution of the common object of the assembly, constructive liability of the other members for that offence may yet arise if that offence is such as the other members knew it to be likely to be committed in prosecution of that object. The expression 'know' does not mean a mere possibility of commission, such as might or might not happen. The question whether knowledge of the likelihood of the commission of a particular offence by any one member of an unlawful assembly could reasonably be attributed to the other members of that assembly, has to be decided in each case on its own facts, such as the weapons carried, the common object sought to be achieved, conduct on the spot, the language they used, *etc. Mizaji* v. *State of Uttar Pradesh*, AIR 1959 SC 572 : 1959 CrLJ 777 : 1959 SCJ 554.

[7604] ● ***Committal of offence in prosecution of common object of unlawful assembly.***—An offence committed in prosecution of the common object of an unlawful assembly would generally also be an offence which the parties knew to be likely to be committed in such prosecution, that is an offence falling under the first part of Section 149 would generally if not always, fall within the second part of that section. But the converse of that proposition is not true, and there are cases which come within the second part but which will not fall within the first. In every case, therefore, it is an issue whether the offence committed falls under the first part or the second part of Section 149 or does not fall under either part. When people go armed with lethal weapons to take possession of land, which is in possession of others, they must be assumed to have knowledge that they would be opposed, and the extent to which they were prepared to go to accomplish their common object would depend upon their conduct as a whole. *Mizaji* v. *State of Uttar Pradesh*, AIR 1959 SC 572 : 1959 CrLJ 777 : 1959 SCJ 554.

[7605] ● ***Unlawful assembly—Common object of taking forcible possession of land.***—In the present case, the accused who were five in number had gone to a field with the common object of getting forcible possession of that field from the opposite party who were in its legal possession. While they were ploughing the field, the opposite party came up and protested. Thereupon all the accused gathered together and told the complainants 'to go away, otherwise they would be finished'. On their refusing to go, *T* asked *M* to fire at them and *M* took out a pistol from the fold of his dhoti and fired it as a result of which one *R* was fatally injured. All the five accused were charged and convicted under section 302 read with Section 149. The question for decision was, whether the three other accused besides *T* could be said to have the knowledge that murder was likely to be committed by *M* in prosecution of the common object of the assembly which was to take forcible possession of the land. From the facts of the case and the conduct of the accused which was that they went to the filed in the company of *T* and *M* armed with lathis, that they surrounded the party of the deceased and used threats, it had to be held that they were prepared to take forcible possession of the field at any cost, and that the murder committed was immediately connected with the common object of the assembly and that they at least knew that murder was likely to be committed to accomplish the common object of obtaining forcible possession. Conviction of all the accused under section 302/149 was confirmed. *Mizaji* v. *State of Uttar Pradesh*, AIR 1959 SC 572 : 1959 CrLJ 777 : 1959 SCJ 534.

[7606] ● ***Committal of offence in prosecution of common object of assembly—Conditions to be satisfied.***—Section 149 of the Code is declaratory of the vicarious liability of the members of an unlawful assembly for an offence committed by any one or more of them, provided that the conditions laid down in the section are satisfied, namely, (*a*) that such offence is committed in prosecution of the common object of the assembly, or (*b*) that the offence is such as the other members knew to be likely to be committed in prosecution of that object. Thus, when the offence committed by a member of an unlawful assembly is not one which is committed in the very prosecution of its common object, the constructive liability for its commission attaches to the other members only if the offence is of such a nature that the knowledge of the likelihood of its commission can be legitimately attributed to them, and not otherwise. However, though members of an unlawful assembly may have a community of object it may be up to a certain point only and beyond that point they may differ in the objects and in the same way the knowledge possessed by each member of what is likely to be committed by any other member in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object. As a consequence of this, the effect of Section 149 may be different on different members of the same unlawful assembly. *Shambhu Nath Singh* v. *State of Bihar*, AIR 1960 SC 725 : 1960 CrLJ 1144.

[7607] ● ***Unlawful assembly common object to cause grievous hurt.***—Section 149 cannot be so construed as laying down that the constructive liability of a member of an unlawful assembly must, in every case, be necessarily for the very same offence of which the principal offender is convicted, an that it depends upon the facts and circumstances of each case what knowledge can properly be attributed to each member for the purpose of determining his liability under section 149. If it is found, that the other members could not have known that the offence committed by one of them was likely to be committed, then even when the principal offender is convicted of one offence, they can be convicted under section 149 only of such minor offence as they can be taken to have known to be likely to be committed. The offence of grievous hurt under section 326 is a minor offence in relation to the offence of murder under section 302, and if on the facts of the case it could not be said, that the other members could have known, that murder was likely to be committed by one of them in prosecution of the common object of the assembly, but those facts are such, that they must be taken to have known that grievous hurt was likely to be committed, it is open to the Court to convict the other members of the unlawful assembly under section 326/149 even when the principal offender is convicted under section 302, though there is no evidence that any grievous hurt was caused by any of them. In the present case, it was established that the accused who were armed with diverse weapons such as bhallas, garasas and lathis had gone up to a man working in his field and that one of them had fired several shots which killed him on the spot. On these facts the principal offender was convicted under section 302 and companions were convicted under section 326/149. The trial Judge was of the view that because of the diverse weapons, which the others were carrying they must have known that grievous hurt was likely to be caused, though they might not have known that their leader was likely to use the gun which he was carrying. On these facts conviction of the other members under section 326/149 was entirely legal, and its legality could not be questioned merely because no member of the assembly was proved to have caused any grievous hurt. There is nothing in the language of Section 149 to prevent the Court from convicting the others for a minor offence of which, on the facts of the case, knowledge could properly be attributed to them, even when the offence committed by the principal offender is a graver one. *Shambhu Nath Singh* v. *State of Bihar*, AIR 1960 SC 725 : 1960 CrLJ 1144.

[7608] ● ***More than five persons constituting unlawful assembly—Identity of four established.***—In the present case, there was a definite and clear finding by the High Court that the number of persons who constituted the unlawful assembly was more than five, that their common object was of killing the deceased, and that the murder was committed by one or more of them in prosecution of that common object. However, what had happened was that though twelve accused had been originally charged under section 302/149, seven of them were acquitted in the Sessions Court and only five were convicted and then in appeal the High Court acquitted one more, so that only four convicted accused remained. On its findings as above, the High Court confirmed their conviction under section 302/149. There was ample evidence on record to establish, that the findings of the

High Court were entirely correct. Once it was established that the unlawful assembly consisted of five or more persons that the four convicted accused were the members of that assembly and that the murder was committed in prosecution of the common object of that assembly, Section 149 clearly applied to the case and conviction for murder with the application of Section 149 could not be contended to be bad in law.

Whether such a finding can be arrived at or not is a question of fact which has to be determined in each case on the evidence given therein. But there is nothing in law to prevent such a finding, and it cannot be argued as though it were a matter of law that it is not at all open to the High Court to arrive at such a finding. In such a case, it cannot be said, that such a finding amounts to making out a new case, merely because of the omission in the charge to state that some persons unknown were members of the assembly. But even assuming that such an omission is an irregularity, it will not invalidate the finding as a matter of law in the absence of any prejudice to the convicted accused as a result of such omission. Convictions under section 149/302 and the sentences of death were upheld. *Bhardwad Mepa Dana* v. *State of Bombay*, AIR 1960 SC 289 : 1960 CrLJ 424.

[7609] ● ***Unlawful assembly—Conviction of accused even when total number less than five.***—The essential question in a case under Section 149 is, whether there was an unlawful assembly as defined in Section 141 of five or more persons. The identity of the persons comprising that assembly is a matter relating only to the determination of the guilt of the individual accused; it has nothing to do with the question of the applicability of Section 149. Even when by reason of the lack of evidence, as to identity some accused are acquitted and the number of the remaining accused falls below five, Sections 143, 147 and 149 still apply, if upon the evidence in the case the Court is able to hold that the remaining accused were members of an unlawful assembly of five or more persons, be they known or unknown, identified or unidentified. In other words, the test for the applicability of Section 149 is *not* whether the number of persons convicted is at least five, but whether at least five persons comprised the unlawful assembly and shared the common unlawful object, and whether the accused before the Court, whatever their number, were definitely its members. If on the evidence in the case the Court can find with certainty, that this test is satisfied, the individual accused who are found to be members of such assembly can be convicted under section 149 even when the total number of such accused is less than five. *Bhardwad Mepa Dana* v. *State of Bombay*, AIR 1960 SC 289 : 1960 CrLJ 424 : (1960) 2 SCR 172.

[7610] ● ***Right of private defence of property against criminal trespass.***—The accused who were armed with lathis and hatchets took two loaded carts through that field for the purpose of reaching a public passage which ran on the other side of the field. When the carts had almost crossed the filed, *H* protested against the trespass which damaged his crops. Thereupon there was a fight in the course of which the accused gave severe blows to *H* and his companions. *H* received seven injuries, including one incised wound on the head and one contused bone-deep wound on the head. As a result of these injuries *H* died.

In the appeal it was contended that the criminal trespass by the accused had come to an end when the trespassers indicated their intention to cease the trespass and not to repeat their action in the future, that thereafter no common unlawful object remained and hence the assembly ceased to be unlawful, and that as the assembly had ceased to be unlawful, Section 149 could not be applied to any act of the accused done thereafter, and each person would be liable only for his own acts, and hence the conviction with the aid of Section 149 for the offence under section 302 and other offences was bad in law. So long as the accused and their carts were in the field of *H*, the criminal trespass committed by them was continuing, whatever be the spot where they were at the time when *H* stopped them. That being so, *H* had the right to prevent the accused from proceeding towards the public passage, however short the distance which remained to be covered might be. In such a case, it could not be said that the trespass had come to an end, even though it be assumed that the defence put up by the accused was true, namely, that they had requested *H* to be allowed to go across the short remaining distance in the field and had undertaken not to repeat the trespass. *Hukam Singh* v. *State of Uttar Pradesh*, AIR 1961 SC 1541 : 1961 (2) CrLJ 711.

[7611] ● ***Intention to use violence in prosecution of common object.***—In such a case, if *H* insisted upon their going back, the accused were bound to abide by his directions, and their refusal to do so clearly indicated the frame of their minds. The difficult position, in which the accused found themselves was of their own creation, and it did not give them any right to insist that they must continue the criminal trespass. Such insistence amounted to continuation of the criminal trespass, and it could not be said that the trespass had ceased. That being so, the unlawful assembly continued to be unlawful and all the members of that assembly were liable under section 149 for the offence committed by any one of them if it was such as they knew to be likely to be committed in prosecution of their common unlawful object.

When several persons armed with lethal weapons, commit criminal trespass upon the land of another, it must be held that they had the common object of using those weapons in case they were thwarted or resisted in the achievement of their object; that they were prepared to use violence in prosecution of that common object, and that they knew that it was likely that in the use of such violence someone resisting the trespass may be attacked by one of them and may be so injured as to die of the injuries caused to him. Where violence is used in prosecution of the common object of an unlawful assembly, and an assaulted person dies as a result of the injuries inflicted upon him, the offence committed on account of the death caused by the concerted acts of the several accused is the offence of murder. In the present case, it had been rightly held by the High Court that the common object of the accused was to force their way through the field of *H* and to use force if resistance was offered, even to the extent of causing death, and that the offence made out by causing the death of *H* was murder committed in prosecution of the common object of the unlawful assembly. *Hukam Singh* v. *State of Uttar Pradesh*, AIR 1961 SC 1541 : 1961 (2) CrLJ 711.

[7612] ● ***Unlawful assembly—Constitution of.***—In a case in which more than five persons are charged under section 149, even when some of the accused are acquitted, the remaining accused can be legally convicted of being members of an unlawful assembly, if it is clearly established that the actual number of the members in the party of the assailants was more than five, even though the number of the remaining accused who are convicted is less than five.

It is only when the number of the assailants is definite, and all of them are named, and the number of persons proved to have taken part in the incident is less than five, that it cannot be held that the assailants' party must have consisted of five or more persons. In such a case, the acquittal of some of the named persons must mean, that they were not in the incident. The fact, that they were named, excludes the possibility of other persons to be in the assailants' party, especially when there be no occasion to think that the witnesses naming all the accused could have committed mistakes in recognising them. The witnesses were all from one village and the accused were from the other villages. All the witnesses had stated that the number of the assailants' party was thirteen though some of them had not been able to name all the assailants and hence ten of them had been acquitted giving them the benefit of doubt. In the circumstances, the Courts below were justified in the conclusion that the assailants' party constituted an unlawful assembly of more than five persons, that the three accused who were clearly identified were members of an unlawful assembly, and that they were constructively liable of the offence under section 302/149. Conviction was upheld and the appeal was dismissed. *Kartar Singh* v. *State of Punjab*, AIR 1961 SC 1787 : 1961 (2) CrLJ 853.

[7613] ● ***Unlawful assembly—Essential ingredient of.***—Section 149 prescribes for constructive criminal liability of all the members of an unlawful assembly, for an offence committed by any member of that assembly which is committed in prosecution of the common object of that assembly or is such as the other members knew to be likely to be committed in prosecution of that object. Under Section 141 an unlawful assembly is born, only where five or more persons compose that assembly with one of the common unlawful objects mentioned in that section. Thus, it is an essential ingredient of Section 149 that the offence must have been committed by any member of an unlawful assembly, and it is an essential condition of an unlawful assembly that its membership must be five or more. That being so, where the charge is that only the five persons named therein constituted the unlawful assembly, as soon as any one or more of the five named persons are acquitted, the assembly must be deemed to have been composed of less than five persons, and in that case Section 149 cannot apply. *Mohan Singh* v. *State of Punjab*, AIR 1963 SC 174 : 1963 (1) CrLJ 100.

[7614] ● ***Unlawful assembly—Applicability of Section 149, IPC.***—When considering the applicability of Section 149, one has to bear in mind the several classes of cases which come before the Criminal Courts for their decision :

(1) The first class of such cases is where more than five persons are named in the charge as composing the unlawful assembly. In such a case, if the evidence proves the charge against five or more of them, it is a clear case where Section 149 can be invoked.

(2) The second class of such cases is where the charge is that the persons included in the charge along with others named in the charge constituted

the unlawful assembly, and that the other persons so named are not available for trial for any such reason that they cannot be traced or are absconding. In such a case, if the evidence shows that the persons before the Court together with the others who are not before the Court constituted an unlawful assembly of five or more persons, Section 149 becomes applicable even though the number of the accused before the Court is less than five.

(3) The third class of such cases is where the prosecution case, is that, the accused before the Court together with other persons not identified and so not named composed the unlawful assembly. In such a case, if the evidence shows that the persons before the Court along with unidentified and unnamed other assailants—composed the unlawful assembly of five or more persons, the accused before the Court can be convicted under section 149 even though they number less than five.

(4) The fourth class of such cases is where the prosecution case is that, the unlawful assembly was constituted by the five or more persons named in the charge. In such a case, if the evidence is confined only to the persons named in the charge, and on some of them being acquitted, less than five persons are left before the Court, Section 149 cannot be invoked against them. However, even in such cases, it is possible that, though the charge names only certain persons, the evidence may show that the unlawful assembly consisted of the persons named in the charge as well as some other persons who were not identified and named. In such a case, the trial Court or even the High Court in appeal may be able to come to the conclusion that even after leaving out the accused who are acquitted, the accused who remain along with the others who have not been identified composed an unlawful assembly of five or more persons, in that case, the acquittal of one or more of the accused before the Court will not affect the validity of the charge under section 149, and the remaining accused can be convicted under that section.

It is true that in the last category of case, the Court will have to be very careful before reaching the conclusion that Section 149 applies. But in such a case there is no legal bar which prevents the Court from reaching such a conclusion. The failure to refer in the charge to the other members of the unlawful assembly, who are unnamed and unidentified may conceivably raise the point, as to whether prejudice would be caused to the persons before the Court, by reason of the fact, that the charge did not indicate that the unnamed persons also were members of the unlawful assembly. But apart from the question of prejudice, which has to be carefully considered, there is no legal bar preventing the Court from holding that, though the charge specified only the named persons, the unlawful assembly in fact consisted of the accused remaining after the acquittal of one or more of them, along with the other persons who have not been named and identified. This is the true legal position in respect of the several categories of cases which may fall to be tried when the charge framed is under section 149 of the Penal Code.

It cannot be contended that the prosecution case must always be confined to the charge framed against the accused, and that when the charge is confined to certain named persons, the Court would be making out a new case of unlawful assembly if it holds that it consisted of the persons before the Court together with other unnamed and unidentified persons. In such a case, the finding of the Court is not about the existence of a new assembly, but about the same assembly as was referred to in the charge, and the only difference is that while according to the charge all the members of that assembly were known, the evidence led before the Court has established that other unnamed and unidentified persons were also the members of that unlawful assembly. It is true, that where the charge specifically names only certain persons as having composed the unlawful assembly, the Court would have carefully to examine the evidence before coming to the conclusion that persons other than those named in the charge were also the members of that assembly, but if that fact is clearly established by the evidence, there is no legal bar which prevents the Court from reaching that conclusion. *Mohan Singh* v. *State of Punjab*, AIR 1963 SC 174 : 1963 (1) CrLJ 100.

[7615] ● ***Constructive criminal liability—Existence of common intention.***—In the present case, five persons, *M, J, D, P* and *S* were charged under section 302 of the Penal Code read with Section 149. No other persons except the five accused was referred to in the charge as composing the unlawful assembly and there was no evidence that any other person was a member of that assembly.

Two of the accused, *P* and *S* were acquitted, but the remaining accused were convicted, *M* and *J* under section 302/149 and *D* under section 302 substantive.

The Court held that in the circumstances conviction of *M & J* under section 302/149 could not be sustained and had to be set aside.

The question then remained, whether *M* and *J* could be convicted on the facts of the case under section 302/34.

Like Section 149, Section 34 also deals with cases of constructive criminal liability. The essential constituent of the constructive criminal liability under section 34 is the existence of the common intention of the several persons who do a criminal act in furtherance of the common intention of all of them. If it can be shown by the evidence that all the accused persons were animated by the common intention to commit an offence, and have taken part in the commission of that offence, every one of them is constructively liable for the criminal act done by any one of them. *Mohan Singh* v. *State of Punjab*, AIR 1963 SC 174 : 1963 (1) CrLJ 100.

[7616] ● *Common intention different from common object.*—Just as the combination of persons, sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two sections are similar and in some cases they may overlap. But nevertheless, the common intention which is the basis of Section 34 is different from the common object which is the basis of an unlawful assembly. *Mohan Singh* v. *State of Punjab*, AIR 1963 SC 174 : 1963 (1) CrLJ 100.

[7617] ● *Common intention denotes action in concert.*—Common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of the minds. Further, for the application of Section 34 there must be the element of participation in action on the part of all the accused persons. The acts done by each may be different and may vary in their character but they must all be actuated by the same common intention. *Mohan Singh* v. *State of Punjab*, AIR 1963 SC 174 : 1963 (1) CrLJ 100.

[7618] ● *Common intention—Implies pre-arranged plan.*—The common intention required by Section 34 is not the same intention or similar intention. The common intention within the meaning of Section 34 implies a prearranged plan, and application of Section 34 can be involved only when it is proved that the criminal act was done in concert pursuant to the pre-arranged plan. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. *Mohan Singh* v. *State of Punjab*, AIR 1963 SC 174 : 1963 (1) CrLJ 100.

[7619] ● *Common intention of totally assaulting victim.*—In the present case it was proved that the appellants shared with D the actual assailant the common intention of fatally assaulting the victim. They were armed with lathis and were laying in wait hidden behind the trees. As soon as he came, they all rushed on him and chased him. This conduct clearly indicated the existence of a common intention. After chasing the victim, they surrounded him and then D gave the fatal blows. Thereafter, the assailants ran away together. All these facts established the common intention to kill by which all of them were actuated. On these facts the conviction of the appellants was altered from one under section 302 read with Section 149 to conviction under section 302 read with Section 34, and the sentence of imprisonment for life passed by the High Court was confirmed. *Mohan Singh* v. *State of Punjab*, AIR 1963 SC 174 : 1963 (1) CrLJ 100.

[7620] ● *Unlawful assembly—Common object.*—In the present case seven accused persons were charged with the offence under section 302 read with Section 149, Penal Code. The Sessions Court acquitted four of the accused, and convicted the other three accused under section 304 read with Section 149. On appeal, the High Court confirmed the conviction of all the three accused but altered it to one under section 326 read with Section 149.

Both the Courts below had rejected the defence version, that the party of the victim were the aggressors. In the appeal, the findings of the Courts below were not challenged, but it was contended that the clear case of the prosecution was against seven named persons and four of them having been acquitted, the conviction of the remaining three accused persons with the aid of Section 149 was illegal, and that as the three accused had been acquitted of the offence under section 302/149, none of them could be convicted under section 326/149, Penal Code, and that all that it was.

It is competent to a Court to come to the conclusion that there was an unlawful assembly of five or more persons even where less than five persons have been convicted by it,—

(*a*) if the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act, and the evidence led to prove this charge is accepted by the Court; or

(*b*) if the first information report and the evidence show such to be the case, even though the charge does not state so; or

(*c*) if, even though the charge and the prosecution witnesses have named only the acquitted and the convicted accused person, there is other evidence which clearly establishes the participation in the unlawful assembly of other persons besides those named in the charge:

Provided that in cases (*b*) and (*c*) no prejudice has resulted to the accused persons who have been convicted by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence. *Ram Bilas Singh* v. *State of Bihar*, (1964) 1 CrLJ 573 : (1964) 1 SCR 775.

[7621] ● ***Unlawful assembly—Committal of acts in furtherance of common object.***—In the present case, only seven persons were named in the charge as having been the members of the unlawful assembly of whom one person had fired the fatal shot which caused death. Some of the witnesses in the case had vaguely stated that 40 or 50 persons took part in the incident including the 7 persons mentioned in the first information report and the charge-sheet, but the prosecution case throughout had been that only the seven named persons took part in the incident. In the circumstances, it was necessary for the High Court to arrive at a definite finding as to whether the evidence of some of the witnesses, that the unlawful assembly consisted of many more persons than the seven persons put up for trial was true and acceptable, or whether that evidence should be rejected in view of the fact that the first information report was that only seven persons were named therein had committed the offence. The High Court had also to consider the further question of prejudice by reason of the defect in the charge. Without arriving at any positive findings of the nature required, the High Court had proceeded on the assumption that there was an unlawful assembly of a large number of persons, of whom seven were put up for trial and of these seven persons four had been acquitted by the trial Court and three had been convicted, and in doing so, the High Court had acted in disregard of the settled law in this behalf. The High Court should have fully examined the evidence and come to a definite conclusion, as to whether there was an unlawful assembly consisting of five or more persons including the three accused convicted by the trial Court and other unidentified persons and should have stated its reasons for arriving at such a conclusion. It should then have ascertained the particular acts committed by any member or members of that assembly in furtherance of the common object, as also the question whether any of the appellants had participated in the incident. In the light of its findings on these matters, the High Court should then have proceeded to consider whether all or any of the appellants could be liable vicariously for all or any of the acts found to have been committed by the unlawful assembly or any member or members thereof other than those alleged to have been committed by the four accused persons whose acquittal had become final. All these questions were essential for the determination of the High Court. In the circumstances, the order of conviction passed by the High Court was set aside and the case is sent back to the High Court for deciding it afresh in the light of the directions contained in this judgment. *Ram Bilas Singh* v. *State of Bihar,* 1964 (1) CrLJ 573 : (1964) 1 SCR 775.

[7622] ● ***Object of assembly unlawful object.***—In the present case, the accused were convicted of offences under Sections 304 and 336, Penal Code read with Section 149. The established facts in the case were that the accused were the tenants of certain fields in respect of which the Civil Court had made decrees in favour of certain persons and warrants had been issued for delivery of possession. When the party of the decree holders sought to execute those warrants, the accused attacked them with lethal weapons and caused the deaths of two of them and serious injuries to the others. The warrants had ceased to be executable under the law by reason of the provisions of Rules 24 and 25 of Order 21 of the Code of Civil Procedure, but the decree holders were not aware of that fact. Relying on this fact, it was contended that the party of the decree holders were guilty of criminal trespass, and that the common object of the assembly constituted by the accused was to defend their own property against criminal trespass, and that as the object was lawful and the assembly was not an unlawful assembly as denied in Section 141, conviction with the aid of Section 149 was bad in law. Even though the warrants had ceased to be executable some time before the date of the incident, that did not make the act of entry upon the fields in the possession of the accused, criminal trespass as the dominant intention of the party of the decree holders was not to intimidate or insult or annoy the persons in possession of the fields. Their main intention was to execute the warrants. Therefore, it must be held that the object of the assembly was an unlawful object, namely, to resist by force the execution of the warrants and that the assembly was an unlawful assembly. That being so, conviction under section 149 was justified. *Matri* v. *State of Punjab*, AIR 1964 SC 986 : 1964 (2) CrLJ 57 : 1964 SCD 557.

[7623] ● ***Common object to Kill deceased.***—In a case in which the accused are charged with the offence under section 302 read with Section 149, it is not necessary, for the purpose of establishing the common unlawful object of the assembly, to prove that the accused were lying in wait to kill the victim. Merely because the incident in the course of which the victims were severely beaten with lethal weapons had developed suddenly, it cannot be said that there was no common object to commit the offence. In the present case, it was clearly established that all the accused were armed with deadly weapons and had taken an active part in inflicting serious injuries on the deceased, that after coming up to the deceased one of them grasped the victim from behind and the others gave him blows on the head, and that even after he had fallen down, they continued to give him severe blows, and that when another person tried to rescue him, they rushed at him and conjointly used their weapons and thus gave to both the victims such serious injuries that they ended in their immediate death. In the circumstances, the object to kill the deceased was written large on the evidence, and conviction under section 302 read with Section 149 of the Penal Code was justified. *Nihal Singh* v. *State of Punjab*, AIR 1965 SC 26 : 1965 (1) CrLJ 106 : 1964 SCD 853 : 1965 1 SCJ 160.

[7624] ● ***Common unlawful object—Sharing of.***—Where the whole group of persons who constituted the assembly were members of a hostile faction, and they had assembled together armed with various weapons with the common unlawful object to taking the lives of the members of the opposite faction, there is no scope for suggesting on behalf of any of the accused that he was only a passive bystander who was there without sharing the common unlawful object. In such a case, each member of the assembly would be guilty under section 302/149 without proof of actual active part taken by him in the killing. *Masalti* v. *State of Uttar Pradesh*, AIR 1965 SC 202 : 1965 (1) CrLJ 226 : 1964 SCD 980.

[7625] ● ***Murder—Common intention—Sharing of.***—The only question argued in this appeal is whether in view of the acquittal of Ramhans by the learned Sessions Judge, from which there had been no appeal by the State, was it open to the High Court to hold that the appellant was guilty of murder under section 302 read with Section 34 by finding on the evidence that Ramhans who shared a common intention with him, shot the deceased and attempted to murder Ramchandra. Ramhan's case, depended on the evidence laid there while the appellant's case had to be decided only on the evidence laid in it. The evidence laid in Ramhan's case and the decision arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case. We are, therefore, of opinion that the judgment in *Krishna Govinda Patil's case,* AIR 1963 SC 1413, does not assist the appellant at all. On the other hand, we think that the judgments earlier referred to on which the High Court relied clearly, justify the view that in spite of the acquittal of a person in one case, it is open to the Court in another case to proceed on the basis, of course, if the evidence warrants it that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the latter case that the person tried in it was guilty of an offence under section 34 by virtue of having committed offence along with the acquitted person. There is nothing in principle to prevent this being done. The principle of *Sambasivam's case,* 1950 AC 458 has no application here because the two cases we are concerned with, are against two different persons, though for the commission of the same offence. Furthermore, as we have already said each case has to be decided on the evidence laid in it and this irrespective of any view of the same act that might have been taken on different evidence led in another case. *Karan Singh* v. *State of Madhya Pradesh*, AIR 1965 SC 1037 : 1965 (2) CrLJ 142 : 1965 SCD 338.

[7626] ● ***Common object of unlawful assembly—Vicarious liability.***—It is not the law, that in a case in which several accused persons are charged under section 302/149, some overt act must be proved against a person before he can be said to be a member of an unlawful assembly. What has to be proved against a person who is charged with the offence of being a member of an unlawful assembly is that he was one of the persons, constituting the unlawful assembly and entertained the common unlawful object of the assembly. The crucial question in such a case is whether the assembly consisting of five or more persons entertained a common unlawful object, and whether the accused was one of such assembly by intentionally joining it or continuing in it being aware of the facts which rendered the assembly an unlawful assembly. In determining this question, it becomes relevant to consider whether the assembly consisted only of persons who were aware of its common unlawful object and had intentionally joined it or whether the assembly also included some persons who were there without entertaining the common unlawful object of the assembly. Where the assembly is of the latter character and while some of the persons assembled together share the common unlawful object, others are only passive witnesses, it becomes necessary to see whether a particular individual who is charged with the offence of being a member of the unlawful assembly, had done something or omitted to do something indicative of the state of his mind, and in the absence of any evidence establishing his awareness and intention to join the unlawful assembly, his mere presence in the assembly does not make him a member of the assembly. It is only in such a context, that the part taken by a person in the incident assumes significance. Otherwise, in law, for holding a person to be a member of an unlawful assembly, it is not necessary to show, that he had himself committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common unlawful object of the assembly of which he was a member. Section 149 which lays down the principle of vicarious liability, for the offence committed by any other member of the unlawful assembly in prosecution of the common object of the assembly, makes this aspect of the matter quite clear. *Masalti* v. *State of Uttar Pradesh*, AIR 1965 SC 202 : 1965 (1) CrLJ 226 : 1964 SCD 980 : (1965) 1 SCJ 605.

[7627] ● *Unlawful assembly—Common object —Offender accused of offence under Section 302 read with Section 149, IPC.*— Sections 146 and 149 represent conditions under which vicarious liability arises for the acts of others. It is not obligatory to charge a person under section 143 or 147 when charging him with Section 147 or 148. Similarly, it is not obligatory to charge a person under section 143 or Section 147 when charging him for an offence with the aid of Section 149. These sections are implied. In may be useful to add a charge under section 147 and Section 148 which charges under other offences of the Penal Code read with Section 149, but it is not obligatory to do so. A person may join an unlawful assembly and be guilty under section 143 or 147 or 148 but he may cease to be its member at the time when the offence under section 302 or some other offence is committed. He would not in that event be liable for the other offence for Section 149 would not apply to him. The present case is not of that kind. Offences under Sections 143 and 147 must always be present when the charge is laid for an offence like murder with the aid of Section 149, but the other two charges need not be framed separately unless it is sought to secure a conviction under them. It is thus, that Section 143 is not used when the charge is under section 147, or Section 148, and Section 147 is not used when the charge is under section 148. Section 147 may be dispensed with when the charge is under section 149 read with any other offence under the Indian Penal Code. There can be proof under section 149 of the existence of an unlawful assembly, of the common object and of the part played by the unlawful assembly or any of its members, same as under section 143 or Section 147 or under section 148. There may be additional charges under these sections to guard against failure of the charge for an offence read with Section 149 but the other charges cannot be regarded as condition precedent. We agree with the conclusion of the Full Bench and therefore confirm the judgment under appeal. *Mahadev Sharma* v. *State of Bihar*, AIR 1966 SC 302 : 1966 CrLJ 197 : (1966) 1 SCA 146.

[7628] ● *Unlawful assembly—Prosecution of common object.*—Where a member of an unlawful assembly is named as an offender who committed an offence for which the members of the unlawful assembly are liable under section 149, IPC, and the evidence at the trial is insufficient to establish, that the named person committed the act attributed to him, he may still be convicted of the offence, if it is proved that he was a member of the unlawful assembly and that the act was done by some member of the assembly in prosecution of the common object or which the members knew was likely to be committed in prosecution of that object. Failure to prove the presence of the named offender among the members of the unlawful assembly will not affect the criminality of those who are proved to be members of the assembly if the other conditions of the applicability of Section 149 be established. If the Court refuses to accept the testimony of the witnesses who speak to the presence of and part played by a named offender, the weight to be attached to the testimony of those witnesses insofar as they involve other may undoubtedly be affected, but it cannot be said that because the testimony of witnesses who depose to the assault by the named offender is not accepted, other members proved to be members of the unlawful assembly escape liability arising from the commission of the offence, in the prosecution of the common object of the assembly. *Ramu Gope* v. *State of Bihar*, AIR 1969 SC 689 : 1969 CrLJ 1061 : (1969) 1 SCJ 939 : (1969) 2 SCA 216 : 1969 ACrR 312 : 1969 AWR (HC) 473 : 1969 ALJ 635 : 1969 MLJ (Cr) 482.

[7629] ● *Free fight—Common object.*—Once the Court comes to the conclusion that the injuries sustained by the persons were in the course of a free fight, then only those persons who are proved to have caused them can be held guilty for the injuries caused by them. *K.N. Virji* v. *State of Gujarat*, AIR 1970 SC 219 : (1970) 3 SCC 103 : 1970 CrLJ 363 : 1970 SCD 244 : 1970 SCCrR 311 : 1970 ACrR 281.

[7630] ● *Unlawful assembly—Common object.*—Under the Fourth clause of Section 141, and assembly of five or more persons is an unlawful assembly, if the common object of the members thereof, is to enforce any right or supposed right by means of criminal force or show of criminal force to any person. Section 141 must be read with Sections 96 to 106 dealing with the right of private defence. The assertion of a right of private defence within the limits prescribed by law cannot fall within the expression "to enforce any right or supposed right" in the Fourth clause of Section 141. The assembly could not be designated as an unlawful assembly if its object was to defend property by the use of force within the limit prescribed by law. *State of Bihar* v. *Nathu*, AIR 1970 SC 27 : (1969) 2 SCC 207 : 1970 CrLJ 5 : 1969 SCD 743 : (1969) 2 SCJ 858 : 1970 SCCrR 235 : (1970) 1 SCA 370 : (1970) 1 SCR 358 : 1970 ALJ 1 : 1969 MLJ (Cr) 856.

[7631] ● *Unlawful assembly—Crime committing in prosecution of common object.*—In order to attract the provisions of Section 149 the prosecution must establish that there was an unlawful assembly, and that the crime was committed in prosecution of the common object of the assembly. *State of Bihar* v. *Nathu*, AIR 1970 SC 27 : (1969) 2 SCC 207 : 1970 CrLJ 5 : 1969 SCD 743 : (1969) 2 SCJ 858 : 1970 SCCrR 235 : (1970) 1 SCA 370 : (1970) 1 SCR 358 : 1970 ALJ 1 : 1969 MLJ (Cr) 856.

[7632] ● *Unlawful assembly in prosecution of common object.*—It is an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly, and it is an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object. Section 149 creates a specific offence and deals with the punishment of that offence. The emphasis is on common object. There is no question of common intention in the section. *S.M. Singh* v. *State of Bihar*, AIR 1970 SC 1492 : (1970) 3 SCC 46 : 1970 CrLJ 1389.

[7633] ● *Mutual fight—No common object.*—In a mutual fight, there is no common object. None of the accused can be convicted by having recourse to Section 149, IPC. *Munir Khan* v. *State of Uttar Pradesh*, AIR 1971 SC 335 : 1971 CrLJ 288 : 1970 UJ (SC) 725 : (1971) 2 SCCrR 93 : 1971 ACrR 151 : 1971 AWR (HC) 156.

[7634] ● *Unlawful assembly—Carrying out illegal common object.*—Mere presence of a person at the place where members of an unlawful assembly have gathered for carrying out their illegal common object, does not incriminate him. But the question is one of fact in each case as to whether he happens to be innocently present at the place of occurrence or was actually a member of the unlawful assembly. *Bishambar* v. *State of Bihar*, AIR 1971 SC 2381 : (1972) 3 SCC 260 : 1971 CrLJ 1700 : 1971 SCD 1012.

[7635] ● *Common object of assembly—Sharing of.*—In this case the appellants were present at the spot at the time of the occurrence not merely as passive or innocent spectators, without intending to share the common object of the assembly, nor did they happen to be there out of idle curiosity, content by merely gazing on having nothing to do with the assaults. *Chandrika Prasad* v. *State of Bihar*, AIR 1972 SC 109 : (1972) 4 SCC 140 : 1972 CrLJ 22.

[7636] ● *Common object of unlawful assembly.*—The mere fact that the victim, who was not one of those who accompanied the Court Nazar for attaching the crop of the J.D., happened to be the first target of use of violence in accomplishing the common object, does not imply that the members of the assembly participating in the assault, on the deceased had a different common object from that of the original assembly. *Gokul* v. *State of Rajasthan*, AIR 1972 SC 209 : (1972) 4 SCC 812 : 1972 CrLJ 42 : (1972) 1 SCJ 499 : 1972 MLJ (Cr) 278.

[7637] ● *Grievous hurt by particular accused not in prosecution of common object.*—Where the appellant struck a blow with a kencha which fell on the left thigh of a workman working in the house of one K whom the appellant and others wanted to attack, and as the appellant struck at the very first person who opened the door and that was how that man came to receive the injury, the conviction of the appellant alone for causing the said injury is correct. Other accused were not guilty of any vicarious liability for the appellant's assault on the workman. *Kshudiram* v. *State of West Bengal*, AIR 1972 SC 1221 : (1972) 3 SCC 479 : 1972 CrLJ 756.

[7638] ● *Common object—Minor differences in FIR and evidence of witnesses.*—Where injuries were caused to the deceased in prosecution of the common object of all the accused to cause the death of the deceased, the accused cannot derive any benefit from the inability of the PWs to state as to which particular injury was caused by which of the accused relying upon some discrepancies in the FIR and in the evidence of witnesses. *Ram Prasad* v. *State of Uttar Pradesh*, AIR 1973 SC 2673 : (1974) 3 SCC 388 : 1973 CrLJ 1807.

[7639] ● *Accused not formed unlawful assembly with common object.*—Where there was no pre-meditation and the occurrence was a sudden affair as a result of remonstrance and counter remonstrance, each of the accused will be liable for his individual act and not vicariously liable for the acts of others and it cannot be said that the accused formed an unlawful assembly and had a common object. *Lalji* v. *State of Uttar Pradesh*, AIR 1973 SC 2508 : (1973) 2 SCC 567 : (1973) SCC (Cri) 921 : 1973 CrLJ 1769 : 1973 SCD 879.

[7640] ● *Occurrence chance encounter—Assembly not becoming unlawful at any stage.*—Where the occurrence was a chance encounter and the fatal assault was a sudden, unanticipated and individual act of the unascertained assailant, their assembly did not become unlawful at any stage, and as such the accused are not liable for the fatal assault by the application of Section 149, IPC. *State of Uttar Pradesh* v. *J.N. Gupta*, AIR 1974 SC 753 : (1974) 4 SCC 471 : (1974) SCC (Cri) 507 : 1974 CrLJ 625 : 1974 SCD 467.

[7641] ● *Common object of accused either to murder or injuries deceased or witnesses not established.*—Where some of the accused were not initially involved in the incident of rescuing a girl from her father-in-law's house and the common object of the accused either to murder or injure the deceased or PWs 2 and 3 was not established, and those persons merely joined the other villagers in trying to stop the accused from taking away the girl, and it was at that stage that the main accused fired his gun resulting in the death of the deceased and injures to PWs 2 and 3, none of the other accused could be held to have at any time entertained an intention to commit murder and they cannot, therefore, be held liable under section 307/149, IPC. *Tarlok Singh* v. *State of Punjab*, AIR 1974 SC 1797 : (1973) 2 SCC 458 : (1973) SCC (Cri) 872 : 1974 CrLJ 1265.

[7642] ● *Unlawful assembly—Committal of offence by.*—It is incumbent upon the prosecution to show that the person concerned was a member of the unlawful assembly at the time of the commission of the offence. If the person concerned goes away and ceases to be a member of the unlawful assembly before the commission of the offence, no vicarious liability can be fastened upon him under section 149 because of any subsequent act done by the other members of the unlawful assembly. *Nawab Ali* v. *State of Uttar Pradesh*, AIR 1974 SC 1228 : (1974) 4 SCC 600 : (1974) SCC (Cri) 636 : 1974 CrLJ 921 : (1974) 2 SCJ 249 : 1974 SCD 575 : 1974 MLJ (Cr) 500.

[7643] ● *Unlawful assembly—Common object originally to beat deceased.*—It was clear on the evidence, that all the five accused came armed with deadly weapons and one of them caught hold of the deceased and shouted that he should be beaten and another said that they would decide the matter on the spot. Hence, the five accused were members of an unlawful assembly with the common object to kill the deceased. Not much importance could be given to the word "beat" used in the charge. The appellants having come armed with deadly weapon and attacked the deceased in the desperate manner they had done, and if the members of the assembly knew that by using those weapons upon the deceased, death would be caused, they were guilty under section 302/149, IPC. Even assuming, that the unlawful assembly was formed originally only to beat, it was clearly established in the evidence that the said object was well-knit with what followed as the dangerous finale of, call it, the beating. This was not a case where something foreign or unknown with the object had taken place all of a sudden. It was the execution of the same common object which assumed the fearful character, implicit in the illegal action undertaken by the five appellants. *Bhajan Singh* v. *State of Uttar Pradesh*, AIR 1974 SC 1564 : (1974) 4 SCC 568 : (1974) SCC (Cri) 604 : 1974 CrLJ 1029.

[7644] ● *Acquittal of some accused and conviction of others.*—Where the case against some of the accused, whose conviction was maintained by the High Court was not at all distinguishable from the case against one of the other co-accused whom the High Court acquitted, the Supreme Court on appeal against acquittal reversed the same and convicted the accused. *State of Uttar Pradesh* v. *Sheo Ram*, AIR 1974 SC 2267 : (1975) 3 SCC 136 : (1974) SCC (Cri) 760 : 1975 CrLJ 14.

[7645] ● *Nature of offence under Section 149, IPC.*—Section 149, IPC, constitutes *per se* a substantive offence although the punishment is under the section to which it is tagged, being committed by the principal offender in the unlawful assembly, known or unknown. *Bhajan Singh* v. *State of Uttar Pradesh*, AIR 1974 SC 1564 : (1974) 4 SCC 568 : (1974) SCC (Cri) 604 : 1974 CrLJ 1029 : 1974 SCD 620.

[7646] ● *Members of unlawful assembly armed with lathis and spears—Common object.*—Where the members of an unlawful assembly were armed with lathis and spears, the common object of which was to assault the victims, the common object may not be to murder one of them, but the members of the assembly must have known that at least grievous hurt with a sharp cutting weapon was likely to be caused by any member of the assembly in prosecution of the common object. *Ram Anjore* v. *State of Uttar Pradesh*, AIR 1975 SC 185 : (1975) 3 SCC 379 : (1975) SCC (Cri) 5 : 1975 CrLJ 249 : 1975 ACrC 66.

[7647] ● *Unlawful assembly—Fourteen out of eighteen acquitted on ground of benefit of doubt.*—In this appeal, the four appellants along with 14 others were tried for rioting and murder. The trial Court acquitted 11 of them giving them the benefit of doubt and convicted the rest including the four appellants. Each of them was convicted under section 302, r/w 149, IPC. The High Court came to the conclusion that the admissions of the four appellants, corroborated by the injuries on the bodies of three of them, left no doubt that they were in any case among the assailants. The others were given the benefit of doubt lest some injustice was done by relying implicitly on partisan witnesses in which innocent persons were not infrequently sought to be roped in with the guilty. That did not mean, that the total number of assailants was actually less than five as contended for the appellants from the fact that 14 out of the 18 accused persons were actually acquitted. It was true that the acquittal of an accused person did raise, in the eye of law, a presumption that he was innocent, even if he was actually guilty. But it was only the acquitted accused person and not the convicted accused persons who could, as a rule, get the benefit of such a presumption. The effect of findings on questions of fact depended upon the nature of those findings. If, for example, only five known persons were alleged to have participated in an attack but the Courts found that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the Court held that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants and therefore, acquitted two of them, the others would not get the benefit of doubt about the identity of the two accused so long as there was a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number. Such a case was one of doubt only as to the identity of some participants, and not as to the total number of participants. But where a large number of known persons such as 18 as in this case were alleged to have participated, and the Court acted on the principle that it was better to err on the side of safety and benefit of doubt was reaped by a large number, with the result that their acquittal reduced the number of those about whose participation there could be no doubt to less than five, it might not be really difficult at all to reach the conclusion that, having regard to undeniable facts, the number of participants could not possibly be less than five. It had to be remembered that doubts might arise with regard to the participation of a particular accused person in circumstances whose benefit could only be reaped by the accused who raised such doubt. Doubts might also arise about the veracity of the whole prosecution version and doubts about the participation of individual accused persons, might contribute to the emergence of such doubts, which might cover and engulf the whole case. Nevertheless, if, as in the instant case, the Court, whose duty it was to separate the chaff from the grain, did hold, that the convicted persons were certainly members of an unlawful assembly which might have consisted of more than five persons, there was no principle of law or justice which could stand in the way of the application of Section 149, IPC for convicting those found indubitably guilty of participation in carrying out of the common object of an unlawful assembly. *Dharam Pal* v. *State of Uttar Pradesh*, AIR 1975 SC 1917 : (1975) 2 SCC 596 : (1975) SCC (Cri) 704 : 1975 CrLJ 1666.

[7648] ● *Unlawful assembly—Having common object.*—The High Court having found that the common object of the assembly was to re-divert the water by use of force, if necessary, and that the respondents had armed themselves along with their followers with guns and gandasas were carrying out that object, the conclusion was unavoidable that the members of the assembly knew that the prosecution of even the limited object of the assembly was likely to result in the murder of the opponents. That aspect was overlooked by the High Court. Therefore, every member of the unlawful assembly would be vicariously liable for the acts committed by any member of that assembly. Their varying participation in the different stages of the incident was directed at achieving the common object— first the murders and then the destruction of evidence establishing the murders. Some fired the fatal shots, some severed the limbs of the victims, some threw the dead bodies into the fire and some led the victory march parading the heads of the victims as prizes. But whether one did this or that act, there was identity of interest among the members of the unlawful assembly and they were actuated by a common object. There was thus but one unlawful assembly and its members were animated by a unity of purpose. Five of the respondents were convicted under section 302 r/w Section 149, IPC, and the other 3 were found not guilty. *State of Uttar Pradesh* v. *Mahendra Singh*, AIR 1975 SC 455 : (1975) 3 SCC 314 : (1974) SCC (Cri) 922 : 1975 CrLJ 425.

[7649] ● ***Unlawful assembly—Common object of killing.***—In this case the appellant and certain others were convicted under section 304(1)/149, IPC, and certain minor sections. One appeal by the State, the conviction of the appellant was altered from Section 304(1)/149 to Section 302/149 and the other convictions against him were maintained. The question was, whether on the evidence on the record, whether the killing of any of the three men who died was within the common object of the large number of persons who took part in the riot in various ways in a fairly widespread area. It might well be that those who actually inflicted the injuries on the three deceased, could be held liable for causing death in a particularly cruel manner. But the question was whether each of the large number of other rioters in the village, who took part in various ways in the upsurge of resentment and hostility against a party of whom three lost their lives, shared the common object to kill them or to do acts whose natural and probable results would be their deaths. Every offence which might be committed by a member of an unlawful assembly, would not necessarily be ascribed to or vicariously fastened upon every other member of that assembly by using Section 149, IPC. The likelihood of causing of death by the nature of the actions of the members of the assembly should be shown to be within the knowledge of a member who was to be made vicariously liable for a death. Such knowledge might be inferred from the nature of the actions committed by others in an unlawful assembly which the member, held vicariously liable, continued to associate himself with, despite those actions seen by him or known to him. In the present case, there were two factions in the village, one of the oppressors and the other of the oppressed, smarting under the pain of injuries inflicted by their oppressors, the intention of a member of an assembly of such faction would be initially quite lawful. His object might not go beyond joining a procession for purposes of protest. On the evidence on record, it could be seen that the participation of the appellant went beyond exhibiting a mere intention to protest. It not only embraced knowledge of likelihood of hurt of some kind to members of the party attacked, but it included an attack by the appellant on PW1, though it was relatively mild. At most, from the concerted action of so many men a member of the unlawful assembly in this case could be reasonably held to be aware, that grievous hurt would result. As it was doubtful whether the appellant could be held guilty of participation in an unlawful assembly which had the common object of killing or even maiming the three men who lost their lives, the appellant could not be convicted under section 302/149, IPC. The trial Court was in error in holding the appellant guilty under section 304(1)/149, IPC. For a conviction under that section, it should be shown that the case of the convicted person fell within one of the five Exceptions found in Section 300, IPC, and in this case it was doubtful, whether the common object of the unlawful assembly jointed by the appellant was to commit any acts which were either intended to cause death, or, from which knowledge of likelihood of death would be inferred. Persons other than those who actually committed the acts resulting in death could not be held vicariously liable for murder. The appeal was, therefore, allowed setting aside the conviction of the appellant under section 302/149, IPC, while maintaining his other convictions. *Santosh* v. *State of Madhya Pradesh*, AIR 1975 SC 654 : (1975) 3 SCC 727 : (1975) SCC (Cri) 182 : 1975 CrLJ 602.

[7650] ● ***Common object—Accused party not being aggressors.***—If the accused were not the aggressors, no case either under section 147 or Section 148, IPC, can be maintained against them. Then it is for the prosecution to prove the individual assaults. If there is no evidence regarding the same, conviction under Sections 323, 324 or 326 cannot be founded against each of them on the basis of Section 149, IPC. *Ishwar Singh* v. *State of Uttar Pradesh*, AIR 1976 SC 2423 : (1976) 4 SCC 355 : 1976 CrLJ 1883 : 1976 CrLR (SC) 357 : 1976 AWC 672 : 1976 ACrC 307.

[7651] ● ***Case of sudden mutual fights Section 149, IPC not to be invoked.***—There were concurrent findings recorded by the two lower Courts that it was a case of sudden mutual fights, that there could be no question of invoking the aid of Section 149 for imposing constructive criminal liability on the appellant. The appellant would, therefore, be convicted only for the injuries caused by him by his individual acts. Secondly, the fight between the parties took place in one stage and not two stages as deposed to by the PWs. Once those two circumstances were accepted, it would be impossible to sustain the conviction of the appellant. When the fight began, according to the prosecution case, the appellant was armed with a dantli and it was with that dantli that he gave a blow on the back side of the head of one L.

But the injury, which resulted in the death of the deceased was, according to prosecution, caused by an axe blow. The medical evidence confirmed that the injury should have been caused by a heavy blow with some sharp cutting object like an axe since the injury had gone deep into the brain matter. It was, therefore, obvious that the appellant, who was armed with a dantli, could not have inflicted the fatal blow on the head of the deceased. The appeal was allowed. *Puran* v. *State of Rajasthan*, AIR 1976 SC 912 : (1976) 1 SCC 28 : 1975 SCC (Cri) 750 : 1976 CrLJ 674.

[7652] ● *More innocent presence in assembly not to make accused member of unlawful assembly.*—Both the Courts did not make a correct approach in examining the individual cases of the accused with reference to their actual presence or participation in the incident in question. All the incidents starting from a hotel and ending with the chawl of Jogendra Singh were all parts of the same transaction, nevertheless they were separate incidents in which different members of the mob had participated. Hence it could not be inferred as a matter of law that once the appellants were members of the mob at the hotel they should be deemed to have participated in all the other incidents at various other places up to the end. It was well-settled that a mere innocent presence in an assembly of persons, as for example a bystander, did not make the accused a member of an unlawful assembly, unless it was shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus, a Court was not entitled to presume that any and every person who was proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities was in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd should from the beginning have anticipated and contemplated the nature of the illegal acts in which the assembly would subsequently indulge. In other words, it should be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all those stages. The evidence in this case was wholly lacking in that behalf and it merely showed that some of the accused were members of the unlawful assembly at one particular stage but not at another. Further, framing of a charge under section 395, r/w Section 149, IPC, was a mere surplusage as an offence under section 395 would come into existence only when an act of dacoity was committed by 5 or more persons jointly. On consideration of the evidence only three of the appellants were found guilty under minor offences. *Musa Khan* v. *State of Maharashtra*, AIR 1976 SC 2566 : (1977) 1 SCC 733 : 1976 CrLJ 1987 : 1976 CrLR (SC) 466.

[7653] ● *Common object—Murder.*—Where the original common object was to kill a particular person but who was not available, and the common object to kill the deceased developed at the second stage when the accused decided to teach him a lesson also, and where there was no reliable evidence at all to show, that the appellants also shared the changed new common object and on the other hand there were clear circumstances that the appellants did not participate in the offence, there was a serious doubt that the appellants being close relations of the other accused and the possibility of their being falsely implicated due to enmity, cannot be reasonably excluded particularly having regard to the admitted enmity which existed between the parties. *Roshan* v. *State of Maharashtra*, AIR 1977 SC 672 : (1976) 4 SCC 65 : (1976) SCC (Cri) 523 : 1977 CrLJ 259 : 1977 CrLR (SC) 44.

[7654] ● *Conviction under Section 302 and 149, IPC—When proper.*—Where the evidence showed that no less than 12 injuries were caused to the deceased and at least one of them was on a vital part of the body, namely, the parietal region and the weapons used were lohangis and iron-shod sticks, which were clearly lethal weapons, the conviction of the accused under section 302 r/w Section 149, IPC, was correct. *Inder Singh* v. *State of Madhya Pradesh*, AIR 1977 SC 2040 : (1977) 1 SCC 2 : (1977) SCC (Cri) 32 : 1977 CrLJ 1605.

[7655] ● *Unlawful assembly—In prosecution of common object.*—An offence will no doubt fall within the purview of Section 141, IPC, even if members of the assembly knew that it was 'likely to be committed' in prosecution of their common object, or if the offence was such as the members of that assembly knew to be likely to be committed in prosecution of that object. In the instant case there is nothing in the testimony of the PWs to show that the party of the accused who were armed with guns fired them in pursuance of the common object of the other persons who were on the terrace, at that time as they did not go to the terrace of their own accord for committing any offence, but they went there when the complainant's party made an aggressive call. It is also not in evidence, that the other accused exhorted those who fired the guns or knew that the guns would be fired. There is, however, nothing in the statements of the three police witnesses to prove that this was so. Section 149, IPC, will not, therefore, fasten criminal liability on the other accused. *K. Neelkantha* v. *State of Andhra Pradesh*, AIR 1978 SC 1021 : (1978) 2 SCC 473 : (1978) SCC (Cri) 285 : 1978 CrLJ 780 : 1978 CrLR (SC) 95.

[7656] ● ***Sharing of common object of unlawful assembly—Occurrence in rural area involving rival factions.***—In the instant case, the appellants were acquitted for offences under section 302 read with Section 34, IPC, Section 302 read with Section 149, IPC, and for offences under Sections 323, 324, 325 read with Section 149 and Section 427 read with Section 34, IPC. The High Court convicted them under section 302 read with Section 34, IPC, and other offences. If some persons had collected at one place and on seeing the deceased alighting from the bus, emerged from that place and chased him, and some of them belaboured him, it could be said that they had met for a purpose and had a common object and acted in concert. If some persons combined to attack him, and if they emerged together one could say that those who were the members of the latter assembly, shared the common object of the assembly, *viz.,* to assault and even to cause hurt to the deceased. At that stage an unlawful assembly was formed.

In a case where a large crowed collected, all of whom were not shown to be sharing a common object of the unlawful assembly, a stray assault by any one accused on any particular witness could not be said to be an assault in prosecution of the common object of an unlawful assembly, so that the remaining accused could be imputed the knowledge that such an offence was likely to be committed in prosecution of the common object of the unlawful assembly.

Whenever in uneventful rural society, something unusual occurred, more so where the local community was faction ridden and a fight occurred amongst factions, a good number of people appeared on the seen not with a view to participate in the occurrence but as curious spectators. In such an event mere presence in the lawful assembly should not be treated as leading to the conclusion that the person concerned was present in the lawful assembly as a member of the unlawful assembly. Vicarious liability would attach to every member of the unlawful assembly if that member of the unlawful assembly either participated in the commission of the offence by overt act or knew that the offence which was committed was likely to be committed by any member of the unlawful assembly in prosecution of the common object of the unlawful assembly and became or continued to remain a member of the unlawful assembly. *Muthu Naicker* v. *State of Tamil Nadu*, AIR 1978 SC 1647 : (1978) 4 SCC 385 : 1978 CrLJ 1713 : 1978 CrLR (SC) 378.

[7657] ● ***Unlawful assembly to commit murder.***—In case of an unlawful assembly to commit murder, the manner in which the five respondents were lying in wait, the fire-arms they were having with them, the exhortation by A-4 and A-5, followed by 3 shots aimed at the deceased by A-1 to A-3 from short distance, threats given by A-1 to A-3 to witnesses not to question them, the manner of running away after snatching the rifle and belt of cartridges from the deceased—all these are sufficient to come to the conclusion that these five accused had constituted an unlawful assembly and as members thereof committed the various offences with which they were charged. *State of Uttar Pradesh* v. *Sughar Singh*, AIR 1978 SC 191 : (1978) 1 SCC 138 : (1978) SCC (Cri) 83 : 1978 CrLJ 141.

[7658] ● ***Common object—Proof of.***—Before the appellants could be convicted of sharing the common object of the assembly or of being members of the same at a time when the assembly became unlawful, it had to be proved by the prosecution, that the appellants were members of the unlawful assembly at the time when the assembly became unlawful. There was evidence in the case to that effect but the evidence merely shows that the appellants were members of the morcha but there is absolutely nothing to show that they were members of the unlawful assembly when its members started pelting stones. The FIR lodged by a full-fledged eye-witness did not mention the names of any of the appellants. That by itself, is a serious infirmity in the prosecution case sufficient to throw doubt on the truth of the version presented by the prosecution to say that as the morcha moved on it must be presumed to be unlawful and any person who was a member of that assembly must be presumed to share the common object of the unlawful assembly is over-stating the law on the subject. It must be shown either from a person's active participation or otherwise that he shared the common object of the unlawful assembly. It is not necessary that the accused should be guilty of any overt act. It is sufficient if it is shown that as a participant of the unlawful assembly, he was sharing the common object of the same. Even that evidence is wholly lacking in the present case. Decision of the Delhi High Court was reversed. *P.S. Sawant* v. *State of Maharashtra*, AIR 1979 SC 1265 : (1979) 4 SCC 727 : 1979 CrLJ 856 : 1979 CrLR (SC) 698.

[7659] ● ***Common object of committing lurking house trespass.***—Appellants were variously armed with dangerous weapons and had committed lurking house-trespass by entering the wireless station after breaking open the doors and windows and assaulted the witness. In these circumstances, all the appellants must be deemed to have shared the common object of committing lurking house-trespass punishable under section 455, IPC. Appellants are liable under section 149/455, IPC. *C. Chellappan* v. *State of Kerala,* AIR 1979 SC 1761 : (1979) 4 SCC 312 : (1979) SCC (Cri) 1029 : 1979 CrLJ 1335 : 1979 CrLR (SC) 744.

[7660] ● ***Common intention to cause murder.***—Mere fact that no overt act has been attributed to the members of the unlawful assembly is not sufficient to disprove the charge under section 149, IPC. Two of the appellants had common intention to cause murder of the deceased, inasmuch as one of them is said to have provided a cartridge to the other before he fired the gun. They were, therefore, guilty under Section 302/34. Others had merely intention to cause an offence under section 325, IPC, and went armed with weapons to dispossess the party of the deceased. They were guilty under section 325/149, IPC. *Fatte* v. *State of Uttar Pradesh*, AIR 1979 SC 1504 : (1979) SCC (Cri) 629 : 1980 CrLJ 829 : 1979 CrLR (SC) 349 : 1979 UJ (SC) 441 : 1979 ACrC 151 : 1979 ALJ 901 : 1980 CrAppR (SC) 299.

[7661] ● ***Murder—Common object.***—Where the appellant exhorted the other accused to assault the victims with guns and other weapons and one of them fired at the deceased, the appellant's conviction under section 302/149 was fully justified.

The appellant exhorted other assailants of the deceased persons and the injured, to open the assault by guns and other weapons. The appellant was also armed with a gun. Consistent evidence of the eye-witnesses is that all the three guns were fired though only one fired hit the deceased. Mere fact, that only one person was hit by the gun cannot exclude the possibility of the other guns having been fired, because it may be that, even though the other guns were also fired their bullets did not hit any body. High Court was, therefore, not justified in holding that appellant RR was armed with a lathi. Moreover, RR in his statement under section 342, CrPC (Section 313 of the 1973 Code) did not deny his presence at the spot but had admitted his presence there and had even stated in his statement that he had also assaulted the prosecution party with a lathi. There is, therefore, absolutely no reason to acquit RR of the charges under section 302/149 and his conviction was fully justified. *Kunwar Bahadur* v. *State of Uttar Pradesh*, AIR 1979 SC 1509 : (1979) 4 SCC 494 : (1980) SCC (Cri) 109 : 1980 CrLJ 831 : 1979 CrLR (SC) 722 : (1979) UJ (SC) 885 : 1980 SimLC 60 : 1979 ALJ 903.

[7662] ● ***Rioting—Common object of unlawful assembly.***—It is not necessary that in a case of rioting under section 149, any specific act should be attributed. It is sufficient if it is proved, that all the members of the unlawful assembly shared the common object of the said assembly which was undoubtedly to cause the murder of the deceased. *Bhe Ram* v. *State of Haryana*, AIR 1980 SC 957 : (1980) 1 SCC 201 : (1980) SCC (Cri) 206 : 1980 CrLJ 735 : 1979 CrLR (SC) 741 : (1980) 2 SCJ 141 : 1980 MLJ (Cr) 572.

[7663] ● ***Formation of unlawful assembly with common object—No evidence as to.***—Whole fight started suddenly on the spur of the moment in a heat of passion. Therefore, the accused could only be liable for the individual act committed by them. No conviction for rioting under the said sections can be recorded. Decision of the Madras High Court was reversed. *Mariadasan* v. *State of T.N.*, AIR 1980 SC 573 : (1980) 3 SCC 68 : (1980) SCC (Cri) 523 : 1980 CrLJ 412 : 1980 CrLR (SC) 177 : 1980 SCCrR 178 : 1980 UJ (SC) 300 : 1980 CrAppR (SC) 115 : 1980 Srinagar LJ 10 : 1980 SimLC 279.

[7664] ● ***Clear finding as to object of assembly pre-condition.***—In a conviction under section 326 read with Section 149, there should be a clear finding as to what was the object of the unlawful assembly and if so whether the object was unlawful, that is, to commit murder, grievous hurt or simple hurt. No overt act was attributed to any of the appellants on the deceased. Merely being armed with lathis by itself would not prove that they shared the common object with which the other appellant armed with a bhala was inspired. Conviction was set aside. *Bhudeo Mandal* v. *State of Bihar*, AIR 1981 SC 1219 : (1981) 2 SCC 755 : (1981) SCC (Cri) 595 : 1981 CrLJ 725 : 1981 CrLR (SC) 427 : 1981 BBCJ (SC) 104 : 1981 CrAppR (SC) 180 : 1981 BLJR 411 : 1981 Chand CrC (SC) 110 : 1981 Chand LR (Cr) 419.

[7665] ● ***Murder unlawful assembly.***—In a conviction under section 302 read with Section 149, participation of the accused was not shown to extend to his being a member of the unlawful assembly which took away the deceased to the flag-post and gave him a beating. But he was one of those who broke open the door of the house and dragged out the deceased. He cannot be convicted for murder with the aid of Section 149. *Badruddin* v. *State of Maharashtra*, AIR 1981 SC

1223 : (1981) SCC (Cri) 610 : 1981 Supp SCC 1 : 1981 CrLJ 729 : 1981 CrLR (SC) 198 : 1981 CrAppR (SC) 187.

[7666] ● ***Murder—Act done by several presence in furtherance of common object.***—Accused were coming in two trucks, those coming in one truck attacked the deceased and those coming by the other truck attacked P W3. Attacks on both the deceased and PW-3 were part of the same transaction. That the accused came by the different truck did not make any difference. It was a clear case where there was prior concert and planning by all the accused. Appeal was dismissed. *Jagdeo Singh* v. *State of Maharashtra*, AIR 1981 SC 648 : (1980) SCC Supp 360 : (1981) SCC (Cri) 267 : 1981 CrLJ 166 : 1981 CrLR (SC) 308 : 1981 UJ (SC) 31.

[7667] ● ***Common object to form unlawful assembly.***—Where the judgment of the High Court setting aside the order of acquittal of the trial Court did not at all discuss the evidence of the PWs, nor the case of each accused considered and not even a finding about common object was given and the accused was not examined under section 342, CrPC of Jammu & Kashmir, the judgment of the High Court was set aside but remand was not ordered due to the passage of time and as the injuries caused to the complainant were simple. *Naba Parray* v. *State of J&K*, AIR 1982 SC 1200 : 1982 CrLJ 1576.

[7668] ● ***Murder—Common object.***—The approach made by the High Court was purely wooden, artificial and based on pure speculation and the Supreme Court, was not at all impressed by the process of reasoning, adopted by the High Court. The grounds taken and the process of reasoning adopted by the High Court, for disbelieving injured eye-witnesses was manifestly wrong and perilously bordered on perversity. From the proved facts the irresistible inference that could be drawn was that the charge under section 302/149 was unassailable. The High Court merely discussed the evidence of the eye-witnesses and on trivial grounds rejected the same without at all taking into consideration the fact, that the accused could not escape conviction under the said section even if the individual assaults were not proved. *State of Gujarat* v. *Naginbhai*, AIR 1983 SC 839 : (1983) 3 SCC 316 : (1983) SCC (Cri) 590 : 1983 CrLJ 1112 : 1983 CrLR (SC) 359.

[7669] ● ***Unlawful assembly—Common object.***—In this case the appellant was A-1 out of nine accused. The Sessions Judge convicted all of them: A-1, 6, 7 and 9 under Sections 303 read with Section 149, IPC, A-2, 3, 4, 5 and 8 under section 302 read with Section 149, IPC. On appeal the High Court found that there was no unlawful assembly and acquitted all the accused of the various charges under Sections 147, 148 and 149 read with the other substantive Sections of the Penal Code. The first accused, whose sentence of death was confirmed, appealed to the Supreme Court by special leave. The facts mentioned above were substantially found by the High Court. Yet the High Court, by a curious process of reasoning came to the conclusion, that there was no unlawful assembly and that each of the accused persons was liable for his own individual act. The High Court thought, that because the accused arrived on the scene at different times and at different stages of the assault, they could not' be said to be animated by any common object. The said reasoning was totally fallacious. It was obvious from the evidence, that the several accused persons were lying in wait at different places near the scene of occurrence. They had apparently split themselves into smaller groups, so that they might not attract attention. It was not as if there was any appreciable interval of time, between their joining each other in the attack. It was a continuous process without any noticeable time lag. First, according to the evidence, A-3 caught him from behind; immediately A-4, 5 and 8 joined him and dragged the deceased in the direction of the temple. They were joined by A-2, 6 and 7 also in dragging him towards the said temple. A-1, who was already sitting near the other temple, first took care of PW3 and then joined the others in assaulting the deceased. Even if there was any interval of time between the various stages of the attack in which the several accused joined and participated, it was a clear case where all of them should be held to have been animated by a common object. There was a point of time in which all of them took part in the assault simultaneously and they also took away the body together. Even if they had come to the scene of offence separately and without any prior arrangement, on facts of the case, clearly they had become members of an unlawful assembly when they joined together to assault the deceased.

The common object could and did develop *eo instanti.* Unfortunately, the High Court gave a categoric finding that there was no common object and, therefore, no unlawful assembly. The High Court acquitted the accused under Sections 147, 148, 302 read with Sections 149, 303 read with Sections 149 and 307 read with Section 149. There was no appeal by the State and the Supreme Court had, therefore, to proceed on the basis that A-1 could only be convicted for the individual acts established against him. On an analysis of the evidence, A-1's conviction under section 303 and the sentence of death had to be set aside. Instead, he was convicted under section 324, IPC. *Vithal* v. *State of Maharashtra*, AIR 1983 SC 179 : (1983) 1 SCC 431 : (1983) SCC (Cri) 219 : 1983 CrLJ 340 : 1983 CrLR (SC) 46.

[7670] ● ***Common intention—Inference of.***— In the instant case two appellants were convicted for an offence under section 304, Part II, r/w Section 149, IPC, altering their conviction by the trial Court under section 302, r/w 149. It was contended, on their behalf that there was no evidence to establish the common object and an unlawful assembly and that the High Court also only considered the question of common intention to kill the deceased and came to the conclusion that such intention could not be attributed to these appellants and, therefore, chose to alter the conviction as aforesaid. There was no material at all to come to a conclusion that they were the members of an unlawful assembly with some unlawful common object in pursuance of which they inflicted injuries to the deceased and others. The counsel for the State contended that even if the appellants could not be convicted with the aid of (Stroud's Judicial Dictionary, 6th Edn., 2000) Section 149 they could safely be convicted with the aid of Section 34, as the common intention could be inferred from the circumstances that all the persons assaulted the deceased and other PWs simultaneously. It was clear that so far as those who participated in the incident it could not be doubted that they shared the common intention to beat the deceased and other PWs. So the conviction of appellant G was maintained under section 304, r/w Section 34, IPC. But so far as appellant B was concerned, there was a clear finding, that he did not participate in the incident. The only act alleged against him was that he by shouting directed the other accused to beat the deceased and other PWs. He was, therefore, acquitted. *Gupteshwar Nath* v. *State of Bihar*, AIR 1986 SC 1649 : (1986) 2 SCC 589 : (1986) SCC (Cri) 191 : 1986 CrLJ 1242.

[7671] ● ***Formation of unlawful assembly by accused with common object.***—Where the firing started somewhat suddenly, and the accused party armed with rifle and guns had collected themselves near a culvert and attacked the persons going in a jeep on the road, there was possibility of mistake as to whether it was a rifle or the guns that had been used by the culprits. But where the oral evidence was clear and was fully corroborated by the medical evidence, the accused had formed themselves into an unlawful assembly with the common object of fatally injuring the deceased and members of his party, the motive being very clear. *Dalip Singh* v. *State of Punjab*, AIR 1986 SC 316 : 1995 Supp SCC 471 : (1985) SCC (Cri) 486 : 1986 CrLJ 313 : 1985 CrLR (SC) 453 : (1985) 2 Crimes 860 : 1985 UJ (SC) 1047 : 1985 CurCrJ (SC) 488.

[7672] ● ***Unlawful assembly—Conviction under Section 148, IPC.***—Where the manner in which the incident took place clearly established, that the appellants were members of an unlawful assembly and were lying in wait for the two deceased persons, their conviction under section 148 cannot be assailed and, in that context, as they were members of an unlawful assembly it is not necessary to go into the question as to which of them inflicted what particular injury. *Dalbir Singh* v. *State of Punjab*, AIR 1987 SC 1328 : (1987) 3 SCC 360 : (1987) SCC (Cri) 519 : 1987 CrLJ 1065 : 1987 IJR 265 : JT 1987 (3) SC 580 : (1987) 2 UJ (SC) 116 : 1987 ACrC 345.

[7673] ● ***Unlawful assembly—Must be of five or more persons.***—Where it is not the prosecution case that, apart from the 7 accused persons, there were other persons who were involved in the crime, on the acquittal of 3 of them, the remaining 4 accused persons cannot be convicted under section 148 or Section 149, IPC, for any offence. *Amar Singh* v. *State of Punjab*, AIR 1987 SC 826 : (1987) 1 SCC 679 : 1987 CrLJ 706 : (1987) 1 (1) IJ Rep 424.

[7674] ● ***Common object—Conviction of members of unlawful assembly on basis of.***— Section 149 of Indian Penal Code creates a specific offence and makes every member of unlawful assembly vicariously liable. But in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. Since Section 149 of Indian Penal Code imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed. Thus accused in prosecution of common object to kill the father of the victim went to their house. The victim's father, the target of attack going inside to fetch spear to ward off the miscreants. Two miscreants killing the victims, the innocent daughters—*held* only two persons can be held guilty of murders, the others had no object to kill the victims, they cannot be roped by aid of Section 149 of Indian Penal Code. Decision of Patna High Court, Reversed. *Allauddin Mian* v. *State of Bihar*, AIR 1989 SC 1456 : (1989) 3 SCC 5 : 1989 CrLJ 1466.

[7675] ● ***Act done must be shown to have been committed to accomplish common object.***—In order to fasten vicarious responsibility on any member of an unlawful assembly, the prosecution must prove, that the act constituting an offence was done in prosecution of the common object of that assembly, or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Section 149 creates a specific offence. It must be strictly construed. There must be a nexus between the common object and the offence committed, and if it is found that the same was committed, to accomplish the common object every member of the assembly will become liable for the same. *Allaudin Mian* v. *State of Bihar*, AIR 1989 SC 1456 : (1989) 3 SCC 5 : 1989 CrLJ 1466.

[7676] ● ***Common object of unlawful assembly.***—In this case the common object of the unlawful assembly as per the charge was to kill PW 6, but as he ran away to fetch a spear to defend himself, his wife PW 5 blocked his way and did not permit him to go out. The common object having thus been frustrated, A-1 and A-2 took out their wrath on the innocent girls, which was no part of the common object of the unlawful assembly. Those two girls were playing outside the house and had not prevented A-1 and A-2 from reaching PW6. Hence the other members of the unlawful assembly could not be punished for the acts of A-1 and A-2. But A-1 and A-2 can be punished for their individual acts. Therefore, the conviction of A-3 to A-6 under section 326/149, IPC is set aside. *Allauddin Mian* v. *State of Bihar*, AIR 1989 SC 1456 : (1989) 3 SCC 5 : 1989 CrLJ 1466.

[7677] ● ***Unlawful assembly—Member of—Not to be acquitted for lack of corroboration.***—Section 149, IPC, makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section creates a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the act done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question, that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts, in which he joined. It is not necessary, that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under section 149. It must be noted that the basis of the constructive guilt under section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge. *Lalji* v. *State of Uttar Pradesh*, AIR 1989 SC 754 : (1989) 1 SCC 437 : 1989 CrLJ 754.

[7678] ● ***Unlawful assembly—Member of—Guilty of offence.***—Thus, once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court, to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it. *Lalji* v. *State of Uttar Pradesh*, AIR 1989 SC 754 : (1989) 1 SCC 437 : 1989 CrLJ 850.

[7679] ● ***Unlawful assembly—Common object of.***—In the instant case, after having held that the appellants formed an unlawful assembly carrying dangerous weapons with the common object of resorting to violence as described in the charge, it was not open to the High Court to acquit some of the members on the ground, that they themselves did not perform any violent act, or that there was no corroboration of their participation. Doing so would amount to forgetting the very nature and essence of the offence created by Section 149, IPC. *Lalji* v. *State of Uttar Pradesh*, AIR 1989 SC 754 : (1989) 1 SCC 437 : 1989 CrLJ 850.

[7680] ● ***Unlawful object—Police resorting to violence while pursuing investigation.***—Where a Police Sub-Inspector and some constables were investigating a case of alleged theft and murder and they apprehended one suspect and he volunteered to get the dead body recovered and as he was being taken to the spot, he tried to escape from police custody wielding a lathi but was ultimately overpowered after giving him a beating, but he soon died on the spot, the Sub-Inspector could not be said to be pursuing in his investigation any unlawful object. Therefore, Section 147 or 149, IPC, could not be attracted. The object was either to recover the dead body or the stolen property and it cannot be said to be an unlawful object so as to attract Section 147. If they could not be convicted for an offence under section 147, they also could not be convicted under any Section of the IPC with the aid of Section 149. Hence conviction under section 147 and with the aid of Section 149 cannot be sustained.

The injuries on the body of the deceased were by hard and blunt object and not on any vital part of the body. According to the medical evidence, none of them could be said to be sufficient in the ordinary course of nature to cause death. as the accused could not be convicted with the aid of Section 149, it is very difficult to come to a conclusion about the individual acts of each of the accused. The general nature of the evidence was that torture was done and that there was harassment under the guidance of the SI but there was no precise statement about what injuries were caused by whom and to which person. Consequently the accused are entitled to acquittal. *Maiku* v. *State of Uttar Pradesh*, AIR 1989 SC 67 : (1988) 4 SCC 669 : 1989 CrLJ 860 : (1988) 3 Crimes 638.

[7681] ● ***Common object of committing murder.***—In the instant case a rioting took place during the course of which the attack on Pawer also took place in the manner stated above. Therefore, it is difficult to hold that all the persons who were in the crowd or who were running towards the Union office had the common object of committing the murder of the deceased. Taking each stage of the occurrence into consideration and if the same is considered in the background, the persons who entered and ran towards the Union office and if some of them entered the Union office dealt some stick blows, it cannot also be held that all of them had the common object to kill the deceased. The circumstances show it is only during the third stage by the time of which some of the accused have also received the injuries, unlawful assembly developed a common object of inflicting fatal blows on the deceased and this occurrence took place in the open space while the deceased was running away. Taking all the circumstances into consideration the appellants and the 4 other convicts who are identified among the group of persons who entered in the Union office cannot be said to have shared the common object of the group which later surrounded and attacked the deceased. *S.P. Sinha* v. *State of Maharashtra*, AIR 1992 SC 1751 : 1993 Supp (1) SCC 658 : 1992 CrLJ 2754.

[7682] ● ***Unlawful assembly—Common object.***—"The Doctor who conducted the post-mortem strangely found that except the gun-shot injuries all other injuries including the cutting of the hand were all post-mortem injuries which could have been caused between half to one hour after the death. Thus, medical evidence clearly establishes that all other injuries other than the gun-shot injuries caused by A-1 were inflicted on a dead body. In view of this medical evidence, it becomes difficult to hold that the accused can be convicted for offence of murder though they inflicted injuries only on a dead person. In view of the matter it cannot be said that the ingredients of Section 300, IPC are attracted. So far as the first part of the occurrence is concerned, even according to the prosecution case, none of these accused did anything by way of word or deed in which case it cannot be said that they were members of the unlawful. "Now the question is whether all the accused would constructively be liable for an offence of murder by virtue of Section 149, IPC. So far as A-1 is concerned, it is the consistent version of all the eye-witnesses that he dealt a fatal below on the head with a sword and the medical evidence shows that there was a fracture of skull and the blow must have been very forceful because even the brain was injured.

Therefore his conviction under section 302, IPC is upheld. Now coming to the rest of the accused all the eye-witnesses have made an omnibus allegation against the accused them. Even A-2, according to the eye-witnesses, gave only one blow and that the remaining accused gave stick blows. All these injuries were not serious and were simple... No doubt Section 149, IPC is wide in its sweep but in fixing the membership of the unlawful assembly and in inferring the common object various circumstances also have to be taken into consideration. Having regard to the omnibus allegation, we think it is not safe to convict every one of them for the offence of murder by applying Section 149, IPC. On a careful examination of the entire prosecution case and the surrounding circumstances, the common object of the unlawful assembly was only to cause grievous hurt.

In differentiating the case of A-2 to A-5 to that of A-1, we do not mean to say that for the purpose of Section 149, IPC every one of them should participate and inflict serious injuries but having regard to the special circumstances of this case particularly in sudden manner in which the occurrence took place in the village itself, we think it would be unsafe to make every one of the accused liable for offence of murder by application of Section 149, IPC. *Thakore Dolji Vanvirji* v. *State of Gujarat*, AIR 1993 SC 209 (211, 212) : 1993 Supp (2) SCC 534 : 1993 SCC (Cri) 704 : 1992 CrLJ 3953 : JT 1992 (6) SC 66.

[7683] ● *Unlawful assembly—Common object of committing murder.*—So far as the first part of occurrence is concerned even according to the prosecution case, none of the accused did anything by way of words or deed in which case it cannot be said that they were members of the unlawful assembly with the common object of committing the murder and shared the same alongwith A-1. Now coming to the second part of the occurrence the evidence is clear and convincing that these accused were present and stopped the cart and some of them inflicted injuries on PW-10 and A-1 again fired and PW-3 received some pellets injuries. No doubt PW-3 did not say that he received injuries because of the firing of the gun by A-1 but there is evidence to show that he did fire even during the second part of the occurrence. That apart there was a serious injury on PW-10, the mother of the deceased. The Doctor, who examined her, no doubt, described it as simple but the fact remains that it was caused by the sharp-edged weapon. This only shows that common object of the unlawful assembly was to cause at least hurt or grievous hurt because of the incised injuries caused to PW-10 and also that A-1 who was also a member of the unlawful assembly, fired his gun, about which the other members must be attributed the knowledge. In the result, A-1 is convicted under section 302, IPC and sentenced to imprisonment for life. The conviction of the other accused under section 302/149, IPC and sentence of imprisonment for life there under are set aside. Instead they are convicted under section 326/149, I.P.C. and sentenced to 7 years rigorous imprisonment. *Jairam* v. *State of Madhya Pradesh*, AIR 1993 SC 92 (94, 95) : 1993 Supp (2) SCC 578 : 1992 CrLJ 3994 : 1992 CrLR (SC) 644 : JT 1992 (5) SC 376 : (1992) 3 Crimes 274.

[7684] ● *Murder charge—Common object.*—The appellants in the instant case requested Bindeshwari Singh and others not to get field ploughed saying that the land belonged to Raja and if he had any doubt be may get the field demarcated. A-1 went back to the village and came again along with some of the accused all armed with lathis. They again requested Bindeshwari Singh and others not to get the field plough. In the meantime A-13 dealt a lathi blow on the head of Bindeshwari Singh and the gun in his hand fell down. Just then 20 or 25 persons armed with *lathis, ballams and farsas* emerged from the neighbouring field. Seeing them Bindeshwari Singh and others started running. They were chased and surrounded by the accused who started beating Bindeshwari Singh with *lathis, ballams* and *farsas* and he received serious multiple injuries and fell down on the ground and succumbed to the injuries on the spot. Dr. R.L. Nagar PW-16, who conducted the post-mortem found as many as 28 injuries all over the body. Only the first three lacerated injuries were on the head and punctured wounds Nos. 5,6,7, 11 and 12 were on the face but the Doctor did not find any internal damage. The Doctor noted that the teeth were artificial and the denture was complete. Only three teeth of the denture were broken. The Doctor even did not say that the injuries cumulatively were sufficient in the ordinary course of nature to cause death. There is no injury on any of the vital organs. This only shows that the common object of the unlawful assembly was only to be labour the deceased, the Manager of Raja who was getting the land ploughed. Under these circumstances it is not safe to convict the appellants under section 302/149, IPC. Instead we convict them under section 304, Part II, IPC. *Sita Ram* v. *State of Uttar Pradesh*, AIR 1993 SC 350 (351, 352) : 1993 Supp (2) SCC 42 : (1993) SCC (Cri) 384 : (1992) 3 Crimes 620.

[7685] ● *Common object of unlawful assembly—Inference of.*—The next question is whether the common object of the unlawful assembly was to commit murder and whether by applying

Section 149 all of them can be convicted under Sections 302/149, IPC. The prosecution case is that one year old child accidentally received the injury on the head caused by A-11. From the said attack on this child, it cannot be inferred that the common object of the unlawful assembly was to commit murder. Then we are left with the death of Yallappa. Though some of the accused were armed with axes and other cutting weapons, but they did not inflict even a single injury on the deceased. Yallappa was admitted into the Hospital and PW-10, opined that these injuries could have been caused only by a blunt weapon. As already noted, Yallappa died two days later and PW-13, who conducted the post-mortem, also found that the two injuries were on the head resulting in fissured fracture of the skull. He, however, noticed on internal examination fracture of some ribs for which there were no corresponding external injuries. He opined that it could be due to a fall or some pressure being applied. *Haramant Laxmappa Kukkadi* v. *State of Karnataka*, AIR 1994 SC 1546 : (1994) 1 SCC 736 : (1994) SCC (Cri) 326 : 1994 CrLJ 1422.

[7686] ● ***Common object of unlawful assembly to commit murder.***—The evidence of the direct witnesses is to the effect that A-1, A-3 and A-10 beat the deceased with sticks. But the Doctor found only two injures in the head and Yallappa died two days later. If really the common object of the unlawful assembly was to commit murder, one would naturally expect such of those accused who were armed with deadly weapons to use them. The nature of the two lacerated injuries found also would show that the assailants did not use much force or cause much violence. As a matter of fact, a number of injuries were found on the eye-witnesses but on deceased Yallappa on whom there were only two lacerated wound. The conviction of the appellants under section 302/149, IPC is set aside and instead they are convicted under section 326/149, IPC. *Haramant Laxmappa Kukkadi* v. *State of Karnataka*, AIR 1994 SC 1546 (1548, 1549) : (1994) 1 SCC 736 : (1994) SCC (Cri) 326 : 1994 CrLJ 1422.

[7687] ● ***Common object of unlawful assembly sharing of.***—The common object of the unlawful assembly has to be inferred from the membership, the weapons used and the nature of injuries as well as surrounding circumstances. Going in a body cannot be a decisive factor in inferring the common object. Many other factors as mentioned above have to be taken into consideration. In a given case, the prosecution has to prove that the person concerned was not only a member of the unlawful assembly at some stage but also shared the common object of the unlawful assembly at all the crucial stages. It is highly unsafe to convict all the appellants under Sections 302/149, IPC. Taking the medical evidence into consideration and the nature of the weapons used on the deceased Yallappa, the common object of the unlawful assembly was to cause grievous hurt and therefore the appellants are convicted under section 326 (1)/148, IPC. *Haramant Laxmappa Kukkadi* v. *State of Karnataka*, AIR 1994 SC 1546 (1548, 1549) : (1994) 1 SCC 736 : (1994) SCC (Cri) 326 : 1994 CrLJ 1422.

[7688] ● ***Free-fight—Common object.***—As a sequel to an alleged misbehaviour to a lady of one family by a male member of another family, there was a free fight between both the families. The members of the family of accused all were armed by lathis except the appellant accused who was armed with Kalhari (axe) and the appellant accused hit a member of the other family by the blunt side of his axe resulting in fracture of skull resulting in his death. In the free fight the accused appellant and some other members of his party too received injuries. In the circumstances, it is difficult to hold that either clause I or III of Section 300, IPC is attracted. But the appellant accused must be attributed knowledge that by inflicting such a blow he was likely to cause the death of the victim. Instead of convicting him under section 302, IPC. Supreme Court convicted the accused under section 304 Part III IPC. *Hanuman* v. *State of Haryana*, AIR 1994 SC 1302 : 1994 CrLJ 2090 (SC).

[7689] ● ***Free fight—Section 149, IPC not applicable.***—In the narration of the facts, it was accused party which pitched upon to kill the deceased and they were armed with deadly weapons. If that be so, one would expect that all of them would have attacked the deceased in the first incident and if any other prosecution party attempted to intervene, they would have been beaten up but that is not the evidence at the trial. It is seen from the evidence that A-1 and A-2 attacked the deceased only in midway while the attack on other parties was going on. Under these circumstances, if we disbelieve the version of the prosecution as spoken in respect of A-3 to A-13, it would be equally difficult and unsafe to accept that part of the evidence that A-1 and A-2 alone attacked the deceased and convict them for the individual offences. *State of Haryana* v. *Chandvir*, AIR 1996 SC 3344 : (1996) 8 SCC 678 : (1996) SCC (Cri) 728 : 1996 CrLJ 3197 : JT 1996 (5) SC 205.

[7690] ● ***Common object of unlawful assembly to commit murder.***—Chhatrasal had gone to the shop of Chander (PW-5) for shaving. At that time all the seven accused who were armed with deadly weapons like spear and bamboo sticks formed an unlawful assembly and assaulted Chhatrasal and dragged him on the road. They continued assaulting Chhatrasal even on the road. Chhatrasal sustained bleeding injures and collapsed on the ground and ultimately succumbed to the injuries. The evidence on record clearly establishes the common object of the unlawful assembly to commit murder. The preparation with which they came together and thereafter assaulted Chhatrasal leaves no manner of doubt about their common object. *Prem Raj* v. *State of Maharashtra*, AIR 1996 SC 3294 : (1996) SCC (Cri) 669 (671) : 1996 CrLJ 2876 : JT 1996 (6) SC 117.

[7691] ● ***Common intention—Conviction.***—In Wathe (*William Shaney* v. *State of M.P.*, AIR 1956 SC 116) the charge was under section 302/34, IPC, but the only co-accused having been acquitted, the conviction of the left out accused, who was the appellant, was challenged on the ground that the element of common intention having got dropped out, the conviction of the appellant was not sustainable. In the two concurring judgments it was pointed out that the omission to frame a charge or the departure from the charge cannot invalidate conviction unless prejudice has been caused. The same is true about alternative charge, in the present case. *Jai Singh alias Bandu* v. *State of Maharashtra*, (1996) SCC (Cri) 672 (673) : JT 1996 (4) SC 728 : (1996) 2 Crimes 127.

[7692] ● ***Common object of unlawful assembly to attack passengers.***—In the instant case, the prosecution case was that sensing some trouble and seeing a mob of armed Muslim boys standing at the entrance of Rajpura Pole, appellant No. 1 stopped the bus just opposite Rajpura Pole with a view to facilitate an attack on the passengers by the said mob. Inspite of the request of the passengers he did not start the bus before the mob could approach it but instead he got down from it went up to the mob and had some discussion with the persons of that mob. Thereafter the mob came near the bus and assaulted the passengers. That was the conspiracy alleged by the prosecution. If really the bus had stopped because of the mob coming in front of it then it was not necessary for him to get down from the bus. He could have disclosed his identity even by remaining in the bus. In view of the evidence of the eye witnesses, the explanation given by him has to be regarded as false. His conduct is also inconsistent with his innocence. The stopping of bus at a place where there was no necessity to stop it, his getting down from the bus and going across the road right up to the entrance of the Rajpura Pole and talking to the persons in the said mob leads to an irresistible inference that he not only facilitated the attack on passengers by stopping the bus just opposite the entrance of Rajpura Pole but also induced the members of the said unlawful assembly to attack the passengers. Thus, an agreement between him and the said unlawful assembly is satisfactorily established by the prosecution and therefore his conviction under section 120-B, IPC also deserves to be upheld. *Mehboob Shamsuddin Malik* v. *State of Gujarat*, (1996) 10 SCC 480 : (1996) SCC (Cri) 1353 : 1996 CrLJ 4129 : 1996 (3) Crimes 161 (SC).

[7693] ● ***Common intention.***—It is open to the Court to take recourse to Section 34 of the IPC even if the said section was not specifically mentioned in the charge and instead Section 149, IPC has been included. Of course a finding that the assailant concerned had a common intention with the other accused is necessary for resorting to such a course. *Dhanna* v. *State of Madhya Pradesh,* AIR 1996 SC 2478 : (1996) 10 SCC 79 : 1996 SCC (Cri) 1192 (1196) : 1996 CrLJ 3516.

[7694] ● ***Unlawful assembly to assault victim.***—No specific role was attributed to those two accused. This finding is contrary to the evidence on record inasmuch as both these accused were the members of the unlawful assembly and did not have the common object as it was implicit in their action *i.e.* they were armed with deadly weapons; came alongwith other accused and participated in the murderous assault on both the victims. The trial Court and the High Court had erred in law in not holding both these accused guilty with the aid of Section 149, IPC for the substantive offences punishable under section 302, IPC. *Hardev Singh* v. *Harbhej Singh*, AIR 1997 SC 1487 (1492) : (1997) 1 SCC 80 : (1997) SCC (Cri) 5 : 1997 CrLJ 727 : 1997 CrLR (SC) 111 : JT 1997 (1) SC 29.

[7695] ● ***Riot—Testimony of eye-witnesses not to be rejected.***—When people are killed during a riot, there may be a possibility of the incident being exaggerated in the testimony of the eye witnesses that should not be a ground to reject their evidence in its entirety. In the cases of rioting, where there are a large number of assailants and a number of witnesses, it is but natural that the testimony of the witnesses may not be identical. What has to be seen is whether the basic features of the occurrence have been similarly viewed and or described by the witnesses in a manner which tallies with the outcome of the riot *viz* the injuries sustained by the victims and the number of people who are attacked and killed. *State of Uttar Pradesh* v. *Dan Singh*, AIR 1997

SC 1654 : (1997) 3 SCC 747 : 1997 CrLJ 1150 : 1997 (1) Scale 626 : 1997 (1) Crimes 121 (SC) : 1997 (1) CCR (SC) 234 : 1997 (2) Supreme 67 : JT 1997 (2) SC 149.

[7696] ● ***Unlawful assembly—Conviction of accused identified.***—Even though a very large number of members of the unlawful assembly had taken part in the attack on the Doms, it would be safe if only those of the respondents should be held to be the members of the unlawful assembly who have been specifically identified by at least four of the eye-witnesses. *State of Uttar Pradesh* v. *Dan Singh*, AIR 1997 SC 1654 (1655) : (1997) 3 SCC 747 : (1997) SCC (Cri) 469 : 1997 CrLJ 1150 : 1997 CrLR (SC) 467 : JT 1997 (2) SC 149.

[7697] ● ***Communal riot—Multiple murder—Spectators not members of unlawful assembly.***—It is no doubt true that some of the villagers may have been present at the time of the occurrence who were mere spectators and they could not be regarded as being members of the unlawful assembly. It also happens, when people are killed during a riot, that there may be a possibility of the incident being exaggerated or some innocent persons being named as being part of the assailants party. This may happen wittingly or unwittingly. But just because there may be some inconsequential contradictions or exaggeration in the testimony of the eye-witnesses that should not be a ground to reject their evidence in its entirety. *State of Uttar Pradesh* v. *Dan Singh*, AIR 1997 SC 1654 (1661) : (1997) 3 SCC 747 : (1997) SCC (Cri) 469 : 1997 CrLJ 1150 : 1997 CrLR (SC) 467 : JT 1997 (2) SC 149.

[7698] ● ***Unlawful assembly—Common object of causing grievous hurt.***—In the instant case the High Court observed that taking a comprehensive view of all the relevant materials the conclusion was irresistible that the common object of the unlawful assembly was to remove babul wood from the scene of offence at any cost even by committing murders, if necessary. Judged in the context of the admitted fact that on the previous evening, A-6 had openly given out that on the next morning they would remove the babul trees, it is obvious that when on the following morning the accused party came to the spot armed with axes, spears, *lathis, etc.* their purpose was to remove the babul trees at any cost and cause such injury as may be necessary for achieving that object. Alongwith the above facts and circumstances when the injuries sustained by PW-15 are taken notice of, it appears to us that all the accused shared the common object of causing grievous hurt to the members of the complainant party. From the manner in which A suddenly started the assault on Ganapati immediately after all the accused persons reached the spot followed by the assault on Rethoba by A-2 and subsequent assaults on the former by A-3, A-5 and A-6 and the latter by A-4, it cannot be conclusively said that the other accused persons knew that the murders were likely to be committed in prosecution of their common object. The above six accused persons acted beyond the common object of the unlawful assembly. It is true that the mere fact that no overt act has been attributed to the accused persons except A-1 to A-6 in the two murders is not sufficient to exonerate them from the charge under section 302/149, IPC. But applicability of Section 149, IPC would depend on the facts of each case. *Tanaji Govind Misal* v. *State of Maharashtra*, AIR 1998 SC 174 (177, 178) : (1997) 8 SCC 341 : 1998 CrLJ 340.

[7699] ● ***Unlawful assembly—Appellant not member of at time of murder.***—Where one of eye witnesses stated that appellants were not the members of unlawful assembly at the time of incident of murder of deceased then they cannot be convicted under section 302/149 but liable to be convicted under section 307/149 for attempting to commit murder of deceased. *Kotta Prakashan* v. *State of Kerala*, AIR 1998 SC 1521 : (1998) 1 SCC 609 : 1998 CrLJ 1239 (SC) : JT 1997 (10) SC 18 : 1997 (7) Scale 577 : 1997 (10) Supreme 408 : 1998 (2) SLT 183 : 1998 (1) CCR 53 (SC).

[7700] ● ***Common object of unlawful assembly—Determination of.***—If the injuries were to be considered in isolation we might have persuaded ourselves to give a second thought to the above submission of the counsel but when the injuries are considered in the context of the facts that there was bitter enmity between the parties, that at an unearthly hour the miscreants armed with various weapons like crow-bars and sticks trespassed into the house of the deceased after breaking open the door, dragged him out of the bed room to the front yard and beat him to death, and that whoever came to his reuse was beaten up, the only conclusion that can be drawn was that they formed the unlawful assembly with the common object of committing murder of the deceased and as soon as their objective was achieved they left the place. *State of Andhra Pradesh* v. *Thakkidiram Reddy*, AIR 1998 SC 2702 : (1998) 6 SCC 554 : 1998 CrLJ 4035 at p. 4042 (SC) : JT 1998 (5) SC 398 : 1998 (4) Scale 416 : 1998 (6) SLT 586 : 1998 (2) JCC (SC) 55 : 1998 (6) Supreme 374 : 1998 (3) Crimes 167 (SC).

[7701] ● ***Sharing of common object of unlawful assembly.***—From the judgments of this Court it is evident that to ascertain whether a particular persons shared the common object of the unlawful assembly it is not essential to prove that he committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object. Once it is demonstrated from all the facts and circumstances of a given case that he shared the common object of the unlawful assembly in furtherance of which some offence was committed or he knew was likely to be committed by any other person, he would be guilty of that offence. Undoubtedly, commission of an overt act by such a person would be one of the tests to prove that he shared the common object, but it is not the sole test. At the dead of night a mob of persons armed with various weapons forcibly trespassed into the house of the deceased after breaking open, the door clearly indicates that they had formed an unlawful assembly with a common object to commit some offence and each of them would be liable for the offence committed to knew likely to be committed by any of the members of the mob. To ascertain what was the common object of the above unlawful assembly, we will advert later. Suffice it to say at this stage, that in the facts and circumstances of this case the six accused (with whom only we are concerned in these appeals) would be guilty for the offence committed by any other member of the mob, in furtherance of the common object, without proof of any overt act committed by them. *State of Andhra Pradesh* v. *Thakkidiram Reddy*, AIR 1998 SC 2702 (2707) : (1998) 6 SCC 554 : (1998) SCC (Cri) 1488 : 1998 CrLJ 4035 : 1998 CrLR (SC) 537 : JT 1998 (5) SC 398.

[7702] ● ***Common object of unlawful assembly—Sharing of.***—Suffice it to say, at this stage, that in the facts and circumstances of this case the six accused (with whom only we are concerned in these appeals) would be guilty for the offence committed by any other members of the mob in furtherance of the common object, without proof of any overt act committed by them. That apart, the manner in which the incident took place clearly proves that even if we were to assume that A2 to A5 and A9 did not share the common object of committing the murder, they, being members of the unlawful assembly certainly knew that the murder was likely to be committed by A1 in prosecutor of the common object so as to make them liable under section 302 read with second part of Section 149, IPC In either view of the matter therefore, we are of the opinion that the High Court was not at all justified in acquitting A2 to A5 and A9 of the charges under Sections 148 and 302/149, IPC. *State of Andhra Pradesh* v. *Thakkidiram Reddy*, AIR 1998 SC 2702 : (1998) 6 SCC 554 : 1998 CrLJ 4035 at. 4042 (SC) : JT 1998 (5) SC 398 : 1998 (3) Crimes : 1998 (6) SLT 586 : 1998 (2) JCC (SC) 55 : 1998 (2) Supreme 374.

[7703] ● ***Common object—Inference of.***—Once we accept the evidence of Kedarnath, it becomes clear that all the five accused were acting in prosecution of their common object. As stated earlier they had gone to the place of incident armed with weapons, stopped the bus, put the gun on the chest of the driver Satpal and threatened him to shoot if he drove the bus ahead. They had caught hold of Ram Babu and tried to drag him out. Rammo had fired two shots at him and other accused had assaulted him with other weapons. They had run away together. Therefore, we are of the opinion, the appellants were rightly convicted under section 302 read with Section 149, IPC. *Haricharan* v. *State of Rajasthan*, AIR 1998 SC 244 (246) : (1997) 11 SCC 589 : 1998 CrLJ 398 : 1997 CrLR (SC) 748 : JT 1997 (8) SC 735.

[7704] ● ***Unlawful assembly—Common object to assault and trespass.***—While it true that before a person could be held to be a member of an unlawful assembly, it is not necessary that he should have done some overt act or guilty of some omission in pursuance of the common object of the unlawful assembly; it is well settled that first it must be established that he was a member of the unlawful assembly. When, as in this case, a large number of villagers were present at the scene of the offence and common object and specific acts were attributed only to a few among the nine accused and there was nothing so far as A-4, A-9 and A-5 were concerned as regards common object or overt acts or motive were concerned, question arises whether they were only members of the general crowd or whether there was proof that A-4, A-9 and A-5 went there with the same common object as those accused to whom overt acts were attributed. It has been held that in such a context, and with a view to guard against convicting persons who were not part of the unlawful assembly, it is permissible to consider the nature of the gathering how they assembled and what weapons they were armed with, how they proceeded and further the part played by them. There is nothing in the evidence either expressly or otherwise to say that A-4, A-5 and A-9 came there on 28-11-79 with common object of trespass and assault on PW-1 and Chitra on the fateful day. *Sudhir Samanta* v. *State of West Bengal*, AIR 1998 SC 289 : (1998) 1 SCC 581 : 1998 CrLJ 495.

[7705] ● ***Common intention or object— Necessary ingredient to attract Section 149, IPC***

absent.—So far as the two other accused A-2 and A-3 are concerned, on going through the evidence of PWs 1 and 8, the prosecution case as against A-2 and A-3 cannot be said to have been proved beyond reasonable doubt. Excepting a bald, vague and general statement that all the accused surrounded and assaulted while ascribing a positive role to different accused persons as to how and with what weapon they had assaulted the deceased and how many blows had been given, but so far as A-2 and A-3 are concerned, there has been no whisper by either PW-1 or PW-8 and even PW-8 in her earlier statement to the police had not stated that A-2 and A-3 were having a stick and a motor-cycle chain in their hands. In this state of affairs it would be unsafe to convict A-2 and A-3 by taking recourse to Section 149, IPC as necessary ingredients to attract the said section as against A-2 and A-3 are totally absent. *Manoj alias Bhanu* v. *State of Maharashtra*, AIR 1999 SC 1620 : (1999) 4 SCC 268 : (1999) SCC (Cri) 533 (538) : 1999 CrLJ 2284 : 1999 CrLR (SC) 301 : JT 1999 (2) SC 580.

[7706] ● ***Unlawful assembly—Common object to cause murder.***—The question whether the group of persons can be made liable for having caused murder of one or two persons by virtue of Section 149, IPC depends upon the facts and circumstances under which the murder took place. Whether the members of an unlawful assembly really had the common object to cause the murder of the deceased has to be decided on the basis of the nature of weapons used by such members, the manner and sequence of attack made by those members on the deceased and the settings and surroundings under which the occurrence took place. The evidence of PW-1 relating to the death of the first deceased indicates that all the accused persons were armed with sickles, battle axes, daggers and sticks and emerged from the western side and after A-1 hacked deceased 1 on the head the other 8 accused cut him and stabbed him. The number of injuries on the deceased as per the post-mortem report corroborates the oral testimony. The manner in which the accused persons appeared at the scene of occurrence with lethal weapons in their hands and mercilessly assaulted the deceased after surrounding him clearly exhibits that their common object was nothing but to kill the deceased. *Rachamreddi Chenna Reddy* v. *State of Andhra Pradesh*, AIR 1999 SC 994 : (1999) 3 SCC 97 : (1999) SCC (Cri) 384 (387, 388) : 1999 CrLJ 1445.

[7707] ● ***Omission to frame charge.***—Non-framing of a charge would not vitiate conviction if no prejudice is caused thereby to the accused. The trial should be fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered. The Code of Criminal Procedure is a procedural law and is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. In the present case the accused were tried on the prosecution version that all of them went at 3.30 p.m. to the field of the deceased; they picked up quarrel with him, inflicted injuries on the deceased as narrated by the prosecution witnesses. Accused 3 to 6 participated; the statements were recorded under section 313, CrPC, and the questions were asked to the effect that they jointly came at 3.30 p.m. and caused injuries to the deceased as stated by the prosecution witnesses and the role assigned to accused Nos. 3 to 6 was also specifically mentioned. Hence it is apparent that no prejudice is caused to the accused who were charged for the offence under section 302 by not framing the charge for the offence punishable under section 302 read with Section 149, IPC. In this view of the matter, the conviction of the accused nos. 3 to 6 for the offence under section 325 read with Section 149 cannot be said to be in any way illegal which requires to be set aside. *Kummari Brahmaiah* v. *Public Prosecutor, High Court of Andhra Pradesh*, AIR 1999 SC 775 : (1999) 2 SCC 522 : (1999) SCC (Cri) 281 (288) : 1999 CrLJ 1134 : 1999 CrLR (SC) 227.

[7708] ● ***Unlawful assembly with common object to commit murder.***—From the evidence it transpires that the accused persons had gone to the field and were ploughing. Obviously at that point of time it cannot be said that they constituted an unlawful assembly within the meaning of Section 141, IPC inasmuch as it has not been established by the prosecution that they had one of the five specified objects enumerated in Section 141, IPC as their common objects. From the evidence of PWs-1, 3 and 4, it is difficult so as to conceive that at any later point of time the accused persons can be said to have nurtured one of the five specified objects as their common objects. This being the position and in the absence of establishing the fact that the accused persons constituted an unlawful assembly, their conviction by taking recourse to Section 149, IPC is unsustainable. Section 149 postulates an assembly of five or more persons having a common object, namely, one of those named in Section 141 and then the doing of acts by members of the assembly in prosecution of that object. In view of our conclusion that there was no unlawful assembly, conviction of the appellants under section 149, IPC cannot be sustained. *Ramashish Yadav* v.

State of Bihar, AIR 1999 SC 3830 : (1999) 8 SCC 555 : (2000) SCC (Cri) 9 : 2000 CrLJ 12 : 1999 CrLR (SC) 665 : JT 1999 (6) SC 560.

[7709] ● ***Common object of liquidating deceased.***—Starting with convergence of appellants at the bus stop; presumably waiting for the return of the deceased after his day's work, the fact that all were variously armed, the fact that they all joined together in inflicting blows on the fallen victim and also on his wife and son who rushed to the rescue of their bread-winner, and the fact that they all jointly dragged the deceased up to the pyre and set him ablaze, are very material in deciding whether they all had the common object of liquidating the deceased on that very evening. There is no reason to dissent from the finding of the High Court that all the appellants are liable to be convicted of the offences found against them. *Hukam Singh* v. *State of Rajasthan*, (2000) 7 SCC 490 : (2000) SCC (Cri) 1416 (1422) : 2001 CrLJ 511 : 2001 CrLR (SC) 759.

[7710] ● ***Unlawful assembly—Prosecution of common object.***—An accused whose case falls within the terms of Section 149, IPC cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he had joined. It is not necessary in all cases that all the persons forming an unlawful assembly must do some overt act. *Umesh Singh* v. *State of Bihar*, AIR 2000 SC 2111 : (2000) 6 SCC 89 : (2000) SCC (Cri) 1026 (1029) : 2000 CrLJ 3167.

[7711] ● ***Common object of committing murder—Forming of unlawful assembly.***—Both sections namely, Section 34 and Section 149, IPC deal with the vicarious liability of an accused for an offence committed by another. Section 149, IPC provides for the guilt of every member of an unlawful assembly, if in prosecution of a common object an offence is committed, or which the members know would be likely to be committed in prosecution of that object.

The similarity of the sections lies in the requirement of a common object or intention or a pre-arranged plan in furtherance of which the act is done. The difference lies in the degree of actual participation required in the criminal enterprise. The emphasis is on physical presence, and promotion or facilitation of the crime. As far as Section 149, IPC is concerned, in addition to the common object, merely being a member of an unlawful assembly within the meaning of Section 141, IPC may be sufficient. In the instant case, the accepted evidence was that there was an unlawful assembly of all the accused, which, with the common object or pre-meditated plan of murdering Kulwant Singh and Bidhi Shankar, waylaid, chased and attacked them resulting in their death. All the elements of both Ss. 149 and 34, IPC were there. The High Court found the ingredients of both Sections 34 and 149, IPC proved as far as all the accused were concerned, when it said. "It can well be inferred that the accused on coming to know that Jagjit Singh and Bidhi Shankar had started on their motorcycles towards Ismailabad, pre-meditated and collected near the house of Darshan Singh and in order to take revenge of the murder of Darshan Singh brother in prosecution of the common object which was to kill Kulwant Singh and Bidhi Shankar did commit the murder of both of them." This should have been sufficient to hold all the accused guilty under Ss. 34 and 149, IPC. The conclusion is not only contradicting to its own findings but is based on an erroneous interpretation of both Section 34 and 149, IPC as authoritatively laid down. The order of the High Court acquitting Gurnam Singh and Iqbal Singh therefore, cannot stand. *Jaswant Singh* v. *State of Haryana*, AIR 2000 SC 1833 : (2000) 4 SCC 484 : (2000) SCC (Cri) 991 (1003, 1004) : 2000 CrLJ 2212 : JT 2000 (4) SC 114.

[7712] ● ***Unlawful assembly—Common object.***—Where the accused had assembled together, armed with guns and lathis and were parties to the assault on the deceased and others, the prosecution is not obliged to prove which specific overt act was done by which of the accused. Indeed the provisions of Section 149, IPC will make it clear that it takes an accused out of the region of abetment and makes him responsible as a principal for each and all merely because he is a member of unlawful assembly. *Umesh Singh* v. *State of Bihar*, AIR 2000 SC 2111 : (2000) 6 SCC 89 : (2000) SCC (Cri) 1026 (1030) : 2000 CrLJ 3167.

[7713] ● ***Offence—Committal of in prosecution of common object.***—The liability of other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge can reasonably be intended from the nature of the assembly, arms or behaviour, or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise. *Umesh Singh* v. *State of Bihar*, AIR 2000 SC 2111 : (2000) 6 SCC 89 : (2000) SCC (Cri) 1026 (1030) : 2000 CrLJ 3167.

[7714] ● ***Common object—Sharing of.***—It is within the radius of permissibility that the Court can rely on a factual presumption for the purpose of reaching one conclusion. Thus, the confessional statement, if admissible and reliable, can be used by the Court for drawing inferences as to whether the confessor shared the common object with the rest of the members of the unlawful assembly. For that purpose the Court will take into account other materials available in evidence. There is no warrant for the proposition that the Court cannot proceed from the confession even a wee bit for the purpose of knowing whether the confessor had entertained any particular intention while perpetrating the acts admitted by him in his confession. Whether such intention could have focused on the common object of the unlawful assembly which he joined depends upon other facts. *Lokeman Shah* v. *State of West Bengal*, AIR 2001 SC 1706 : (2001) 5 SCC 235 : (2001) SCC (Cri) 829 (838) : 2001 CrLJ 2196 : JT 2001 (4) SC 520.

[7715] ● ***Common object of unlawful assembly—Sharing of.***—It is an overstatement of law that when a morcha moved on to a stage when it became unlawful any person who was a member of that morcha must be presumed to share the common object of the unlawful assembly. The Court must enter satisfaction that a particular accused was a member of the unlawful assembly either through his active participation or otherwise. It must further be shown that he shared the common object of the assembly. Of course the Court can draw necessary inference from the conduct, but mere presence in the assembly is hardly sufficient to draw any adverse inference against him. The question whether or not the offence having been committed in prosecution of the common object of the assembly is one of fact, depending upon the facts and circumstances of each particular case. *Lokeman Shah* v. *State of West Bengal*, AIR 2001 SC 1706 : (2001) 5 SCC 235 : (2001) SCC (Cri) 829 (839) : 2001 CrLJ 2196 : JT 2001 (4) SC 520.

[7716] ● ***Accused joining unlawful assembly midway.***—Section 142, IPC pertains to a person who intentionally joins an unlawful assembly and continues to involve himself in it. The only condition which the section envisages is that the person who joins the unlawful assembly should have been aware of the facts which rendered such assembly unlawful. If he knew that an unlawful assembly had been formed with a common object and if he has chosen to join it en route to its destination the person joining midway can also be fastened with the vicarious liability envisaged in Section 149, IPC, unless he drops himself out before reaching such destination.

There is no doubt that appellant Lokeman Shah joined the unlawful assembly knowing fully well that it had already become unlawful as its common object was to chase the persons whom the rioters believed to be responsible for defilement of the mosque. It is immaterial that the deceased V.K. Mehta had no part in the destruction or defilement of any mosque, but the rioters believed him to be the one. We must bear in mind that the chasers carried with them explosive and lethal weapons. In all such broad circumstances it would be inane to presume that the common object of those chasers was something less than finishing the prey whom they were chasing after. *Lokeman Shah* v. *State of West Bengal*, AIR 2001 SC 1706 : (2001) 5 SCC 235 : (2001) SCC (Cri) 829 (839, 840) : 2001 CrLJ 2196 : JT 2001 (4) SC 520.

[7717] ● ***Common object sharing of with accused.***—None of them had inflicted any injury to the deceased. The question, therefore, is whether they shared a common object with A10-Munshi Ram. The broad features of the occurrence would indicate that question of attacking the deceased emanated only after A10-Munshi Ram hurled the first question to him as he has no right on the land whereupon the wall was constructed. It was thereafter only that A10-Munshi Ram exhorted the order present to attack the deceased saying that he was the root-cause of all troubles. But the fact that none of the appellants attacked the deceased is an indicator that none of them shared the common object along with A10. It is pertinent to point out that all of them did not come together, instead they came from different directions. The mere fact that they attacked the kith and kin of the deceased, who came forward and assaulted some of the appellants, is not sufficient enough to reach a definite conclusion that the appellants shared common object with A10-Munshi Ram. *Rajinder Meena* v. *State of Rajasthan,* 2001 (2) SLT 598 : (2001) 1 CCR 341.

[7718] ● ***Common object—Sharing of.***—Even if some other persons also ran behind those three assailants, it is a very difficult exercise for the Court to conclude that those other persons who ran behind the three assailants shared the common object of murdering the deceased. It would have been easier for the prosecution to succeed if PW-3 had also said that alongwith the three assailants the other persons also ran. The difficult situation for the prosecution now is that if we have to place reliance on the testimony of PW-3, the conviction has to be confined to three persons mentioned above and the rest of the persons cannot be convicted. When the perused the medical evidence in this case, we found that all the injuries sustained by the deceased could be attributed to the actions alleged against the aforesaid three persons. This is yet another reason creating difficulty for the prosecution so far as the present appellants are concerned. On a conspectus of the whole evidence, we entertain a reasonable doubt as to the degree of involvement of the present appellants. We are unable to hold, with reasonably certainty, that these five persons also shared the common object alongwith the three principal assailants for murdering Begru Manjhi. In view of the said area of reasonable doubt, we are disposed to give the benefit of it to the appellants. *Fagu Manjhi* v. *State of Bihar*, (2001) 10 SCC 692 : 2003 SCC (Cri) 1045.

[7719] ● ***Murder—Common object.***—We entertain doubt as to whether the accused Khargi and Shobhi would have shared the common object to murder Tota Ram. Evidence of the eyewitnesses has shown only that those two persons ran and remained behind the deceased. In spite of the fact that they were armed with sticks none of them used those weapons to inflict at least one beating on the deceased. None of them said anything at the spot. None of them prevented the deceased from running away nor did they step forward to stand in front of the deceased. In the aforesaid broad situation it is difficult to conclude that the accused Khargi and Shobhi ran only because they also shared the common object with the other assailants. Perhaps they would have run to rescue the deceased, but if that is too much to imagine at least they would have run to see what was going to happen. To say that their running was only with the common object along with the other assailants to murder the deceased we require something more to have been done by them. As the prosecution witnesses did not attribute anything more to those two accused, we find it difficult to confirm the conviction of those two persons with the help of Section 149 of the Indian Penal Code.

In the result we confirm the conviction and sentence passed on the accused Pyarey and the accused Gaindan for the offence under Section 302 read with Section 34 of the Indian Penal Code. But we allow the appeal in respect of the accused Khargi and the accused Shabhi and the conviction and sentence passed on them are set aside. *Pyarey* v. *State of U.P.*, (2001) 10 SCC 487 : 2004 SCC (Cri) 430 (431-32).

[7720] ● ***Murder—Unlawful assembly—Common object.***—The unlawful assembly was to murder the victims. But at the same time it is not possible for the appellants to persuade us in holding that the members of the unlawful assembly were not aware that consequence of their wanton acts would include death of at least some of the persons. For the aforesaid reasons we bring down the offence to Section 304, Part I read with Section 149 of the IPC. The said alteration would call for alteration in the quantum of sentence also. A plea was made that the sentence may be limited to the period already undergone by the accused. Some of them had undergone only imprisonment for a couple of years whereas some others are still languishing in Jail. For the application of a uniform sentence, each one of them must be sentenced to rigorous imprisonment for a period of seven years. *Umrao Singh* v. *State of Uttar Pradesh,* (2002) 9 SCC 215 : 2001 CrLJ 4947 (4947, 4948) (SC).

[7721] ● ***Common object—Existence of.***—Section 149 is an exception to the criminal law whereunder a person can be convicted and sentenced for his vicarious liability only on proof of his being a member of the unlawful assembly, sharing the common object, notwithstanding as to whether he had actually participated in the commission of the crime or not. Common object does not require prior concert and a common meeting of minds before the attack. An unlawful object can develop after the accused assembled., The existence of the common object of the unlawful assembly has to be ascertained in the facts and circumstances of each case. It is true that the mere presence of the accused is not sufficient to hold them guilty for the sharing of common object as the prosecution has to further establish that they were not mere by-standers but in fact were sharing the common object. When a concerted attack is made by a large number of persons, it is often difficult to determine the actual part played by each of the accused but on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence. There may not be a common object in a sudden fight but in a planned attack on the victim, the presence of the common object amongst the persons forming the unlawful assembly can be inferred. *Chandra Bihari Gautam* v. *State of Bihar*, AIR 2002 SC 1836 : (2002) 9 SCC 208 : JT 2002 (4) SC 62 : 2002 CrLJ 2541 : 2002 (2) Crimes 222 (SC).

[7722] ● *Unlawful assembly—Common object to commit murder.*—Section 149 has two parts. First part deals with the commission of an offence by a member of unlawful assembly in prosecution of the common object of that assembly and the second part dales with the liability of the members of the unlawful assembly who knew that an offence was likely to be committed in prosecution of the object for which they had assembled. Even if the common object of the unlawful assembly is stated to be apprehending Nawlesh Singh only, the fact that the accused persons had attacked the house of the complainant at the dead of the night and were armed with deadly weapons including the guns, and used petrol bombs proves beyond doubt that they knew that in prosecution of the alleged initial common object murders were likely to be committed. The knowledge of the consequential action in furtherance of the initial common object is sufficient to attract the applicability of Section 149 for holding the members of the unlawful assembly guilty for the commission of the offence by any member of such assembly. In this case the appellants, along with others, have been proved to have formed unlawful assembly, the common object of which was to commit murder and arson and in prosecution of the said common object they raided the house of the informant armed with guns and committed offence. The Courts below have, therefore, rightly held that the accused persons formed an unlawful assembly, the common object of which was to commit murder of the informant and his family members and in prosecution of the said common object six persons were killed. The appellants were also proved to have hired the services of some extremists for the purposes of eliminating the family of the complainant. *Chandra Bihari Gautam* v. *State of Bihar*, AIR 2002 SC 1836 : (2002) 9 SCC 208 : 2002 CrLJ 2541 : JT 2002 (4) SC 62 : 2002 (2) Crimes 222 (SC).

[7723] ● *Common object of unlawful assembly—Existence of.*—In the instant case the prosecution has established the existence of the common object of the unlawful assembly for attracting the applicability of Section 149 of the Indian Penal Code and the mere fact that no overt act has been attributed to each of the accused persons is not sufficient to hold that charge under section 149 of the Indian Penal Code has not proved against them. *Chandra Bihari Gautam* v. *State of Bihar*, AIR 2002 SC 1836 : (2002) 9 SCC 208 : 2002 CrLJ 2541 : JT 2002 (4) SC 62 : 2002 (2) Crimes 222 (SC) : 2002 (2) SCR 1164.

[7724] ● *Unlawful assembly—Common object to inflict multiple injuries.*—The participation of all the accused persons, including the two appellants before us, in the incident is amply proved. All the accused persons had formed an unlawful assembly, the members whereof were armed with deadly weapons. The two accused appellants had aimed at vital organs of the body of the deceased while inflicting injuries and the injuries caused by them have proved to be fatal. The attack by the accused persons was indiscriminate and they were determined to kill the deceased. While inflicting injuries they chased the deceased and did not allow him to escape and they continued to assault him even after he had fallen on the ground. In this background alternative submission of the learned counsel for the appellants that the conviction of the two accused-appellants should have been under section 304 Part II of the IPC as they have been found to have inflicted only one injury each while the deceased has died on account of multiple injuries suffered by him cannot be accepted. However, in our opinion the accused appellants should have convicted more appropriately under Section 302 read with 149, IPC rather than under section 302, IPC alone. *Mohd. Yakub* v. *State of Andhra Pradesh*, AIR 2002 SC 2793 : (2002) 9 SCC 25 : 2002 CrLJ 3731 : JT 2002 (5) SC 400 : 2002 (5) Scale 397 : 2002 (5) Supreme 142 : 2002 (3) Crimes 57 (SC).

[7725] ● *Common object to cause murder.*—A vivisection of the common object as between those accused armed with lethal weapons like axes and iron rods and the three accused who had only wooden sticks is called for on the fact situation in this case because the evidence of the four eyewitnesses mentioned above is not very much helpful in discerning whether A5-Tukaram Sambhaji Jarag, A9-Balu Keraba Jarag and A10-Bhika Sambha Jarag really entertained the common object of murder. We take this view particularly in the light of the finding rendered by the trial Court that the offence has not escalated beyond what the accused had done as against PW13-Laxman Jarag. We are inclined to give the benefit of doubt to A5-Tukaram Sambhaji Jarag, A9-Balu Keraba Jarag and A10-Bhika Sambha Jarag regarding the common object attributed to them for causing the murder of Narayan Jarag. *Lalu Shiva Jarag* v. *State of Maharashtra*, JT 2002 (2) SC 127.

[7726] ● *Unlawful assembly—Sharing of common object.*—Generally no direct evidence is available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons attacked the victim had the common object for an offence which was known to be likely to be committed in prosecution of such an object. It is true that a mere innocent person, in an assembly of persons of being a by-stander does not make such person a member of an unlawful assembly but where the persons forming the assembly are shown to be having identical interest in pursuance of which some of them come armed, others though not armed would, under the normal circumstances, be deemed to be the members of the unlawful assembly. In this case the accused persons have been proved to be on inimical terms with the complainant-party. The enmity between the parties had been aggravated on account of litigation with respect to the dispute over the mango trees. Accused persons who came on the spot are shown to have come armed with deadly weapons. The facts and circumstances of the case unequivocally prove the existence of the common object of such persons forming the unlawful assembly who had come on the spot and attacked the complainant party in consequence of which three precious lives were lost. The High Court was, therefore, justified in holding that the accused persons, involved in the occurrence, had shared the common object. *Bhagwan Singh* v. *State of Madhya Pradesh*, AIR 2002 SC 1621 : (2002) 4 SCC 85 : 002 CrLJ 2024 : JT 2000 (3) SC 387 : 2002 (3) Scale 169 : 2002 (2) Supreme 567 : 22002 (2) Crimes 42 (SC).

[7727] ● ***Unlawful assembly—Common object to give hard beating.***—When a large number of persons were armed only with sticks of pelted stones which they could find any where either near the fields or on their way and it was not established as to who specifically attacked whom, it is not clear as to whether the intention was to cause death. It is more probable that the intention was to give hard beating only. Even if we accept the case that the deceased-Vithal was pursued right upto 'wada', the object of the mob was to teach him a stern lesson who is said to be a bully in the village. In the circumstances and in the light of evidence, we must hold that the reasonable inference to be drawn is that the common object was to commit offences under section 323 and Section 325 read with Section 147/149, IPC and not under section 302 read with Section 149, IPC. The trial Court as well as High Court appear to have lost sight of crucial aspects. *Bhima* v. *State of Maharashtra*, AIR 2002 SC 3086 : (2002) 7 SCC 33 : 2002 CrLJ 4293 : JT 2002 (6) SC 322 : 2002 (6) Scale 140 : 2002 (5) Supreme 555 : 2002 (5) SLT 46 : 2002 (4) Crimes 39 (SC).

[7728] ● ***Formation of unlawful assembly and existence of common object.***—There is overwhelming evidence on the prosecution side to show that the appellants came to the place of incident in a group and caused various injuries to deceased Thota Nagaraju and Thota Abbayi. These witnesses were extensively cross-examined, but nothing could be brought out in their evidence to show that they were either not present or that they had not seen the incident. Their evidence also would show that most of the accused were armed with various deadly weapons and that they had come to the scene of occurrence with purpose to cause the death of the two deceased persons and to cause injuries to others. It is proved beyond doubt that the appellant formed themselves into an unlawful assembly and their common object was clearly discernible from the way in which they caused the death of the two deceased persons. *Rachapalli Abbulu* v. *State of Andhra Pradesh*, AIR 2002 SC 1805 : (2002) 4 SCC 208 : JT 2002 (4) SC 39 : 2002 (3) Scale 377 : 2002 (3) Supreme 172 : 2002 (3) SLT 164 : 2002 (5) SRJ 218 : 2002 (2) Crimes 179.

[7729] ● ***Unlawful assembly—Accused person becoming less than five.***—In view of the fact that three accused persons referred to above were acquitted by the trial Court itself of the charge under section 302/149 out of the seven accused persons and no other person is said to have participated in the occurrence as mentioned in the prosecution case and evidence, and as the number of accused persons becomes less than five, there cannot be said to be any unlawful assembly, as such conviction of appellant Nos. 2 to 4 under section 392/149 becomes unwarranted. *Dhupa Chamer* v. *State of Bihar*, AIR 2002 SC 2834 : (2002) 6 SCC 506 : 2002 CrLJ 3764 (SC) : 2002 (4) Crimes 65 (SC).

[7730] ● ***Word "Object"—Meaning of.***—The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. *Gangadhar Behera* v. *State of Orissa*, AIR 2002 SC 3633 : (2002) 8 SCC 381 : 2003 CrLJ 414 : JT 2002 (8) SC 135 : 2002 (7) Supreme 276.

[7731] ● ***Common object distinguished from common intention.***—'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, as its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co-instant. *Gangadhar Behera* v. *State of Orissa*, AIR 2002 SC 3633 : (2002) 8 SCC 381 : 2003 CrLJ 41 : JT 2002 (7) SC 135 : 2002 (7) Scale 402 : 2002 (7) Supreme 276.

[7732] ● ***Common object—How and when formed.***—A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. *Gangadhar Behera* v. *State of Orissa*, AIR 2002 SC 3633 : (2002) 8 SCC 381 : 2003 CrLJ 41 : JT 2002 (8) SC 135 : 2002 (7) Supreme 276 : (2002) 7 Scale 402.

[7733] ● ***Expression "in prosecution of common object"—How to construe.***—The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly: *Gangadhar Behera* v. *State of Orissa*, AIR 2002 SC 3633 : (2002) 8 SCC 381 : 2003 CrLJ 41 : JT 2002 (8) SC 135 : 2002 (7) Supreme 276 : (2002) 7 Scale 402.

[7734] ● ***Common intention distinguished from common object.***—Insofar as other appellants are concerned, the finding of the High Court is that there is no specific allegations against them. There is no evidence whatsoever to establish that any criminal act was done by them in furtherance of common intention. There were about 50 persons. Nothing was shown before the Sessions Court or the High Court or even before this Court to establish common intention of the remaining accused. The common intention is different than the common object. The charge against them is not under section 149, IPC. Even otherwise, it is not shown that the ingredients of Section 149, had been established. There is total absence of evidence both in respect of Section 34 as well as Section 149, IPC. Therefore it is not possible to confirm the conviction of the appellants other than two accused. *Jhapsa Kabari* v. *State of Bihar*, AIR 2002 SC 312 (314) : (2001) 10 SCC 94 : 2002 CrLJ 587 : (2002) 1 Crimes 205.

[7735] ● ***Common object—Sharing of by accused.***—Previous enmity coupled with the joining in a group constituting an unlawful assembly going to the scene of occurrence armed with lethal weapons and participating in the attack by mercilessly beating the deceased after surrounding him, will sufficiently establish that the common object was nothing but to kill the deceased. The facts of the case on hand sufficiently establish not only previous enmity, but also a premeditated and concerted move to wreck vengeance and the deadly nature of weapons carried by the group of accused, who formed by themselves into an unlawful assembly coupled with the evidence on record that on seeing the deceased-Ramprasad, Sitaram (PW-4) and Rajendra Singh (PW-5) the accused-Man Singh exhorted co-accused shouting "*maro salo ko*" and all the accused thereupon bounced upon and assaulted the complainant party prove the common object, beyond reasonable doubt. When Rajendra Singh (PW-5) came forward to save the victim from the blows inflicted by Man Singh, Om Prakash appears to have assaulted him by *farsa* on the head and all the accused jointly seem to have assaulted the victim. The medical evidence disclosed altogether eleven wounds on the body of the victim of which injuries 1 to 3 were considered to be dangerous to life. Sitaram (PW-4) and Rajendra Singh (PW-5) examined by the Doctor also were found to have sustained seven and one injuries, respectively on their body. The conduct of the appellants both before and during the course of occurrence in this case sufficiently demonstrated that the accused shared the common object and engaged themselves in furtherance of the same. Consequently, no exception whatsoever could be taken to the findings recorded by the Courts below convicting the appellants under section 302 read with Section 149, IPC. *Rameshwar Dayal* v. *State of Madhya Pradesh,* AIR 2002 SC 754 : (2002) 3 SCC 45 : 2002 CrLJ 1016 : (2002) 1 Crimes 287.

[7736] ● *Common object to Kill deceased.*—Under Section 149, IPC, the liability of the other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Common object has to be distinguished from the common intention. There is no question of common intention in Section 149 of the IPC. Where no injury is inflicted pursuant to the common object to kill the deceased, but caused only when provoked by one of the witnesses, the members of the unlawful assembly cannot be held guilty for the commission of the offence of murder. *Sukhan Raut* v. *State of Bihar*, AIR 2002 SC 319 : (2001) 10 SCC 284 : 2002 CrLJ 560 : (2002) 1 Crimes 186.

[7737] ● *Murder—Unlawful assembly— Common object.*—The murder has been committed in broad daylight between 12.00 noon and 1 p.m. Witnesses and accused are known persons. The accused persons had formed an unlawful assembly armed with formidable weapons; came to the house of Bhima; broke down the wall and entered into the house. The found Bhima not in the house and butchered his two children by inflicting axe injuries. Deduced from the aforesaid facts and circumstances, it is quite apparent that the accused had formed an unlawful assembly with the object to eliminate Bhima to take avenge of long-standing animosity and the quarrel ensued 7-8 days prior to the incident. It is quite apparent, therefore, that the accused persons had formed an unlawful assembly with the common object to take avenge from Bhima and his family members and committed the murder. The common object to murder Bhima and his family can be gathered from the formidable arms carried by the accused, entering the house by breaking the wall and finding Bhima not there, butchering his children. Gathered from the above facts and circumstances and the evidence on record, it cannot be said that the four accused joined the assembly as a matter of idle curiosity or they were passive onlookers without intending to entertain the common object of that assembly. The Trial Court after careful appreciation of the evidence, gave a clear finding that two accused persons Dhulla and Balji entered into Bhima's house after breaking the rear wall of the house and the remaining three accused persons Nathu, Heera and Dheera entered through the door. This would go to show that all the five accused had entered into the house of Bhima. The question whether two accused came to the house after breaking the rear wall and the remaining accused persons entered through the door is inconsequential for determining their common object. From the fact that all the accused persons formed an unlawful assembly and entered into the house of PW-1 with formidable weapons, it is clearly deducible that they formed the common object to eliminate Bhima and his family. As already noticed, the common object to kill Bhima can be gathered from the formidable weapons which the accused carried and their aggressive behaviour of entering the house by breaking down the wall. No other conclusion is possible. *State of Rajasthan* v. *Nathu*, AIR 2002 SC 3159 : (2003) 5 SCC 537 : 2003 SCC (Cri) 1156 : JT 2002 (6) SC 570 : (2002) 4 Crimes 209.

[7738] ● *Death—Causing of in prosecution of common object of unlawful assembly.*—If death had been caused in prosecution of the common object of an unlawful assembly, it is not necessary to record a definite and specific finding as to which particular accused out of the members of the unlawful assembly caused the fatal injury. Once an unlawful assembly has come into existence, each member of the assembly becomes vicariously liable for the criminal act of any other member of the assembly committed in prosecution of the common object of the assembly. *State of Rajasthan* v. *Nathu*, AIR 2002 SC 3159 : (2003) 5 SCC 537 : 2003 SCC (Cri) 1156 : JT 2002 (6) SC 570 : (2002) 4 Crimes 209.

[7739] ● *Common object—Absence of.*—The genesis of the incident commenced with the first accused entering the field of the deceased and uprooting stealthily some of the standing crops and only when he was caught and a tussle ensued and "hullas" were raised, they brought the other accused suddenly into the scene. The accused were initially asking PW-10, the deceased and other members of his family, who were present, to release A-1 and it is only when the deceased refused to release him stating that he will be put before the Panchayati in the village and till then he will not be released, the situation became aggravated and on the alleged exhortation by A-5, the assault on the victim took place, all on the *spur* of the moment. There is absolutely no evidence whatsoever to attribute any common object or such a thing having activated all of them to join in furtherance of the object either before arrival or during the course of occurrence as such. Hence, the charge under Section 149, IPC has to fail and the conviction thereunder is liable to be and shall stand set aside. *Malhu Yadav* v. *State of Bihar*, AIR 2002 SC 2137 : (2002) 5 SCC 724 : 2002 SCC (Cri) 1190 : 2002 CrLJ 2819.

[7740] ● *Common intention formation of.*—From the evidence on record it appears that when Accused 1 was not released by the complainant party, Accused 2, 3, 4 and 5 formed a common intention to commit an offence, in furtherance of which they used weapons like spears and lathis and inflicted injuries on the vital part of the body of Satilal, deceased.

The prosecution has established that the four accused persons joined in the actual doing of the act which resulted in the death of Sotilal and the common intention though not initially in existence, was formed during the transaction on the spot. The existence of the common intention amongst the aforesaid accused persons has been established from the surrounding circumstances and from their conduct on the spot. The absence of the charge under Section 34 against the aforesaid accused persons would not make any difference because on the proved facts and the evidence available on record, their intention to commit an offence has been established. Failure to charge the accused under Section 34, who stood charged under Section 149, IPC would not result in any prejudice to them. *Malhu Yadav* v. *State of Bihar*, AIR 2002 SC 2137 : (2002) 5 SCC 724 : 2002 SCC (Cri) 1190 : 2002 CrLJ 2819.

[7741] ● *Common object to Kill deceased.*—Having regard to the fact the witnesses are closely related persons and there is a history of bitter enmity between the deceased and the accused partly, as revealed from the FIR coupled with the evidence of PW-10, we feel that the evidence of PWs 10 and 3 should have been scrutinized with greater care and circumspection as there was every possibility of exaggeration and embellishment. Viewed in this background and going by the state of evidence on record, a reasonable doubt arises on the veracity of prosecution version that each of the appellants armed with weapons went to the scene of occurrence with a view to kill or injure the victim already injured in the cause of first incident. On a cumulative consideration of all these factors, a serious doubt arises as to the correctness of the prosecution case that each of the accused (excluding Srinivas Pandey and Ram Parvesh Pandey) accompanied *Dinesh Pandey* in prosecution of their common object to injure or kill the deceased. The possibility of some being present cannot be ruled out; but, who they are in the question. On this aspect, it is difficult to eliminate chaff from the grain on an analysis of the evidence. The anxiety on the part of the prosecution to implicate as many members of the opposite faction as possible is quite apparent Srinivas Pandey and Ram Pravesh Pandey read are liable to be convicted under Section 302 read with Section 34, IPC. The absence of a specific charge under Section 34, IPC cannot be said to have caused any prejudice to the two appellants as the facts giving rise to constructive criminal liability were well known to them from the beginning and the case which they have to meet under Section 34 is substantially the same as the prosecution put forward. *Shiva Shankar Pandey* v. *State of Bihar*, AIR 2002 SC 3151 : (2002) 7 SCC 229 : 2002 SCC (Cri) 1676 : 2002 CrLJ 4658 : JT 2002 (6) SC 570 : (2002) 4 Crimes 209 (SC).

[7742] ● *No material to show appellant shared any common object.*—There is no material whatsoever to hold any one of these appellants shared any common object of either Govind Rai, the deceased accused, or Sahai Lohar who is convicted under Section 302 for committing the murder of the deceased. Though in the complaint, there is an omnibus statement that these appellants also attacked with lathis. The medical evidence does not support this case nor in their evidence before the Court the prosecution witnesses have attributed any overt act to these appellants. Learned counsel appearing for the State very fairly conceded that there is no material whatsoever to hold these appellants guilty of sharing the common object of either Govind Rai, the deceased accused, or Sahai Lohar. Therefore, we are of the opinion that the conviction recorded against these appellants is totally uncalled for and without any material hence, this appeal has to succeed and the conviction and sentence imposed on these appellants by the Courts below are set aside, and the appellants redirected to be released forthwith, if not wanted in any other case. Accordingly, the appeal of the appellants stands allowed. *Basisth Roy* v. *State of Bihar*, AIR 2003 SC 1439 : (2003) 9 SCC 52 : 2003 SCC (Cri) 1754 : 2003 CrLJ 1301 : (2003) 2 Crimes 153 (SC).

[7743] ● ***Common object different from common intention.***—It is incorrect to claim that prior formation of an unlawful assembly with a common object is a must and should have been found as a condition precedent before roping the accused within the fold of Section 149, IPC. No doubt the offence committed must be shown to be immediately connected with the common object, but whether they had the common object to cause the murder in a given case would depend and can rightly be decided on the basis of any proved rivalry between two factions, the nature of weapons used, the manner of attack as well as all surrounding circumstances. Common object has been always considered to be different from common intention and that it does not require prior concert and common meeting of minds before the attack. Common object could develop coincidental and being a question of fact it can always be inferred and deduced from the facts and circumstances of a case projected and proved in a given case. *Amzad Ali* v. *State of Assam*, AIR 2003 SC 3587 : (2003) 6 SCC 270 : 2003 SCC (Cri) 1338 : 2003 CrLJ 3545 : JT 2003 (6) SC 160 : (2003) 3 Crimes 133 (SC).

[7744] ● ***Change in common object of unlawful assembly—Effect.***—In the absence of any material to the contrary, it should be presumed that those members of the original unlawful assembly who only shared the common object of assaulting deceased-Prabhakar cannot be attributed with the subsequent change in the common object of some of the members of the assembly who entered the house of Prabhakar and caused grievous injuries to him. So far as the present appellants are concerned, who stood outside the house of the deceased and who could not have known what actually transpired inside the house, the act of those members of the original unlawful assembly who entered the house, cannot be attributed, hence, as contended by the learned counsel for the appellants at the most these appellants will be liable to be punished for sharing the original common object which is only to assault the deceased, therefore, they can be held guilty of an offence punishable under Section 352 read with Section 149 only. *Bhimrao* v. *State of Maharashtra*, AIR 2003 SC 1493 : (2003) 3 SCC 37 : 2003 SCC (Cri) 727 : 2003 CrLJ 1204.

[7745] ● ***Offence when committed by any member of unlawful assembly in prosecution of common object.***—Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly nevertheless the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case very member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the Court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149—Either clause—Is attracted and the Court is convinced, on facts and in law both, of liability capable of being fastened vicariously by reference to either clause of Section 149 of IPC merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act. These principles are settled. *Rajendra Shantaram Todankar* v. *State of Maharashtra*, AIR 2003 SC

1110 : (2003) 2 SCC 257 : 2003 SCC (Cri) 506 : 2003 CrLJ 1277 : (2003) 1 Crimes 346 (SC).

[7746] ● ***Unlawful assembly—Common object of.***—Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. *State of Maharashtra* v. *Kashirao*, AIR 2003 SC 3901 : (2003) 10 SCC 434 : 2004 SCC (Cri) 801 (807) : 2003 CrLJ 4464.

[7747] ● ***Word "object"—Meaning of.***—The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object", as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly. *State of Maharashtra* v. *Kashirao*, AIR 2003 SC 3901 : (2003) 10 SCC 434 : 2004 SCC (Cri) 801 (807-08) : 2003 CrLJ 4464.

[7748] ● ***Common object distinguished from common intention.***—"Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and the language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one come into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter is lawful may subsequently become unlawful. In other words, it can develop during the course of incident at the spot *eo instanti*. *State of Maharashtra* v. *Kashirao*, AIR 2003 SC 3901 : (2003) 10 SCC 434 : 2004 SCC (Cri) 801 (808) : 2003 CrLJ 4464.

[7749] ● ***Offence committal of to accomplish common object.***—Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. *State of Maharashtra* v. *Kashira*, AIR 2003 SC 3901 : (2003) 10 SCC 434 : 2004 SCC (Cri) 801 (808) : 2003 CrLJ 4464.

[7750] ● ***Word "knew"—Meaning of.***—The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true, there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of he assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part but offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. *State of Maharashtra* v. *Kashirao*, AIR 2003 SC 3901 : (2003) 10 SCC 434 : 2004 SCC (Cri) 801 (809) : 2003 CrLJ 4464.

[7751] ● ***Transfer of Malice—Common object to kill.***—The provision is founded on a doctrine called by Hale and Foster, a transfer of malice. Others describe it as a transmigration of motive. Coke calls it coupling the event with the intention and the end with the cause. If the killing takes place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if the real intention of the killer had been actually carried out. *State of Maharashtra* v. *Kashirao*, AIR 2003 SC 3901 : (2003) 10 SCC 434 : 2004 SCC (Cri) 801 (810) : 2003 CrLJ 4464.

[7752] ● ***Transfer of malice—Common object to chase and assault deceased.***—Though Section 149, IPC may not in a given case apply to a case covered by Section 301, it would depend upon the factual background involved. No hard-and-fast rule of universal application can be invoked. In the facts of the present case, as adumbrated, the essential ingredients of Section 149 have been amply established. Though initially the malice was focused on PW-1, the fact that all the accused chased and assaulted the deceased is a case of transfer of malice. The same was again pursued by coming back and attacking PW-1. *State of Maharashtra* v. *Kashirao*, AIR 2003 SC 3901 : (2003) 10 SCC 434 : 2004 SCC (Cri) 801 (810) : 2003 CrLJ 4464.

[7753] ● ***Word "Knew" in the second part—Meaning.***—Section 149, IPC consist of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 141, if it can held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desire to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known', Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true: there may be cases which would come within the second part but not with the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case is would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. *Charan Singh* v. *State of Uttar Pradesh*, 2004 SCC (Cri) 1041 (1046-47). **TO THE SAME EFFECT :** (1) *Gangadhar Behera* v. *State of Orissa,* AIR 2002 SC 3633 : (2002) 8 SCC 381 : 2003 CrLJ 41 : JT 2002 (8) SC 135.

[7754] ● ***Unlawful assembly—Common object of—When not proved.***—Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. *Charan Singh* v. *State of U.P.*, (2004) 4 SCC 205 : 2004 SCC (Cri) 1041 (1045) : (2004) 1 Crimes 423.

[7755] ● ***Word "object"—Meaning of.***—"The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. *Charan Singh* v. *State of U.P.*, (2004) 4 SCC 205 : 2004 SCC (Cri) 1041 (1045) : (2004) 1 Crimes 423.

[7756] ● ***Expression "in prosecution of common object"—Connotation.***—The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly. *Charan Singh* v. *State of U.P.*, (2004) 4 SCC 205 : 2004 SCC (Cri) 1041 (1045) : (2004) 1 Crimes 423.

[7757] ● ***"Common object" of unlawful assembly question of fact.***—The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words, it can develop during the course of incident at the spot *eo instanti. Charan Singh* v. *State of U.P.*, (2004) 4 SCC 205 : 2004 SCC (Cri) 1041 (1046) : (2004) 1 Crimes 423.

[7758] ● ***Murder—Unlawful assembly—Common object.***—The concurrent finding of fact of the Courts below is that the appellants along-with three others, namely, A-2 (since deceased). A-5 and A-8 formed themselves into an unlawful assembly the common object of which was to commit the murder of Babu, the deceased. Once it is held that they were members of the unlawful assembly and in pursuance of common object of such an assembly, Babu was murdered, the appellants could not escape their liability because every member of the unlawful assembly is guilty of the offence committed by any member of such unlawful assembly, if in prosecution of the common object of that assembly an offence is committed. The appellants cannot argue that they were not members of the unlawful assembly because their participation in the assault has been proved beyond reasonable doubt. Once their participation is established, they cannot escape their liability by pleading that they did not cause any serious injury but merely assaulted the deceased with fists. The mere fact that they were members of the unlawful assembly at the time when the offence was committed, makes them guilty of the offence committed by any member of the unlawful assembly in prosecution of the common object of that assembly. Section 149 of the IPC enunciates a principle of vicarious liability and, therefore, every member of the unlawful assembly is guilty of the offence committed by any member of such assembly. *Rajendran* v. *State of Tamil Nadu*, 2004 SCC (Cri) 1879 (1881) : 2004 CrLJ 2544 : (2004) 2 Crimes 252.

[7759] ● ***Common object of unlawful assembly—Sharing of.***—In the case in hand the evidence shows that all the appellants came in a group by using cars and a motorcycle and intercepted the bus. Knowing fully well that the deceased persons were travelling in that bus, appellants entered the bus and killed them on the spot. All the accused persons can be held to have shared the common object of unlawful assembly. *Sahdeo* v. *State of U.P.*, AIR 2004 SC 3508 : 2004 CrLJ 2876 : (2004) 2 Crimes 482.

[7760] ● ***"Common object" different from common intention.***—"Common object" is different from a "common intention" as it does not require a prior concert and a common meeting minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and the language and utterances of the members composing it, the nature of arms carried, and from a consideration of all the surrounding circumstances. It may be gathered also from the course of conduct adopted by and behaviour of the members of the assembly at or before the actual conflict. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one, comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words, it can develop during the course of incident at the spot *eo instante. Madan Singh* v. *State of Bihar*, (2004) 4 SCC 622 : 2004 SCC (Cri) 1360 (1368) : (2004) 2 Crimes 123.

[7761] ● ***Common object of unlawful assembly.***—Section 149, IPC consists of two parts. The first of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down as to the circumstances from which the common object can be called out, it may reasonable be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would fall within the first part being offences committed in prosecution of the common object, while at the same time, though not always falling within the second part, as offences which the members of the unlawful assembly knew to be likely to be committed by a person engaged in the prosecution of the common object and acting with the purpose of executing it. Common object in terms of Section 149 can develop at the spot. Existence of the object has to be considered at the time of actual occurrence and not necessarily from anterior point of time. *Madan Singh* v. *State of Bihar*, (2004) 4 SCC 622 : 2004 SCC (Cri) 1360 (1369) : (2004) 2 Crimes 123.

[7762] ● *Common object of unlawful assembly where not proved.*—Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. *Dani Singh* v. *State of Bihar*, AIR 2004 SC 4570 : (2004) 13 SCC 203 : 2005 SCC (Cri) 127 (136) : 2004 CrLJ 3328.

[7763] ● *Word "object"—Meaning of.*—The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, compose the assembly, that is to say, they should all be aware of it and occur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exit only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their object and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect Section 149, IPC may be different on different members of the same assembly. *Dani Singh* v. *State of Bihar*, AIR 2004 SC 4570 : (2004) 13 SCC 203 : 2005 SCC (Cri) 127 (136-37) : 2004 CrLJ 3328.

[7764] ● *Offence committed in prosecution of common object.*—Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first, offences committed in prosecution of the common object, which would be generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. *Dani Singh* v. *State of Bihar*, AIR 2004 SC 4570 : (2004) 13 SCC 203 : 2005 SCC (Cri) 127 (137, 138) : 2004 CrLJ 3328. **TO THE SAME EFFECT :** *Sunil Kumar* v. *State of Rajasthan,* AIR 2005 SC 1096 : (2005) 9 SCC 283 : 2005 CrLJ 1402 : 2005 SCC (Cri) 1230 (1235-36).

[7765] ● ***Unlawful assembly—Acts committed pursuant to common object.***—By virtue of Section 149, IPC every member of an unlawful assembly at the time of the commission of the offence is guilty of an offence committed by any member of the unlawful assembly. The section creates constructive or vicarious liability of the members of the unlawful assembly for unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of constructive guilt under Section 149 is mere membership of an unlawful assembly. In a case under Section 149 the accused if is a member of the unlawful assembly, the common object of which is to commit a certain crime and if that crime is committed by one or more members of that assembly every person who happened to be a member of that assembly would be liable for that criminal act by virtue of his being a member of it, irrespective of the fact whether he actually committed the act or not. To attract Section 149, IPC the prosecution must prove that the commission of the offence was by any member of an unlawful assembly and such offence must have been committed in prosecution of the common object of the assembly or must be such that the members of the assembly knew that it was likely to be committed. Unless these three elements are satisfied by the prosecution the accused cannot be convicted with the aid of Section 149, IPC. *Parsuram Pandey* v. *State of Bihar*, AIR 2004 SC 5068 : (2004) 13 SCC 189 : 2005 SCC (Cri) 113 (119) : 2004 CrLJ 4978.

[7766] ● ***Common object to do away with deceased.***—The facts which have been proved by the prosecution are that on heated exchange of words in the field of Bharat Pandey, between Bharat Pandey, Birender Pandey, Kanhaiya Pandey with Raghunath Pandey, Raghunath Pandey went home enraged and returned back immediately thereafter (within 3 minutes according to PW-6) with a rifle accompanied by other accused persons who were also carrying guns and spear. Immediately on entering the field, Raghunath Pandey opened fire at Kanhaiya Pandey and as a result thereof he received two gunshot injuries from the weapon used by Raghunath Pandey. Neither Parshuram Pandey nor Bishram Pandey used their guns to fire at Kanhaiya Pandey, Bharat Pandey or Birender Pandey, who were standing nearby. No other overt act or role has been attributed to them which could definitely point out to their common object to kill or injure Kanhaiya Pandey or PWs-5 and 6. The mere fact that they accompanied Raghunath Pandey with weapons in hand does not necessarily lead to the inference that they had shared the common object or intention with Raghunath Pandey to kill Kanhaiya Pandey. Their behaviour at the scene of offence negatives such inference. However, the only fact proved by the prosecution is that they started indiscriminate firing which resulted in some villagers receiving simple injuries, though the reason for such firing is not clear. In view of the short span of time within which the whole incident took place it could not be presumed that the three appellants along with the other accused Raghunath Pandey had formed the common object to do away with Kanhaiya Pandey. *Parsuram Pandey* v. *State of Bihar*, AIR 2004 SC 5068 : (2004) 13 SCC 189 : 2005 SCC (Cri) 113 (119-20) : 2004 CrLJ 4978.

[7767] ● ***Unlawful assembly—Formation of common object.***—The principles relating to applicability of Section 149 of the Indian Penal Code are not in dispute. For the purpose of attracting the said provision, it is not necessary that an overt act must be committed by all the accused persons. What is necessary is formation of an unlawful assembly and knowledge of the persons thereof about consequences arising from doing an act which amounts to offence. *Shri Gopal* v. *Subhash*, AIR 2004 SC 4900 : (2004) 13 SCC 174 : 2005 SCC (Cri) 98 (101, 102) : 2004 CrLJ 3349.

[7768] ● ***Common object established.***—The definite prosecution case as well as the evidence as that the five accused persons, including the four appellants, came together in a jeep, one of whom was armed with gun and others with *lathis*, after arriving at the place of occurrence, they abused members of the prosecution party and on protest being made by them, accused Laxman Singh fired at the deceased, who succumbed to the injuries, whereas the appellants pelted stones upon the deceased and PW-2 and threw *lathis* upon them, as a result of which they received several other injuries apart from the two injuries by firearm inflicted by accused Laxman Singh upon the deceased, and thereupon, they fled away together from the place of occurrence. On these facts, we have no difficulty in coming to the conclusion that the common object of the unlawful assembly, of which the appellants were members, was to cause death of the deceased and pursuant to that common object, one of the members of the unlawful assembly, namely, accused Laxman Singh inflicted two fatal injuries upon the deceased by firearm whereas the appellants inflicted six other injuries on him.

In view of the foregoing discussion, the prosecution has succeeded in proving its case beyond reasonable doubt and the High Court has not committed any error in upholding convictions of the appellants, as such no interference is called for by this Court. *Rajinder* v. *State of Haryana*, AIR 2004 SC 4352 : (2006) 1 SCC (Cri) 155 (159) : 2004 CrLJ 4224 : JT 2004 (7) SC 481 : 2004 (3) Crimes 360.

[7769] ● ***Common object different from common intention.***—"Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 149, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one, comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words, it can develop during the course of incident at the spot *eo instanti*. *Dani Singh* v. *State of Bihar*, 2005 SCC (Cri) 127 (137). **TO THE SAME EFFECT :** *Sunil Kumar* v. *State of Rajasthan,* AIR 2005 SC 1096 : (2005) 9 SCC 283 : 2005 (Cri) 1230 (1234-35) : 2005 CrLJ 1402.

[7770] ● ***Sections 149 and 141—Applicability—common object of unlawful assembly—Meaning.***—Section 149 has its foundation on constructive liability which is the *sine qua non* for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of such an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly. *Sunil Kumar* v. *State of Rajasthan*, AIR 2005 SC 1096 : (2005) 9 SCC 283 : 2005 SCC (Cri) 1230 (1234) : 2005 CrLJ 1402.

[7771] ● ***Large number of persons present—Safe to convict only those persons against whom overt act alleged.***—The evidence on record establishes the fact that a large number of persons were present. In such a case, it may be safe to convict only those persons against whom overt act is alleged with the aid of Section 149, IPC, lest some innocent spectators may get involved. This is only a rule of caution and not a rule of law. In the instant case, we find that even if Nagarjit Ahir was present when the occurrence took place, there is nothing to suggest that he shared the common object of the unlawful assembly. Admittedly, he did not take any part in the assault. We do not, therefore, consider it safe to convict him merely on the ground that he was present, because admittedly a large umber of persons had come to the ghat that day for taking a bath in River Ganges. We, therefore, extend to him the benefit of doubt and acquit him of all the charges levelled against him. *Nagarjit Ahir* v. *State of Bihar*, AIR 2005 SC 722 : (2005) 10 SCC 369 : 2005 SCC (Cri) 1530 (1534) : 2005 CrLJ 904 : 2005 (1) Crimes 191.

[7772] ● ***Common object—Scope.***—The main trust of the argument of counsel for the appellants was that the evidence on record shows that only three appellants assaulted the deceased with sharp edged weapons and in the absence of proof of common object of the assembly to cause death of two deceased persons the other accused persons could not have been convicted by taking aid of Section 149 of the IPC. There is a distinction between the common object and common intention. The common object need not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the assembly gathered before the commission of the crime at the spot itself. There need not be prior meeting of the mind. It would be enough that the members of the assembly which constitutes five or more persons, have common object and that they acted as an assembly to achieve that object. In substance, Section 149 makes every members of the common unlawful assembly responsible as a member for the act of each and all merely because he is a member of the unlawful assembly with common object to be achieved by such an unlawful assembly. One has to keep in mind that mere presence in the unlawful assembly cannot render a person liable unless there was a common object and that is shared by that person. The common object has to be found and can be gathered from the facts and circumstances of each case. *Rabindra Mahto* v. *State of Jharkhand,* AIR 2006 SC 887 : (2006) 10 SCC 432 : 2006 CrLJ 957 (961, 962) : (2006) 1 Crimes 97.

[7773] ● ***No common object.***—The High Court did not find any common object on the part of all the accused so as to make them themselves liable to be convicted for commission of an offence under Sections 302/149 IPC. In a case of this nature. Where a large member of persons are made accused, the possibility of some accused persons committing murder at the spur of moment cannot also be ruled out. *Sabbi Mallesu* v. *State of Andhra Pradesh,* AIR 2006 SC 2747 : (2006) 10 SCC 543 : 2006 CrLJ 4038 (4041) : (2006) 3 Crimes 146.

[7774] ● ***Acquittal of accused upheld.***—In the instant case undisputedly, both the parties inflicted injuries to the members of the other party, there was possibility that the deceased sustained a head injury after discharge from the hospital, in face of medical evidence on record the finding of the High Court that the accused had no common object to cause the death of the deceased or to attempt to commit murder and acquittal of the accused was upheld. *Umrao* v. *State of Haryana,* AIR 2006 SC 2152 : (2006) 10 SCC 136 : 2006 CrLJ 2798 : (2006) 2 Crimes 225.

[7775] ● ***Only four persons found guilty—Conviction under Section 149, IPC held proper.***—When the evidence clearly shows that more then five persons armed with swords, spears etc had to the house of Sadruddin with the common object of causing injury and injured him. The mere fact that several accused were acquitted and only four are convicted, does not enable the four who are found guilty to contend that Section 149, IPC is inapplicable. *Kallu* v. *State of Madhya Pradesh,* AIR 2006 SC 831 : (2006) 10 SCC 313 : 2006 CrLJ 798 (803) : 2006 (1) Crimes 105.

[7776] ● ***Accused did not cause injury to deceased—Common object to cause the murder cannot be inferred.***—Where the accused A2, A3 and A5 did not cause any injury to the deceased, the common object of the unlawful assembly was not to commit the murder of the deceased, the conviction of the three accused under Section 302 was set aside, and the three accused were convicted under Section 326. *Radha Mohan Singh* v. *State of Uttar Pradesh,* AIR 2006 SC 951 : (2006) 2 SCC 450 : 2006 CrLJ 1121 (1131) : (2006) 1 Crimes 183.

[7777] ● ***No material showing that accused knew that offence was likely to be committed in prosecution of common object.***—As far as the conviction of seven co-accused there is not an iota of evidence led by the prosecution to sustain the charge of Section 302/149 IPC against them and the only evidence, which has come on record, is the testimony of PW 10—Informant who stated that Magister Chaudhary came and surrounded him on the spot. No witness has proved that the accused persons had come on the scene of occurrence with an intention to commit the murder of Shambhu Rai. None of them had given any blow to the deceased with the weapons they allegedly were carrying with them. It is now the settled law that under Section 149 IPC, the liability of other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other persons knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms of behaviour on or before the scene of occurrence. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during occurrence does not arise. On scrutiny of the entire evidence on record, the conviction of the other accused persons not sustainable and their appeal deserved to be allowed. The conviction of the seven accused persons recorded under Section 302/149 was set aside. *Bunnilal Chaudhary* v. *State of Bihar,* AIR 2006 SC 2531 : (2006) 10 SCC 639 : 2006 CrLJ 3297 (3301) : (2006) 3 Crimes 46.

[7778] ● ***Applicability and scope.***—Common object has two parts. The first part would be attracted when the offence is committed in furtherance of the common object. The offence even, if is not committed in direct prosecution of the common object of the assembly, Section 149 may still be attracted. *Hori Lal* v. *State of Uttar Pradesh,* (2006) 13 SCC 79 : 2007 (2) SCC (Cri) 581 : 2007 CrLJ 1181 (1185) : 2007 (1) Crimes 215.

[7779] ● ***For attracting S. 149, IPC pre-concert not required.***—When a large number of persons assembled with a gun and other weapons having in mind the dispute over the land in question, they must be held to have found common knowledge that by reason of their act, somebody may at least be grievously injured. For the purpose of attracting Section 149, IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose. *Triloki Nath* v. *State of U.P.*, AIR 2006 SC 321 : (2006) 2 SCC (Cri) 178 (198) : 2005 (4) Crimes 304 : 2005 (9) Scale 76.

[7780] ● ***Unlawful assembly.***—It is evident that no evidence has been brought on record to establish that the appellants Munna and Ujjal had committed any offence. As noticed hereinbefore, they were not named in the FIR. They were not identified in the dock. No witness has taken their names as the persons who committed any overt act. No recovery has been made from them. There is also no evidence that they had chased the deceased. As it had not been established that the appellants were members of an unlawful assembly, they could not have been convicted for commission of an offence under Sections 302/149, IPC. *Munna Candra* v. *State of Assam,* AIR 2006 SC 3555 : (2006) 3 SCC 752 : (2006) 2 SCC (Cri) 43 (48) : 2006 CrLJ 1632 : 2006 (2) Crimes 13.

[7781] ● ***Applicability of Section 149, IPC.***—Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141 IPC. *Mummidi Hemadri* v. *State of Andhra Pradesh,* AIR 2007 SC 2528 : (2007) 13 SCC 496 : 2007 (2) Crimes 389 (SC) : 2007 (4) SCR 30. **TO THE SAME EFFECT** : (1) *Shivjee Singh* v. *State of Bihar,* AIR 2009 SC 417 : (2008) 11 SCC 631 : 2008 SCC (Cri) 987. (2) *Maranadu* v. *State,* (2008) 16 SCC 529 : 2008 CrLJ 4562 : 2008 (4) Crimes 16 (SC).

[7782] ● ***Requirement for applicability of Section 149, IPC.***—It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an assembly, it cannot be said that he is a member of unlawful assembly. What is required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which falls within the purview of Section 141, IPC. *Mummidi Hemadri* v. *State of Andhra Pradesh,* AIR 2007 SC 2528 : (2007) 13 SCC 496 : 2007 (2) Crimes 389 (SC) : 2007 (4) SCR 30.

[7783] ● ***Common object proved.***—"Each one of the appellants was armed with deadly weapons. They came before us together and death was caused to the deceased. They entered into the house. Two of the appellants had inflicted blows with swords. We are, therefore, of the opinion that common object on the part of each of the appellants stands proved. Once formation of common object amongst the accused is proved, it is not necessary for the Court to consider specific overt act played by each of them." *State of Maharashtra* v. *Tulshiram Bhanudas Kamble,* AIR 2007 SC 3042 : (2007) 14 SCC 627 : 2007 CrLJ 4319 (4327) : (2007) 4 Crimes 48.

[7784] ● ***Common object—Meaning.***—The word "object" means the purpose or design and, in order to make it "common" it must be shared by all. In other words, the object should be common to the persons who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in the section have to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only upto a particular stage and not thereafter. *Mummidi Hemadri* v. *State of Andhra Pradesh,* AIR 2007 SC 2528 (2530) : (2007) 13 SCC 496 : 2007 (2) Crimes 389.

[7785] ● ***Common object—Facts and circumstances to be seen.***—The question as to whether in a given case common object has been made out or not, will depend upon the facts and circumstances thereof: conduct of the parties and the manner in which the occurrence has taken place, will have some bearing on the question. Eight persons came together. They assaulted the deceased and PW 6 indiscriminately. Despite having been asked to stop assaulting them, not only by PW 2 but also by the wife of the deceased, they did not pay any heed thereto. They continued to assault them. They dragged them to the west bank of the river and only left them there when a large number of people gathered and asked them not to do so. It cannot be said that the accused appellants did not have common object to cause the death of the deceased. *Vikram* v. *State of Maharashtra,* 2007 AIR SC 1893 : 2007 (12) SCC 332 : 2007 CrLJ 3193 (3198) (SC) : 2007 (6) SCR 185 : 2007 (7) JT 215 : 2007 (4) Supreme 698 : 2007 (5) SLT 688 : 2007 (2) JCC 1553 : 2007 (6) Scale 698.

[7786] ● ***"In prosecution of common object".***—The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of the object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what it likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect Section 149, IPC may be different on different members of the same assembly. *State of Punjab* v. *Sanjiv Kumar,* AIR 2007 SC 2430 : (2007) 9 SCC 791 : 2007 (3) SCC (Cri) 578 : 2007 CrLJ 3519 (3521) : 2007 (3) Crimes 100 (SC). **TO THE SAME EFFECT** : (1) *Shivjee Singh* v. *State of Bihar,* (2008) 1 SCC 631 : 2008 (3) SCC (Cri) 987. (2) *State of Karnataka* v. *Chikkahotappa,* AIR 2008 SC 2692 : 2008 CrLJ 3495 : 2008 (8) SCR 1167.

[7787] ● ***Common object and Common intention.***—'Common object', is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. *State of Punjab* v. *Sanjiv Kumar,* AIR 2007 SC 2430 : (2007) 9 SCC 791 : 2007 (3) SCC (Cri) 578 : 2007 CrLJ 3519 (3521). **TO THE SAME EFFECT** : (1) *Mummidi Hemadri* v. *State of Andhra Pradesh,* AIR 2007 (SC) 2528

2007 (2) Crimes 389 (SC). (2) *Gunnana Pentayya* v. *State of Andhra Pradesh,* 2008 (3) Crimes 325 (SC).

[7788] ● ***Common object—Proof.***—Once formation of common object amongst the accused is proved, the Court is not required to consider specific overt act played by each of them. Where the appellants armed with deadly weapons entered into the house and caused death of deceased and inflicted blows with swords on deceased it was held that common object on the part of each of the appellants stands proved. *State of Maharashtra* v. *Tulshiram Bhanudas Kamble*, AIR 2007 SC 3042 : (2007) 14 SCC 627 : 2007 CrLJ 4319 : 2007 (4) Crimes 48.

[7789] ● ***"Knew"—Meaning.***—The word "Knew" used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. *State of Pubjab* v. *Sanjiv Kumar,* AIR 2007 SC 2430 : (2007) 9 SCC 791 : 2007 (3) SCC (Cri) 578 : 2007 CrLJ 3519 (3522) : 2007 (3) Crimes 100 (SC). **TO THE SAME EFFECT** : *Maranadu* v. *State,* 2008 CrLJ 4562 : 2008 (4) Crimes 16 (SC).

[7790] ● ***Object of Section 149, IPC.***—Section 149 IPC *per se* constitutes a substantive offence. The object of this section is to make clear that an accused person whose case falls within its terms cannot put forward the defence that he did not, with his own hand, commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew likely to the committed in prosecution of that object. Unlawful assembly was formed originally to assault and something might have happened all of a sudden. *Sunil Balkrishna Bhoir* v. *State of Maharashtra,* (2007) 14 SCC 598 : 2007 CrLJ 3277 : 2007 (6) SCR 669.

[7791] ● ***Scope of Section 149, IPC.***—Section 149 IPC, consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object in order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141 IPC, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. *Mummidi Hemadri* v. *State of Andhra Pradesh,* AIR 2007 SC 2528 : 2007 (4) SCR 30 2007 (4) Scale 431 : 2007 (2) Supreme 978 : 2007 (2) Crimes 389 (SC).

[7792] ● ***Section 149 IPC & Section 304 Part II—Sentence.***—We are of the view that the learned counsel for the appellants is right in submitting that neither of the appellants has been convicted for a substantive offence punishable under Section 304, Part II, IPC. Both of them were convicted under the vicarious liability mentioned in Section 149, IPC and they were accordingly convicted for an offence not amounting to murder punishable under Section 304, Part II read with Section 149, IPC along with other offences. In our opinion, therefore, ends of justice would be met if instead of rigorous imprisonment for seven years as imposed by the High Court for the said offence, the appellants are ordered to undergo rigorous imprisonment for five years. Conviction, sentence and fine for other offences, imposed on the appellants by the High Court call for no interference and accordingly that part of the order is confirmed. *Suresh Singh* v. *State of Haryana,* AIR 2007 (SC) 3093 : 2007 CrLJ 4717 (4721) : 2007 (10) SCR 495 : 2007 (11) Scale 589 : 2007 (4) Crimes 125 (SC).

[7793] ● ***Charge under Section 149—Requirement.***—When charge under Section 149, IPC, is there it is not necessary that each one should be assigned independent part played in the beating. If it is found that one of them was a member of the unlawful assembly and that unlawful assaulted the deceased which ultimately caused the death of the deceased, then all who were members of the unlawful assembly can be held liable. *Sheo Prasad Bhor* v. *State of Assam,* AIR 2007 SC 120 : (2007) 3 SCC 120 : (2006) 13 SCC 79 : 2007 (2) SCC (Cri) 45 : 2007 CrLJ 1423 (1424) : (2007) 1 Crimes 145.

[7794] ● ***Common object—How to be ascertained.***—Whether in a given case, the accused persons shared common object or not, must be ascertained from the acts and conduct of the accused persons. The surrounding circumstances are also relevant and may be taken into consideration in arriving at a conclusion in this behalf. *Hari Lal* v. *State of Uttar Pradesh,* 2007 (2) SCC (Cri) 581 : 2007 CrLJ 1181 (1185) : 2007 (1) Crimes 215 (SC).

[7795] ● ***Common object—Ascertainment.***—Common object of an assembly is to be ascertained from the acts and language of the members composing it and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined keeping in view the nature of the assemble, the arms carried by the members and the behaviour of the members at or near the scene of incident. *Mummidi Hemadri* v. *State of Andhra Pradesh,* AIR 2007 SC 2528 (2530) : 2007 (2) Crimes 389 (SC) : 2007 (4) SCR 30. **TO THE SAME EFFECT** : *State of Punjab* v. *Sanjiv Kumar,* AIR 2007 SC 2430 : (2007) 9 SCC 791 : 2007 CrLJ 3519.

[7796] ● ***Common object—How to be determined.***—For determination of common object of the lawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive of the crime are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined keeping in view the nature of the assembly, the arms caused by the members, and the behaviour of the members at a near the scene of the incident. It is not necessary under the law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. *Maranadu* v. *State,* (2008) 16 SCC 529 : 2008 CrLJ 4562 (4566) : 2008 (4) Crimes 16 (SC). **TO THE SAME EFFECT** : (1) *Gunnana Pentayya* v. *State of Andhra Pradesh,* 2008 (3) Crimes 325 (SC). (2) *Bhanwar Singh* v. *State of Madhya Pradesh,* AIR 2009 SC 768 : (2008) 16 SCC 657 : 2008 (2) Crimes 342.

[7797] ● ***Common object at a particular stage.***—What is the common object of the unlawful assembly at a particular stage is essentially a question of fact to be determined keeping in view the nature of assembly, the arms carried by the members and the behaviour of the members at a near the scene of incident. *State of Karnataka* v. *Chikkahotappa,* AIR 2008 SC 2692 : (2008) 15 SCC 299 : 2008 CrLJ 3495 (3498).

[7798] ● ***Common object—Ascertainment.***—Common object of an assembly is to be ascertained from the acts and language of the members composing it and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. *State of Karnataka* v. *Chikkahotappa,* AIR 2008 SC 2692 : 2008 CrLJ 3495.

[7799] ● ***Overt act—Not necessary.***—The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of such an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. *State of Karnataka* v. *Chikkahotappa,* AIR 2008 (SC) 2692 : 2008 CrLJ 3495 : 2008 (8) SCR 1167 : 2008 (9) Scale 338 : 2008 (6) SLT 141 : JT 2008 (7) SC 395.

[7800] ● ***Word "Knew" used in Second limb of Section 149, IPC.***—The word "knew" used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part but offences committed in prosecution of the common object would also be generally, if not always be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. *State of Karnataka* v. *Chikkahottappa,* AIR 2008 SC 2692 : (2008) 15 SCC 299 : 2008 CrLJ 3495 : 2008 (8) SCR 1167 : 2008 (9) Scale 338.

[7801] ● ***Word "knew" in second limb of Section 149, IPC.***—When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the member of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first part, but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely committed in the prosecution of the common object. *Shivjee Singh* v. *State of Bihar,* AIR 2009 SC 417 : 2008 (11) SCC 631 : 2008 (3) SCC (Cri) 987 : 2008 (10) Scale 530.

[7802] ● ***Two parts of Section 149—Distinction.***—Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind,. and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of the incident. The word "knew" used in the second part of the section implies something more than a possibility and it cannot be mode to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part, but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely offences which the parties knew likely to be committed in the prosecution of the common object. *Maranadu* v. *State,* 2008 CrLJ 4562 : (2008) 16 SCC 529 : 2008 (4) Crimes 16 (SC) : 2008 (12) Scale 420 : 2008 (5) Supreme 677. **TO THE SAME EFFECT** : *Shivjee Singh* v. *State of Bihar,* AIR 2009 SC 417 : (2008) 11 SCC 631 : 2008 (3) SCC (Cri) 987.

[7803] ● ***Common object—Scope and proof.***—It is equally well-settled that where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence in pursuance of common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults a victim, it is not necessary that all of them must take part in the actual assault. Even in absence of actual assault, all members of unlawful assembly may be held vicariously liable for the acts of others provided there was common object to commit a crime. Appreciation of evidence in such a complex situation is indeed a difficult task, but courts exercising powers in administering criminal justice have to do their best in dealing with such cases and it is expected of them to discharge their duty to sift the evidence carefully and to decide which part of it is true and which is not. *Viji* v. *State of Karnataka,* 2008 (4) Crimes 320.

[7804] ● ***Requirements for incurring vicarious liability.***—For the purpose of incurring the vicarious liability for the offence committed by a member of such an unlawful under the provisions, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. *Sikander Singh* v. *State of Bihar*, AIR 2010 SC 3580 : (2010) 7 SCC 477 : 2010 CrLJ 3854.

[7805] ● ***Mere presence of persons at the scene of offence—Not enough.***—Mere presence of the persons at the scene of offence itself would not be enough to convict them and punish under Section 149, IPC, unless it is established that each of them was part of the unlawful assembly and committed the offence in prosecution of the common object of that assembly. In all such cases, the question who had committed the overt act is of no consequence. *Debashish Daw* v. *State of West Bengal*, AIR 2010 SC 3633 : (2010) 9 SCC 111 (*Akbar Sheikh* v. *State of West Bengal*, (2009) 7 SCC 415 **rel. on**).

[7806] ● ***No direct evidence available—It has to be ascertained from the facts and attending circumstances.***—When a concerted attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons who attacked the victim had the common object for an offence which was known to be likely to be committed in prosecution of such an object. It is true that a mere innocent person, in an assembly of persons or being a bystander does not make such person a member of an unlawful assembly but where the persons forming the assembly are shown to be having identical interest in pursuance of which some of them come armed, others though not armed would, under the normal circumstances, be deemed to be the members of the unlawful assembly. *Prathap* v. *State of Kerala*, AIR 2010 SC 3526 : JT 2010 (9) 168 : 2010 CrLJ 4442 : 2010 (8) Scale 552.

[7807] ● ***Common object—Determination.***—For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. *Sikandar Singh* v. *State of Bihar*, AIR 2010 SC 3580 : (2010) 7 SCC 477 : JT 2010 (7) 637 : 2010 (5) CrLJ 3854 : 2010 (3) Crimes 139 (SC).

[7808] ● ***Requirements for conviction of person of offence with aid of Section 149, IPC.***—Whenever a Court convicts any person of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but that in pursuance of such common object of the offence was committed. Thus, before recording the conviction under Section 149 IPC, the essential ingredients of Section 149, IPC must be established. *Daya Kishan* v. *State of Haryana*, AIR 2010 SC 2147 : (2010) 5 SCC 81 : 2010 CrLJ 2886 : JT 2010 (4) 325 : 2010 (4) Scale 263.

[7809] ● ***Requirements.***—A common object does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and they act as a assembly to achieve the object. *Sikandar Singh* v. *State of Bihar*, AIR 2010 SC 3580 : (2010) 7 SCC 477 : 2010 CrLJ 3854.

[7810] ● ***Essential ingredients.***—The provisions of Section 149, IPC has essentially two ingredients : (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of the assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. *Sikandar Singh* v. *State of Bihar*, AIR 2010 SC 3580 : (2010) 7 SCC 477 : 2010 CrLJ 3854. **TO THE SAME EFFECT :** (1) *Daya Kishan* v. *State of Haryana*, AIR 2010 SC 2147 : (2010) 5 SCC 81 : 2010 CrLJ 2886. (2) *Dharvidher* v. *State of U.P.*, (2010) 7 SCC 759 : 2010 (3) Crimes 170 (SC).

COMMON SENSE

[7811] ● ***Common sense.***—We must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naiveté and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimony which warrants credence. More than all, it baffles belief in human nature that a girl sleeping with her mother and other children in the open will come by blood on her garments and injury in her private parts unless she has been subjected to the torture of rape—And if rape has been committed, as counsel more or less conceded why, all persons in the world, should the victim hunt up the petitioner and point at him the accusing finger? To forsake there vital considerations and go by adolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called "judicial' probability. Indeed, the Court loses its credibility if it rebels against realism. The law of Court is not an unnatural world. *Krishan Lal* v. *State of Haryana*, AIR 1980 SC 1252 : (1980) 3 SCC 159 : (1980) SCC (Cri) 667 (669, 670) : 1980 CrLJ 926 : 1980 CrLR (SC) 728.

[7812] ● ***Common sense not to be put in cold storage.***—There is no rule of law that common sense should be put in cold storage while considering constitutional provisions for safeguards against misuse of powers by authorities though these provisions should be strictly construed. Bearing this salutary principle in mind and having regard to the conduct of the detenue—Venilal Mehta specially in the mercy petition and other communications the version of the detenue Venilal is feigning lack of any knowledge of English must be judged in the proper perspective. The Court is not denuded of its power to examine the truth. The detaining authority came to the conclusion that he knew both Hindi and English. It has [illegible]

Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or *lis* before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of Courts and erode in stages the faith inbuilt in the judicial system ultimately destroying the very justice-delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings. Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. If the State's [illegible]

without any definite object of finding out the truth and bringing to book those who were responsible [illegible]

spectator, mute to the manipulations and preferred [illegible]

leaves much to be desired. One gets a feeling that [illegible] memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after this Court expressed its unhappiness over the perfunctory manner in which the appeal was presented and the challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be mock trials or shadow-boxing or fixed trials. Judicial criminal administration system must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution. *Zahira Habibulla H. Sheikh* v. *State of Gujarat*, AIR 2004 SC 3114 : (2004) 4 SCC 158 : 2004 SCC (Cri) 999.

COMMUNALISM/ COMMUNAL RIOTS

[7814] ● ***Communalism/Communal riots.***—Article in newspaper alleged that militant minorities thrive on communalism. Author referred the Muslims generally as 'a basically violent race'. Article contained various aspersions on the Muslim community. Another article criticised naming of Delhi roads after the Moghul emperors who according to the author were lustful perverts, rapists and murderers. Both the articles promoted feelings of enmity, hatred and ill-will between the Hindu and Muslim communities on grounds of community and this could not be done in the guise of political thesis or historical truth. Conviction under section 153-A was proper. *Babu Rao Patel* v. *State (Delhi Admn.)*, AIR 1980 SC 763 : (1980) 2 SCC 402 : (1980) SCC (Cri) 500 : 1980 CrLJ 529 : 1980 CrLR (SC) 197 : 1980 SCCrR 173 : 1980 CrAppR (SC) 94 : (1980) 2 SCWR 63 : ILR (1980) HP 169 (SC) : 1980 Raj LR 390.

[7815] ● ***Breaking out of communal riots—Offences of.***—In the instant case, the order of detention repeatedly states that the detenue committing the alleged five offences set out in the detention order was the cause for breaking out of communal riots in Meerut City. But in the counter affidavit filed on behalf of the respondents, it has been stated that "the communal riots broke out in Meerut on April 14, 1987 on the occasion of Shab-e-Barat. That was controlled by the Administration. However, in the night intervening between May 18/19, 1987 again a communal riot broke out". But all the offences said to have been committed by the detenue were after 9 a.m. on May 19, 1987. It was not in the intervening night between May 18/19. It was, therefore, inaccurate to state that the communal riot broke out due to the incidents attributed to the detenue on May 19, 1987. *Shashi Aggarwal* v. *State of Uttar Pradesh*, AIR 1988 SC 596 : (1988) 1 SCC 436 : (1988 SCC (Cri) 178 (180) : 1988 CrLJ 839 : 1988 CrLR (SC) 184.

[7816] ● ***Roping in of suspicious persons belonging to other community.***—The investigating agency merely on suspicion have roped-in the persons belonging to the other community who were residing in the locality and then somehow trying to get them identified through the witnesses who belong to the community from where the people were burnt alive and the learned Designated Court was swayed away by the so-called evidence of identification and based the conviction. We have already discussed as to how unreliable the evidence of these eye-witnesses is and no Court on the basis of such unreliable evidence can base conviction, howsoever ghastly the crime may be. In the aforesaid premises, we set aside the conviction and sentence passed by the learned Designated Court under the provisions of TADA Act as well as under different sections of the Indian Penal Code and direct that the appellants be set at liberty forthwith unless they are required in any other case. *Mohd Iqbal M. Shaikh* v. *State of Maharashtra*, AIR 1998 SC 2864 : (1998) 4 SCC 494 : (1998) SCC (Cri) 1064 (1085) : 1998 CrLJ 2537 : 1998 CrLR (SC) 355 : (1998) 2 Crimes 106.

[7817] ● ***Terrorist act—Meaning setting afire chaval of Hindus by members of rival community.***—As has been held by the Court in *Hitendra Vishnu Thakur* v. *State of Maharashtra*, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087 it is not possible to give a precise definition of terrorism or to lay down what constitutes terrorism. But the Court has indicated in the aforesaid decision that it may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. It has also been stated in the decision that if the object of the activity is to disturb harmony of the society or to terrorise people and the society with a view to disturb even the tempo, tranquility of the society, and a sense of fear and insecurity is created in the minds of a section of the society or society at large, then it will, undoubtedly, be held to be a terrorist Act. In the instant case on the facts that shortly after the demolition of Babri Masjid at Ayodhya, a communal riot erupted in Mumbai and during that period in the locality in question which was predominantly occupied by Muslims, a chawl occupied by Hindus who were in minority was set to fire by the people belonging to the rival community and on account of such fire, several people were burnt alive, it is difficult to accept the contention of Mr. Jain that the activities do not fall within the ambit of TADA. In our opinion judging from the atrocity of the activities and judging from the sensitive and tense atmosphere prevailing in the town, under which the acts were perpetrated resulting ultimately in the death of several persons, the conclusion becomes irresistible that such activities had far reaching consequences and it affects the society at large and the even tempo had been greatly disturbed and as such the provisions of the Act get attracted to such activities. *Mohd Iqbal M. Shaikh* v. *State of Maharashtra*, AIR 1998 SC 2864 : (1998) 4 SCC 494 : (1998) SCC (Cri) 1064 : 1998 CrLJ 2537 : 1998 CrLR (SC) 355 : JT 1998 (3) SC 135 : 1998 Cr App R (SC) 305 : (1998) 2 Crimes 106.

[7818] ● ***Appreciation of evidence; people belonging to one community burnt alive on account of communal frenzy.***—We are quite aware of the principle that in a country like India where it is difficult to find witness who has not made any embellishment or exaggeration, and, therefore, in such case Court would be justified in separating the chaff from the grain and then act upon the grain. But where the evidence consists of only chaff as in the present case, question of separating chaff from the grain would not arise. Then again when all the eye-witnesses suffer from the same infirmities as has been discussed by us, the question of one corroborating the other would not arise. If a witness is partly reliable and partly unreliable then one may look for corroboration to the reliable part of the ocular version of a witness. But if a witness is wholly unreliable, the question of corroboration does not arise. It is not doubt true that the incident with which we are concerned in the present case was a ghastly one and on account of communal frenzy, several people belonging to one community were burnt alive by some others but unless and until the prosecution evidence conclusively establishes those others, as the perpetrators of the crimes, it is not possible for a Court of law to record conviction on mere conjectures and hypothesis. *Mohd Iqbal M. Shaikh* v. *State of Maharashtra*, AIR 1998 SC 2864 : (1998) 4 SCC 494 : (1998) SCC (Cri) 1064 (1065) : 1998 CrLJ 2537 : 1998 CrLR (SC) 355 : (1998) 2 Crimes 106.

[7819] ● ***Communal riot—Chasing of persons responsible for defilement of mosque.***—A communal riot broke out on the morning of 18-3-1984. The rioters were running on a rampage hither and thither with bombs, brickbats and other weapons, prowling for human prey. Vinod Kumar Mehta, a 35-year-old IPS officer was then the Deputy Commissioner of Police (DCP) at Port Division, Calcutta. Garden Reach Police Station falls within the territorial limits of his domain and hence he set out to quell the riots, escorted by his Security Guard Mukhtar Ali (a police constable) besides some other police personnel. When they felt that the infuriated rioters were thirsting for victims they thought it safe to go into a mosque expecting asylum. But the Imam of the mosque was not disposed to afford shelter to such people. So they went out of the mosque. Security Guard Mukhtar Ali ran into the house of a private individual while the Deputy Commissioner ran into the house of a police constable (PW 21 Abdul Latif Khan). As the rioters were chasing him PW 24 Md. Hadis Khan, son of PW 21 Abdul Latif Khan gave asylum to the Deputy Commissioner in his house.

The rioters spotted the fleeing cops. The Deputy Commissioner in order to save himself from the fury of the chasing mob got into the bathroom of the house of PW 21 but a few of the marauders pursued him up to that place and caught him and killed him. The Security Guard was also intercepted by the bloodthirsty assailants and he too was killed. Not being satisfied with the death of these police personnel the killers mutilated their corpses, stripped them off, tethered them and tried to incinerate the dead bodies which succeeded only partly as the bodies remained charred. *Lokeman Shah* v. *State of West Bengal*, AIR 2001 SC 1706 : (2001) 5 SCC 358 : (2001) SCC (Cri) 829 (834) : 2001 CrLJ 2196 : JT 2001 (4) SC 520.

[7820] ● ***Appellants acted in rage of fury blindfolded by communal frenzy—No previous enmity or acquaintance.***—The appellants had neither any previous enmity with the victims nor even any acquaintance with them. It is an admitted fact that they acted in a rage of fury blindfolded by communal frenzy. We are aware that in most of the communal riots the participants are by and large illiterate and indoctrinated people. When the literate leaders try to keep themselves away, without participating in the perpetration of crimes though, perhaps, some such persons would fan up the communal frenzy by their utterances in the minds of the ignorant poor people who in a deranged fury rush into the streets prowling for prey. It was an unfortunate plight of the people who are ignorant about the real sublime thoughts of religions that they threw themselves into the cauldron of communal delirium which was burning up to the boiling point. That was a time when the minds of the rioters turned demented and no sensible thoughts would enter into them. The leaders and the society have not played their part to teach them that religions are not meant for killing fellow human beings. If ignorance had promoted people to take up cudgels in the name of religion for indulging in carnage or murders they are no doubt liable to be convicted and sentenced for the offence committed by them. But we have great difficulty to treat such a case as rarest of the rare cases in which the alternative sentence of life imprisonment can unquestionably be foreclosed. Thus, we alter the sentence passed on Nasim @ Naso for the offence under section 302 read with Section 149, IPC and impose the next alternative (imprisonment for life) for the said offence. Subject to this modification of the sentence we dismiss both these appeals. *Lokeman Shah* v. *State of West Bengal*, AIR 2001 SC 1706 : (2001) 5 SCC 358 : (2001) SCC (Cri) 829 (840) : 2001 CrLJ 2196 : JT 2001 (4) SC 520.

[7821] ● ***Preservation of communal harmony and public order.***—Courts should not normally interfere with matters relating to law and order which is primarily the domain of the concerned administrative authorities. They are by and large the best to assess and to handle the situation depending upon the peculiar needs and necessities, within their special knowledge. Their decision may involve to some extent an element of subjectivity on the basis of materials before them. Past conduct and antecedents of a person or group or an organisation may certainly provide sufficient material or basis for the action contemplated on a reasonable expectation of possible turn of events, which may need to be avoided in public interest and maintenance of law and order. No person, however, big he may assume or claim to be, should be allowed irrespective of the position he may assume or claim to hold in public life to either act in a manner or make speeches which would destroy secularism recognised by the Constitution of India, Secularism is not to be confused with communal or religious concepts of an individual or a group of persons. It means that State should have no religion of its own and no one could proclaim to make the State have one such or endeavour to create a theocratic State. Persons belonging to different religions live throughout the length and breadth of the country. Each person whatever be his religion must get an assurance from the State that he has the protection of law freely to profess, practice and propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of ones own presumptuous good social order. Therefore, whenever the concerned authorities in charge of law and order find that a person's speeches or actions are likely to trigger communal antagonism and hatred resulting in fissiparous tendencies gaining foothold undermining and affecting communal harmony, prohibitory orders need necessarily to be passed, to effectively avert such untoward happenings. *State of Karnataka* v. *Praveen Bhai Thogadia*, AIR 2004 SC 2081 : (2004) 4 SCC 684 : 2004 SCC (Cri) 1387 (1394) : 2004 CrLJ 1825 : JT 2004 (4) SC 245 : (2004) 2 Crimes 107.

[7822] ● ***Communal harmony not to suffer and be made dependent upon will of individual.***—Communal harmony should not be made to suffer and be made dependent upon the will of an individual or a group of individuals, whatever be their religion, be it of a minority or that of the majority. Persons belonging to different religions must feel assured that they can live in peace with persons belonging to other religions. While permitting holding of a meeting organised by groups or an individual, which is likely to disturb public peace, tranquillity and orderliness, irrespective of the name, cover and methodology it may assume and adopt, the administration has a duty to find out who the speakers and participants are and also to take into account previous instances and the antecedents involving or concerning those persons. If they feel that the presence or participation of any person in the meeting or congregation would be objectionable, for some patent or latent reasons as well as the past track record of such happenings in other places involving such participants, necessary prohibitory orders can be passed. Quick decisions and swift as well as effective action necessitated in such cases may not justify or permit the authorities to give prior opportunity or consideration at length of the pros and cons. The imminent need to intervene instantly, having regard to the sensitivity and perniciously perilous consequences it may result in if not prevented forthwith, cannot be lost sight of. The valuable and cherished right of freedom of expression and speech may at times have to be subjected to reasonable subordination to social interests, needs and necessities to preserve the very core of democratic life— Preservation of public order and rule of law. At some such grave situation at least the decision as to the need and necessity to take prohibitory actions must be left to the discretion of those entrusted with the duty of maintaining law and order, and interposition of Courts—Unless a concrete case of abuse or exercise of such sweeping powers for extraneous considerations by the authority concerned or that such authority was shown to act at the behest of those in power, and interference as a matter of course and as though adjudicating an appeal, will defeat the very purpose of legislation and legislative intent. *State of Karnataka* v. *Praveen Bhai Thogadia,* AIR 2004 SC 2081 : (2004) 4 SCC 684 : 2004 SCC (Cri) 1387 (1394-95) : 2004 CrLJ 1825.

COMMUNICATION

[7823] ● ***Communication.***—The argument of the appellant is that the statements to PW-2 that he would give her jewels, and that he had gone to the middle house to get them were inadmissible under section 122 of the Evidence Act being communications made to his wife. This is plainly so, and the Courts below ought not to have taken this evidence into consideration. This is the evidence of PW-2 that the accused was seen in the early hours of the 27th May, 1952 while it was still dark, coming down the roof of his house, that he went to the bhusha kothri and came out again and had a bath and put on the *dhoti* again. This is not inadmissible under section 122, as it has reference to acts and conduct of the appellant and not to any communication made by him to his wife. *Ram Bharosey* v. *State of Uttar Pradesh*, AIR 1954 SC 704 : 1954 CrLJ 1755.

[7824] ● ***Decision of continued detention—Communication of.***—Section 14 of the Jammu and Kashmir Preventive Detention Act entitles continued detention and does not provide for any formal order. The decision of Government to continue detention beyond three months need not necessarily be communicated to him. *Mohammed Afzal Khan* v. *State of J&K*, AIR 1957 SC 173 : 1957 CrLJ 320 : 1957 (1) Mad LJ (Cr) 62.

[7825] ● ***Objection against production of document—Communication of—In official confidence.***—In dealing with objection against the production of a document raised under section 124, Evidence Act Court would have to determine whether the communication in question has been made in official confidence. If the answer to the said question is in the negative then the document has to be produced; if the said answer is in the affirmative then it is for the officer concerned to decide whether the document should be disclosed or not. *State of Punjab* v. *Sodhi Sukdev Singh*, AIR 1961 SC 493 : (1961) 2 SCR 371.

[7826] ● ***Communication—Meaning of.***—In order that the detenue should be in position effectively to make his representation against the order, he should have knowledge of the grounds of detention, which are in the nature of the charge against him setting out the kinds of prejudicial acts which the authorities attribute to him. Communication, in this context, must, therefore, mean imparting to the detenue sufficient knowledge of all the grounds on which the order of detention is based. Thus where the grounds are several and are based on numerous speeches said to have been made by the accused himself on different occasions and different dates. Naturally, therefore, any oral translation or explanation given by the police officer serving those on the detenue would not amount to communicating the grounds. Communication, in this context must mean bringing home to the detenue effective knowledge of the facts and circumstances on which the Order of detention is based. The High Court was wrong in its conclusion that in every case communication of the grounds of detention in English, so long as it continues to be the official language of the State, is enough compliance with the requirements of the Constitution. If the detained person is conversant with the English language, he will naturally be in a portion to understand the gravamen of the charge against him and the fact and circumstances on which the order of detention is based. But to a person who is not so conversant with the English language in order to satisfy the requirements of the Constitution, the detenue must be given the grounds in a language which he can understand and in a script which he can read, if he is a literate person. *Harikrishan* v. *State of Maharashtra*, AIR 1962 SC 911 (914) : (1962) 1 CrLJ 797 : 1962 Supp (2) SCR 918.

[7827] ● ***Communication in official confidence.***—The communication must be in official confidence. Cables sent to or received through telegram-office do not answer a document communicated in official confidence. No privilege can be claimed in respect of those cables. *Husain Umar* v. *Dalip Singhji*, AIR 1970 SC 45 (52) : (1969) 3 SCC 429 : (1970) SCC (Cri) 99 : 1970 CrLJ 9 : (1970) 1 SCR 130.

[7828] ● ***Communication—Meaning of.***—The ordinary meaning of the word "Communicate" is to impart, confer or transmit information. (Cf. Shorter Oxford English Dictionary, Vol. 1, at p. 352). Where the order of suspension in question was published in the Gazette though that was after the date when the respondent was to retire. But the point whether it was communicated to him before that date. *Held,* that, once an order is issued and it is sent out to the concerned Government servant, it must be held to have been communicated to him. *State of Punjab* v. *Khem Raj*, AIR 1970 SC 214 (218, 219) : (1969) 3 SCC 28.

[7829] ● ***Order of suspension—Takes effect from date of communication—Not from date of***

actual receipt.—Once an order is issued and it is sent out to the concerned Government servant, it must be held to have been communicated to the Government servant. It is difficult to accept the view that it is only from the date of the actual receipt by him that the order becomes effective. If that be the true meaning of communication, it would be possible for a Government servant to effectively thwart an order by avoiding receipt of it by one method or the other till after the date of his retirement, even though such an order is passed and despatched to him before such date. An officer, against whom action is sought to be taken, thus may go away from the address given by him for service of such orders or may deliberately give a wrong address and thus prevent or delay its receipt and be able to defeat its service on him. Such a meaning of the word 'communication' ought not to be given unless the provision in question expressly so provides. *State of Punjab* v. *Khem Raj*, AIR 1970 SC 214 at 219 : (1963) 3 SCC 28 : 1970 Lab IC 271.

[7830] ● ***Communication between spouses during marriage.***—In the instant case, the father-in-law brought a criminal action for defamation against his son-in-law for some libellous statements made by the son-in-law in his letter to his wife *i.e.* daughter of the complainant. The letter was produced by the complainant, the daughter of the complainant was not required to be summoned, the letter being available to the complainant father-in-law, the accused objected to the disclosure of the communication on the ground that the letters between the spouses during the marriage are privileged. The plea is not acceptable except where the spouses to whom the communication is made is a witness and claims privilege from disclosure, evidence as to communication between husband and wife during marriage is admissible. *M.C. Verghese* v. *T.J. Ponnan*, AIR 1970 SC 1876 : (1970) 3 SCC 513 : (1970) SCC (Cri) 119 : 1970 CrLJ 1651 : (1969) 2 SCR 692.

[7831] ● ***Admissibility in evidence of communication made during marriage—Bar as to.***—The bar to admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be judged in the light of the status at that date and not the status at the date when evidence is sought to be given in Court. *M.C. Verghese* v. *T.J. Ponnan*, AIR 1970 SC 1876 : (1970) 3 SCC 513 : (1970) SCC (Cri) 119 : 1970 CrLJ 1651 : (1969) 2 SCR 692 : 1968 Ker LT 904 : (1970) 2 SCJ 353 : 1970 Mad LJ (Cr) 636.

[7832] ● ***Duty to communicate judgment to trial Court.***—In the instant case, the leave petition had been dismissed on an earlier occasion on the score that the petitioners had not surrendered to judicial custody which is more or less a condition precedent to seeking the leave of this Court to file an appeal. However, the petitioners point out in the present petition for restoration of SLP that although they had offered their person and surrendered before the Assistant Sessions Judge, requesting that they be remanded to jail custody, the Court declined to take them into custody for want of receipt of judgment from the High Court. It is unfortunate that when High Court deliver judgments confirming the conviction and sentence, there is a long delay in communicating the fact of affirmation of the sentence to the trial Courts. A sentence should not be delayed at least after it is confirmed by the High Court but when this happens on account of the indifference of the administrative side of the High Court in the mechanical process of communication to the trial Court, it speaks sadly of the management side of our Court system. We wish that more business-like procedures in such matters were evolved so that the rule of law need not suffer a new shock on account of messy management of judicial business rectifiable by a little more promptitude and attention. *Muktinarain Jha* v. *State of Bihar*, AIR 1978 SC 770 (771) : (1978) 1 SCC 497 : (1978) SCC (Cri) 131 : 1978 CrLJ 763 : 1978 CrLR (SC) 85.

COMMUNITY

[7833] ● ***Word "community" occurring in Section 133(1)(b), CrPC connotation of.***—Section 133(1)(b) relates to trade or occupation which is injurious to health or physical comfort. It itself deals with physical comfort to the community and not with those acts which are not in themselves nuisance but in the course of which public nuisance is committed. In order to bring a trade or occupation within the operation of this section, it must be shown that the interference with public comfort was considerable and a large section of the public was affected injuriously. The word "community" in clause (b) of Section 133(1) cannot be taken to mean residents of a particular house. It means something wider, that is, the public at large or the residents of an entire locality. The very fact that the provision occurs in a chapter with "public nuisance" is indicative of this aspect. It would, however, depend on the facts situation of each case and it would be hazardous to lay down any straitjacket formula.

The conduct of the trade must be injurious in *praesenti* to the health or physical comfort of the community. There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted. Unless there is such imminent danger to the health or physical comfort of that community or the conduct of the trade and occupation is in fact injurious to the health or the physical comfort of that community, an order under Section 133 cannot be passed. A conjoint reading of Sections 133 and 138 of the Code discloses that it is the function of the Magistrate to conduct an enquiry and to decide as to whether there was reliable evidence or not to come to the conclusion to act under Section 133. *Kachrulal Bhagirath Agarwal* v. *State of Maharashtra*, AIR 2004 SC 4818 : (2005) 9 SCC 36 : 2005 SCC (Cri) 1191 (1196, 1197) : 2004 CrLJ 4634 : 2004 (4) Crimes 99.

[7834] ● ***Word "Community" explained.***—Section 133, CrPC relates to trade or occupation which is injurious to health or physical comfort to the community and not with those acts which are not in themselves nuisance but in the course of which public nuisance is committed. In order to bring a trade or occupation within the operation of this section, it must be shown that the interference with public comfort was considerable and a large section of the public was affected injuriously. The word "community" in clause (b) of Section 133(1) cannot be taken to mean residents of a particular house. It means something wider, that is, the public at large or the residents of the entire locality. *Suhelkhan Khudyarkhan* v. *State of Maharashtra*, AIR 2009 SC 1868 (1871) : 2009 (2) Crimes 220 (SC) : 2009 (5) SCR 1142.

COMMUTATION

[7835] ● ***Commutation.***—The Code of Criminal Procedure and along with it Sections 401 and 402-A thereof, relating to commutation of sentence having been made specifically applicable by the Code of Criminal Procedure (Amendment) Act, 1951 to all Part B States, the prerogative under the old Cochin Law must in any case be deemed to have been repealed or abrogated by competent legislative authority after the coming into force of the Constitution. "The sentences of death in the present appeals are liable to be reduced to life imprisonment. We may add a foot note to the ruling in *Rajendra Prasad's* case (1979) 3 SCC 646 : 1979 SCC (Cri) 749. Taking the cue from the English legislation an abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting Court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large." *Dalbir Singh* v. *State of Punjab*, AIR 1979 SC 1384 : (1979) 3 SCC 745 : 1979 SCC (Cri) 848 : 1979 CrLJ 1058.

[7836] ● ***Section 433-A CrPC prospective.***—The section declares emphatically an imperative intent to keep imprisoned for at least 14 years those who fall within the sinister categories spelt out in the operative part of the section. The section overrides any special or local law as regards remissions and short sentencing schemes. Section 433-A is prospective. It not only excludes Section 432 but also subjects operation of Section 433(a) to serious restrictions and also excludes all contrary Prison Rules in respect of convicts contemplated by it. *Maru Ram* v. *Union of India*, AIR 1980 SC 2147 : (1981) 1 SCC 107 : 1980 CrLJ 1440.

[7837] ● ***Laws of remission and short-sentencing.***—Let us assume for a moment that the laws of remission and short-sentencing are enacted under Entry 4 of List II. In that event the States' competency to enact cannot be challenged. After all, even in prison-prisoner legislation, there may be beneficent provisions to promote the habilitative potential and reduce warder-prisoner friction by stick-cum-carrot strategies. Offer of remission, paroles, supervised releases, opportunities for self-improvement by family contacts, time in community work centres and even meditational centres, can properly belong to prison legislation. Rewards by remissions, like punishments by privations are permissible under Entry 4 of List II. Indeed, progressive rehabilitatory prison laws which have a dynamic correctional orientation and reformatory destination, including meaningful intermissions and human remissions is on the Indian Agenda of unfulfilled legislations. *Maru Ram* v. *Union of India*, AIR 1980 SC 2147 : (1981) 1 SCC 107 : 1980 CrLJ 1440.

[7838] ● ***Object of 433A CrPC.***—The object of Section 433-A CrPC, 1973 is that those, governed by it, shall not be released unless they have served a sentence of at least, 14 years' imprisonment. *State of Andhra Pradesh* v. *G.M. Morey*, AIR 1982 SC 1195 : (1982) 2 SCC 436 : 1982 SCC (Cri) 464 : 1982 CrLJ 1571 : 1982 CrLR (SC) 284 : 1982 UJ (SC) 473 : 1982 All Cr Cas 210 (SC) : 1982 SC Cr R 185.

[7839] ● ***Section 433-A—Not retrospective.***—Section 433-A is not retrospective in operation. *State of A.P.* v. *G.M. Moray*, AIR 1982 SC 1195 : (1982) 2 SCC 436 : 1982 CrLJ 1571 : 1982 All Cr R 270 : 1982 BBCJ (SC) 143. TO THE SAME

EFFECT : (1) *G.M. Moray* v. *Govt. of A.P.*, AIR 1982 SC 1163 : (1982) 2 SCC 433 : 1982 CrLJ 1249.

[7840] ● ***Section 433-A—Applicability and object.***—Section 433A CrPC does not govern all life convicts. It does not apply to those convicted and sentenced to life imprisonment before its commencement. It does not apply to those convicted and sentenced to life imprisonment for offences not punishable with death, such as, Sections 304, 307, 326, IPC *etc.* Those convicted and sentenced to life imprisonment after the commencement of Section 433A, CrPC for offences, for which the sentence of death could have also been imposed alone, are governed by Section 433A, CrPC. The effect of Section 433A, CrPC on those that are governed by it, is that they must undergo imprisonment for a minimum period of 14 years. Those, that are not governed by Section 433A, CrPC, are not bound to undergo imprisonment for a minimum period of 14 years, being eligible for such remissions as may be granted to them by the Government. *State of Andhra Pradesh* v. *G.M. Morey*, AIR 1982 SC (1195) : (1982) 2 SCC 436 : 1982 SCC (Cri) 464 : 1982 CrLJ 1571 : 1982 CrLR (SC) 284.

[7841] ● ***Premature release of lifers under para 516-B Punjab Jail Manual.***—Para 651B of the Manual itself contained executive instructions and had no force of a statutory rule. If that be so it would always be open to the State Government from time to time to alter or amend or even withdraw such executive instructions by issuing fresh instructions. In other words any existing executive instructions could be substituted by issuing fresh executive instructions for processing the cases of lifers for premature release but once issued these must be uniformly and invariably applied to all cases of lifers so as to avoid the charge of discrimination under Article 14.

A sentence of imprisonment for life is a sentence for the remainder of the natural life of the convict and there is no question of releasing such a convict earlier in the absence of a formal order of commutation passed by the State Government either under Section 55, IPC or Section 433(b) of CrPC, 1973 and that even the Remission Rules, though statutory, cannot override the statutory provisions contained in the Penal Code. In other words, unlike the cases of prisoners sentenced to terms of imprisonment, in the case of lifers even the Remission Rules though statutory are of no avail in the absence of a formal order of commutation either under Section 55, IPC, or Section 433(b) of CrPC, 1973. Admittedly, in the case of none of the petitioners before us has any order of commutation been passed by the State Government under either of the said provisions. *Sadhu Singh* v. *State of Punjab*, AIR 1984 SC 739 : (1984) 2 SCC 310 : 1984 SCC (Cri) 241 : 1984 CrLJ 404 : 1984 CrLR (SC) 63.

[7842] ● ***Male prisoner under 20 years of age at the time of commission of offence—Premature release of—When.***—Rule 516-B(b) of Punjab Jail Manual provides that a male prisoner aged below 20 years at the time of commission of offence and serving a single sentence of more than 20 years shall be entitled to be considered for premature release after serving 10 years of detention. Standing Board constituted for the purpose is directed to consider premature release of prisoner. *Hiralal* v. *State of Jammu and Kashmir*, AIR 1984 SC 1239 : 1984 Supp SCC 682 : 1985 SCC (Cri) 140 : 1984 CrLJ 995 : 1984 CrLR (SC) 265.

[7843] ● ***Adolescent offender convicted of capital offence sentenced to life imprisonment.***—The State Government of Tamil Nadu cannot keep any adolescent offender who is convicted of a capital offence but sentenced to imprisonment for life in respect of whom an order is made under Section 10A of the Tamil Nadu Borstal Schools Act in a Borstal School or in any other kind of detention after he has attained 23 years of age. We, therefore, direct the Government of the State of Tamil Nadu to release all such inmates of the Borstal Schools in Tamil Nadu who have attained 23 years of age forthwith. *C. Elumalai* v. *State of Tamil Nadu*, AIR 1985 SC 118 : (1984) 4 SCC 539 : 1985 SCC (Cri) 1 : 1985 CrLJ 510 : 1985 CrLR (SC) 33 : 1985 (1) Crimes 650.

[7844] ● ***Person sent to Borstal School—Not to be detained beyond age of 23 years.***—In this case the respondent was convicted of an offence under Section 302, IPC and sentenced to imprisonment for life but as he was 20 years old, the State Government passed orders under Section 10A of the A.P.Borstal Schools' Act and sent him to the Borstal School. As he completed 23 years of age but was not released from the School, he moved the High Court of A.P. for his release. The High Court ordered his release. Against the said order the Government preferred this appeal by special leave. It was submitted on behalf of the appellant that, while a person detained in a Borstal School under Section 10-A of the Act was entitled to be released on his attaining 23 years of age before the commencement of Section 433A of the CrPC, he could not be now released until he had undergone 14 years of imprisonment as prescribed by Section 433A if he was a person who was sentenced to imprisonment for life for an offence for which death is also one of the punishments prescribed by law. Now the crucial question was whether the respondent herein should actually undergo imprisonment for a minimum period of 14 years as insisted upon by Section 433A of the Code. Section 433A came into force on December 18, 1978. The above contention obviously overlooked the words 'prison' and 'imprisonment' in Section 433A of the Code and effect of an order made by the State Government under Section 10A read with Section 8 of Act. As soon as an order was made under Section 10A of the Act in respect of a person who was sentenced to imprisonment for life and was sent to a Borstal School pursuant thereto, he ceased to be a prisoner undergoing imprisonment. He would be a detenu in a Borstal School and the provisions of Section 8 of the Act would have to be given their full effect in his case also. Under Section 8 of the Act the person detained in a Borstal School could be kept there for a maximum period of 5 years and in no case after he had attained 23 years of age. There was no provision for sending back to prison except under Section 14 of the Act. If that Section was inapplicable there was no legal way in which he could be sent back to prison to satisfy the requirements of Sections 433-A of the Code. Moreover, an anomalous situation which would arise in the case of a person sent to a Borstal School under Section 10-A of the Act was that if the period of detention in a Borstal School was not to be counted as the period of imprisonment because detention was *in lieu* of imprisonment and because a Borstal School was not a prison then such person could not claim by way of credit the period of detention in a Borstal School while computing the 14 years of imprisonment mentioned in Section 433A of the Code. It was obvious that Parliament which was aware of laws like the Acts which were in force in the States did not choose to interfere with them by enacting Section 433A of the Code. If it intended to nullify or modify such laws the non-obstante clause in Section 433-A would have been more comprehensive including all local statutes enacted for the benefit of children and juvenile or adolescent offenders. In the light of the observations made in *Maru Ram's case*, AIR 1980 SC 2147 : 1980 CrLJ 1440 : (1981) 1 SCR 1196, Section 10-A of the Act remained unimpaired and it had to be given full effect even after the enactment of Section 433A of the Code. The Parliament never intended while enacting Section 433A to deny the benefit available to adolescent offenders under Section 10A of the Act. So construed, a person detained under Section 10A of the Act would have to be released on his attaining 23 years of age. *State of A.P.* v. *Vallabhapuram Ravi*, AIR 1985 SC 870 : (1984) 4 SCC 410 : 1984 SCC (Cri) 635 : 1984 CrLJ 1511 : 1984 CrLR (SC) 397 : (1984) 2 Crimes 552 : 1984 Cur CrJ (SC) 453 : 1985 SCCrR 1 : (1985) 1 SCWR 17 : 1984 CrAppR (SC) 376.

[7845] ● ***Premature release—Consideration for.***—Entitlement of convict for pre-mature release should be considered on the basis of prevailing executive instructions—Consideration for pre-mature release could not be deferred on the ground that convict had not completed 14 years of imprisonment. *State of Haryana* v. *Ram Diya*, AIR 1990 SC 1336 : (1990) 2 SCC 701.

[7846] ● ***Release of prisoner—Case of prisoner completing 14 years of detention in jail inclusive of remission.***—Paragraph 516-B provides that the case of every convicted prisoner (except female and males below 20 years at the date of the commission of the crime) sentenced to imprisonment for life or imprisonment aggregating to over 14 years and who has undergone a period of detention in jail amounting, together with remission earned to 14 years, 'shall be' submitted to the State Government, through the Inspector-General of Prisons, for orders. In the case of female prisoners or prisoners who were below 20 years on the date of the commission of the crime, reference is required to be similarly made to the State Government on their completing a detention period of 10 years inclusive of remissions. Clause (v), however, provides that notwithstanding anything contained in the earlier part of the paragraph, a Superintendent of Jail 'may', in his discretion, refer at any time for the orders of the State Government, the case of any prisoner sentenced to imprisonment for life whose sentence might in the Superintendent's opinion be suitably commuted to a term of imprisonment. It would appear from a plain reading of this paragraph that in the case of a prisoner who has completed 14 years of detention in jail, inclusive of remissions earned, it is imperative on the part of the Superintendent of the Jail to submit his case, through the I.G. of Prisons, to the State Government for consideration. The use of the word 'shall be submitted' bring out this intention when we contrast them with the word 'may' and the words 'in his discretion' used in Clause (v) thereto which begins with non obstante clause. Therefore, where the intention was to confer a mere discretion on the Superintendent of Jail it was made manifest by the use of the expression 'may' followed by the words 'in his discretion' and where the intention was to cast a duty to submit the case to the State Government, it was brought out by the word 'shall' preceding the words 'be submitted.... for the orders of the State Government'. We have, therefore, no doubt in our minds that paragraph 516-B, through an executive instruction, has been couched in language which clearly shows that in the former type of cases where the prisoner has completed 14 years of detention in jail, inclusive of remissions, his case must be referred to the State Government for consideration. Notwithstanding this limitation of completion of 14 years, Clause (v) confers a discretion on the Superintendent of the Jail to refer or submit the case of a prisoner to the State Government even before he has completed 14 years if in his opinion the case is fit for commuting the sentence. *State of Punjab* v. *Joginder Singh*, AIR 1990 SC 1396 : (1990) 3 SCC 318 : 1990 SCC (Cri) 419 : 1990 CrLJ 1464 : 1990 CrLR (SC) 273 : 1990 (2) Crimes 260.

[7847] ● ***Law governing suspension, remission and commutation of sentence—Statutory and constitutional.***—The law governing suspension, remission and commutation of sentence is both statutory and constitutional. The stage for the exercise of this power generally speaking is post-judicial, *i.e.*, after the judicial process has come to an end. The duty to judge and to award the appropriate punishment to the guilty is a judicial function which culminates by a judgment pronounced in accordance with law. After the judicial function thus ends the executive function of giving effect to the judicial verdict commences. *Ashok Kumar alias Golu* v. *Union of India*, AIR 1991 SC 1792 : (1991) 3 SCC 498 : 1991 SCC (Cri) 845 (857) : 1991 CrLJ 2483.

[7848] ● ***Commutation of death sentence to life imprisonment—Release of offender.***—Section 433-A, CrPC, 1973 begins with a non-obstante clause—notwithstanding anything contained in Section 432, CrPC—and proceeds to say that where a person is convicted for an offence for which death is one of the punishments and has been visited with the lesser sentence of imprisonment for life or where the punishment of an offender sentenced to death has been commuted under Section 433 into one of imprisonment for life, such offender will not be released unless he has served at least 14 years of imprisonment. Therefore, one who could have been visited with the extreme punishment of death but on account of the sentencing Court's generosity was sentenced to lesser punishment of imprisonment for life and another who actually was sentenced to death but on account of executive generosity his sentence was commuted under Section 433(a) for imprisonment for life have been treated under Section 433A as belonging to that class of prisoners who do not deserve to be released unless they have completed 14 years of actual incarceration. Thus the effect of Section 433A is to restrict the exercise of power under Sections 432 and 433 by the stipulation that the power will not be so exercised as would enable the two categories of convicts referred to in Section 433A to freedom before they have completed 14 years of actual imprisonment. This is the legislative policy which is clearly discernible from the plain language of Section 433-A of the Code. *Ashok Kumar alias Golu* v. *Union of India*, AIR 1991 SC 1792 : (1991) 3 SCC 498 : 1991 SCC (Cri) 845 (857) : 1991 CrLJ 2483.

[7849] ● ***Premature release of convict.***—In view of mandate of Section 433, CrPC, the High Court cannot make direction to prematurely release the respondent and set him at liberty forthwith. The High Court can only direct consideration of the case of premature release by the Govt. and cannot order premature release of the respondent itself. *State of Punjab* v. *Kesar Singh*, AIR 1996 SC 2512 : (1996) 5 SCC 495 : 1996 SCC (Cri) 1034 : 1996 CrLJ 3586. **TO THE SAME EFFECT :** (1) *Union Territory of Chandigarh* v. *Charanjit Kaur,* (1996) 7 SCC 492 : 1996 SCC (Cri) 484 : 1996 (1) Crimes 173 (SC).

[7850] ● ***Life convict—Premature release.***—By earning remissions a life convict does not acquire a right to be released prematurely. But if the Government has framed any rule or made a scheme for early release of such convicts then those rules or schemes will have to be treated as guidelines for exercising its power under Article 161 of the Constitution.

If this is the correct legal position then no life convict can validly contend that his case for premature release should be considered according to the Government policy/instructions that were in force on the date on which he came to be convicted as he acquired a right to get remissions as declared and to be released accordingly. If according to the Government policy/instructions in force at the relevant time the life convict has already undergone the sentence for a period mentioned in the policy decision/instructions, then the only right which he can be said to have acquired is the right to have his case put up by the prison authorities in time before the authorities concerned for considering exercise of power under Article 161 of the Constitution. Ordinarily, when an authority is called upon to exercise its powers that will have to be done consistently with the legal position and the Government decision instructions prevalent at that time. However, in order to see that a life convict does not lose any benefit available under the remission scheme which has to be regarded as the guideline, it would be just and proper to direct the State Government to treat the date on which his case is/was required to be put up before the Governor under Article 161 of the Constitution as the relevant date with reference to which their cases are to be considered. *State of Haryana* v. *Balwan*, AIR 1999 (SC) 3333 : (1995) 7 SCC 355 : 1999 SCC (Cri) 1193 : 1999 CrLJ 4299 : 1999 CrLR (SC) 699 : 1999 (3) Crimes 130.

[7851] ● ***Sentence commutation of.***—The appellant stood convicted under Section 16(1)(*a*) of the Prevention of Food Adulteration Act read with Section 7(i) thereof and was sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 2000. Learned counsel for the appellant made a plea for affording the benefit which has been given to the accused in *N. Sukumaran Nair* v. *Food Inspector*, (1997) 9 SCC 101 : 1997 SCC (Cri) 608 : 1995 CrLJ 3651. The said plea is made on the premise that the offence in this case took place in the year 1983 and the food article-groundnut oil on analysis was found not to contain any foreign substance or anything injurious to health and that it was found adulterated solely on the ground that its constituents fell below the standard very marginally.

This case seems to be almost on a parallel with the facts enumerated in the decision cited above. We are also persuaded to extend the same benefit which the appellant in the aforesaid decision was granted by this Court, as this would be an appropriate case for commutation of sentence under clause (*d*) of Section 433, CrPC, 1973. We, therefore direct the appellant to deposit in the Trial Court a sum of Rs. 10,000 as fine in commutation of the sentence of 6 month imprisonment within a period of 6 weeks from today and intimate to the appropriate Government that such fine has been deposited. On deposit of the fine, the State Government may formalise the matter by passing appropriate order under Cl. (*d*) of Section 433 of the CrPC. In the meanwhile, the appellant will remain on bail. *Santosh Kumar* v. *Municipal Corporation*, (2000) 9 SCC 151 : 2000 SCC (Cri) 1184 (1185) : 2000 CrLJ 2777.

[7852] ● ***Death sentence—Commutation of.***—"In the interest of justice, we commute the death sentence imposed upon the appellant and direct that the appellant shall undergo the sentence of imprisonment for life. We further direct that the appellant shall not be released from the prison unless he had served out at least 20 years of the imprisonment including the period already undergone by the appellant". *Shri Bhagwan* v. *State of Rajasthan*, AIR 2001 SC 2342 : (2001) 6 SCC 296 : 2001 SCC (Cri) 1095, 1105 : 2001 CrLR (SC) 425.

[7853] ● ***Sentence of "imprisonment for life" means whole of convicted person's natural life.***—Section 433(b) enables the appropriate Government, to commute the sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or for five under Section 433A, there is an embargo on that power by providing that where a sentence of imprisonment for life is imposed on the conviction of a person for an offence for which death is one of the punishments provided under the law, such person is not to be released from prison unless he served at least fourteen years of imprisonment. The question is considered by various decisions rendered by this Court and by the Privy Council and it has been reiterated that a sentence of imprisonment for life imposed *prima facie* be treated as imprisonment for the whole of the remaining period of the convicted person's natural life. It is also established law that rules framed under the Prisons Act do not substitute a lesser sentence of transportation for life. *Shri Bhagwan* v. *State of Rajasthan*, AIR 2001 SC 2342 : (2001) 6 SCC 296 : 2001 SCC (Cri) 1095 (1103) : 2001 CrLR (SC) 425.

[7854] ● ***Death sentence—Commutation of to life imprisonment.***—In the instant case, the death sentence imposed on accused shall be commuted to life imprisonment but he shall be incarcerated for the remainder of his life and that he shall not be let loose upon the society as he is a potential danger. *Subash Chander* v. *Krishan Lal*, AIR 2001 SC 1903 : (2001) 4 SCC 458 : 2001 CrLJ 1825 : (2001) 3 Scale 130.

[7855] ● ***Life imprisonment imposition of.***—In the peculiar circumstances of the case, apprehending imminent danger to the life of Subhash Chander and his family in future, taking on record the statement made on behalf of Krishan Lal (A1) we are inclined to hold that for him the imprisonment for life shall be the imprisonment in prison for the rest of his life. He shall not be entitled to any commutation or premature release under Section 401 of the CrPC, Prisoners Act, Jail Manual or any other statute and the Rules made for the purposes of grant of commutation and remissions. *Subash Chander* v. *Krishan Lal*, AIR 2001 SC 1903 : (2001) 4 SCC 458 : 2001 SCC (Cri) 735 : 2001 CrLJ 1825 : 2001 CrLR (SC) 454 : JT 2001 (4) SC 444.

[7856] ● ***Death sentence—Commutation of.***—Merely because 8 persons, convicted by the trial Court, were acquitted, by itself cannot be termed to be a justified ground for commuting the death sentence. However, as the High Court, presumably on general conspectus and upon consideration of facts of the case, found that the accused persons should not be awarded death sentence, we feel that for interfering with the discretion of the Court, further exceptional grounds are required to be made out. When two views about the quantum of sentence, a view which favours the grant of life in comparison of death is generally accepted. But for the exercise of the powers by the High Court in commuting the death sentence we had some reservations about the sentence awarded by the impugned judgment but in view of the exercise of discretion in commuting the death sentence we are not inclined to interfere with the sentence awarded to the accused persons specially A6, A7, A8. *Subash Chander* v. *Krishan Lal*, AIR 2001 SC 1903 : (2001) 4 SCC 458 : 2001 CrLJ 1825.

[7857] ● *Conviction and sentence when attaining finality.*—The decision in *Harbans Singh* v. *State of U.P.*, AIR 1982 SC 849 : (1982) 2 SCC 101 : 1982 CrLJ 795 does not lay down any rule that an appeal/special leave petition already disposed of by the this Court is to be reheard when an appeal preferred by another set of accused involved in the same incident comes up for consideration at a later stage.

In this present appeals, appellants Gurdev Singh and Satnam Singh were not tried alongwith appellants Piara Singh and Sarabjit Singh. As appellants Gurdev Singh and Satnam Singh were absconding, they could be tried only subsequently in a separate trial. As the special leave petition of Piara Singh and Sarabjit Singh came to be finally disposed of on 28.2.1997 and the conviction and sentence entered against them attained finality, it is not just, proper and legal to hear the appeal and consider the question involved therein on merits again. *Gurdev Singh* v. *State of Punjab*, AIR 2003 SC 4187 : (2003) 7 SCC 258 : 2003 CrLJ 3764.

[7858] ● *Commutation/remission of sentence—Relevant factors to be considered.*—In the instant case, where the appellant's killed two persons in a marriage ceremony on the course of a frivolous quarrel triggered off by sarcastic remark of one of the deceased, the Supreme Court held as under :

> "We would like to observe that the facts and circumstances of this case *prima facie* justify remission of the sentence to some extent. But, having found the appellants guilty under Section 302 read with 34, IPC, it is not possible for this Court to reduce the sentence of life imprisonment. It is open to the appellants to approach the State Government/Governor of the State for the commutation or remission of sentence. We may mention that apart from the unexpected turn of events that have taken place, the incident had taken place about three decades back. It is also brought to our notice that the appellant Suresh Chandra is aged about 80 years how and he is ailing. We have no doubt that the applications for commutation/remission of sentence will be duly considered with expedition, taking into account the relevant circumstances." *Suresh Chandra* v. *State of U.P.*, AIR 2005 SC 3120 : (2005) 6 SCC 130 : 2005 SCC (Cri) 1364 (1369) : 2005 CrLJ 3449.

[7859] ● *Premature release of life convicts—Policy decision.*—The Supreme Court issued a limited notice as to why the State shall not be directed to consider the case of respondent in terms of *Mohender Singh,* 2007 AIR SCW 6988. In view of the limited notice issued by the Court the counsel for appellants although was not permitted to raise the contention that the date specified by the Court in *Balwan Singh,* 1999 AIR SCW 3327 should be considered to be cut off date, the Supreme court observed that "the directions contained therein" cannot be held to be declaration of law within the meaning Article 141 of the Constitution of India.

"This Court therein did not have any occasion to consider the legality and/or validity of the policy decision of the State *vis-à-vis* the Prison Rules".

"The right to ask for remission of sentence by a life convict would be under the law as was prevailing on the date on which the judgment of conviction and sentence was passed. If the executive instructions cannot be given a retrospective effect being not in consonance with the Prisoner's Rules framed under the Prison Act, we fail to understand as to how the said decision constitutes a binding precedent".

We, therefore, are of the opinion that keeping in view the decision of this Court in *Mahender Singh,* 2007 (12) Scale 669, the impugned judgment should be modified directing the appellant to consider the cases of the respondents. It is, therefore, directed that if the respondents have not already been released the State shall consider their cases in terms of the judgment of this Court in *Mahender Singh's* case (supra) having regard to the policy decision as was applicable on the date on which they were convicted and not on the basis of the subsequent policy decision of the year 2002. *State of Haryana* v. *Bhup Singh,* AIR 2009 SC 1252 : (2009) (2) SCC 268 : 2009 CrLJ 1134 : 2008 (17) SCR 1306.

[7860] ● *Suspension or remission of sentence.*—Section 432(1) CrPC empowers the State

Government to suspend or remit sentences of any person sentenced to punishment for an offence, at any time, without conditions or upon any conditions that the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. Section 433-A CrPC imposes restriction on powers of remission or commutation where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he has served at least fourteen years of imprisonment. *State of Haryana* v. *Jagdish*, AIR 2010 SC 1690 : (2010) 4 SCC 216 : 2010 CrLJ 2398 : JT 2010 (3) 341 : 2010 (2) Crimes 73 (SC).

[7861] ● ***Clemency power of executive under Art. 72 and 161 of Constitution.***—"The clemency power of the executive is absolute and remains unfettered for the reason that the provisions contained under Article 72 or 161 of the constitution cannot be restricted by the provisions of Sections 432, 433 and 433-A, CrPC, though the authority has to meet the requirements while exercising the clemency power. . . . To say that clemency power under Art. 72/161 of the constitution cannot be exercised by the President or the Governor, as the case may be, before a convict completes the incarceration period provided in the short sentencing policy, even in an exception case, would be mutually in consistent with the theory that clemency power is unfettered". *State of Haryana* v. *Jagdish*, AIR 2010 SC 1690 : (2010) 4 SCC 216 : 2010 CrLJ 2398.

[7862] ● ***Remission of sentence—Power of sovereign.***—The power of the sovereign to grant remission is within its exclusive domain and it is for this reason that our Constitution makers went on to incorporate the provisions of Article 72 and Article 161 of the Constitution of India. This responsibility was cast upon the Executive through a Constitutional mandate to ensure that some public purpose may require fulfillment by grant of remission in appropriate cases. This power was never intended to be used or utilised by the Executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way, wipe out the conviction. It is a power which the sovereign exercises against its own judicial mandate. The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon. *State of Haryana* v. *Jagdish*, AIR 2010 SC 1690 : 2010 CrLJ 2390.

COMPANY

[7863] ● ***Company.***—*Companies Act, 1913, S. 179.*—Section 179 of the Companies Act provides that an Official Liquidator shall have power to prosecute or to institute criminal proceedings on behalf of the company, with the sanction of the Court".

This section lays down the powers of the liquidator regarding institution of criminal proceedings, and does not impose any limitation on the powers of a criminal Court to take cognizance of a criminal case upon a private complaint. It is only an enabling provision which enables the liquidator to take criminal proceedings with the sanction of the Court. It does not control the general law of the land.

The general power of a criminal Court to take cognizance of offences can be restricted only when such a restriction is placed by the express words of a statute, as in Sections 132, 195, 196 and 197, CrPC or in clause 16 of the Drugs Control Order, 1943, or sanction of the Prevention of Corruption Act, and unless when a prosecution without sanction is in direct contravention of any such statutory provision, it cannot be claimed by any accused against whom a criminal proceeding on a private complaint has been instituted, that the Court which has taken cognizance of that offence is incompetent to do so.

Section 179 of the Companies Act cannot operate as a bar against the prosecution of a Director of a company on a charge-sheet submitted by the Police, even though the first information report of the offence committed was lodged by the Official Liquidator. *Jaswantrai Munilal Akhaney* v. *State of Bombay*, AIR 1956 SC 575 : 1956 CrLJ 1116 : 1956 SCR 483.

[7864] ● ***Complaint by liquidator—Absence of direction by Court or hearing of accused persons.***—*Companies Act, 1913, Ss. 237 (1) and (6); S. 179.*—Section 179 of the Companies Act deals with the powers of a Liquidator to institute or defend proceedings with the sanction of the Court. Section 237(1) deals with the powers of the Court to give directions to a Liquidator for the prosecution of delinquent directors or officials of a company. Section 237(2) requires that when any matter is referred to the Registrar of Companies, the Registrar shall produce the papers before the Advocate-General and shall institute proceedings only if the Advocate-General so advises and only after giving the accused an opportunity of making a statement in writing and of being heard thereon.

Section 237(2) applies only to a Registrar and not to a Court acting under section 237(1) and the obligation to give such an opportunity to the accused before prosecuting him does not attach to a Court acting under section 237(1).

Section 237(1) does not lay down any procedure in the matter of the directions which a Court can give to a Liquidator, and nowhere in the Act has it been laid down that the Court must first give a hearing to the persons proposed to be prosecuted before giving the direction to prosecute to a Liquidator, or that a direction given by a Judge to a Liquidator to prosecute a director or other official is a condition precedent to the lawful institution of criminal proceedings by a Liquidator.

Section 179 does not require any sanction for commencing prosecution. It does not purport to impose any limitations on the powers of criminal Court to entertain a criminal prosecution launched by a Liquidator in the ordinary course under the Code of Criminal Procedure. This section does not contain any prohibitory words corresponding to the words contained in Sections 196 and 197, CrPC.

In the present case a liquidator had instituted proceedings against directors of a company without obtaining any sanction or order from a Court with referring the matters to the Registrar, and without giving the accused any opportunity to make a statement. The complaint made by the Liquidator did not suffer from any infirmity and the proceedings were perfectly in order. *Sailendra Nath Sinha (Dr.)* v. *Jasodha Dulal*, AIR 1959 SC 51 : 1959 CrLJ 242 : 1959 SCR 1263.

[7865] ● ***"In the way of his business as agent"—Meaning of.***—*Companies Act, 1956, S. 252.*—As Chairman and Principal officer of the Bharat Insurance Company, Dalmia had the power on behalf of the company to operate on those accounts. The fact that he did not inform the bank, that he had the powers to operate the account does not mean that the power which the company had entrusted to him is nullified. One may have dominion over property, but may not exercise any power which he could exercise with respect to it. Non-exercise of the power will not make the dominion entrusted to him nugatory. Directors are not only agents, but they are in some sense and to some extent trustees or in the position of the trustees of the company's money and property and agents in the transactions which they enter into on behalf of the company. Dalmia as a Director and Chairman of the company was an agent of the company. Directors are also no doubt trustees of assets which come into their hands, or which are under their control. We are, therefore, of the opinion that Dalmia and Chokhani were entrusted with the dominion over the funds of the Bharat Insurance Company in the Banks.

The effect of Raghunath Rai's delivering the blank cheques signed by him to Chokhani in the ordinary course of business might amount to putting Chokhani in sole control, over the funds of the Insurance company in the Bank. The signing of cheques facilitated Chokhani's committing breach of trust.

It was then contended by Chokhani and Dalmia that the term 'agent' in Section 409, IPC is restricted only to those persons who carry on the profession of agents. What Section 409, IPC requires is that person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property, or with dominion over that property, in the way of his business as an agent. The expression 'in the way of his business' means that the property is entrusted to him 'in the ordinary course of his duty or habitual occupation or profession or trade'. He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied, if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. Chokhani was appointed agent of the Bharat Insurance Company on January 31, 1951. Dalmia, as a Director and chairman of the company, was an agent of the company. Both Dalmia and Chokhani being agents of the company, the control, if any, they had over the securities and the funds of the company would be in their capacity as agents of the company and would be in the course of Dalmia's duty as the Chairman and Director; or in the course of Chokhani's duty as a duly appointed agent of the company. Hence any criminal breach of trust committed by them with respect to the securities and funds of the company would clearly be an offence under section 409, IPC.

In view of the above, the appellants have been rightly convicted of the offences charged. *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821 : (1962) 2 CrLJ 805 : (1963) 1 SCR 253.

[7866] ● ***Offence of conspiracy to commit criminal breach of trust in respect of funds of company and making false returns etc.***—In the instant case, the police, after investigation submitted a report under section 173, CrPC for offence of conspiracy to commit criminal breach of trust in respect of the funds of the company and making false returns, balance-sheets and accounts in furtherance of the object of conspiracy with committing offences punishable under Sections 409 and 477-A, Penal Code and under section 282 of the Companies Act. The contention of the appellants that the Penal Code will not be applicable to a charge made against the Directors in relation to the officers of the Company and the prosecution, if any, may be instituted under the provisions of the Companies Act cannot be accepted. *Alamohan Das* v. *State of West Bengal*, AIR 1970 SC 863 : 1970 CrLJ 860 : (1969) 3 SCR 520.

[7867] ● ***Obligation to pay dividend arises at place of company's registered office.***—*Companies Act, 1956, S. 205.*—A dividend once declared is a debt payable by the Company to its registered share-holders. It is clear from Section 205 of the Companies Act, 1956 that although under sub-section (3) no dividend shall be payable except in cash, sub-section (5) authorises a company to pay the dividend by a cheque or a warrant. Therefore, dividend can be said to have been paid either when it is paid in cash or when a cheque or a warrant is sent through the post directed to the registered address of the shareholder entitled to payment thereof.

Once, therefore, a dividend warrant is posted at the registered address of the shareholder, dividend is deemed to have been paid. The offence under section 207 of the Companies Act takes place when there is failure to pay or a cheque or a warrant thereof is not posted to the registered address of the shareholder. It will be noticed that the section makes the failure to post within the prescribed period and not the non-receipt of the warrant by the shareholder an offence. Therefore, the obligation to pay within the prescribed period is satisfied once the dividend is paid or a cheque or a warrant therefor is posted at the registered address of the shareholder. *Prima facie,* both the obligation to post the dividend warrant and the failure to satisfy that obligation would occur at the place where the obligation is to be performed and that would be the registered office of the company and not the address at which the warrant is to be posted. The offence under section 207 is the failure to pay dividend or to post a cheque or a warrant for the dividend amount. Since the obligation to post the warrant arose at the registered office of the company, failure to discharge that obligation also arose at the registered office of the company. Therefore, the alleged offence must be held to have been taken at the place where the company's registered office is situated and not where the dividend warrant, when posted would be received. *Hanuman Prasad Gupta* v. *Hiralal*, AIR 1971 SC 206 : (1970) 1 SCC 437 : (1970) SCC (Cri) 190 (192, 193, 195) : 1971 CrLJ 262 : (1970) 3 SCR 788.

[7868] ● ***Sale of pig iron in contravention of clause (5) of iron and Steel Control Order.***—*Essential Commodities Act, 1955, Ss. 120 and 10.*—In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel control order was made by the Company. In fact the company was not charged with the offence at all. The liability of the persons in charge of the company only arises when the contravention is by the company itself. Since in this case there is no evidence and no finding that the company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible. The circumstance that the two respondents were in management of the affairs of the company and the firm and were aware of the arrival of the goods would create suspicion against the respondents; but that suspicion could not take the place of proof. In order to justify conviction of the respondents, evidence was needed to show that they knew of the sale or were parties to it. No such evidence was available. So their conviction was not justified. *State of Madras* v. *Parekh*, AIR 1971 SC 447 : (1970) 3 SCC 491 : (1971) SCC (Cri) 97 : 1971 CrLJ 418.

[7869] ● ***Appeal against order of criminal Court passed in trial of Offences under Companies Act.***—*Companies Act, 1956, S. 624B.*—Section 624-B of the Companies Act does not confer any right of appeal from any order passed by a Criminal Court in respect of any offence under the provisions of the Companies act. The right to appeal to the High Court in the present cases of acquittal is governed by Section 417 of the CrPC a right of appeal. Section 624-B only mentions as to the person through whom appeal is presented. An appeal under section 417(3), CrPC against acquittal is competent only when there is special leave granted by the High Court. *Assistant Registrar of Companies, West Bengal* v. *Standard Paint Works (Pvt.) Ltd.*, AIR 1971 SC 1115 : (1971) 2 SCC 85 : (1971) SCC (Cri) 388 (390) : 1971 CrLJ 827.

[7870] ● ***Failure to file copies of balance sheet and profit and loss account with Registrar.***—It was urged before us that the principle accepted by this Court in *State of Bombay* v. *Bandhan Ram Bhandani,* AIR 1961 SC 186 that a company or its directors in a prosecution under section 32 and Section 133 of the Companies Act, 1913 could not in defence to such prosecution rely upon their own failure to call the general body meeting, applies with equal force to a prosecution under section 134 of the Act. But it appears to us that there is a very clear distinction between Ss. 32 and 133 on the one hand and Section 134 on the other hand. Under Section 133 the failure to comply with Section 131 is made punishable. But Section 134 lays down that after balance-sheet and profit and loss account on the income and expenditure account, as the case may be, have been laid before the company at the general meeting three copies thereof shall be filed with the Registrar and not to do so is made punishable under sub-section (4) and a failure. The responsibility of sending three copies of the balance-sheet and profit and loss account or the income and expenditure account, as the case may be, arises only after they have been laid before the company at the general meeting. Without so laying, copies could not be sent to the Registrar and even if they are sent it would not be a compliance with the provisions of the section. It is possible to conceive of the law providing that the balance-sheet and profit and loss account shall be sent to the Registrar even without the necessity of their being laid before the general body meeting of the Company. In that case, any failure to do so would be punishable and the question whether a general body meeting had been held and the balance-sheet and profit and loss account have been laid before it will not arise. Therefore, the condition precedent or the essential prerequisite of the balance-sheet and the profits and loss account being laid before the general meeting of the company not being fulfilled, the requirement of Section 134 cannot be complied with. Under Section 134 of the 1913 Act the obligation to send a copy of the balance-sheet and profit and loss account is dependent completely on its being laid before a general meeting. It is clear, therefore, that on principle and authority it should be held that no offence was committed by the directors in this case under section 134. They might have been guilty of offences under Ss. 76 and 133 but not under section 134. *State of Andhra Pradesh* v. *Andhra Provincial Potteries Ltd.*, AIR 1973 SC 2429 : (1973) 2 SCC 786 : (1973) SCC (Cri) 1062 (1066, 1067, 1068) : 1973 CrLJ 1616 : 1973 CrLR (SC) 593 : (1974) 1 SCR 410.

[7871] ● ***Nomination under Section 17(2) of PFA Act Prosecution of person not nominated.***—On the plain meaning of Section 17 of the Prevention of Food Adulteration Act, 1954, when an offence has been committed by a company, where there is no nomination under section 17(2) of the Prevention of Food Adulteration act, 1954, every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business, is deemed to be guilty of the offence and is liable to be proceeded against and punished. Notwithstanding the nomination of a person under Section 17(2), any Director, Manager, Secretary or other officer of the company (not being a person nominated under sub-s. (2) of Section 17 can also be vicariously made liable if it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of such person. *Delhi Administration* v. *I.K. Nangia*, AIR 1979 SC 1977 (1979) : (1980) 1 SCC 258 : (1980) SCC (Cri) 220 : 1980 CrLJ 834 : 1980 CrLR (SC) 58 : (1980) 1 SCR 1016.

[7872] ● ***Charge in pro rata offer of new share not violative of basic character of private company.***—A change in the *pro rata* method of offer of new shares is not violative of the basic characteristics of a private company which becomes a public company by virtue of Section 43-A of the Companies act, 1956. To this limited extent only, but not beyond it, the provisions of sub-s. (1-A) of Section 81 can apply to such companies. *Needle Industries (India) Ltd.* v. *Needle Industries Newey (India) Holding Ltd.*, AIR 1981 SC 1298 : (1981) 3 SCC 333 : (1981) 3 SCR 698.

[7873] ● ***Conditions subjects to which deposits be invited or accepted.***—The power conferred by Section 58-A of the Companies Act, 1956 on the Central Government to prescribe the limits up to which, the manner in which and conditions subject to which deposits may be invited or accepted by non-banking companies had a definite object, namely, to check the abuse by the corporate sector and to protect the depositors/investors. Mischief was known and the regulatory measure was introduced to remedy the mischief. The conditions which can be prescribed to effectuate this purpose must a *fortiori*, to be valid, fairly and reasonably, relate to checkmate the abuse of juggling with the depositors'/ investors' hard earned money by the corporate sector and to confer upon them a measure of protection, namely, availability of liquid assets to meet the obligation of repayment of deposit which is implicit in acceptance of deposit. can it be said that the condition prescribed by the Companies (Acceptance of Deposits) Rules, 1975 are irrelevant or have no reasonable nexus to the objects sought to be achieved as to be arbitrary? The answer is emphatically in the negative. *Delhi Cloth and General Mills Co. Ltd* v. *Union of India*, AIR 1983 SC 937 : (1983) 4 SCC 166 : 1983 UJ (SC) 699 : (1983) 3 SCR 438.

[7874] ● *Section 58-A inserted by Companies Amendment Act not violative of permissible limit of delegated legislation.*—The Companies Act, 1956 as a whole and Section 58-A in part lay down a legislative policy, namely, gradual ever-widening and effective control of the corporate sector so as to ensure a measure of protection to the persons dealing with it. The policy is definite, guidelines are available from the history of the legislation and Companies Act taken as a whole and one cannot shut one's eye to articulated sickness in private sector undertakings all around so that this feeble measure extending only a semblance of protection can be struck down as arbitrary or as violative of the permissible limits of delegated legislation. *Delhi Cloth and General Mills Co. Ltd.* v. *Union of India*, AIR 1983 SC 937 : (1983) 4 SCC 166 : 1983 UJ (SC) 699 : (1983) 3 SCR 438.

[7875] ● *Placement before each House of Parliament every rule enacted sufficient to check transgression of permissible limits.*—*Companies Act, 1956, S. 58A (as inserted by Companies (Amendment) Act (41 of 1974).*—Moreover Deposit Rules have been framed in exercise of power conferred by Sections 58A and 642 of the Companies Act. Section 642 requires that every rule enacted in exercise of the power conferred by it, must be placed before each House of Parliament for a period of thirty days and both Houses have power to suggest modification in the proposed rules. This Control of Parliament is sufficient to check any transgression of permissible limits of delegated Legislation by the delegate. *Delhi Cloth and General Mills Co. Ltd.* v. *Union of India*, AIR 1983 SC 937 (950) : (1983) 4 SCC 166 : (1983) 3 SCR 438 : 1983 UJ (SC) 699.

[7876] ● *Rule 3-A of Companies (Acceptance of Deposits) Rules not ultra vires Section 58A.*—Rule 3A does extend some protection to a depositor howsoever minimal it may be. When Rule 3A is viewed in the context of various other provisions denied to extend protection to depositors and investors it does play a small but effective part whereby liquid finance would be available to the company accepting deposits maturing during the year. ... Section 58-A amongst various other things was designed to introduce some measure of control over the non-banking companies inviting and accepting deposits in the ultimate interest of the depositors, and by compelling limited liquidity in resources, the society at large was sought to be protected from the ever haunting spectre of sickness in industry often conveniently resorted to by the private sector companies. Section 58A must receive its legitimate construction in the backdrop of this fact situation. Viewed from this angle, Section 58A will enable the Central Government to prescribe conditions subject to which deposits can be accepted and one such condition would be how to readily make a small position of the deposit available for repayment because while inviting and accepting deposits, it is implicit therein that repayment would be assured on the date of maturity. Hence Rule 3A is not *ultra vires* of the provisions of Section 58-A. *Delhi Cloth and General Mills Co. Ltd.* v. *Union of India*, AIR 1983 SC 937 : (1983) 4 SCC 166 : (1983) 3 SCR 438.

[7877] ● *Sessions Trial—Must proceed de die in diem until concluded.*—It is an entirely wholesome practice for the trial to go on from day-to-day. It is most expedient that the trial before the Court of Session should proceed and be dealt with continuously from its inception to finish. Not only will it result in expedition, it will also result in elimination of maneuver and mischief. It will be in the interest of both the prosecution and the defence that the trial proceeds from day-to-day. It is necessary to realise that Sessions cases must not be tried piece-meal. Before commencing a trial, a Sessions Judge must satisfy himself that all necessary evidence is available. If it is not, he postpone the case but on a strongest possible ground and for the shortest possible period. Once, the trial commences, he should, except for a very pressing reason which makes an adjournment inevitable, proceed *de die in diem* until the trial is concluded. *Lt. Col. S.J. Chaudhary* v. *State (Delhi Administration)*, AIR 1984 SC 618 : (1980) 3 SCC 437 : (1984) SCC (Cri) 163 (163, 164) : 1984 CrLJ 340 (SC).

[7878] ● *Contravention by company of order under Section 3 of Essential Commodities Act.*—*Essential Commodities Act, 1955, S. 10.*—Section 10 of the Essential Commodities Act (10 of 1955) does not provide that if it is alleged that the person contravening the order made under the Essential Commodities is a Company, the prosecution of the Directors, the officers, and servants of the company or other persons is precluded unless the company itself is prosecuted. Section 10 of the aforesaid Act indicates the persons who may be prosecuted where the contravention is made by the company. It does not lay down any condition that the person-in-charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the Company. Section 10 of the Act lists the persons who may be held guilty and punished when it is a Company that contravenes an order made under section 3 of the Essential

Commodities Act. Naturally, before the person-in-charge or an officer of the company is held guilty in that capacity it must be established that there has been a contravention of the order by the Company. *Sheoratan Agarwal* v. *State of Madhya Pradesh*, AIR 1984 SC 1824 (1825) : (1984) 4 SCC 352 : (1984) SCC (Cri) 620 : 1984 CrLR (SC) 388 : (1984) 2 Crimes 566 : (1985) 1 SCR 719.

[7879] ● ***Right of share holder to requisition extraordinary meeting of company.***—Mere appointment of a Receiver under section 182-A of the U.P. Land Revenue Act, 1901 in respect of certain shares of a company without more cannot deprive the holder of the shares whose name is entered in the register of Members of the company the right to vote at the meetings of the company or to issue a notice under section 169 of the Companies Act, 1956. *Balkrishan Gupta* v. *Swadeshi Polytex Ltd.*, AIR 1985 SC 520 : (1985) 2 SCC 167.

[7880] ● ***Shares held by share holder attached under Section 149 of U.P. Land Revenue Act.***—An order of attachment of shares of a company held by a shareholder for purpose of sale in a proceeding under section 149 of the U.P. Land Revenue Act 1901 cannot have the effect of depriving the holder of the shares of his title to the shares. The attachment of the shares has not deprived the shareholders of its right to vote at the meeting or to issue the notice under section 169 of the Companies Act, 1956. *Bal Krishan Gupta* v. *Swadeshi Polytex Ltd.*, AIR 1985 SC 520 (535) : (1985) 2 SCC 167.

[7881] ● ***Appointment of Receiver under Section 182-A of U.P. Act—Effect.***—A perusal of the provisions of Section 182-A of the U.P. Land Revenue Act shows that there is no provision in it which states that on the appointment of a person as a Receiver, the property in respect of which he is so appointed vests in him similar to the provision in Section 17 of the Presidency Towns Insolvency Act, 1909 where on the making of an order of adjudication the property of the insolvent wherever situated would vest in the official assignee, or in Section 28(2) of the Provincial Insolvency Act, 1920 which states that on the making of an order of adjudication, the whole of the property of the insolvent would vest in the Court or in the Official Receiver. Sub-s (4) of Section 182-A of the Land Revenue Act provides that Rr. 2 to 4 of O. XL of the Code of Civil Procedure, 1908 shall apply in relation to a Receiver appointed under that section. A Receiver appointed under O. XL of the Code of Civil Procedure only holds the property committed to his control under the order of the Court but the property does not vest in him. The privileges of a member can be exercised by only that person whose name is entered in the Register of Members. A Receiver whose name is not entered in the Register of Members cannot exercise any of those rights unless in a proceeding to which the company concerned is a party and an order is made therein. *Balkrishan Gupta* v. *Swadeshi Polytex Ltd.*, AIR 1985 SC 520 : (1985) 2 SCC 167 : (1985) 2 SCR 854.

[7882] ● ***Seizer of books, documents and papers by Investigating Officer.***—In the course of investigation, the Investigating Officer has seized and taken into his possession various books, documents and papers. It appears that the petitioners have obtained directions for convening a meeting of the unsecured creditors of the company. As the meeting is once postponed it is likely that it may be directed to be convened in near future. To facilitate holding of the meeting of the company, any documents seized in the course of the investigation are necessary, an appropriate application shall be made to the learned Company Judge and upon his direction, the Investigating Officer in whose possession or custody the documents are retained shall produce-them before the Chairman, presiding over the meeting who after taking necessary inspection and permitting taking of the photostat copies shall return them to the Investigating Officer and he is entitled to retain the same and shall retain them. Respondents Nos. 1 and 2 are at liberty to approach the Investigating Officer and he will grant necessary facility for taking inspection of the documents seized. *Eastern Spinning Mills Shri Virendra Kumar Sharda* v. *Rajiv Poddar*, AIR 1985 SC 1668 (1669) : 1989 Supp (2) SCC 385 : 1985 CrLJ 1858.

[7883] ● ***Attachment and sale of property—Rights of judgment debtor.***—The effect of an order of attachment is what Section 149 of the Land Revenue Act itself says. Such attachment is made according to the law in force for the time being for the attachment and sale of moveable property under the decree of a Civil Court. Section 64 of the Code of Civil Procedure, 1908 states an attachment under section 149 of the Land Revenue Act is made according to the law in force for the time being for the attachment and sale of moveable property under the decree of a Civil Court. Section 60 of the Code of Civil Procedure, 1908 says that the properties that are liable to attachment for purposes of sale. Section 64 of the CPC, 1908 states that where an attachment of a property is made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, divided or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is forbidden under section 64, CPC is a private transfer by the judgment debtor of the property attached contrary to the attachment. A private transfer under section 64, CPC is not absolutely void that is void as against all the world but void only as against the claims enforceable. Until the property is actually said, the judgment-debtor retains title in the property attached. Under R. 76 of O. 21 of the CPC, 1908 the shares in a Corporation which are attached may be sold through a broker. In the alternative such shares may be sold in public auction under R. 77 thereof. On such sale either under R. 76 or under R. 77, the purchaser acquires title. Until such sale is effected, all other rights of the judgment-debtor remain unaffected even if the shares may have been seized by the officers of the Court under R. 43 of O. 21 of the CPC, 1908 for the purpose of effecting the attachment, or through a Receiver or though an order in terms of R. 46 of O. 21 of the CPC may have been served on the judgment-debtor or on the company concerned. *Balkrishan Gupta* v. *Swadeshi Polytex Ltd.*, AIR 1985 SC 520 (534) : (1985) 2 SCC 167 : (1985) 2 SCR 854.

[7884] ● *Preventive Detention—Discharge of detenu in criminal case.*—It is not possible to urge that simply because a man has been discharged in a criminal case, those grounds could not be grounds for preventive detention. But there must be live links between the grounds of criminal activities alleged by the detaining authority and the purpose of detention. This credible chain would be snapped if there was too long and unexplained interval between the offending acts and the order of detention. There must be proximity, but no mechanical test of counting months of interval can be laid down—it depends on the nature of the acts alleged or relied, gravity of the situation and the reason for the delay. It is in that background only that it can be said that casual connection is broken. The power to detain and the right to liberty must be harmoniously balanced in the larger interest of the community. *Suraj Pal Sahu* v. *State of Maharashtra*, AIR 1986 SC 2177 : (1986) 4 SCC 378 : (1986) SCC (Cri) 452 (471-472) : 1986 CrLJ 2047 : 1986 CrLR (SC) 21.

[7885] ● *Offence under Section 5 of Imports and Exports (Central) Act—Prosecution of company and it Managing Director.*—In the instant case, the Dy. Chief Controller of Imports and Exports filed a complaint under the Imports and Exports (Control) Act, 1947 against a company and its Managing Director. In the petition of the complainant there was clear allegation that the Managing Director had committed the offence acting on behalf of the licensee. Obviously the company has to act through some one and had acted through the Managing Director. The complaint against the Managing Director cannot be quashed on the ground that offence under section 5 of the Imports and Exports (Control) Act, 1947 must be principally done by the licensee. If facts alleged in the complaint *prima facie* show commission of offence, complaint can be quashed in absence of witnesses or copies of documents etc. *T.J. Stephen* v. *Parle Bottling Co. (Pvt.) Ltd.*, AIR 1988 SC 994 : 1988 Supp SCC 458 : (1988) SCC (Cri) 690 : 1988 CrLJ 1095 : 1988 CrLR (SC) 231 : JT 1988 (1) SC 606.

[7886] ● *Expression 'officer or employee' in Section 630(1)(b) of Companies Act also includes those whose employment terminated.*—*Companies Act, 1956, S. 630.*—This Court in *Baldev Krishna Shahi* v. *Shipping Corporation of India Ltd.*, (1987) SCC (Cri) 750 has placed a beneficent construction on the provisions contained in sub-section (1) of Section 630 of the Companies Act, 1956 and according the term "officer or employee" in sub-s. (1) of Section 630 of the Companies act, 1956 must be interpreted to mean not only the present officers and employees of a company but also to include the past officers and employees of the company. It has also been taken the view that the words "any such property" cl. (b) thereof qualify the words "any, property of a company" appearing in cl. (*a*). As observed in *Baldev Krishna Sahi's* case Section 630 plainly makes it an offence if an officer or employee of a company who was permitted to use the property of the company during his employment, wrongfully retains or occupies the same after the termination of his employment. It is the wrongful withholding of such property, meaning the property of the company after termination of the employment which is an offence under section 630(1)(*b*) of the Act. The construction placed by this Court in *Baldev Krishna Sahi*'s case is the only construction possible. Therefore, that is no warrant to give restrictive meaning to the term "officer or employee" appearing in Section 630 of the Act as meaning only the existing officers and employees and not those whose employment has been terminated. *Amrit Lal Chum* v. *Devoprasad Dutta Roy*, AIR 1988 SC 733 : (1988) 2 SCC 269 : (1988) SCC (Cri) 339 (341) : JT 1988 (1) SC 218 : (1988) 2 SCR 783 : (1988) 1 Crimes 596.

[7887] ● *"Related person"—Meaning of.*— *Central Excise and Salt Act, 1944, S. 4(4)(c).*—

"The words "related person" have been considered by this Court in *Union of India* v. *Atic Industries Ltd.,* AIR 1984 SC 1495. It has been held that the first part of the definition of "related person" in clause (c) of sub-section (4) of Section 4. Act 1944 defines "related person" to mean a "person who is so associated with the assessee that they have interest directly or indirectly in the business of each other". It is not enough, the Court observed, that the assessee has an interest, direct or indirect in the business of the person alleged to be a related person nor is it enough that the person alleged to be a related person has an interest direct or indirect in the business assessee. To attract the applicability of the first part of the definition, it was observed, the assessee and the person alleged to be a related person must have interest, direct or indirect in the business of each other. Each of them must have a direct or indirect interest in the business of the other. The quality and degree of interest which each has in the business of the other may be different; the interest of one in the business of the other may be direct while the interest of the latter in the business of the former may be indirect. That would not make any difference so long as each has got some interest, direct or indirect in the business of the other.

After sales service undertaken by the distributors was more in the nature of replacement of defective goods sold, which any manufacturer was bound to do and that is a normal essential service of a distributor

It appears that the link between the respondents T.I. Miller Ltd. Company and T.I. & M. Sales Ltd., is the main distributors of M/s Tube Investments of India Ltd., who are the holding company of the respondents. This relationship does not satisfy the criteria for establishing the related persons concept. These were limited companies at the material time, and it will be difficult to say that a limited company has any interest direct or indirect in the business carried on by one of its shareholders. *Collector of Central Excise* v. *T.I. Millers Ltd., Madras & T.I. Diamond Chain,* AIR 1988 SC 1154 (1155, 1158) : 1988 Supp SCC 361 : 1988 CrLR (SC) 300 : (1988) 3 SCR 355.

7888] ● ***'Continuing offence'—Meaning and effect of.***—*Section 630(1)(B), Companies Act, 1956.*—The concept of continuing offence does not wipe out the original guilt, but it keeps the contravention alive day by day. It may also be observed that the Courts when confronted with provisions which lay down a rule of limitation governing prosecutions, in cases of this nature, should give due weight and consideration to the provisions of Section 473 of the Code which is in the nature of an overriding provision and according to which, notwithstanding anything contained in the provisions of Chapter XXXVI of the Code of Criminal Procedure any Court may take cognizance of an offence after the expiration of a period of limitation if, *inter alia*, it is satisfied that it is necessary to do so in the interest of justice. The expression 'continuing offence' has not been defined in the Code. The question whether a particular offence is a 'continuing offence' or not must, therefore, necessarily depend upon the language of the statute which creates that offence, the nature of the offence and the purpose intended to be achieved by constituting the particular act as an offence. Applying the law enunciated above to the provisions of Section 630 of the Companies Act, we are of the view that the offence under this section is not such as can be said to have consummated once for all. Wrongful withholding, or wrongfully obtaining possession and wrongful application of the company's property, that is, for purposes other than those expressed or directed in the articles of the company and authorised by the Companies Act, cannot be said to be terminated by a single act or fact but would subsist for the period until the property in the offender's possession is delivered up or refunded. It is an offence committed over a span of time and the last act of the offence will control the commencement of the period of limitation and need be alleged. The offence consists of a course of conduct arising from a singleness of thought, purpose of refusal to deliver up or refund which may be deemed a single impulse. Considered from another angle, it consists of a continuous series of acts which endures after the period of consummation on refusal to deliver up or refund the property. It is not an instantaneous offence and limitation begins with the cessation of the criminal act, *i.e.* with the delivering up or refund of the propriety. It will be a recurring or continuing offence until the wrongful possession, wrongful withholding or wrongful application is vacated or put an end to. The offence continues until the property wrongful obtained or wrongfully withheld or knowingly misapplied is delivered up or refunded to the company. For failure to do so sub-section (2) prescribes the punishment. This, in our view, is sufficient ground for holding that the offence under Section 630 of the Companies Act is not one time but a continuing offence and the period of limitation must be computed accordingly, and when so done, the instant complaints could not be said to have been barred by limitation. *Gokak Patel Valkart Ltd.* v. *Durdayya G. Hiremath*, (1991) 2 SCC 141 : 1991 SCC (Cri) 315 (327-28) : (1991) 1 Crimes 556.

[7889] ● ***Managing Director verifying returns of company as principal officer.***—In view of Section 139 read with Section 140(c) of the Income Tax Act the return has to be signed by the principal officer of the Company. A statutory obligation is cast on the principal officer to sign the tax returns. The substitution of the words made under the new Amendment Act of 1975 will not in any way alter the position with regard to the operation of the provisions of the Income-tax Act as against a Managing Director of a company when he has signed the return of the company in such capacity. The effect of the amended Section 140(C) of the Act is that the company's return of income should be signed only by the managing director or by any director, when there is no managing director, and not by the Secretary or the treasurer who are, however, included within the meaning of "principal officer" under section 2(35) of the Act. By the introduction of Section 278-B by the Taxation Laws (Amendment) Act of 1975, with effect from 1st October, 1975, it is enacted that where an offence, under the Income-tax Act, 1961 has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The effect of the new section is to make every person connected with the affairs of the company, apart from the Managing Director who has signed the return, liable to be proceeded against and punished. *M.R. Pratap* v. *V.M. Muthukrishnan*, AIR 1994 SC 674 (678) : (1992) 3 SCC 384 : 1994 CrLJ 628 : 1992 CrLR (SC) 493 : (1992) 2 Crimes 349.

[7890] ● ***Cassette not reliable piece of evidence.***—*Corrupt Practice under Representation of the People Act (43 of 1951).*—From the evidence of PW-1 and the election petitioner it is found that the story regarding the recording of the cassette Ex P-7 by Shri Ingini is shrouded in mystery and the cassette, Ex P-7 appears to be a piece of evidence on which reliance cannot be placed since the very basis as to how it came to be recorded and why it was preserved or how the election petitioner came to know about it, has not been explained by the election petitioner and has been further confused by Basavaraj Ingini, appearing as Court Witness. The appellant has denied his voice in the recorded cassette. ... The manner in which cassette Ex. P. 7 came into existence and was produced at the trial and relied upon by the election petitioner has created an impression on our minds that the election petitioner has not come out with the true story. The learned Trial Judge fell in error, even without going into the question of the admissibility of cassette Ex P-7, which, has been seriously disputed by Mr. Subal in view of the denial by the returned candidate that the voice in the cassette was his, to rely upon his piece of evidence and to hold on the basis thereof, that the appellant was guilty of committing the corrupt practices covered by Section 123(2), (3), (3-A) of the Representation of People Act, 1951. We find ourselves unable to rely on cassette Ex P-7 or to hold that it was recorded in the manner and at the time and place as deposed to by the election petitioner and Shri Ingini. The cassette Ex P-7 is not a reliable piece of evidence. *Quamarul Islam* v. *S.K. Kanta*, AIR 1994 SC 1733 : 1994 Supp (3) SCC 5 : JT 1994 (1) SC 452.

[7891] ● ***Failure of company to prove premises given to appellant in lieu of his services.***—The appellant had joined the services of M/s Rallis India Ltd. He had occupied a residential flat. He resigned. The Rallis India Ltd., the second respondent (the company, hereinafter), initiated proceedings against the appellant under Section 408, IPC and Section 630 of the Companies Act for the continued occupation of the appellant in the said flat. The Magistrate, by his order found the appellant guilty of offence under section 630 of the Companies Act and directed restitution of the flat. The Trial Court after considering the entire evidence recorded the findings holding that the company failed to prove that they are the tenant in respect of the suit premises. They had not given the premises to the appellant under leave and licence agreement, as pleaded by them in the plaint. The company failed to prove that the appellant is a licensee of the suit premises. It also failed to prove that the premises were given to the appellant *in lieu* of his services. On the other hand, the appellant proved that he is a monthly tenant of the premises with the landlords Badami etc.. The Civil Court after full dressed trial Court recorded the finding that the appellant had not come into possession through the company but had independent tenancy rights from the principal landlord, and, therefore the decree for eviction was negatived. The findings, recorded by the Criminal Court, stand superseded by the findings recorded by the Civil Court. Thereby, the findings of the Civil Court get precedence over the findings recorded by the Trial Court in particular, in summary trial for offences like Section 630, Companies Act. The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the Trial Court and neither the finding of the Civil Court gets nor the decree becomes inoperative. That it cannot be held that the appellant has been in wrongful possession of the property entailing his conviction and punishment under section 630 of the Companies Act and requiring handing over of the possession of the flat. The appeal is accordingly allowed. *V.M. Shah* v. *State of Maharashtra*, AIR 1996 SC 339 (339, 340, 341) : (1995) 5 SCC 767 : (1995) SCC (Cri) 1077.

[7892] ● ***Wrongful possession of property.***—In *Baldev Krishna* v. *Shipping Corporation of India Ltd.*, AIR 1987 SC 2245 this Court considered the scope of sub-section (1) of Section 630 of the Companies Act, 1956 and held that an officer or an employee of a company who obtains possession of any property of the company during the course of his employment, to which he is not entitled but for employment, if he does not deliver possession of such property to the company, after termination of his employment to the company, he would be in wrongful possession of such property. Therefore, the existence of the relationship of employer and employee is a condition precedent. If the employee, having any property of the company in his possession wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles of company and authorised by the Companies Act, he will be liable for the punishment under section 630 of the Companies Act. *V.M. Shah* v. *State of Maharashtra*, AIR 1996 SC 339 (340) : (1955) 5 SCC 767 : (1995) SCC (Cri) 1077 : JT 1995 (6) SC 433.

[7893] ● ***Fishing by foreign vessels in depth less than 40 fathoms of water in contravention of terms of permit.***—Under Section 5 of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 to fish in the Maritime Zones of India, on the allegation that they were fishing in a depth of less than 40 fathoms to water in contravention of the terms and conditions of the permits.

For the alleged contravention the Companies which owned the vessels and their Managing Directors as well the Companies which had chartered them and their Managing Directors were prosecuted.

Section 17(i) of the Maritime Zone of India (Regulation of Fishing by Foreign Vessels) Act, 1981 clearly says that when the offence is committed by a company, persons responsible to the company for the day-to-day business will be also liable alongwith the company for the offence committed unless, of course, they can prove that the offence was committed without their knowledge or they exercised due diligence to prevent its commission. The evidence on record unmistakably proves that the Managing Directors herein were responsible to their respective companies for the conduct of their business and they (the Managing Director) did not bring on record any material to avail of the proviso of the above sub-section and for that matter, to exonerate themselves from the offences committed by their companies. *V.B.C. Export Pvt. Ltd.* v. *Commander S.D. Baijal*, AIR 1996 SC 2682 : (1996) 5 SCC 382 : (1996) SCC (Cri) 1031 (1032, 1034) : 1996 CrLR 3981.

[7894] ● ***Complaint—Meaning of.***—The word "complainant" is not defined in the Code of Criminal Procedure, whether old or new. Any person can set the law in motion except in cases where the statute has specifically provided otherwise. The word "person" is defined in the Indian Penal Code (Section 11) as including "any company or association or body of persons whether incorporated or not". By virtue of Section 2(y) of the new CrPC, words and expressions used in that Code but not defined therein can have the same meaning assigned to them in the Penal Code. Thus, when the word "person" is specifically defined in the Penal Code as including a company, that definition can normally be adopted for understanding the scope of the word "complainant". However, the definition clauses subsumed in Section 2 of the new CrPC contains the opening key words that such definitions are to be adopted "unless the context otherwise requires". *Associated Cement Co. Ltd.* v. *Keshvanand*, AIR 1998 SC 596 : (1998) 1 SCC 687 : (1998) SCC (Cri) 475 (481) : 1998 CrLJ 856 : 1998 CrLR (SC) 176.

[7895] ● ***Offence under TADA—Prosecution of Company not permissible.***—The company is not a natural person. In many recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management or affairs of such Company or Corporations *e.g.* Essential Commodities Act, Prevention of Food Adulteration Act etc. But there is no such provision in TADA which makes the company liable for the act of its officers. Hence there is no scope whatsoever to prosecute a company for the offence under section 3(4) of TADA. *Kalpnath Rai* v. *State*, AIR 1998 SC 201 : (1997) 8 SCC 733 : (1998) SCC (Cri) 134 (152) : 1998 CrLJ 369 : JT 1997 (9) SC 18 : (1997) 4 Crimes 227.

[7896] ● ***Offence by company of pollution of streams and rivers by trade effluents.***—Where an offence under the Water (Prevention and Control of Pollution) Act, 1974 has been committed by a company, every person who was in charge of and was responsible to the company for the conduct of the business of the company is also made guilty of the offence by the statutory creation. Any director, manager or other officer of the company, who has consented to or connived in the commission of the said offence, is made liable for the punishment of the offence. What is to be looked at during the stage of issuing process is whether there are allegations in the complaint by which the managers or directors of the company can also be proceeded against, when the company is alleged to be guilty of the offence. *U.P. Pollution Control Board* v. *Mohan Meakins Ltd.*, AIR 2000 SC 1456 (1460) : (2000) 3 SCC 745 : 2000 CrLJ 1799.

[7897] ● ***Companies Act does not prohibit enforcement of debt due from company.***—There is no provision in the Companies Act which prohibits enforcement of the debt due from a company. When a company goes into liquidation, enforcement of debt due from the company is only made subject to the conditions prescribed therein. But that does not mean that the debt has become unenforceable altogether. Perhaps due to want of sufficient assets of the company the realisation of a debt would be different. But that is no premise to hold that the debts is legally unenforceable. Enforceability of a debt is not to be tested on the touchstone of the modality or the procedure provided for its realisation or recovery. Hence, the contention that the special provision incorporated in the Companies Act regarding the debts and liabilities due from the company will render the debt unenforceable, cannot be accepted.

The alternative approach is this : even assuming that any disposition of the property made by a company after commencement of the winding-up proceedings is null and void, how is that an escape ground from the offence under section 138, N.I. Act. That section created a statutory offence which on the confluence of the various factors enumerated therein, commencing with the drawing of the cheque and ending with the failure of the drawer of the cheque to pay the amount covered by it within the time stipulated ripens into a penal liability. *Pankaj Mehra* v. *State of Maharashtra*, AIR 2000 SC 1953 : (2000) 2 SCC 756 : (2000) SCC (Cri) 556 (567) : 2000 CrLJ 1781 : 2000 CrLR (SC) 237 : JT 2000 (2) SC 113.

[7898] ● ***Section 22 of SICA does not bar criminal proceedings against company or its directors.***—Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 does not create any legal impediment for institution and proceeding with a criminal case on the allegations of an offence under section 138 of the N.I. Act against a company or its directors. The section only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such an embargo is to preserve the assets of the company from being attached or sold for realisation of dues of the creditors. The section does not bar payment or money by the company or its directors to other persons for satisfaction of their legally enforceable dues. *Kusum Ingots and Alloys Ltd.* v. *Pennar Peterson Securities Ltd.*, AIR 2000 SC 954 : (2000) 2 SCC 745 : (2000) SCC (Cri) 546 (555) : 2000 CrLJ 1464 : 2000 CrLR (SC) 319.

[7899] ● ***Liability of company—Commission of offence by company attracting mandatory punishment of imprisonment and fine under Section 56(1)(i) Foreign Exchange Regulation Act.—****Foreign Exchange Regulation Act, 1976, Section 56(1)(i).*—There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

As in the case of torts, the general rule prevails that the corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorised powers, and without proof that his act was expressly authorised or approved by the corporation. In the statutes defining crimes, the prohibition is frequently directed against any "person" who commits the prohibited act, and in many statutes the term "person" is defined. Even if the person is not specifically defined, it necessarily includes a corporation. It is usually construed to include a corporation so as to bring it within the prohibition of the statue and subject it to punishment. In most of the statues, the words "person" is defined to include a corporation. Therefore, as regards corporate criminal liability, there is no doubt that a corporation or company could be prosecuted for any offence punishable under law, whether it is coming under the strict liability or under absolute liability. Inasmuch as all criminal and *quasi*-criminal offences are creatures of statue, the amenability of the corporation to prosecution necessarily depends upon the terminology employed in the statute. In the case of strict liability, the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but on the establishment of the *actus reus*, subject to the defence of due diligence. The law is primarily based on the terms of the statutes. In the case of absolute liability where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is case of automatic primary responsibility. It is only in a case requiring *mens rea*, a question arises whether a corporation could be attributed with requisite *mens rea to* prove the guilt. *Standard Chartered Bank* v. *Directorate of Enforcement*, AIR 2005 SC 2622 : (2005) 4 SCC 530 : 2005 SCC (Cri) 961 (971, 972) : 2005 (2) Crimes 258.

[7900] ● ***Prosecution and fixation of criminal liability of corporate bodies and sentencing where statute provide for mandatory sentence of imprisonment and fine.***—There are several other offences in the Indian Penal Code which describe offences of serious nature whereunder a corporate body also may be found guilty, and the punishment prescribed is mandatory custodial sentence. There are a series of other offences under various statues where the accused are also liable to be punished with custodial sentence and fine.

If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the Court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law does not compel a man to do that which cannot possibly be performed (*impotentia excusat legam*). This principle can be found in *Bennion's Statutory Interpretation*, 4th Edn. at p. 969. "All civilized systems of law import the principle that *lex non cogit ad impossibilia....*" As PATTERSON, J. said "the law compels no impossibility". Bennion discussing about legal impossibility at p. 970 states that : "If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element." This Court applied the doctrine of impossibility of performance (*lex non cogit ad impossibilia*) in numerous cases. *Standard Chartered Bank* v. *Directorate of Enforcement*, AIR 2005 SC 2622 : (2005) 4 SCC 530 : 2005 SCC (Cri) 961 (978) : 2005 (2) Crimes 258.

[7901] ● ***Company cannot be sentenced to imprisonment Court to resort to punishment of imposition of fine.***—As the company cannot be sentenced to imprisonment, the Court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver.

Even for offences under Section 56(1)(ii), FERA Act, the company could be prosecuted as the amount involved is less than rupees one lakh and there is no mandatory sentence of imprisonment and the prescribed punishment is imprisonment for a term which may extend to three years or with fine or with both. It is also pertinent to note that the object of the amendment was to have more stringent provisions where the amount involved in the offence is more than rupees one lakh. It is not reasonably possible to assume that amendment to the section was carried out to give immunity to corporate bodies from prosecution for serious offences. The scheme of the Indian Penal Code also would show that for serious and graver offences, mandatory sentence of imprisonment is prescribed and for less serious offences the Court is given a discretionary power of imprisonment or fine. There is not a blanket immunity for any company from any prosecution for serious offence offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy. *Standard Chartered Bank* v. *Directorate of Enforcement,* AIR 2005 SC 2622 : (2005) 4 SCC 530 : 2005 SCC (Cri) 961 (978).

[7902] ● ***Retrieving company's properly wrongfully withheld by officer/employees.***—*No difference in movable and immovable property "such an officer or employee—Companies Act, 1956 Section 630.*—Section 630 of the Companies Act section does not make any difference between the movable and immovable property. The property in Section 630 includes both movable and immovable property. Sub-section (2) of Section 630 authorises the Court trying the offence, in its discretion to order any such officer or employee of the company which includes past or present, or his or her legal representative, to deliver, within a specified time, possession of such property which has been wrongfully obtained or wrongfully withheld or knowingly misapplied. In default, the Court may impose a punishment of imprisonment for a term which may extend to two years.

Section 630 of the Companies Act, does not only cover cases of the present employee or officer of the company and this provision strictly speaking is not penal in the sense as understood under penal law. The main purpose to make action an offence under Section 630 is to provide a speedy and summary procedure for retrieving the property of the company where it has been wrongly obtained by the employee or officer of the company or where the property has been lawfully obtained but unlawfully retained after termination of the employment of the employee or the officer and to impose a fine on the officer or employee of the company if found in breach of the provision of Section 630 of the Companies Act and further to issue direction if the Court feels it just and appropriate for delivery of the possession of the property of the company and to impose a sentence of imprisonment when there is non-compliance with the order of the Court regarding delivery or refund of the property of the company. *Shubh Shanti Services Ltd.* v. *Manjula S. Agarwalla*, AIR 2005 SC 2506 : (2005) 5 SCC 30 : 2005 SCC (Cri) 993 (1001, 1003) : 2005 (3) LLJ 1010 : 2005 (2) Crimes 284.

[7903] ● *Due process of Law Procedure established by law.*—*Companies Act, 1956 Section 630—Due process of law.*—Due process of law would in short mean a procedure established by law, which is a procedure fixed or laid down in law. When the High Court has passed an order of injunction, in the aforesaid terms, what is meant by the High Court is, that the Company shall not take forcible possession of Sonmarg flat during the pendency of the suit and the Company was given liberty to take steps for possession as is permissible under law including the provisions of any statute giving right to obtain possession to the company in the facts and circumstances of the case. The company can prove unlawful possession of the property by the employee or his or her legal representative after the demise of the employee or an officer of the company. The company has the remedy to initiate action under Section 630(1) and on conviction by the competent criminal Court it can approach the same Court for directing delivery of possession which sub-section (2) of Section 630 of the Companies Act provides. The remedy is provided in the statute itself and the High Court's order by no stretch of imagination can be read to mean that the company has to necessarily approach the civil Court only for obtaining possession of the Sonmarg flat and that the remedy available under the Companies Act cannot be resorted to. The decision of the High Court that Section 630 of the Companies Act being penal in nature, the proceeding thereunder cannot be construed to be a proceeding taken in due process of law, cannot be sustained. Filing of civil suit for possession by the Company does not deprive the Company of the right to institute prosecution under the Companies Act and incidentally get an order for delivery of possession. *Shubhash Shanti Services Ltd.* v. *Manjula S. Agarwala*, AIR 2005 SC 2506 : (2005) 5 SCC 30 : 2005 SCC (Cri) 993 (1003) : 2005 (3) LLJ 1010 : 2005 (2) Crimes 284.

[7904] ● *Continued possession of company's flat by legal representatives of deceased employee to whom flat allotted for residential purpose during service period—Legality.*— *Companies Act, 1956 Sections 630, 291.*—In the matter of company affairs, Directors act as a body and collectively as a Board. Any Director acting individually has no power to act on behalf of the company in respect of any matter except to the extent to which any power or powers of the Board have been delegated to him by the Board within the limit permitted by the Companies Act or any other law. The position of the Chairman of the Board of Directors is not substantially different from an individual Director. Under the Companies Act, the Chairman of the company does not have any special or extraordinary rights to be exercised by him without being authorised by the Board of Directors. The Board of Directors of course have an authority to delegate the power or authority to act for and on behalf of the company to the Chairman of the Board of Directors.

Power of Chairman.—Section 291 of the Companies Act authorises the Board of Directors of the company to exercise such powers or of such acts or things as the company is authorised to exercise and do such acts or things, except in the matter where the power is to be exercised by the company in general meeting. The exercise of the powers by the Board shall be subject to the provisions contained in the Companies Act or any other Act or in the memorandum or articles of the company. Therefore, under Section 291 of the Companies Act, the action of the Board of Directors should be in conformity with the provisions of the company law or any other enactment or in conformity with the memorandum or articles of association of the company. It is the specific case of the respondents which has been found correct by the Courts that they are holding possession of the Company's flat at Sonmarg on the oral assurance given by Shri Goenka, Chairman of the Board of Directors that they can continue to reside in the said flat until the possession of the flat at Blue Heaven Cooperative Society is given to them. Admittedly the flat at Sonmarg belongs to the Company. Shri S.C. Agarwalla, husband of Respondent 1 and father of Respondent 2 was the ex-employee of the Company. He expired when he was in the employment of the Company and Respondents 1 and 2 were residing in the flat after the demise of Shri Agarwalla as his heirs. Thus it is for Respondents 1 and 2 to show the authority of Shri Goenka to bind the Company on the basis of the oral assurance given to them by him to retain the possession of the flat. The High Court has not referred to any evidence to that effect led by the respondents, nor is there any finding that the Board of Directors have authorised the Chairman Shri Goenka to give such an assurance for and on behalf of the Company. *Subh Shanti Services Ltd.* v. *Manjula S. Agarwala*, AIR 2005 SC 2506 : (2005) 5 SCC 30 : 2005 SCC (Cri) 993 (1004-05) : 2005 (3) LLJ 1010 : 2005 (2) Crimes 284.

[7905] ● ***Assurance given by Chairman beyond his powers—Not binding on company.***— *Companies Act, 1956, Section 630—Assurance given by Chairman of Company.*—In the absence of any authority to the Chairman by the Board of Directors to act for and on behalf of the Company, the assurance given by him to the respondents would not bind the Company, nor will it create a binding agreement between the parties, namely, Respondents 1 and 2 and the Company to permit the respondents to remain in possession even after the death of Shri Agarwalla, of the flat in Sonmarg. Apart from this, the Board of Directors itself could exercise the powers in accordance with the memorandum of association or the articles of the Company. Any power exercised beyond the memorandum or the articles of the Company would not bind the Company. Any assurance given by the Board of Directors either should be authorised object of the Company by the memorandum of association or the articles of the Company or its purpose should be reasonably ancillary or incidental to carrying on the Company's business. *Subh Shanti Services Ltd.* v. *Manjula S. Agarwala*, AIR 2005 SC 2506 : (2005) 5 SCC 30 : 2005 SCC (Cri) 993 (1005) : 2005 (2) Crimes 284 : 2005 (3) LLJ 1010.

[7906] ● ***Wrongful withholding of company's property—Attracting offence under Section 630(1) of Companies Act, 1956—Respondents to pay fine of Rs. "one thousand each".***—*Companies Act, 1956, Section 630(1).*—The late Agarwalla was an old employee of the Company since 1971. He expired on 2.11.1992 and assurance was given by the Chairman to the widow of the ex-employee with whom he had long-standing relation, when he went to see her to console her on 4.11.1992, barely two days after the death of Shri Agarwalla. Such evidence in our opinion irresistibly points that predominant, if not, the only consideration operating in the mind of the Chairman was to console the widow and to permit here to live in the flat for some time. The assurance given to Respondents 1 and 2 by the Chairman of the Company has more of a gratuitous and compassionate flavour and less to do with the interest of the Company in mind. Moreover, it is difficult to comprehend how the Chairman could promise on behalf of the Company that the respondents will be permitted to remain in the flat till delivery of the flat of Blue Heaven, when he himself was not sure of the time the Company would get the possession of the Blue Heaven flat. That apart, the act of the Chairman cannot be construed to be one done incidental to the business of the Company or as a matter of necessity.

After the death of Shri Agarwalla on 2.11.1992, Respondents 1 and 2 remained in possession of the Company's Sonmarg flat. Admittedly they were not in employment of the Company nor the Company has authorised them to remain in possession of the same particularly after notice dated 9.11.1994 to vacate the premises and hand over the possession to the Company. The possession of the Company's flat by the respondents, after the service of notice to vacate the premises by the Company, is wrongful withholding of the property of the Company. The respondents by having wrongfully withheld the possession of the Company's flat and not delivering the property to the Company, have committed an offence. The interim order of the High Court dated 16.11.1998 in the civil suit filed by the appellant Company does not wipe out the offence committed already for which criminal complaint was filed. Subsequent to that order, the possession may not be wrongful, but on the date of complaint and till the date of that order, the respondents did wrongfully withhold that property, attracting the offence under Section 630(1). Having regard to the factual position of the case, we think that imposition of fine or rupees one thousand each would be a proper punishment for wrongful withholding of the Sonmarg flat. Accordingly, Respondents 1 and 2 are sentenced to pay fine of rupees one thousand each. *Subh Shanti Services Ltd.* v. *Manjula S. Agarwalla*, AIR 2005 SC 2506 : (2005) 5 SCC 30 : 2005 SCC (Cri) 993 (1006) : 2005 (3) LLJ 1010 : 2005 (2) Crimes 284.

[7907] ● ***Dishonour of Cheque by company.***— The concept of vicarious liability was introduced in penal statutes like Negotiable Instruments Act to make the directors; partners or other persons, in charge of and control of the business of the company or otherwise responsible for its affairs; the company itself being a juristic person. *Raghu Lakshminarayan* v. *M/s Fine Tubes,* AIR 2007 SC 1634 : (2007) 5 SCC 103 : 2007 CrLJ 2436 (2437).

[7908] ● ***Criminal Proceedings against company.***—Criminal Proceedings can be initiated against a company even where imposition of substantive sentence is provided for. *Aneeta Hada* v. *Godfather Travel and Tours Private Ltd.,* (2008) 13 SCC 703 : 2008 (7) SCR 1054 : 2008 (8) Scale 25.

[7909] ● ***Dishonour of Cheque issued by sick company***.—According to the High Court, admittedly the purchase orders in question were entered into and the purchases were made by the appellants with full knowledge of the proceedings that the company was declared sick under the SICA, the appellants clearly all through gave the impression to the respondent company that the outstanding amount towards the purchase of the goods would be shortly cleared. The fact that the purchases were made with the clear promise to repay could not be disputed by the appellants. The Directors had in fact issued the cheques for discharging their liability with the full knowledge, would not only clearly show that there was an undisputed debt, but would also show that, right from the inception, the appellants in fact had no intention of paying the amount for the purchases made by them. The intention of the appellants can be gathered by their subsequent acts, conduct and behaviour of taking a shelter under the provisions of SICA. Hence, the appellants are not entitled to any indulgence of this court under its extraordinary jurisdiction under Article 136 of the Constitution. The appellants had lost their total credibility because of their conduct. When the appellant company was declared sick, then without disclosing this fact the appellants ought not to have made huge purchases from the respondent company. Ultimately, the appellant company did not pay for the purchases. This clearly indicates that the appellants had no intention of making payment of the purchases made by it.

The High Court, in the impugned order, has directed the trial Court to dispose of the cases of the appellants as early as possible, but not later than six months from the date of its order. The appellants by approaching this Court have caused avoidable delay in disposal of these cases before the trial Court.

In the facts and circumstances of the case, we deem it appropriate to request the trial Court now to conclude the trial of these cases as expeditiously as possible and, in any event, within six months from the date of this judgment. *Southern Steel Ltd.* v. *Jindal Vijayanagar Steel Ltd.,* AIR 2008 SC 3143 : 2008 (5) SCC 762 : 2008 (3) SCC (Cri) 75 : 2008 CrLJ 3960 : 2008 (7) Scale 493 : 2008 (4) Supreme 319.

COMPARISON

§ (See also "HANDWRITING")

[7910] ● ***Comparison of handwriting.***—The second paragraph of Section 73 enables the Court to direct any person present in the Court to give specimen writings "for the purpose of enabling the Court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the Court to compare" is that there is some proceeding before the Court in which or as a consequence of which it might be necessary for the Court to compare such writings. The direction is to be given for the purpose of enabling the Court to compare and not for the purpose of enabling the investigating or other agency "to compare". If the case is still under investigation there is no present proceeding before the Court in which or as a consequence of which it might be necessary to compare the writings. The language of Section 73 does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. *State of Haryana* v. *Jagbir Singh,* AIR 2003 SC 4377 : (2003) 11 SCC 261 : 2004 SCC (Cri) 126 (133) : 2003 CrLJ 5054.

[7911] ● ***Opinion of expert.***—When the Court has to form an opinion as to identity of handwriting or finger impression's the opinion, upon that points, of persons specially skilled in question as to identity or handwriting or finger impressions are relevant facts. *Thiruvengada Pillai* v. *Navaneethammal,* AIR 2008 SC 1541 (1546) : 2008 AIR SCW 1684 : (2008) 4 SCC 530.

[7912] ● ***Finger impressions on documents.***—When there is a positive denial by the person who is said to have affixed his finger impression and where the finger impression in the disputed document is vague or smudgy or not clear, making it difficult for comparison, the Court should hesitate to venture a decision based on its own comparison of the disputed and admitted finger impressions. Further even in cases where the Court is constrained to take up such comparison, it should make a thorough study, if necessary with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the reasons for any conclusion based on comparison of the thumb impression, if it chooses to record a finding thereon. The Court should avoid reaching conclusions based on a mere casual or routine glance, or perusal. *Thiruvengada Pillai* v. *Navaneethammal,* AIR 2008 SC 1541 (1547) : (2008) 4 SCC 530.

[7913] ● *Thumb impressions on documents—Duty of Court.*—When it is said that there is no bar to a Court to compare the disputed finger impression with the admitted finger impression, it goes without saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted finger impression and after verifying whether the same characteristics are found in the disputed finger impression. The comparison of the two thumb impressions cannot be casual or by a mere glance. Further, a finding in the judgment that there appeared to be no marked differences between the admitted thumb impression and disputed thumb impression, without anything more, cannot be accepted as a valid finding that the disputed signature is of the person who has put the admitted thumb impression. Where the Court finds that the disputed finger impression and admitted thumb impression are clear where the Court is in a position to identify the characteristics of finger prints, the Court may record a finding on comparison, even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the Court should not hazard a guess by a casual perusal. The decision in *Murarilal* (Supra) and *Lalit Popli* (Supra) should not be construed as laying a proposition that the court is bound to compare. *Thiruvengada Pillai* v. *Navaneethammal,* AIR 2008 SC 1541 (1547) : (2008) 4 SCC 530.

[7914] ● *Scope of Section 73 Evidence Act.*—Section 23 enables the court to compare the signatures, writing or seal with others admitted or proved. *Keshav Dutt* v. *State of Haryana*, (2010) 9 SCC 286.

COMPENSATION

[7915] ● *Compensation.*—The word 'Compensation' means anything given to make things equivalent, a thing given to or to make amends or loss, recompense, remuneration or pay : it need not, therefore, necessarily be in terms of money, because the law may specify the principles on which, and the manner in which compensation is to be determined and given. If it were to be in terms of money alone, the expression 'paid' would have been more appropriate. *State of Gujarat* v. *Shantibai*, AIR 1969 SC 634 (644) : (1969) 1 SCC 509 : (1969) 2 SCJ 322.

[7916] ● *Imposition of fine to compensate children of deceased.*—The appellant was admittedly a young boy of 15 years of age at the time when he shot Mishri Lal Rai and killed him. He acted in exercise of his right of private defence but exceeded it. In view of these circumstances, it would be fair and just if the sentence of imprisonment imposed on the appellant is reduced to the period already undergone by him, since he has already suffered imprisonment for a period of about two years. The requirement of social justice demands that a heavy fine should be imposed on the appellant *in lieu* of reduction of sentence so that children of Mishri Lal Rai may be compensated. *Prabhu Prasad* v. *State of Bihar,* AIR 1977 SC 704 : (1976) 4 SCC 289 : 1976 SCC (Cri) 597 (598) : 1977 CrLJ 346.

[7917] ● *Payment of compensation in lieu of property lost.*—Disposal of property : Property in *custodia legis* when: Payment of compensation in *lieu* of property lost.

The short point of law that was raised in this appeal was as regards the powers of the Court in indemnifying the owner of the property which is destroyed or lost whilst in the custody of the Court. In this case a large number of ornaments and cash, *etc.*, were stolen from the house of the complainant. The number of stolen articles were recovered from the accused. When they were produced before the Magistrate, he directed the police officer concerned to retain the articles in his custody until the same were verified and their value was determined by a goldsmith. The S.I. kept the articles in the Guard Room of his police station in a trunk with a list of the articles and a corresponding entry in the concerned register as the Court was waiting to obtain sanction of the necessary funds from the higher authorities for payment of the fees of the goldsmith. When the Court subsequently directed the S.I. after his return from leave to produce the articles in the Court, the S.I. opened the trunk and to his utter dismay found that the trunk contained only stones and no articles all of which had disappeared. Before going on leave, the S.I. found the articles in the trunk intact. The S.I. immediately filed a complaint of theft of the ornaments. As the accused were not traced, that case was referred. The original charge-sheet in respect of the theft of the articles in the complainant's house ended in conviction of the accused from whom they were recovered. Their appeal to the Sessions Judge was unsuccessful but the High Court acquitted them on technical grounds. After the conclusion of the trial, the complainant filed an application before the trial Magistrate to return the stolen articles or their value. The Magistrate rejected the application on the ground that as the articles did not reach the Court, the complainant was not entitled to their restoration. The Sessions Court as well as the High Court also dismissed his applications. Hence this appeal. A production before the Court did not mean physical custody or possession by the Court but included even control exercised by the Court by passing an order regarding the custody of the article. In the instant case when once the Magistrate, after having been informed that the articles were produced before the Court, directed the S.I. to keep them with him in safe custody, to get them verified and valued by a goldsmith, the articles were undoubtedly produced before the Court and became *custodia legis.* The articles were the subject -matter of an offence of theft. That fact was sufficient to clothe the Magistrate with the power to pass an order for return of the property. Where the property was stolen, lost or destroyed and there was no *prima facie* defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate might order payment of the value of the property in an appropriate case where the ends of justice so required. The view of the High Court that once the articles were not available with the Court, the Court had no power to do anything in the matter and was utterly helpless was not correct. The Court ordered the State to pay the cash equivalent of the property lost to the complainant. Decision of the High Court reported in 1971 CrLJ 566 (Mys) was reversed. *Basava* v. *State of Mysore*, AIR 1977 SC 1749 : (1977) 4 SCC 358 : 1977 SCC (Cri) 598 : 1977 CrLJ 1141 : 1977 CrLR (SC) 257 : 1977 SCCrR 391 : (1977) 1 SCWR 613 : (1977) 2 SCJ 289 : 1977 CrAppR (SC) 314 : ILR (1977) 2 Kant 925 : 1977 BBCJ (SC) 168 : 1977 AWC 467 : 1977 ACrR 337 : 1977 ACrC 220 : 1977 CurLJ (Cri) 162 : 1977 MLJ (Cri) 486.

[7918] ● ***Accident Tribunals—Duty of—Inference to culpability—When to be drawn.***—In a case a stage carriage belonging to the petitioner was on a trip when after night fall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal, which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their lives instantly, several lost their limbs. Both the Accidents Claims Tribunal and the High Court concluded that the accident had taken place due to the rashness and negligence of the driver. The Supreme Court held : road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often pursuades the Courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of *res ipsa loquitur.* Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic maybes. No interference by this Court is called for specially where human misery is pitted against operational negligence. *N.K.V. Bros. (P) Ltd.* v. *M. Karumai Ammal,* AIR 1980 SC 1354 : (1980) 3 SCC 437 : 1980 SCC (Cri) 774. : 1980 UJ (SC) 414 : 1980 LS (SC)54.

[7919] ● ***Offence—Compounding of.***—We are happy to record that the injured and the appellants have amicably settled their dispute and we have been assured that happy relationship will be established in the student community. For these reasons we grant permission to compound the offence and accept the composition as per the terms set out in the consent precipe filed today. In view of the composition both the appeals are allowed and the conviction and sentence of the appellants are set aside with the direction that out of the fine paid by the appellants after deducting the amount of Rs. 3000/- already paid to the injured, the balance may be paid over to the injured PW 1 and PW 4 to be equally divided between them. *Bhupendra Singh* v. *State of Madhya Pradesh*, AIR 1981 SC 1240 : 1980 Supp SCC 352 : 1981 SCC (Cri) 280 : 1981 CrLJ 751 : 1981 CrLR (SC) 116.

[7920] ● ***No direction for compensation where no fine imposed.***—The High Court ordered payment of Rs. 3,000/- as litigation costs to the State. For sustaining such as an order under Section 357(a), there must be a substantive sentence of fine. High Court, while maintaining conviction, set aside imprisonment imposed by the trial Court and has not imposed any fine on the accused. On the other hand, he has been given benefit of probation. There cannot therefore be a direction for compensation under Section 357 (a). Order was set aside. *Girdhari Lal* v. *State of Punjab*, AIR 1982 SC 1229 (2) : (1982) 1 SCC 608 : 1982 SCC (Cri) 325 : 1982 CrLJ 1742 (1) : 1982 GujLH 345 (1).

[7921] ● ***Composition amount awarded to widow of deceased—Enhancement.***—Having regard to the facts and circumstances of the present case and particularly in view of the fact that the bread earner of the family is gone and the widow and two minor children are reduced to a condition of helplessness and the widow has to lead the rest of her life alone and at the mercy of her friends and relatives and taking into account the earning capacity of the deceased, the amount of Rs. 40,000 awarded by way of compensation is not adequate and it should be enhanced to Rs. 55,000. *Sukhbinder Kaur* v. *Nirmolak Singh*, (1982) 2 SCC 348 : 1982 SCC (Cri) 428 : 1982 Cr App R (SC) 276.

[7922] ● ***Enhancement of fine to compensate widow and children of deceased.***—Having regard to the facts and circumstances of the present case and in view of the fact that "J" died as a result of accident leaving a family behind him and also taking into account the fact that the appellant has already been in Jail for a period of four and a half months, it would meet the ends of justice if the sentence of imprisonment imposed upon the appellant is reduced to that already undergone by him and instead the fine of Rs. 2,000 which has been imposed upon him is enhanced to Rs. 10,000 in order that the widow and the children of the deceased "*J*" may be compensated by payment of the amount of the amount of the fine to them. This payment will be without prejudice to the right of the widow and children of the deceased "*J*" to claim damages for the death of Jagdish Chander, though, it any such damages are awarded this payment may be taken into account in assessing such damages. *Sukhdev Singh* v. *State of Punjab*, (1982) 2 SCC 439 : 1982 SCC (Cri) 467 : 1982 Cr App R (SC) 276.

[7923] ● ***Compensation—Liability of insurer extended to legal provision as it stood on date of accident.***—In a case the appellant's husband who was driving a scooter, when a goods truck knocked him dead. The appellant filed an application before the Motor Accidents Claims Tribunal, Bangalore, under Section 110-A of the Motor Vehicles Act, 1939, seeking compensation for her husband's death. The respondent denied its liability on the ground, amongst others, that its record did not disclose that it had issued any insurance policy in respect of the particular truck. On a consideration of the entire evidence, the Tribunal passed an award on November 20th, 1972, holding that the appellant was entitled to recover compensation in the sum of Rs. 60,000/- for herself and her children. The Tribunal limited the liability of the respondent insurer to a sum of Rs. 50,000/-.

The respondent filed an appeal in the High Court contending that on the date on which the insurance policy was alleged to have been issued by it, its statutory liability was limited to a sum of Rs. 20,000/- only and, therefore, the Tribunal was in error in passing an award against it in the sum of Rs. 50,000/-. This contention was accepted by the High Court and hence, this appeal by the claimant. The apex Court held : Chapter VIII of the Motor Vehicles Act, 1939 (The Act), bears the heading "Insurance of motor vehicles against third party risks". By Section 94 (1) of the Act, no person can use a motor vehicle in a public place except as a passenger, unless there is in force in relation to the use of the vehicle a policy of insurance complying with the requirements of the chapter. Section 95 prescribes the requirements of the insurance policy and the limits of liability thereunder. Broadly, by sub-section (1) of Section 95, a policy of insurance must insure the person or classes of persons specified in the Policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in a public place. Section 95 (2) (a) of the Act, with which alone we are concerned in this appeal.

Amendment made to clause (a) of Section 95 (2) by The Motor Vehicles (Amendment) Act, 56 of 1969, substituted therein the word "fifty" for the word "twenty".

The question which arose for consideration was whether the insurer's liability for third party risks under the statutory policy must be held to be limited to Rs. 20,000/- according to the relevant legal provision as it existed on the date on which the policy came into force or, whether that liability can be extended to Rs. 50,000/- in accordance with the legal provision as it stood on the date of the accident, the accident having occurred during the currency of the policy. The relevant dates which have to be borne in mind in this behalf are these. The insurance policy came into force on June 30th, 1969 and covered the period form June 30th, 1969 to June 29th, 1970; the amendment by which the statutory liability of the insurer was increased from Rs. 20,000/- to Rs. 50,000/- came into force on March 2nd, 1970; and the accident which gave rise to the proceedings occurred on April 5th, 1970. That must mean liability as determinable under Chapter VIII at the relevant time, that is to say, at the time when the liability arises. Since the liability of the insurer to pay a claim under a motor accident policy arises on the occurrence of the accident and not until then, one must necessarily have regard to the state of the law obtaining at the time of the accident for determining the extent of the insurer's liability under a statutory policy. In this behalf the governing factor for determining the application of the appropriate law is not the date on which the policy of insurance came into force but the date on which the cause of action accrued for enforcing liability arising under the terms of the policy. That we consider to be a reasonable manner in which to understand and interpret the contract of insurance entered into by the insured and the insurer in this case. The contracting parties did not incorporate the provisions of Chapter VIII of the Act in their contract. That is to say, they did not identify the liability of the promisor on the basis of the provisions of Chapter VIII as they stood on the date when the contract was made. They merely referred to the provisions of Chapter VIII, which means "the provisions of Chapter VIII in force at any given time", the given time being the date on which the right to sue accrues or, correspondingly, the liability arises. If the parties to a contract agree that one shall pay to the other damages for breach of contract in accordance with the law contained in any particular statute, without identifying the law as the provision which is in force on the date of the contract, the law which will apply for determining the quantum of damages is the one which is in force on the date on which the breach of contract is committed, that being the date on which the cause of action arises, and not the law which was in force on the date on which the contract was made. The application of a law to facts which come into existence after that law has come into force does not involve giving retrospective operation to the law, merely because the facts to which the law is being applied are relatable to a contract or an instrument which had come into operation prior to the date on which the law itself had come into force. *Padma Srinivasan* v. *Premier Insurance Co. Ltd.*, AIR 1982 SC 836 : (1982) 1 SCC 613 : 1982 SCC (Cri) 330.

[7924] ● *Illegal detention after acquittal—Power of Supreme Court to order compensation.*—In a petition for *Habeas Corpus* for illegal detention of the petitioner after acquittal in a trial more than 14 years ago the Supreme Court can pass order for compensation even though he was released soon after filing of the writ. *Rudul Sah* v. *State of Bihar*, AIR 1983 SC 1086 : (1983) 4 SCC 141 : 1983 SCC (Cri) 798 : 1983 CrLJ 1644 : 1983 UJ (SC) 759 : 1983 Chand CrC(SC) 131 : 1983 CrAppR (SC) 373 : 1983 BLJ 684.

[7925] ● *Writ of habeas corpus practice of Supreme Court.*—In this petition filed for a writ of *habeas corpus,* it was established that C. Daniel and C. Paul were taken to Phungrei Camp by officers and jawans of 21st Sikh Regiment on 10-3-1982 and that they never left the army camp as canvassed on behalf of the respondents on 11-3-1982. It was obligatory upon the respondents, therefore, to produce the said persons and to explain their whereabouts, more so because respondents claimed the power to arrest and question anyone under the provisions of the Armed Forces (Special Powers) Act, 1958. It was contended for the respondents that once the respondents has adopted a position that the two persons had come to the army camp at the request of the army authority, but left that place on their own in company of their friends, a writ of *habeas corpus* could not be issued, and the respondents could not be called upon to file a return to the writ. When a petition for a writ of *habeas corpus* under Article 32 of the Constitution was moved before the Court, ordinarily the Court would not issue *ex parte* a writ of *habeas corpus* unless the urgency of he situation so demanded or issuing of a notice of motion was likely to result in defeat of justice. Further, the Court would be reluctant to issue a writ of *habeas corpus ex parte* where the fact of detention might be controverted and it might become necessary to investigate the facts. The normal practice was that when a petition for a writ of *habeas corpus* was moved, the Court would direct a notice to be served upon the respondents with a view to affording the respondents to file evidence in reply. If the facts alleged in the petition were controverted by the respondents appearing in response to the notice by filing its evidence, the Court would proceed to investigate the facts to determine whether there was substance in the petition for a writ of *habeas corpus.* If on investigation of facts, the Court rejected the contention of the respondents and was satisfied that the respondents were responsible for unauthorised and illegal detention of the person or persons in respect of whom the writ was sought, the Court would issue a writ of *habeas corpus* which would make it obligatory for the respondents to file a return. Accordingly, the petition was allowed directing the issue of a writ of *habeas corpus* to respondents 1, 2 and 4 commanding them to produce the two persons before the Supreme Court on 12-12-1983 and file the return. *Sebastian M. Hongray* v. *Union of India*, AIR 1984 SC 571 : (1984) 1 SCC 339 : 1984 CrLJ 289.

[7926] ● *Failure of Govt. to produce certain persons—Payment of Rs. One lakh to wife of each person as exemplary costs.*—Now in the facts and circumstances of the case it is not proposed to impose imprisonment nor any amount as and by way of fine but keeping in view the torture, the agony and the mental oppression through which Mrs. C. Thingkhurla, wife of Sri C. Daniel and Mrs. C. Vangamala, wife of Shri C. Paul had to pass and they being the proper applicants, the former application being by Sebastian M. Hongray, it is directed that as a measure of exemplary costs, as is permissible in such cases, respondents 1 and 2 shall pay Rs. 1 lac to each of the aforementioned two women within a period of four weeks from today. *Sebastian M. Hungray* v. *Union of India,* AIR 1984 SC 1026 : (1984) 3 SCC 82 : 1984 SCC (Cri) 407 (409-410) : 1984 CrLJ 830 : 1984 CrLR (SC) 237 : (1984) 2 Crimes 22.

[7927] ● *Gift of Land by accused to victim's widow—Acquittal by High Court on that ground illegal.*—Both the respondents were convicted by the learned Sessions Judge under Section 302 read with Section 34 of the IPC, and each of them was sentenced to undergo imprisonment for life. On appeal, for very strange reasons, the High Court acquitted the first respondent and converted the conviction of the second respondent to one under Section 304-A, IPC, and reduced the sentence to 2 years' RI What the High Court said speaks for itself. It said:

"However, we are told by the learned counsel for the parties that they being closely related some members of the village have intervened and have brought about some sort of arrangement under which Ram Kumar appellant has already made a gift of three acres of land in favour of Smt. Maya Devi, widow of Chander Shekhar, as compensation on account of the loss of life of her husband. Though this is not a matter which can be taken notice of by this Court, yet it has always been our desire to see that enmity between close relations should be encouraged to come to an end. Since the father of Ramesh Kumar (PW-6) had lost his life, he could possibly have indulged in some exaggeration to magnify the nature of the offence. In the circumstances, we give benefit of doubt to Ram Kumar appellant and acquit him. We convert the conviction of Ratna apppellant from one under Section 302 to one under Section 304-A, Indian Penal Code and sentence him to undergo two years' rigorous imprisonment. Ram Kumar appellant is on bail. His bail bond shall stand discharged." It could only be said that the judgment of the High Court had left the Court shocked and perplexed. This Court was at a total loss to understand it. The entire system of administration of criminal justice was reduced to a mockery. If the judgment of the High Court was upheld, it was as if a person who could afford to make gifts of land or money to the heirs of the victim might get away even with a charge of murder. Courts were to dispense justice, not to dispense with justice. And, justice to be dispensed was not palm-tree justice or idiosyncratic justice. The judgment could not stand a second's scrutiny. It was accordingly set aside and the matter was remanded to the High Court so that the criminal appeals and revision might be reheard. *Ramesh Kumar* v. *Ram Kumar,* AIR 1984 SC 1029 : (1984) 3 SCC 90 : 1984 CrLJ 832 (SC).

[7928] ● *Arrest of member of Legislative Assembly—Resultant deprivation of right to attend impending Assembly Session—Award of compensation of Rs. 50,000/-.*—The petitioner was an MLA of Jammu and Kashmir who incurred the wrath of the Government. They were bent upon preventing him from attending the Assembly Session which was to meet on 11-9-1985. On the opening day of the Budget Session which was 17-8-1985, he was suspended from the Assembly. The order of suspension was stayed by the High Court on 9-9-1985. On the intervening night of 9th-10th, September, 1985, he was proceeding from Jammu to Srinagar, en route at 3-00 a.m. on the 10th, he was arrested and taken away be the Police. Efforts to trace him proved futile and hence his wife filed the present writ against the respondents to produce her husband before the Court, to declare his detention illegal and to set him at liberty. On 16-9-1985, the M.L.A. was released on bail by the Additional Sessions Judge. The petitioner then filed a supplementary affidavit that he was kept in Police lock up from 10th to 14th and that he was produced before a Magistrate for the first time only on the 14th. The petitioner was detained from 3-00 a.m. on 10-9-1985 till he was produced before the Sub-Judge on the 14th September 1985. The two remand orders did not contain any statement that the petitioner was produced before either of them. The applications for remand also did not contain any statement that he was being produced before either of them. No affidavits of the Officer-in-charge of the police station or of the officer who arrested him was filed in the Supreme Court. At the hearing it was represented that their affidavits had been got ready but mislaid and the prayer for adjournment for filing them was refused. Non-production of the prisoner before the Magistrate on the 11th or before the Sub-judge on the 13th was certainly a gross violation of the petitioner's constitutional rights under Articles 21 & 22(2). If the personal liberty of an M.L.A. is to be played with in that fashion, one can only wonder what may happen to lesser mortals. Police officers who are the custodians of the law and order should have shown greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness.

Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct. The two police officers, the one who arrested him and the one who obtained the orders of remand, are but minions in the lower runs of the ladder. But the responsibility lay elsewhere and with the higher echelons of the Government of J&K. There was no doubt that the Constitutional rights of the petitioner have him violated with impunity since he is not in detention. There is no need to make any order to set him at liberty, but suitably and adequately he should be compensated. The Supreme Court had the right to award monetary compensation by way of exemplary costs or otherwise. When a person came to the Supreme Court with the complaint that he had been arrested and imprisoned with mischievous or malicious intent and that his Constitutional and legal rights were invaded, the mischief or malice and the invasion might not be washed away or wished away by his being set free. In appropriate cases like the present one this Court had jurisdiction to compensate the victim by awarding suitable monetary compensation. The State of J&K was directed to pay a sum of Rs. 50,000/-. *Bhim Singh* v. *State of J.&K.*, AIR 1986 SC 494 : 1986 SCC (Cri) 47 : 1986 CrLJ 192.

[7929] ● ***Infringement of fundamental right—Claim for compensation.***—Ordinarily, of course, a petition under Article 32 of the Constitution should not be used as a substitute for enforcement of the right to claim compensation of infringement of a fundamental right through the ordinary process of Civil Court. It is only in exceptional cases of the nature indicated above that compensation may be awarded in a petition under Art. 32. This is the principle on which this Court awarded compensation in *Rudul Sah* v. *State of Bihar*, AIR 1983 SC 1086. So also this Court awarded compensation to Bhim Singh whose fundamental right personal liberty was grossly violated by the State of J&K. In all cases where compensation has been awarded by this Court, the infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the Court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the Civil Court for claiming compensation. *M.C. Mehta* v. *Union of India,* AIR 1987 SC 1086 : (1987) 1 SCC 395 : JT 1987 (1) SC 1 : (1987) 1 SCR 819.

[7930] ● ***Police firing—Compensation—Payment to victims.***—There has been no dispute that as a result of the Police firing 21 people died and several others were injured. The heirs and relations of a few of the dead people had been compensated by the State to the tune of Rupees ten thousand as found from the record. No justification has been indicated as to why the said compensation has not been given in every case of death or injury. It is a normal feature of which judicial notice can be taken that when such unfortunate consequence emerge even in Police firing, the Sate comes forward to give compensation. Mrs. Jaya Narayan for the State candidly stated that it is not the intention of the State to deprive the relatives of some of the victims who succumbed to the injuries sustained by police firing from benefit of compensation. Ordinarily in the case of death compensation of Rs. 20,000 is paid and there is no reason as to why the quantum of compensation should be limited to Rs 10,000. We may not be taken to suggest that in case of death the liability of the wrong-doer is absolved when compensation of Rs. 20,000 is paid. It is directed that without prejudice to any just claim for compensation that may be advanced by the relations of the victims who have died or by the injured persons themselves, for every case of death compensation of Rupees twenty thousand and for every injured person compensation of Rupees five thousand shall be paid. Where some compensation has already been paid, the same may be adjusted when the amount now directed is being paid. *Peoples' Union of Democratic Rights* v. *State of Bihar,* AIR 1987 SC 355 : (1987) 1 SCC 265 : 1987 SCC (Cri) 58 : 1987 CrLJ 528 : 1987 CrLR (SC) 11 : (1987) 1 SCR 631 : JT 1987 (1) SC 18.

[7931] ● ***Substituting monetary compensation in lieu of substantive sentence.***—It is the duty of the Court to impose a proper punishment and to allow the respondent to escape with payment of a fine of Rs. 10,000 will deprive the law of its effectiveness and result in travesty of justice. Such drastic reduction in sentence in murder cases apart from creating law and order problems would be repugnant to the basic concepts of criminal justice. In the present case, the respondent had dealt a solitary blow with a lathi on the head of the deceased in the heat of the moment, without premeditation and after a sudden fight and under those circumstances there was nothing to prove that he had intended to cause the death of the deceased but could only be attributed with knowledge that it was likely to cause an injury which was likely to cause his death and, therefore, he could only be liable under Section 304, Part II, there was no justification for substituting monetary compensation in *lieu* of substantive sentence. *State of Haryana* v. *Prabhu,* 1987 Supp SCC 177 : 1988 SCC (Cri) 51 (52) : 1988 CrLR (SC) 87.

[7932] ● *Award of compensation to victim under Section 357(3), CrPC.*—Section 357 (3) of the Code is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power is intended to do something to reassure the victim that he/she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is to some extent a constructive approach to crimes. It is indeed a step forward in our criminal justice system. The Supreme Court recommended to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.

In the instant case the payment by way of compensation must however be reasonable. The quantum of compensation may be determined by taking into account the nature of the crime, the justness of the claim by the victim and the ability of the accused to pay. If there are more that one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary, by instalments, may also be given. The Court may enforce the order by imposing sentence in default.

The victim in this case lost his power of speech permanently. That is why he has not stepped into the witness box for the prosecution. The life long disability of the victim ought not to be by-passed by the Court and he must be made to feel that the Court and the accused had taken care of him. Any such measure which would give him succour is far better than a sentence by deterrence. The counsel stated that his clients were willing to pay any amount determined by this Court. Having due regard to all the facts and circumstances of the case, a compensation of Rs. 50, 000/- would meet the ends of justice, to be paid in equal proportions. *Hari Kishan and State of Haryana* v. *Sukhbir Singh*, AIR 1988 SC 2127 : (1988) 4 SCC 551 : 1989 CrLJ 116 : 1988 (3) Crimes 541.

[7933] ● *Compensation—State liable for tortious act committed by its agency.*—An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment, the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. The son of Kamlesh Kumari aged 9 years died due to beating and assault by the SHO Lal Singh and as such she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortious acts of its employees. Respondent 2, Delhi Administration, is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the SHO on a conspectus of decisions of this Court in *State of Rajasthan* v. *Vidhyawati*, AIR 1962 SC 933 and *Peoples' Union of Democratic Rights* v. *Police Commissioner*, (1989) 4 SCC 730. We deem it just and proper to direct the Delhi Administration, respondent No. 2 to pay compensation to Kamlesh Kumari, mother of the deceased, Naresh a sum of Rs. 75,000 within a period of four weeks from the date of this judgment. *Saheli, a Women's Resources Centre, through Ms. Nalini Bhanot* v. *Commissioner of Police, Delhi Police*, AIR 1990 SC 513 : (1990) 1 SCC 422 : 1990 SCC (Cri) 145 : 1990 CrLR (SC) 152 : JT 1989 (4) SC 553.

[7934] ● *"Compensation" connotation at.*—The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him. *Lucknow Development Authority* v. *M.K. Gupla*, AIR 1994 SC 787 (796-797) : (1994) 1 SCC 243.

[7935] ● *Compensation Award of for mental and physical harassment.*—In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the (street is) made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was *mala fide* and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same.? It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant are over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the Court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries. *Lucknow Development Authority* v. *M.K. Gupta*, AIR 1994 SC 787 (799, 800) : (1994) 1 SCC 243.

[7936] ● *Power to award compensation not ancillary to other sentences but in addition.*— In the instant case the accused did not commit the murders merely of personal gains but on the other hand committed the same under the influence of extreme mental and emotional disturbance and also having a reasonable apprehension that his life was in danger. The accused seemed to have acted in a frenzied manner in such a disturbed mental condition. The fact that there is no direct evidence connecting the accused with the murders cannot be overlooked. Under these circumstances it may not be safe to award death sentence. Widow of the deceased is left without any support with a family to be maintained. Therefore, it is a fit case where this Court should award compensation to her. Section 357(3), CrPC provides for ordering of payment by way of compensation to the victim by the accused. It is an important provision that it must also be noted that power to award compensation is not ancillary to other sentences but it is in addition thereto. *Balraj* v. *State of Uttar Pradesh*, AIR 1995 SC 1935 : (1994) 4 SCC 29 : 1994 SCC (Cri) 823 (827) : 1995 CrLJ 3217.

[7937] ● *Compensation for causing death of deceased and injuries to other.*—A-4 was responsible for causing the death of Harbans Singh, deceased 2 and injuries to Surjit Singh, PW 6 by rash and negligent driving. Accordingly, as provided under Section 357, CrPC A-4 is directed to pay Rs. 30,000 by way of compensation to the legal heirs of Harbans Singh deceased 2 and Rs. 10,000 to Surjit Singh PW-6. *Hardev Singh* v. *State of Punjab,* 1994 Supp (2) SCC 282 : 1994 SCC (Cri) 1234 (1239) : (1994) 2 Crimes 307.

[7938] ● *Compensation—Death of Army Officer while in service.*—The manner in which the authorities have dealt with the episode of the alleged burning is all the more reprehensible. All that is stated in the affidavit-in-reply is that when the officer was sent to the airfield "the officer did not board the plane. He had gone to attend some private business in the cook house and later his charred body was found with 98% in the serious as contended by the plaint (Sic). As such there was no cause of apprehension". We are pained at the utterly irresponsible conduct of the authorities in the present case right from the inception.

It is surprising that when the officer was not in a condition to move on account of his ailment, and when on 16-6-1978 his condition was considered so delicate that even his wife and children were permitted to see him only after a great deal of persuasion, and when he was all the while accompanied by the Specialist Doctor, he was allowed to move on his own and go for his private business to the cook house, if the version of the respondent-authorities is to be believed. It is also difficult to believe that when he was being airlifted at his own request, he had refused to board the plane and instead had left for his said alleged private business. All that thereafter was found was his charred body with 98% burns. No enquiry whatsoever seems to have been made and if made, its results are kept a secret. That such an incident should have occurred in the presence of the responsible Army Officers and should go uninvestigated and in fact completely ignored is all the more baffling. There is a good deal in this case for which the authorities have to answer. In the aforesaid facts the conclusion is that the officer died, while in service in mysterious circumstances and his death is attributable to and aggravated by the military service. The responsibility of his death is *prima facie* traceable to the act of criminal omissions and commissions on the part of the concerned authorities. The petitioner is, therefore, entitled to suitable compensation as well as to the special family pension and the children allowance according to the relevant Rules w.e.f. 23-6-1978, *i.e.*, the date of death of her husband. Compensation in the amount of Rs. 6 lacs is awarded to her. *Charanjit Kaur* v. *Union of India*, AIR 1994 SC 1491(1495) : (1994) 2 SCC 1 : JT 1994 (1) SC 131.

[7939] ● ***Compensation for foisting false case by Police Officer.***—A Police Officer foisted false case, State Govt. directed to pay Rs. 5,000/- as compensation to accused after recovering it from concerned Police Officers. *Daulat Ram* v. *State of Haryana,* AIR 1995 SC 1998 : (1996) 11 SCC 711 : 1995 CrLJ 3648 (SC).

[7940] ● ***Payment of fine by way of compensation to widow of deceased.***—The appellant after his conviction for the offence under Section 307, IPC by the High Court has been in custody for over one year. He has also remained in custody for sometime during the investigation of the case and the trial. After hearing learned counsel for the complainant we consider that it would meet the ends of justice if the sentence of the appellant for the offence under S. 304, Part II, IPC is reduced to the period already undergone by him but in addition he is directed to pay a fine of Rs. 20,000 by way of compensation under S. 357, Cr PC to be paid to the widow of the deceased. *Giani Ram* v. *State of Haryana,* AIR 1995 SC 2452 : 1995 CrLJ 4168.

[7941] ● ***Rape—Award of interim compensation during pendency of proceedings.***—If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme on the basis of the principles set out in the decision in *Delhi Domestic Women's Forum* v. *Union of India*, (1995) 1 SCC 14, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offence of rape, which is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life. Having regard to the facts and circumstances of the present case in which there is a serious allegation that Bodhisattwa Gautam had married Subhra Chakraborty before the God he worshipped by putting vermilion on her forehead and accepting her as his wife and also having impregnated her twice resulting in abortion on both the occasions, we, on being *prima facie* satisfied, dispose of this matter by providing that Bodhisattwa Gautam shall pay to Subhra Chakraborty a sum of Rs. 1,000 every month as interim compensation during the pendency of Criminal Case No. 1/95 in the Court of Judicial Magistrate, 1st Class, Kohima, Nagaland. He shall also be liable to pay arrears of compensation at the same rate from the date on which the complaint was filed till this date. *Bodhisattwa Gautam* v. *Subhra Chakraborty*, AIR 1996 SC 922 : (1996) 1 SCC 490 : 1996 SCC (Cri) 133 : JT 1995 (9) SC 509.

[7942] ● ***Compensation Family feud resulting in death.***—Considering the nature of the crime, the fact that the accused and the victim are near relations, that it is a property issue which ended in the calamity, the fact that the accused are admittedly in a position to pay, we are of the view that this is a fit case in which S. 357(3), CrPC can be invoked and a just and reasonable compensation given to the family of Balbir Singh (PW-5 and children). In the circumstances, while upholding the conviction of the appellants for the offence under S. 299 read with S. 304 Part I., IPC the following directions are being given in the interests of justice:

> "That the appellants are found guilty and sentenced under S.299 read with S. 304, Part I of the IPC to a term of imprisonment, which will be limited to the period they have already undergone for causing the death of Balbir Singh and Amrik Singh.

In addition to the above, we order that the two appellants/accused Nos. 1 and 3 shall pay by way of compensation a sum of Rs. 35,000 each to PW-5 and her children who have suffered the irreparable loss due to the death of Balbir Singh for which the appellants/accused persons have been sentenced to the term of imprisonment already undergone by them." *Baldev Singh* v. *State of Punjab*, AIR 1996 SC 372 (378) : (1995) 6 SCC 593 : 1995 SCC (Cri) 1132 : (1995) 4 Crimes 244 : JT 1995 (7) SC 286.

[7943] ● ***Long detention as order trial—No direction for monetary compensation to be given.***—In the facts and circumstances of the case it appears to us that the respondent had made an application for taking note of the mitigating circumstances in the matter of awarding suitable punishment against him by indicating the period of detention as under-trial accused before Court-martial. He was convicted under S. 307 of the IPC and was awarded the sentence of imprisonment for only one year presumably by taking into consideration, the mitigating circumstances. It is indicated here that for an offence under S. 307 of the IPC imprisonment up to a period of ten years can be given. Hence, we are not inclined to give any direction for monetary compensation for long detention as under-trial accused. *Union of India* v. *Anand Singh Bisht*, AIR 1997 SC 361 : (1996) 10 SCC 153 : 1996 CrLJ 4435.

[7944] ● ***Reduction in substantive sentence—Payment of fine as compensation to heirs of deceased.***—In the present case coming to the question of sentence, we feel that the appellants should adequately compensate the members of the deceased's family for the atrocities they committed taking advantage of the helplessness of Phoola Devi. We therefore, while reducing their substantive sentence of R.I. for five years to three years direct the appellant to pay a sum of Rs. 20,000 and each of the other four appellants a sum of Rs.10,000 as fine. *Sukhpal* v. *State of Madhya Pradesh*, AIR 1997 SC 468 (470) : AIR 1997 SC 541 : (1997) 9 SCC 773 : 1977 SCC (Cri) 789 : JT 1997 (1) SC 387.

[7945] ● ***Award of compensation in public Law proceedings—Adjustment of against damages awarded in civil suit.***—It is now a well accepted proposition in most of the jurisdiction, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong- doer. In the assessment of compensation the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal Courts in which the offender is prosecuted, which the State in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action, like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may, in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit. *D.K. Basu* v. *State of West Bengal*, AIR 1997 SC 610 (628) : (1997) 1 SCC 416 : 1997 SCC (Cri) 92 : 1997 CrLJ 1743 : (1996) 4 crimes 253.

[7946] ● ***Compensation for established breach of fundamental rights.***—S. 330, CrPC. directly makes torture during interrogation and investigation punishable under the Indian Panel Code. These statutory provisions are, however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the Sate of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience. *D.K. Basu* v. *State of West Bengal*, AIR 1997 SC 610 (624) : (1997) 1 SCC 416 : 1997 SCC (Cri) 92 : 1997 CrLJ 1743 : JT 1997 (1) SC 1 : (1997) 4 Crimes 253.

[7947] ● ***Appellant victim of prolonged illegal incarceration—Compensation—Award of.***—According to prosecution case in the after-noon of 8.3.1990, a police party, when they were checking the luggage of the passengers at the inner gate of Inter-State Bus Terminus saw the appellant alighting from a bus with a rexine bag. Seeing them, he tried to move away briskly. PW-6 apprehended him on suspicion and found, on search of his bag, 3 country made pistols and 12 cartridges. The appellant pleaded not guilty to the charges levelled against him; and his specific defence was that in the evening of 6.3.90 when he got down at I.S.B.T. from the bus, he boarded at Meerut, the Police apprehended him, and after detaining him for three days in the Policed Post foisted false case against him. He asserted that no country-made fire arms or cartridges were recovered from him. The appellant, did not examine any witness in his defence but produced before the Court certified copy of a telegram sent by his father to the higher authorities on 8.3.1990, wherein he complained that his son Zahid (the appellant) was arrested by the Police Post, I.S.B.T. on 6.3.1990 and an application that he (the father) moved before a Metropolitan Magistrate, New Delhi on the same day making identical complaint. Though the appellant did not examine his father or any other witness to prove at which hour of the day the above application was filed and moved, it can be safely presumed that it was filed and order of the Magistrate obtained thereon, during Court hours, which ended at 5.00 p.m. Since, according to the prosecution, the appellant was arrested at 5.30 p.m., the above circumstances undoubtedly makes the defence version probable. To confirm whether we would be justified in basing our conclusion on the above circumstance, we called for the Daily Diary Book of the Police Post containing entry No. 33, dated 8.3.1990, a copy of which (Ex PW 4/A) was exhibited by (PW-4) to prove that the patrolling party left the Police Post at 5.00 p.m. On a careful look of the original entry we, however, find that the time at which the party left, stands interpolated, and even with naked eyes, it can be seen that the time of departure of the party which was earlier shown as 6 p.m., was changed to 5p.m. To keep the sequence of entries order, similar interpolations had been made in the earlier two entries. PW-4, who exhibited a plain copy of D.D. No. 33, testified that he could not produce the original as the same had been destroyed. It is now manifest that the above statement was falsely made by PW-4, lest the production of the original diary entry exposed the concerned Police Officers about the interpolation made. The reasons for the interpolation is not far to seek. If PWs-5 and 6 had left the Police Post at 6.00 p.m. (as originally shown in the Daily Diary Book entry No. 33) they could not have apprehended the appellant at 5.30 p.m. as testified by them nor could they have prepared the seizure list at the same time (as shown). From the materials on record we have, therefore, no hesitation in concluding that it was only on receipt of the order of the Magistrate as communicated through the Station House Officer of Kashmere Gate Police Station that PW-5 and 6 along with other Police personnel felt it absolutely necessary to justify the detention of the appellant and with that ulterior object cooked up the story of his apprehension at 5.30 p.m. on 8.3.1990 with unauthorized firearms and ammunitions. We, therefore, allow this appeal and set aside the conviction. Since the appellant has been made a victim of prolonged illegal incarceration due to machination of PWs-5 and 6 and other Police personnel of I.S.B.T. Police Post, we direct the Delhi Government to pay him a sum of Rs. 50,000 as compensation. *Mohd. Zahid* v. *Govt. of N.C.T. of Delhi*, AIR 1998 SC 2023 : (1998) 5 SCC 419 : 1998 SCC (Cri) 1327-1330 : 1998 CrLJ 2908 : 1998 CrLR (SC) 397 : JT 1998 (3) SC 750 : 1998 Cr App R (SC) 383 : (1998) 2 Crimes 325.

[7948] ● ***Compensation instead of fine.***—In this context a reference to S. 29(2) of the CrPC is necessary as it contains a limitation for the Magistrate of first class in the matter of imposing fine as a sentence or as a part of the sentence. S. 29(2) reads thus: "The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both." It is true, if a judicial Magistrate of the first class were to order compensation to be paid to the complainant from out of the fine realised the complainant will be the loser when the cheque amount exceeded the said limit. In such a case a complainant would get only the minimum amount of Rs. 5000. However, the Magistrate in such cases can alleviate the grievance of the complainant by making resort to S. 357(3) of the Code. It is well to remember that the this Court has emphasised the need for making liberal use of that provision (*Hari Kishan* v. *Sukhbir Singh*, AIR 1988 SC 2127) No. limit is mentioned in the subsection and, therefore, a Magistrate can award any sum as compensation. Of course while filing the quantum of such compensation, the Magistrate has to consider what would be the reasonable amount of compensation. *K. Bhaskaran* v. *Sankaran Vaidhyan Balan*, AIR 1999 SC 3762 : (1999) 7 SCC 510 : 1999 SCC (Cri) 1284 (1294) : 1999 CrLJ 4606 : JT 1999 (7) SC 558.

[7949] ● ***Death in police firing—Compensation payment of.***—Without trial, and even without considering the evidence which may be adduced in the cases, learned Judges, ordered the Government to pay Rs. 10 lakhs each to the dependents of all the persons who died in Police firing. Rs. 10 lakhs cash were given to the victims of molestation, Rs. 50,000 each for 398 persons who were detained by the Police. The High Court while imposing such a heavy liability on the State has not made any attempt to discuss the relevant questions which are to be answered for fixing liability of compensation and for quantification of the amount of compensation. On, consideration, the direction for payment of compensation is clearly unsustainable and is liable to be vacated. *A.K. Singh* v. *Uttrakhand Jan Morcha*, AIR 1999 SC 2193 : (1999) 4 SCC 476 : 1999 SCC (Cri) 580, 585 : 1999 CrLR (SC) 354.

[7950] ● ***Death of father of claimant due to bomb blast in Jail—Compensation.***—The deceased as also Challa Ramkrishna Reddy who apprehended danger to their lives, complained to the Police and requested for adequate Police guards being deployed at the Jail, but their requests were not heeded to and true to their apprehension, a bomb was thrown at them which caused the death of Challa Chinnappa Reddy and injuries to Challa Ramkrishna Reddy (PW-1). In this process, one of the three persons, who was sleeping near the Jail, was also killed. The Police Sub-Inspector was also in conspiracy and it was for this reason that inspite of their requests, adequate security guards were not provided. Even the normal strength of the guards who should be on duty at night was not provided and only two Constables, instead of nine, were put on duty. Since the Sub-Inspector of Police himself was in conspiracy, the act in not providing adequate security at the Jail cannot be treated to be an act or omission in pursuance of a statutory duty namely R. 48 of the Madras Prison Rules. Moreover the action was wholly *mala fide* and therefore there was no question of the provisions of Art 72 of the Constitution being invoked to defeat the claim of the respondents as the protection of shorter period of limitation, contemplated by that article, is available only in respect of *bona fide* acts. The Fundamental Rights which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by this Court. This through a stream of cases has already awarded compensation to the persons who suffered personal injuries at the hands of the Govt. officers. *State of Andhra Pradesh* v. *Challa Ramkrishna Reddy*, AIR 2000 SC 2083 : (2000) 5 SCC 712.

[7951] ● ***Compensation—Death by electrocution while walking on road.***—Once it is established that the death occurred on account of electrocution while walking on the road, necessarily, the authorities concerned must be held to be negligent and, therefore, in the case in hand, it would be NDMC who would be responsible for the death in question. It is found that the appellant was serving as a machineman in the Statesman and was aged 54 years on the date of death, and the age of retirement is 60 years. Taking these factors into consideration, NDMC is directed to award to the appellants, who are the legal heirs of the deceased, compensation to the tune of Rs. 1,00,000 and NDMC should pay the same within 3 months from today failing which it will carry interest at the rate of 12%. *Parvati Devi* v. *Commissioner of Police, Delhi, (*2000) 3 SCC 754 : 2000 SCC (Cri) 771(771).

[7952] ● ***Compensation Award of—Victim of rape.***—Mrs. Chandrima Das, a practicing Advocate of the Calcutta High Court, filed a petition under Art. 226 of the Constitution against the Chairman, Railway Board and others claiming compensation for the victim, Smt. Hanuffa Khatoon, a Bangladeshi National who was gang-raped by many, including employees of the Railways in a room at Yatri Niwas at Howrah Station of the Eastern Railway. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the Civil Court for damages and the matter should not have been considered in a petition under Art. 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages undue Private Law. In the instant case it is not a mere matter of violation of an ordinary right of a person but the violation of fundamental rights which is involved. Smt. Hanuffa Khatoon was a victim of rape. This Court in *Bodhisattwa* v. *Subhra Chakaraborty*, AIR 1996 SC 922 : (1996) 1 SCC 490 has held "rape" is an offence which is violative of the fundamental right of a person guaranteed under Article 21 of the Constitution. "Rape is a crime not only against the person of a woman, it is a crime against the entire society" *Chairman, Railway Board* v. *Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465 : 2000 CrLJ 1473 : JT 2000 (1) SC 426.

[7953] ● ***Custodial death—Compensation.***—The State of Utter Pradesh is responsible in public law for the death of Rishipal and must pay compensation to the petitioners for the same (see *D.K. Basu* v. *State of W.B.*, AIR 1997 SC 610 : 1997 CrLJ 743). It is appropriate to order the State of Uttar Pradesh to pay to the petitioners compensation for the death of Rishipal in the sum of Rupees five lakhs within three months. *Ajab Singh* v. *State of Uttar Pradesh*, AIR 2000 SC 3421 (3423) : (2000) 3 SCC 521 : 2000 SCC (Cri) 718 : 2000 CrLJ 1809 : 2000 CrLR (SC) 340.

[7954] ● ***Compensation words "as may be prescribed"—Meaning of.***—The collocation of the words : "as may be prescribed" in Section 124-A of the Railways Act is to be understood as to mean "as may be prescribed form time to time". The relevance of the date of untoward incident is that the right to claim compensation form the Railway Administration would be acquired by the injured on that date. The statute did not fix the amount of compensation, but left it to be determined by the Central Government from time to time by means of rules. This delegation to the Central Government indicates that it was difficult for Parliament to fix the amount because compensation amount is a varying phenomenon and the Government would be in a far advantageous position to ascertain what would be the just and reasonable compensation in respect of a myriad different kinds of injuries by taking into account very many factors. What the legislature wanted was that the victim of the accident must be paid compensation and the amount must represent a reality which means the amount should be a fair and reasonable compensation. The Government has the better wherewithals to ascertain and fix such amount. It is for the said reason that Parliament left it to the Government to discharge that function. Sections 124 ands 124-A of the Act speak the same language that "the Railway Administration shall be liable to pay compensation". As pointed above, it is the liability of the Railway administration to "pay compensation to such extent as may be prescribed". Hence the time of ordering payment is more important to determine as to what is the extent of the compensation which is prescribed by the rules to be disbursed to the claimant. In this context a reference to Section 129 of the Act appears useful. The Central Government is empowered by the said provision to make rules by notification "to carry out the purposes of this Chapter". It is evident that one of the purposes of this chapter is that the injured victims in railway accidents and untoward incidents must get compensation. Though the word "compensation" is not defined in the Act or in the Rules it is the giving of an equivalent or substitute of equivalent value. In *Black's Law Dictionary,* "Compensation" is shown as "equivalent in money for a loss sustained; or giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; or recompense in value for some loss, injury or service especially when it is given by statute." It means when you pay the compensation in terms of money it must represent, on the date of ordering such payment, the equivalent value. *Rathi Menon* v. *Union of India*, AIR 2001 SC 1333 : (2001) 3 SCC 714 : 2001 SCC (Cri) 1311 (1318) : JT 2001 (3) SC 457.

[7955] ● ***Compensation—Relevant date for determination.***—In this context we may look at Section 128 (1) also. It says that the right of any person to claim compensation before the Claims Tribunal as indicated in Section 124 or 124-A shall not affect the right of any such person to recover compensation payable under any other law for the time being in force. But there is an interdict that no person shall be entitled to claim compensation for more than once in respect of the same accident. This means that the party has two alternatives, one is to avail himself of his civil remedy to claim compensation based on common law or any other statutory provision, and the other is to apply before the Claims Tribunal under Section 124 or 124-A of the Act, As he cannot avail himself both the remedies he has to choose one between the two. The provisions in Chapter XIII of the Act are intended to provide a speedier remedy to the victims of accidents and untoward incidents. If he were to choose the latter that does not mean that he should be prepared to get a lesser amount. He is given the assurance by the legislature that the Central Government is saddled with the task of prescribing fair and just compensation in the Rules from time to time. The provisions are not intended to give a gain to the Railway Administration but they are meant to afford just and reasonable compensation to the victims as a speedier measure. If a person files a suit the amount of compensation will depend upon what the Court considers just and reasonable on the date of determination. Hence when he goes before the Claims Tribunal claiming compensation the determination of the amount should be as on the date of such determination. *Rathi Menon* v. *Union of India*, AIR 2001 SC 1333 : (2001) 3 SCC 714 : 2001 SCC (Cri) 1311 (1318) : JT 2001 (3) SC 457.

[7956] ● ***Compensation—Material on record when scanty Court to assess on material available.***—In the instant case, the High Court did not have sufficient material before it to correctly assess the capacity of the accused to pay the compensation but the keeping then object of the section in mind as seen from the reasoning of the High Court, we think it is a fit case in which the Court was justified in invoking Section 357. Since the material on record is scanty, the Court will have to assess this monetary figure from the material available and also taking into consideration the facts, the judicial notice of which the Court can take note of. *Rachapal Singh* v. *State of Punjab*, AIR 2002 SC 2710 : (2002) 6 SCC 462 : 2002 SCC (Cri) 1362 : 2002 CrLJ 3540 : (2002) 3 Crimes 36 (SC).

[7957] ● ***Compensation—Accused when facing serious offence like murder.***—The High Court has also awarded Rs. 1 lakh as compensation to the accused on the ground that she was illegally detained in the Police Station and the Police personnel committed acts of molestation, obscene violation, *etc.* It is noteworthy that after investigation the Police has submitted chargesheet against accused. Her application for bail was rejected by the learned Sessions Judge and thereafter by the High Court prior to the decision of the revision. There is absolutely no justification for awarding compensation to a person who is facing prosecution for a serious offence like murder even before the trial has commenced. This direction, therefore, deserves to be set aside. *State Rep. By Inspector of Police* v. *N.M.T. Joy Immaculate*, AIR 2004 SC 2282 : (2004) 5 SCC 729 : 2004 SCC (Cri) 1722 (1734) : 2004 CrLJ 2527 : (2004) 2 JCC 731 : (2004) 3 Crimes 136.

[7958] ● ***Power of Court to award compensation to victim of offence.***—Opportunity has to be granted before directing payment of compensation under Section 357(4), CrPC. If the Appellate Court intends to award compensation, an opportunity of hearing has to be granted so that the relevant aspects like the need to award compensation, capacity of the accused to pay and several relevant factors can be taken note of. *Mangilal* v. *State of M.P.*, AIR 2004 SC 1280 : (2004) 2 SCC 447 : 2004 SCC (Cri) 1085 (1092) : 2004 CrLJ 880 : (2004) 1 JCC 138 : JT 2004 (1) SC 81 : (2004) 1 Crimes 177.

[7959] ● ***Power u/s. 357(3) when to be exercised.***—The power under Section 357(3), CrPC can be exercised only when the Court imposes sentence by which fine does not form a part. Where a Court having sentenced to imprisonment, as also fine, the power under sub-section (3) of Section 357, CrPC could not have been exercised. *Sivasuryian* v. *Thangavelu*, (2004) 13 SCC 795 : (2006) 1 SCC (Cri) 532.

[7960] ● ***Compensation—Direction for payment setting aside of.***—The trial Court had imposed a sentence of fine of Rs. 2000 as fine and the High Court enhanced the quantum of fine without there being any further discussion on the matter. Therefore, the direction to the appellant to pay a fine of Rs. 2 lakhs could only by treated as enhancement of fine already imposed by the Sessions Judge. Moreover, Section 357(3) contemplates a situation where the complainant has suffered any loss or injury and for which the accused person has been found *prima facie* responsible. There is no such finding or observation by the High Court. Of course, the daughter of the complainant passed away but the direction of the High Court to pay Rs. 2 lakhs was on the assumption that the complainant had paid Rs. 2 lakhs as part of the dowry to the appellant. There is no evidence to show that such an amount was given to the appellant. On the other hand, the appellant's learned counsel contended that it was a love marriage between the appellant and the deceased and no dowry passed between the parties. It is also pertinent to note that Section 357(5), CrPC says that at the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section. The direction to pay compensation under Section 357(3) is on the assumption of basic civil liability on the part of the person who committed the offence to redress the victim or his dependents by payment of compensation. The complainant could not have filed a civil suit for recovery of the dowry amount if any, as the payment itself was illegal and prohibited under law. In any view of the matter, the direction of the High Court to pay a sum of Rs. 2 lakhs as fine was not warranted by law and we set aside the same and also further direction that the appellant to undergo default sentence. *Arun Garg* v. *State of Punjab*, 2005 SCC (Cri) 338 (347).

[7961] ● ***Uphaar Cinema Tragedy—Compensation to victims of.***—*Compensation to Victims of Uphaar Cinema Tragedy.*—The Apex Court directed as under :—

(1) That the appellants shall, within a period of one month from today, deposit an amount of Rs. 3,01,40,000 (Rupees three crores one lakh and forty thousand) with the High Court.

(2) That for the purpose of arranging the funds, the appellant shall be at liberty to offer the cinema building as security and raise money from the financial institutions.

(3) That, other than offering the property as security for the purpose of raising the amount as aforesaid, the appellants shall not create any other encumbrance or any other third-party interest in the cinema building.

(4) That, the order of the criminal Court as to sealing of the property and maintaining the same intact till the criminal trial is over, shall be meticulously observed.

(5) That on the amount being deposited, 50 per cent of the amount deposited by the appellants shall be available for distribution to the claimants rateably. The balance amount shall be invested with a nationalised bank so as to be available for distribution consistently with the final decision of this Court. *M.C.D.* v. *Association of Victims of Uphaar Tragedy*, 2005 SCC (Cri) 1256 (1258).

[7962] ● ***Compensation in rape case.***—When the State has not challenged the award of compensation, it is not open to it to question the legality of the award in appeal filed by accused in the Supreme Court. *Dinesh* v. *State of Rajasthan*, AIR 2006 SC 1267 : (2006) 3 SCC 771 : (2006) 2 SCC (Cri) 1 : 2006 CrLJ 1679 : 2006 (1) Crimes 247.

[7963] ● ***Sentence reduced to sentence already undergone—Compensation.***—Where accused was held guilty and convicted under Section 325 and 323, IPC, the substantive sentence imposed was reduced to the sentence already undergone and the accused was directed to pay Rs. 10,000/- as compensation to the complainant. *Mangappa* v. *State of Karnataka,* (2007) 6 SCC 231 : 2007 (3) SCC (Cri) 76 : 2007 CrLJ 3220 (3223).

[7964] ● ***Person losing right arm in police firing—Special ex gratia amount paid to claimant.***—On 7.7.1991 during the ambush in terrorist chase the respondent was hurt. He was visiting a relative in the night. The police asked him to stop. According to the police forces he did not pay any heed to stop the vehicle. In any event, police started shooting, several bullets hit his right fore-arm which was immediately blown off and severed from upper arm. He was taken to the hospital where the right arm below elbow was amputated. Thereafter also the respondent had to undergo another surgery at PGI, Chandigarh as he had developed abscess. He was paid Rs. 20,000/- in terms of the notification and a sum of Rs. 3,378/- as medical expenses. After about 10 years, the petition under Section 482, CrPC was filed demanding compensation of repress 3 lacs. The claim was resisted on several grounds including delayed approach and the non-applicability of Section 482, CrPC. The Supreme Court observed:

"A bare look at the notification dated 18-1-1991 makes the position clear that it was paid as "special *ex gretia* grant". The limit was also fixed. Therefore, the question of the respondent making any claim in terms of the notification for a higher amount does not arise additionally the respondent was not claiming compensation in writ petition but under Section 482, CrPC and such a claim is also misconceived. Additionally, the respondent was not claiming was made 10 years after the amount fixed by the government had been paid to him. . . But we find that medical expenses paid are certainly low compared to the normal expenses which appear to have been spent for operations and treatment. We fix the quantum at Rs. 20,000/-. The same is in addition to the fixed sum already paid by way of *ex gratia* compensation under the notification. Though there was a belated claim, in view of the peculiar circumstances of the case we have not treated the belated approach to be fatal. An additional sum of Rs. 17000/- shall be paid to the respondent within two months." *State of Punjab* v. *Kuldeep Singh,* (2007) 6 SCC 218 : (2007) 3 SCC (Cr) 68 : 2007 CrLJ 3751.

[7965] ● ***Claim for additional compensation after delay of 10 years under Section 482, CrPC.***—A bare look at the notification dated 18.1.1991 makes the position clear that it was paid as "special *ex-gratia* grant". The limit was also fixed. Therefore, the question of the respondent making any claim in terms of the notification for a higher amount does not arise. Additionally, the respondent was not claiming compensation in a writ petition but under Section 482, CrPC, and such a claim is also misconceived. Additionally, the claim was made 10 years after the amount fixed by the Government had been paid to him. It is also not in dispute that the respondent has been appointed as a Chowkidar in a Government school. Therefore, strictly speaking, in terms of the notification nothing further is to be paid to the respondent. But we find that medical expenses paid are certainly low compared to the normal expenses which appear to have been spent for the operations and treatment. We fix the quantum at Rs. 20,000/-. The same is in addition to the fixed sum already paid by way of *ex-gratia* compensation under the notification. Though there was a belated claim, in view of the peculiar circumstances of the case we have not treated the belated approach to be fatal. An additional sum of Rs. 17,000/- shall be paid to the respondent within two months. The appeal is allowed to the aforesaid extent. *State of Punjab* v. *Kuldeep Singh,* (2007) 6 SCC 218 : (2007) 3 Crimes 89 : 2007 CrLJ 3751 (3751, 3752) (SC).

[7966] ● ***Dishonour of cheque—Compensation awarded.***—The respondent convicted under Section 138, Negotiable Instruments Act has not been charged with any fraudulent action. He had a probable defence. The appellant had not preferred any appeal against the judgment of the Trial Judge for enhancement of the sentence. It may be that quantum of compensation had been altered to that of the fine but in effect and substance the same did not matter. Interest of justice would be subserved, if the respondent is directed to pay a compensation of Rs. 7 lacs instead and in place of a fine of Rs. 5000/- as has been directed by the High Court. Thus the appellant would be entitled to get the sum of Rs. 7 lacs by way of compensation. *Dilip S. Dhanukar* v. *Kotak Mohindra,* (2007) 6 SCC 528 : 2007 CrLJ 2417 (2431)

[7967] ● *Awarding of compensation—Consideration by Court.*—In awarding compensation to the victim of offence, the Court shall consider whether it is fit-case in which compensation deserves to be awarded, the nature of the crime, the injury suffered by the victim and the capacity of the convict-to pay compensation etc. *Manish Jalan* v. *State of Karnataka,* 2008 AIR SCW 5160 (5164).

[7968] ● *Awarding of compensation—Power of Court.*—Sometimes compensation is granted by the Court *in lieu* of sending a person behind the bar or in addition to a very light sentence of imprisonment, Section 357, CrPC empowers the Courts not to just impose a fine alone or fine alongwith the sentence of imprisonment, but also when the situation arises, direct the accused to pay compensation. The power of Court to award compensation is not ancillary to other sentences but in addition thereto. *K.A. Abbas H.S.A.* v. *Sabu Joseph*, (2010) 6 SCC 230 : 2010 (3) Crimes 15 (SC).

[7969] ● *Compensation—Ability and capacity of accused.*—Where passing an order awarding compensation, the Court has a duty to find out whether the accused has the ability or capacity to pay the amount awarded. *K.A. Abbas H.S.A.* v. *Sabu Joseph*, (2010) 6 SCC 230 : 2010 (3) Crimes 15 (SC).

COMPENSATION FOR VIOLATION OF ART. 21, CONSTITUTION OF INDIA

[7970] ● *Compensation for violation of Art. 21, Constitution of India.*—It is thus now well settled that the award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a Civil Court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal Court ordering compensation under Section 357 of the Code of Criminal Procedure. *Suba Singh* v. *State of Haryana*, AIR 2006 SC 1117 : (2006) 3 SCC 178 : (2006) 2 SCC (Cri) 54 (74-75) : 2006 CrLJ 1242 : JT 2006 (2) SC 235.

COMPETENT WITNESS

[7971] ● *Wife and husband competent witness.*—The Section 120 of Evidence Act declares wife and husband as competent witness for and against the other. *Chilukuri* v. *Venkatanarayana*, AIR 1954 SC 176 : 1954 SCR 424.

[7972] ● *Accomplice competent witness.*—An accomplice is a competent witness and his evidence could be accepted and a conviction based on it if there is nothing significant to reject it as false. But the rule of prudence, ingrained in the consideration of accomplice evidence, requires independent corroborative evidence first of the offence and next connecting the accused against whom the accomplice evidence is used, with the crime. *Haroon Haji Abdulla* v. *State of Maharashtra*, AIR 1968 SC 832 : 1968 CrLJ 1017 : (1968) 2 SCR 641.

[7973] ● *Accomplice competent witness against accused.*—Accomplice evidence denotes evidence of a participant in crime with others. Section 133 makes the accomplice a competent witness against the accused person. It has been subjected to scrutiny and the usual checks for corroboration and was, therefore, received with due caution. *L. Choraria* v. *State of Maharashtra*, AIR 1968 SC 938 : (1968) 2 SCR 624 : 1968 CrLJ 1134 : 1968 SCD 743.

[7974] ● *Doctor competent witness.*—The doctor examining deceased and conducting postmortem is the most competent witnesses. *Mafabhai Nagarghai Raval* v. *State of Gujarat*, AIR 1992 SC 2186 : 1992 SCC (Cri) 810 : 1992 CrLJ 3710 (SC) : 1992 CrLR (SC) 599.

COMPLAINANT

[7975] ● *Complainant.*—The present appeals by special leave were directed against the judgment of the High Court of Madras dismissing their applications for quashing charges under Sections 500 and 501, IPC. The common question raised in all these appeals was whether the respondent (the original complainant) was an aggrieved person competent to file the said complaint within the meaning of Section 198, CrPC, read with Section 499, *Explanation 2,* IPC.

The appellants were at the material time the Editors and Publishers of three daily newspapers printed and published in Madras. The respondent who was the Chairman of the Reception Committee of the conference organised by the Dravida Kazhagam filed the complaints alleging that the newspapers published a distorted version of the resolution advocating that it should not be an offence for a person's wife to desire another man, that he was one of the members responsible for sponsoring and piloting that resolution. The High

Court held that the Dravida Kazhagam was an identifiable group, that the complainant was the member thereof and was the Chairman of the Reception Committee in the conference and that he was an active member of the Kazhagam, that he was one of those piloted and sponsored the resolution and therefore he was certainly a person aggrieved within the meaning of Section 198, Cr PC. Counsel for the appellants contended that the view of the High Court was incorrect. *Explanation 2* to Section 499, IPC laid down the rule that a defamatory imputation against a collection of persons fell within the definition of defamation. But such a collection of persons should be an identifiable body so that it was possible to say with definiteness that a group of particular persons, as distinguished from the rest of the community, was defamed. Therefore in a case where *Explanation 2* was resorted to, the identity of the company or the association or the collection of persons should be established so as to the relatable to the defamatory words or imputations. The news item complained of clearly stated that the resolution was passed by the conference and not by the Dravida Kazhagam and respondent signed describing himself in his first letter as the Chairman of the Reception Committee and not as an important member of the Dravida Kazhagam. There was no grievance there that the Dravida Kazhagam suffered injury in reputation or otherwise by that alleged distortion. In his advocate's letter to the appellants, the respondent's complaint was that the news item was highly defamatory and had tarnished the image of the conference, of whose Reception Committee he was the Chairman. In his evidence before the Magistrate also, he clearly stated that the resolution was moved by the President of and passed by the conference. Thus, his case throughout was that the publication of the said resolution reported in the said news item in distorted form had tarnished the image not of the Daravida Kazhagam but of the conference. That being so, the High Court completely missed the real issue, *viz.,* whether the conference was a determinate and an identifiable body so that defamatory words used in relation to the resolution passed by it would be defamation of the individuals who composed it, and the respondent, as one such individual and Chairman of its Reception Committee could maintain a complaint under Section 500, IPC. Whether the Dravida Kazhagam was an identifiable group or not was beside the point in the view of the Supreme Court. The conference was not such a determinate class like the Rashtriya Swayam Sevak or the body of public prosecutors in the ruling cited, where complaints by its individual member or members were held maintainable. It was impossible to have any definite idea as to its composition, the number of persons who attended, the ideas and the ideologies to which they subscribed and whether all of them positively agreed to the resolution in question. The evidence simply was that the person presiding it read out the resolution and because no one got up to oppose it, it was taken as approved of by all. The conference clearly was not an identifiable or a definitive body so that all those who attended it could be said to be its constituents who, if the conference was defamed, would, in their turn, be said to be defamed. Section 198, CrPC, is mandatory, so that if a Magistrate were to take cognizance of the offence of defamation on a complaint filed by one who was not an aggrieved person, the trial and conviction of an accused in such a case by the Magistrate would be void and illegal. For the reasons set out, these appeals were allowed, the order of the High Court set aside and the proceedings taken out by the Magistrate were quashed on the ground that the respondent's complaint was not competent. *G. Narasimhan* v. *T.V. Chakkappa,* AIR 1972 SC 2609 : (1972) 2 SCC 680 : 1993 CrLJ 52.

[7976] ● *Evidence of complainant corroboration.*—The evidence of the complainant should be corroborated in material particulars. After introduction of Section 165 A of the IPC making the person who offers bribe guilty of abetment of bribery the complainant cannot be placed on any bare footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon. *Panalal Damodar Rathi* v. *State of Maharashtra*, AIR 1979 SC 1191 : (1979) 4 SCC 526 : 1979 SCC (Cri) 121 : 1979 CrLJ 936 : 1979 CrLR (SC) 574.

[7977] ● *Complainant in the nature of accomplice.*—Complainant is in the nature of accomplice. His story is *prima facie* suspect. Corroboration of his testimony in material particulars is necessary for the Court to act upon the same. *Gulam Mahmood A. Malik* v. *State of Gujarat*, AIR 1980 SC 1558 : 1980 Supp SCC 684 : 1981 SCC (Cri) 586 : 1980 CrLJ 1096 : 1980 CrLR (SC) 504.

[7978] ● *Non-mentioning of name of accused in FIR.*—Statement in the FIR is that the Factory Inspector (accused) accompanied by his friends visited the Factory of the complainant and demanded bribe from him. Not the name of the accused but the designation of his office alone was known to the complainant. Absence of the name of the accused is hardly of any significance.

In a bribery case, visit of the accused to the Factory of the complainant and demand of bribe by the accused from the complainant were alleged. The accused admitted that the complainant followed by the raiding party came to his house. Omission to mention about the time and place of further meeting in the FIR loses all significance. *Kishan Chand Mangal* v. *State of Rajasthan*, AIR 1982 SC 1511 : (1982) 3 SCC 466 : 1983 SCC (Cri) 92 : 1983 CrLJ 1 : 1982 CrLR (SC) 477.

[7979] ● *Head constable being complainant not proceeded with investigation.*—PW-3, Siri Chand, Head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint that a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161, CrPC. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.

The appeal was allowed. *Megha Singh* v. *State of Haryana*, AIR 1995 SC 2339 (2340) : (1996) 11 SCC 709 : 1995 CrLJ 3988.

[7980] ● *Bar on taking cognizance of complaint made without authority of appropriate Govt.*—The provisions of Section 34 of the Industrial Disputes Act require that no Court shall take cognizance of any offence punishable under the said Act or of the abetment of such offence save on a complaint made by the appropriate Government or under the authority of the appropriate Government. There is no limitation therein in regard to the party to whom the authorisation may be given, it is the workman, the trade union and the employer who are most concerned with offences under the said Act and neither the terms of S. 34 nor public policy require that they should be excluded from making such complaints. At the same time the provisions of S. 34 of the Industrial Disputes Act are in the nature of a limitation on the entitlement of a workman or a trade union or an employer to complain of offences under the said Act. They should not, in the public interest, be permitted to make frivolous, vexatious or otherwise patently untenable complaints, and to this end S. 34 requires that no complaint shall be taken cognizance of unless it is made with the authorisation of the appropriate Government. Section 39 empowers the appropriate Government to delegate the powers exercisable by it under the said Act. This is altogether different from the concept of authorisation to file a complaint under Section 34. If the powers under S. 34 of the Act have been delegated under S. 39, the delegate can file the complaint himself or authorise someone else to file it. Learned Counsel's argument, if accepted, would render the words "or under the authority of" in S. 34 otiose and that is impermissible. These words necessarily must be given due meaning and the meaning is that the appropriate Government may authorise someone other than itself, even a non-Government servant, to file a compliant under S. 34. *Raj Kumar Gupta* v. *Lt. Governor, Delhi*, AIR 1997 SC 2680(2683) : (1997) 1 SCC 556 : JT 1996 (10) SC 559.

[7981] ● *Complainant—Meaning of.*—The word "complainant" is not defined in the Code of Criminal Procedure, whether old or new. Any person can set the law in motion except in cases where the statute has specifically provided otherwise. The word "person" is defined in the IPC (S.11) as including "any company or association or body of persons whether incorporated or not" By virtue of S. 2 *(y)* of the new Code of CrPC, words and expressions used in that Code but not defined therein can have the same meaning assigned to them in the Penal Code. Thus, when the word "person" is specifically defined in the Penal Code as including a company, that definition can normally be adopted for understanding the scope of the word "complainant". However, the definition clauses subsumed in S. 2 of the new Code contains the opening key words that such definitions are to be adopted "unless the context otherwise requires". The scheme of the new Code of CrPC makes it clear that complainant must be a corporeal person who is capable of making physical presence in the Court. Its corollary is that even if a compliant is made in the name of an incorporeal person (like a company or corporation), it is necessary that a natural person represents such juristic person in the Court and it is that natural person who is looked upon, for all practical purposes, to be the complainant in the case. In other words, when the complainant is a body corporate, it is the *de jure* complainant, and it must necessarily associate a human being as *de facto* complainant to represent the former in Court proceedings. *Associated Cement Co. Ltd.* v. *Keshvanand*, AIR 1998 SC 596 (600) : (1998) 1 SCC 687 : 1998 SCC (Cri) 475 : 1998 CrLJ 856 : 1998 CrLR 156.

[7982] ● *Complainant be heard before proceedings quashed.*—In the instant case the accused approached the High Court for quashing the criminal proceedings initiated by the appellant. It may not be that the complainant should have been made a party by the aforesaid himself in the petition the quashing the criminal proceedings, as the accused has no such obligation when the case was charge-sheeted by the Police. It is predominantly the concern of the State to continue the prosecution. But when the complainant wishes to be heard when the criminal proceedings are Sought to be quashed it would be a negation of justice to him if he is foreclosed from being heard even after he makes a request to the Court in that behalf. What is the advantage of the Court in telling him that he would not be heard at all even at the risk of the criminal proceedings initiated by him being quashed. It is no solace to him to be told that if the criminal proceedings are quashed he may have the right to challenge it before the higher forums. The scheme envisaged in the Code of Criminal Procedure indicates that a person who is aggrieved by the offence committed is altogether wiped out from the scenario of the trial merely because the investigation was taken over by the Police and the charge-sheet was laid by them. Even the fact that the Court had taken cognizance of the offence is not sufficient to debar him from reaching the Court for ventilating his grievance. Even in the Sessions Court, where the Public Prosecutor is the only authority empowered to conduct the prosecution as per Section 225 of the Code, a private person who is aggrieved by the offence involved in the case is not altogether debarred from participating in the trial. This can be discerned from Section 301 (2) of the Code. *J.K. International* v. *State, Govt. of NCT of Delhi,* AIR 2001 SC 1142 (1144) : (2001) 3 SCC 462 : 2001 SCC (Cri) 547 : 2001 CrLJ 1264 : 2001 CrLR (SC) 243 : JT 2001 (3) SC 130.

[7983] ● ***Appellant not accused but complainant.***—The appellant filed an appeal in the High Court against the acquittal of the respondents who were acquitted after their trial. As neither the appellant nor her counsel was present, the High Court issued bailable warrant against the appellant. The appellant approached the Supreme Court but in the meantime, once again when the matter was listed in the High Court before another Bench of Single Judge, non-bailable warrant of arrest of appellant was issued.

The order of the High Court issuing non-bailable warrant seems to have been passed unmindful of the fact that the appellant was not an accused but a complainant who had preferred an appeal against acquittal. In case the appellant was not present, there may have been other options but certainly not for arrest of the complainant appellant who was complaining against the acquittal of some accused persons. The unfortunate sequel of such unmindful orders has been that the appellant was taken into custody and had to remain in Jail for some time, may be for a few days, but without any justification whatsoever. She suffered in view of the total non-application of mind at the stage of passing of the two impugned orders. Some degree of care is supposed to be taken before passing an order of issue of warrants, bailable or non-bailable. Such orders cannot stand. The orders passed by the High Court are liable to be quashed. As a token of compensation, a sum of Rs. 10,000 is directed to be paid to the appellant within a period of six weeks. *Omwati* v. *State of U.P.*, (2004) 4 SCC 425 : 2004 SCC (Cri) 1287 (1289).

[7984] ● ***Death of Complainant—Permission for continuation of proceedings.***—To bring in application of Section 302 of the Code, permission to conduct prosecution has to be obtained from the Magistrate inquiring into or trying a case. The Magistrate is empowered to permit prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than the Advocate-General or the Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission.

If any permission is sought for by the legal heirs of the deceased complainant to continue prosecution, the same shall be considered in its perspective by the Court dealing with the matter. It is brought to the notice that by order dated 13.10.2003 further proceedings before the Magistrate are stayed. In that background, Mr. Adsure submitted that the application shall be filed before this Court. If and when any application is filed the same shall be dealt with appropriately. Ordered accordingly. *Balasaheb K. Thackeray* v. *Venkat,* 2006 (5) SCC 530 : 2006 (2) SCC (Cri) 630 : 2006 (6) Scale 557 : 2006 (5) Supreme 298 : 2006 (3) Crimes 52 (SC).

[7985] ● ***Date fixed for examination of defence witnesses—Presence of complainant not necessary.***—In the instant case, the date was fixed for examining the defence witnesses. Appellant could have examined witnesses, if he wanted to do so. In that the appearance of complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence. Presence of the complainant or her lawyer would have been necessary only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. *S. Anand* v. *Vasumathi Chandrasekhar*, AIR 2008

SC 1296 : (2008) 4 SCC 67 : 2008 CrLJ 1943 (1945).

[7986] ● ***Dishonour of cheque—Death of Complainant.***—The Complaint petition was filed in the year 2009. The Complainant died in 2003. A large number of dates were fixed for hearing of the case but the heirs of the complainant did not press their application for substitution. The accused had been attending the court for a long-time, except on some dates where when remained absent or was otherwise represented by his advocate. He attended the Court on less than 20 occasions after the death of the original complainant. In view of the above facts and circumstances, the acquittal of accused under Section 256, CrPC for non-appearance of the complainant for held proper. *S. Rama* v. *Rami Reddy,* AIR 2008 SC 2066 : (2008) 5 SCC 535 : 2008 CrLJ 2625 (2627) (SC).

COMPLAINT

[7987] ● ***Complaint.***—In the present case, the accused who were all public servants, were prosecuted on a private complaint for offences under the Penal Code. Sanction for prosecution under Section 197 had not been obtained, and the accused objected to the trial on the ground of want of such sanction. The trial Court accepted the objection and discharged the accused. The complainant applied in revision to the High Court against this order of discharge, and the High Court affirmed the order and dismissed the application. The complainant appealed against the order of the High Court to the Supreme Court.

There was no reason to interfere with the order of the High Court. In a case in which, on the facts of the case, it is clear that the offence in question was committed by the accused while acting or purporting to act in the discharge of his official duty, previous sanction of the Government is essential under Section 197 for the prosecution of the accused, and the trial Court has no competence to take cognizance of the offence without the requisite sanction and has no option except to discharge the accused if the sanction has not been obtained. *Matajog Dubey* v. *H.C. Bhari,* AIR 1956 SC 44 : 1956 CrLJ 140 : 1956 SCJ 110 : 1956 SCA 22.

[7988] ● ***Complainant by returning officer.***—In the present case, a District Magistrate was appointed a Returning Officer for the purposes of an election under the Representation of People Act, 1951. One *V* who was a candidate at the election filed before him a nomination paper containing a false declaration as to his caste, and a false affidavit supporting that declaration. Thereupon the Returning Officer filed a complaint under Section 200, CrPC against him charging him with an offence under Section 193 of the Penal Code. The accused *V* however treated the complaint as one under Section 476, CrPC, and filed an appeal against it under Section 476-B which was summarily rejected by the High Court. *V* appealed against the order of the High Court to this Court under special leave.

The Returning Officer appointed under the Act of 1951 is not a "Court" within the meaning of Section 195, CrPC, though he discharged *quasi*-judicial functions, and hence the offence under Section 193 of the Penal Code which was committed before him was not an offence "in or in relation to a proceeding in a Court" within the meaning of Section 195 (1) (*b*), CrPC. That being so, the complaint made by the Returning Officer is only a private complaint under Section 200, CrPC, and not one made under Section 476, CrPC and hence no appeal to the High Court under Section 476-B could lie against such a complaint. Under the circumstances, the order of the High Court rejecting *V*'s appeal under Section 476-B, and treating the complaint made against him as being one under Section 200, and not under Section 476, is perfectly justified and proper. *Virendra Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : 1956 SCJ 138 : 1956 SCA 410.

[7989] ● ***Magistrate's power to accept plea of self defence.***—The question of law as to the scope and effect of Sections 202 and 203, CrPC which arose in the present case may be stated as under. When a Magistrate directs an inquiry under Section 202, CrPC for ascertaining the truth or falsehood of a complaint made to him under Section 201, and he receives from the officer to whom the inquiry is directed the statements of witnesses recorded by him and his report on the inquiry, if those statements and report support the plea of self-defense made by the person complained against (*a*) is it open to the Magistrate to hold on the basis of such statements and report that the plea can be accepted as true and to dismiss the complaint straightway without issuing a process against the person complained against, or (*b*) is he bound in every such case, as a matter of law, to issue a process against the person complained against and leave to him establish his plea of self-defence at his trial. Section 202 says that on receiving a complaint of an offence, the Magistrate may, if he thinks fit, postpone the issue of process against the person complained against, and may direct an inquiry for the purpose of ascertaining the truth or falsehood of the complaint. In other words, the inquiry is for the purpose of ascertaining whether there is evidence to show that the complaint is true, that is, to support the complaint and to justify the issue of process and the commencement of proceedings against the person concerned. Section 202 does not say that at that stage the person complained against could be called upon to answer the accusation made against him; that can legally be done only when a process has been issued and he is put on his trial. Section 203 consists of two parts. The first part says that on receiving the record of the statements made by witnesses to the inquiring officer and his report on the result of the inquiry, the Magistrate must consider the material placed before him; and then the second part says that if after considering that material, there is, in his judgment, no sufficient ground for proceeding, he may dismiss the complaint, after briefly recording his reasons for doing so. It is manifestly clear from the provisions of Section 203 that the judgment which the Magistrate has to form must be based on the statements of the complainant and his witnesses and the result of the inquiry as contained in the report he has received. *Vadilal Panchal* v. *Dattatraya*, AIR 1960 SC 1113 : 1960 CrLJ 1499.

[7990] ● *Scope of inquiry by—Magistrate under Section 202, CrPC.*—In arriving at his judgment, the Magistrate is not bound to accept the report of the inquiring officer or the statement of any witness or any plea that is setup on behalf of the person complained against, and he is not fettered in any way except by judicial considerations. All that is required of him is that he must apply his judicial mind to the materials on which he has to form his judgment, and if after doing so the is of the opinion that a plea based on any exception under the Penal Code which is pleaded on behalf of the person complained against must be accepted, there is nothing in Section 203 or anywhere else in the Code which precludes him from accepting that plea, provided always that there are satisfactory and reliable materials on which he can base his judgment. If the Magistrate has not misdirected himself as to the scope of an inquiry under Section 202, and has applied his mind judicially to the materials before him as required by Section 203, it would be erroneous in law to hold that a plea based on an exception can never be accepted by him in arriving at his judgment. No doubt, the questions as to what bearing such a plea has on the case of the complainant and the witnesses who support him, and as to the extent to which they are falsified by the evidence of other witnesses, are questions which must be answered with reference to the facts of each case, and no universal rule can be laid in respect of such questions. *Vadilal Panchal* v. *Dattatraya*, AIR 1960 SC 1113 : 1960 CrLJ 1499.

[7991] ● *Second complaint when permissible.*—There is no provision in the Criminal Procedure Code or in any other statute which debars a complainant from preferring a second complaint on the same allegations if the first complaint did not result in a conviction or acquittal or even discharge. Section 300 of the CrPC, which debars a second trial, has taken care to explain that "the dismissal of a complaint or the discharge of an accused is not an acquittal for the purpose of this section." However, when a Magistrate conducts an inquiry under Section 202 of the CrPC and dismisses the complaint on merits, a second complaint on the same facts cannot be made unless there are very exceptional circumstances. Even so, a second complaint is permissible depending upon how the complaint happened to be dismissed at the first instance.

If the dismissal of the complaint was not on merit but on default of the complainant to be present, there is no bar in the complainant moving the Magistrate again with a second complaint on the same facts. But if the dismissal of the complaint under Section 203 of the Code was on merits, the position could be different. There appeared a difference of opinion earlier as to whether a second complaint could have been filed when the dismissal was under Section 203. The controversy was settled by this Court in *Pramatha Nath Talukar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 876 : (1962) 1 CrLJ 770 : 1962 Supp (2) SCR 297. *Jatinder Singh* v. *Ranjit Kaur*, AIR 2001 SC 784 (786) : (2001) 2 SCC 570 : 2001 SCC (Cri) 354 : 2001 CrLJ 1015 : 2001 CrLR (SC) 198.

[7992] ● *Entertainment of second complaint where first complaint dismissed.*—An order of dismissal of a complaint under Section 203, CrPC is no bar to the entertainment of a second complaint on the same facts, but the second complaint can be entertained only in exceptional circumstances, such a under :

(a) where the previous order of dismissal was passed on an incomplete record, or.

(b) where the previous order was the result of a misunderstanding of the nature of the complaint, or was manifestly absurd or unjust, or

(c) Where new facts are adduced in the second complaint which could not, with reasonable—diligence, have been brought on the record in the previous proceeding.

It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have the same complaint inquired into once again on the same facts.

With respect to the question whether, in a case in which a previous complaint has been dismissed, a fresh complaint containing the same allegations can be entertained on the ground that fresh evidence is forthcoming, the correct view of the law is that the second complaint can be entertained only when the fresh evidence is of such a nature that it could not even with reasonable diligence have been adduced in the previous proceeding. It cannot be the law that the complainant may first place before the Magistrate some of the facts and the evidence in his possession and then, if he fails, he can adduce some more evidence under a fresh complaint in respect of the same matter. That is not a correct view of the law.

Taking into consideration all the facts relating to the inspection of the documents taken by *P* before he filed his earlier complaint, it must be held that the fact in regard to the City Telephone Exchange was not a new fact which had come out after the previous complaint had been filed. It was a fact which could, with reasonable diligence, have been adduced in the earlier proceeding by *P*, and as it was not so adduced, it could not be made a ground for entertaining the present compliant by S. *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar,* AIR 1962 SC 876 : 1962 (1) CrLJ 770.

[7993] ● ***Dismissal of first complaint after considering evidence—Second complaint abuse of process of Court.***—When, on a complaint filed before him, the Magistrate takes into consideration the whole evidence offered by the complainant, and then comes to the conclusion that the evidence is not worthy of credit, and that there is no satisfactory ground to proceed with the complaint, he is entitled to refuse the issue of process and dismiss the complaint under Section 203. In such a case, it cannot be said that the order of dismissal made by the Magistrate was manifestly absurd, unjust or foolish, nor it be said that the Magistrate ignored any principles which were necessary to apply under Sections 202 and 203, CrPC. In view of all the circumstances of the case, the bringing of the fresh complaint was a gross abuse of the process of the Court and was not with the object of furthering the interest of justice. *Pramatha Nath Talukdar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 876 : (1962) 1 CrLJ 770.

[7994] ● ***Prosecution under Section 182, IPC must be on complaint in writing.***—The offence under Section 182, Penal Code is complete when a person has moved a public servant for action. The section does not require that action must always be taken, and it is enough for the completion of the offence that the person who moves the public servant knows or has reason to believe that action would be taken on the false information given by him.

The words of Section 195, CrPC are explicit, and they show that in every instance the Court must be moved by the appropriate public servant before cognizance of an offence under Section 182, Penal Code is taken. There is an absolute bar under Section 195 against the Court taking cognizance of the case under Section 182, Penal Code, except upon a complaint in writing against the person concerned by the appropriate public servant, that is by the public servant to whom the false information was given or by his superior.

Where a person reports to a Tehsildar to take action on averment of certain facts, believing that the Tehsildar would take some action upon it, and the facts alleged in the report are found to be false, it is incumbent, if prosecution is to be launched, that a complaint in writing should be made by the Tehsildar, as being the public servant concerned in the case. In such a case, if no complaint by the Tehsildar is filed, and only a charge-sheet is put in by the police, it is not sufficient compliance with the requirements of Section 195(1)(*a*), CrPC even though the Tehsildar may have written to the police officer to put in the charge-sheet and this paper may have been filed along with the charge-sheet. Assumption of cognizance by the Magistrate of an offence under Section 182, Penal Code on such a charge-sheet filed by the police, without the complaint in writing of the public servant concerned is wrong and incompetent, and the trial being without jurisdiction *ab initio*, conviction cannot be maintained. *Daulat Ram* v. *State of Punjab*, AIR 1962 SC 1206 : 1962 (2) CrLJ 286 : 1962 ACrR 466 : 1962 AWR (HC) 868.

[7995] ● ***Complaint by Public Prosecutor in respect of newspaper publication defamatory of Governor.***—Section 198-B is enacted for the specific purpose of allowing the State to prosecute a person for defamation of a high dignitary of a State or a public servant if the defamation is directed against the conduct of such person in the discharge of his public functions. The section provides that in such a case, cognizance of the offence may be taken upon a complaint made by the Public Prosecutor. However, sub-section (3) (a) of Section 198-B provides that in the case of the Governor of a State, no complaint shall be made by the Public Prosecutor except with the previous sanction of a Secretary to the Government "authorised by him in this behalf". Thus under Section 198-B (3)(*a*) two restrictions are placed upon the power of the Public Prosecutor to lodge a complaint with respect to the defamation of the Governor. The first is that the Secretary to the Government must have given the sanction to lodge the complaint, and the second is that the Secretary must have been authorised by the Governor in this behalf. This means that the Governor has first to consider for himself whether the alleged defamatory statement is of a kind of which he should take notice and seek to vindicate himself or whether the defamatory statement should be ignored as being either of a trivial nature or made by an irresponsible person. This decision whether a complaint should be lodged or not has to be taken by the Governor himself and he cannot leave it to some other person or an authority like the Government.

It is true that the sanction has to be given by the Secretary and hence it is the Secretary who is the sanctioning authority who has to apply his mind to the relevant facts of the case and come to a decision whether or not it is in the public interest to lodge a compliant before according sanction, and it is also true that in giving the sanction the Secretary does not merely perform a ministerial act. However, it is clear from the language of the Section that the initiative in the matter has to be taken by the Governor by indicating unequivocally that he deserves action to be taken, and that the authorisation required to be given by him is not an idle formality. *Gour Chandra Rout* v. *Public Prosecutor*, AIR 1963 SC 1198 : 1963 (2) CrLJ 194 : 1963 SCD 423.

[7996] ● ***Preliminary enquiry into complaint—Position of accused.***—If on receiving a complaint of an offence the Magistrate decides to hold an inquiry into the case before issuing a process against the person complained against, he is not precluded from remaining present when the inquiry is held by the Magistrate. He may remain present either in person or through a counsel or agent with a view to being informed of what is going on. But since the very question for consideration is whether he should be called upon to face an accusation, he has no right to take part in the proceeding, nor has the Magistrate jurisdiction to permit him to do so. It would follow from this that it would not be open to the Magistrate to put any questions to witnesses at the instance of the person named as accused, but against whom process has not been issued, nor can the Magistrate examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. *Chandra Deo Singh* v. *Prakash Chandra Bose*, AIR 1963 SC 1430 : 1963 (2) CrLJ 397.

[7997] ● ***Magistrate to scrutinise complaint carefully.***—No doubt, one of the objects behind the provisions of Section 202 of the Code is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent the person named in the complaint as accused from being called upon to face a frivolous complaint. But there is also another object behind the provision, and that is to find out what material there is to support the allegations made in the complaint. Therefore, it is bounden duty of the Magistrate while making an enquiry to elicit all facts, not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not, has, at that stage, necessarily to be determined on the basis of the material placed before him by the complaint. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under Section 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting the accused to intervene during the enquiry would frustrate its very object, and that is why the legislature has made no specific provision permitting the accused person to take part in the enquiry. *Chandra Deo Singh* v. *Prakash Chandra Bose*, AIR 1963 SC 1430 : 1963 (2) CrLJ 397.

[7998] ● ***Reasons for dismissal of complaint—Necessity.***—Section 203 of the Code requires that when a Magistrate dismisses a complaint because in his judgment there is no sufficient ground for proceeding in the matter, he shall record his reasons for doing so. This is a mandatory provision, and if a Magistrate proceeds to dismiss the complaint without recording his reasons for the dismissal, the error is of a kind which goes to the root of the matter. Giving of reasons for making an order of dismissal of a complaint is a prerequisite of the order and absence of the reasons would make the order a nullity. Even assuming that Section 537 (a) of the Code applies to such a case, it cannot be said that the error is curable under that provision, because prejudice is writ large on the face of the order. The complainant is entitled to know why his complaint has been dismissed with a view to consider an approach to a revision Court, and being kept in ignorance of the reasons in the mind of the Magistrate clearly prejudices his right to move the revision Court, and where he takes the matter to the revision Court, renders his task before that Court difficult, particularly in view of the limited scope of the provision of Sections 438 and 439 of the Code (now Sections 400 and 401). In such a case justice demands that an order of dismissal of a complaint made by a Magistrate without recording his reasons must be set aside. *Chandra Deo Singh* v. *Prakash Chandra Bose*, AIR 1963 SC 1430 : 1963 (2) CrLJ 397.

[7999] ● ***Scope and object of enquiry under Section 202(1), CrPC.***—For determining the question whether a process against the accused should be issued or not, what the Magistrate has to be satisfied about is whether there is "sufficient ground for proceeding", and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction is a question which can be determined only at the trial, and not at the stage of enquiry. The object of Section 202 is to enable the Magistrate to form an opinion as to whether there is evidence in support of the allegations made in the complaint and not whether the process should be issued or not, and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. What the Magistrate has to see is whether there is evidence in support of the allegations made in the complaint, and not whether the evidence is sufficient to warrant a conviction. The enquiry under Section 202 is not to be likened to trial which can take place only after process is issued. No doubt, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but that has to be done only with reference to the intrinsic quality of the statements made at the enquiry which mean, the statements on oath made by the complainant and by the persons examined at the instance of the complainant. Where there is a *prima facie* case, even though much can be said on both sides, the Magistrate is bound to admit the complaint and issue process and proceed with the case. Once the Magistrate is satisfied that there is a *prima facie* evidence against the accused even though the accused may have a defence that the offence was committed by some other person or persons the matter has to be left to be decided at the appropriate stage after the trials held by the appropriate Forum, and issue of process cannot be refused. *Chandra Deo Singh* v. *Prakash Chandra Bose,* AIR 1963 SC 1430 : 1963 (2) CrLJ 397.

[8000] ● ***Complaint under Section 195(1)(c)—When necessary.***—In the present case, *B*, who was a displaced person, made an application for compensation under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, to the Settlement Officer as required under the Act. It was found that the claim for compensation made by him was based on a fabricated verified claim. He had produced before the Settlement Officer, not the original verified claim but only its attested copy. He was convicted of the offence under Section 471, Penal Code, and the conviction was confirmed by the High Court.

In the appeal, one of the contentions raised was that Section 195(1)(*c*) applied as the Settlement Officer was a Court and the prosecution was incompetent in the absence of a complaint by the Settlement Officer.

It was not necessary to decide the question whether the Settlement Officer acting under the Act was a "Court" within the meaning of Section 195(1)(*c*) of the Code, because assuming that he was a Court the question still remained whether a complaint by him was necessary when the document produced before him was not the original forged document but only its copy.

Under Section 195(1)(*c*) a complaint by the Court is required when the prosecution is for the offence of forgery or using a forged document as genuine, when "such document" is produced or given in evidence in any proceeding in that Court. It is clear that it is only when the forged document itself is produced in Court that a complaint by the Court is required. Where what is produced before the Court is not the forged document itself but only a copy thereof, Section 195(1)(*c*) does not apply and a complaint by the Court is not necessary. *Budh Ram* v. *State of Rajasthan,* 1963 (2) 698 CrLJ 698.

[8001] ● ***High Court directing Registrar to file complaints against appellant—Duty of Supreme Court.***—In an appeal against the order of the High Court directing its Registrar to make a complaint under Section 476, CrPC against a person for his prosecution for offences under Sections 193, 199 and 211 of the Penal Code, the Supreme Court will ordinarily do no more than examine whether the High Court has fairly considered the facts to reach the conclusion —

(a) that *prima facie* there is a good reason to launch the prosecution,

(b) that there is a reasonable prospect of conviction, and

(c) that it is expedient in the interest of justice to order a prosecution.

If the Supreme Court is satisfied that the High Court has fairly and correctly viewed the case from this angle, it would not ordinarily interfere with the order made by the High Court. *Hari Das* v. *State of West Bengal*, AIR 1964 SC 1773 : 1964 (2) CrLJ 737.

[8002] ● ***Cognizance taken on complaint not on—Police Report.***—When a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such facts made by any police officer it is a case instituted in the Magistrate's Court on a police report.

If the learned Magistrate had used the words "for investigation" instead of the words "for instituting a case" the order would clearly be under Section 202 of the Code of the Criminal Procedure. We do not think that the fact that he used the words "for instituting a case" makes any difference. It has to be noticed that the Magistrate not bound to take cognizance of the offences on receipt of the complaint. He could have, without taking cognizance, directed an investigation of the case by the police under Section 156(3) of the Code of Criminal Procedure. Once however he took cognizance he could order investigation by the police only under Section 202 of the Code of Criminal Procedure and not under Section 156(3) of the Code of Criminal Procedure.

Cognizance having already been taken by the Magistrate before he made the order there was no scope of cognizance being taken afresh of the same offence after the police officer's report was received. There is thus no escape from the conclusion that the case was instituted on Bhadai Shah's complaint on November 22, 1956 and not on the police report submitted later by the Police Sub-Inspector, Baikunthpur, The contention that the appeal did not lie under Section 417(3) of the Code of Criminal Procedure must therefore be rejected. *Jamuna Singh* v. *Bhadai Shah,* AIR 1964 SC 1541 : 1964 (2) CrLJ 468 : 1964 (5) SCR 37.

[8003] ● ***Provision not to be evaded by changing garb or label of offence.***—We have expressed the view that Section 195, CrPC does not bar the trial of an accused person for a distinct offence disclosed by the same or slightly different set of facts and which is not included within the ambit of the section, but we must point out that the provisions of Section 195 cannot be evaded by resorting to devices or camouflage. For instance, the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply, and then convicting him of an offence to which it does, on the ground that the latter offence is a minor one of the same character, or by describing the offence as one punishable under some other section of the IPC, though in truth and substance the offence falls in the category of sections mentioned in Section 195, CrPC. Merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of Section 195 prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it. On behalf of the appellants it was suggested that the prosecution of the appellants under Section 353, IPC, was by way of evasion of the requirements of Section 195, CrPC. But we are satisfied that there is no substance in this argument and there is no camouflage or evasion in the instant case. *Durgacharan Naik* v. *State of Orissa,* AIR 1966 SC 1775 : 1966 CrLJ 1491 : (1966) 2 SCWR 162 : 1966 SCD 1043 : 32 CutLT 1106.

[8004] ● ***Complaint in writing when necessary for prosecution.***—The gist of the provision is that offences of forgery of a document as described in Section 463, IPC and of using such forged documents if produced or given in evidence by a person other than a party to the proceeding in a Court, do not require a complaint in writing of the Court concerned, but prosecution in respect of offences under Sections 193 to 196, 199 and 200 (among others) committed in a judicial proceeding by a person (whether a party or not) requires a complaint in writing of the Court before which the offence is committed or of some other Court to which such Court is subordinate. It is this difference which has apparently induced the selection of Sections 465/471 rather that Sections 193/196 of the Indian Penal Code. The former sections do not require complaint by the Court but the latter sections do and this was the main point of controversy before us. *S. Dutt* v. *State of Uttar Pradesh*, AIR 1966 SC 523 : 1966 CrLJ 459 : (1966) 1 SCR 493.

[8005] ● ***Case—Meaning of—Two cases instituted one on police report and other on complaint.***—Section 417(3) (Section 378(3) of the new Code) refers to a case in which cognizance is taken upon a complaint of facts constituting an offence. The word "case" is not defined by the Code but its meaning is well understood in legal circles. In criminal jurisdiction it means ordinarily a proceeding for the prosecution of a person alleged to have committed an offence. In other contexts the word may represent other kinds of proceedings but in the context of the sub-section it must mean a proceeding which at the end results either in discharge, conviction or acquittal of an accused person.

In respect of a case of arson a police charge-sheet was filed against two persons. But being dissatisfied, the owner of the house filed a private complaint against those two persons and another for the same offence with the aid of Section 34, IPC, in the same Court. Both were committed, the two cases were separately numbered by the Sessions Court, one against the two accused in the police case and the other against the remaining accused impleaded in the complaint. The two cases ended in acquittal. The owner of the house applied under Section 417(3) for special leave to appeal against all the 3 accused but the High Court held that he had no *locus standi* to invoke Section 417(3). Hence this appeal. There could be no question of merger of the two cases because the identity of them was maintained till the end of the Sessions trial. Therefore the owner was entitled to move the High Court under Section 417(3) in his own case. The fact that his application for revision was rejected had no bearing on his statutory right to move the High Court. *Bhimappa Basappa Bhu Sannavar* v. *Laxman Shivarayappa Samagouda*, AIR 1970 SC 1153 : (1970) 1 SCC 665 : 1979 SCC (Cri) 263 : 1970 CrLJ 1132.

[8006] ● ***Complaint by Food Inspector.***—It is competent for Municipal Board to file complaint by authorizing Food Inspector. Complaint filed by Food Inspector is competent. *Dhian Singh* v. *Municipal Board, Saharanpur*, AIR 1970 SC 318 : (1969) 2 SCC 371 : 1970 CrLJ 492 : 1970 (1) SCR 736.

[8007] ● ***Complaint includes oval allegation.***—The word "complaint" has a wide meaning since it includes even an oral allegation. It may, therefore, be assumed that no form is prescribed which the complaint must take. It may only be said that there must be an allegation which *prima facie* discloses the commission of an offence with the necessary facts for the Magistrate to take action. *Bhimappa Bosappa Bhu Sannavar* v. *Laxman Shivarayappa Samagouda,* AIR 1970 SC 1153 : (1970) 1 SCC 665 : 1970 SCC (Cri) 263 : 1970 CrLJ 1132.

[8008] ● ***Complaint not equated to mere information or accusation.***—Expression "complaint" in Section 72 cannot be equated to mere information or accusation. The context in which that expression is used in Section 72 indicates that it is a formal document indicting an officer of the postal departmental for a criminal offence. The purpose behind Section 72 is that officials of the postal department should not be harassed with frivolous prosecutions and that before any of the prosecutions contemplated by Section 72 is launched, the authorities mentioned in that section should have examined the appropriateness o launching a prosecution and either file a complaint themselves or authorise the filing of such a complaint. Such a requirement will not be satisfied if the concerned authorities merely ask the police to investigate into the case and take appropriate action. An information laid before the police or even a sanction granted for a prosecution by the police would not meet the requirements of Section 72.

If the legislature contemplated that a mere information to the police by the appropriate authority is sufficient then there was no need to enact Section 72. Further if all that was required was to obtain the sanction of the concerned authority then the legislature would have enacted a provision similar to Section 197 of the CrPC. The fact that the legislature did not choose to adopt either of the two courses mentioned above is a clear indication of the fact that the mandate of Section 72 is that there should be a formal complaint as contemplated by Section 4(1)(*h*) of the Criminal Procedure Code. *Bholanath Amritlal Purohit* v. *State of Gujarat*, AIR 1971 SC 194 : 1971 CrLJ 258 : 1971 (1) SCR 817 : 1971 All Cri R 462.

[8009] ● ***Jurisdiction of Magistrate to permit withdrawal of complaint.***—When the High Court after giving a clear finding that on the allegations in the complaint the case initiated before the Magistrate as a warrant case was misconceived, directed the Magistrate to investigate whether the accused had not committed a different offence triable as a summons case, the Magistrate has jurisdiction to permit the complainant under Section 248 of the old Code (new Section 257) to withdraw the complaint and should acquit the accused once he permits the complaint to be withdrawn. Even if the order of the discharge is to be treated as passed in a case where summons case procedure is to be followed, it was within the jurisdiction of the Magistrate and hence it cannot be characterised as either illegal or not justified. *Cricket Assn. of Bengal* v. *State of West Bengal*, AIR 1971 SC 1925 : 1971 CrLJ 1432 : 1971 SCD 575 : 1971 UJ(SC) 535 : (1971) 2 SCCrR 383.

[8010] ● ***Purpose and object of creating bar against cognizance of private complaint.***—The offences about which the Court alone, to the exclusion of the aggrieved private parties, is clothed with the right to complain, may, be appropriately considered to be only those offences committed by a party to a proceeding in that Court, the commission of which has a reasonably close nexus with the proceedings in that Court so that it can, without embarking upon a completely independent and fresh inquiry, satisfactorily consider by reference principally to its records the expediency of prosecuting the delinquent party. The purpose and object of the Legislature in creating the bar against cognizance of private complaints in regard to the offences mentioned in Section 195(1)(b) and (c) is both to save the accused person from vexatious or baseless prosecution inspired by feelings of vindictiveness on the part of the private complainants to harass their opponents and also to avoid confusion which is likely to arise on account of conflicts between findings of the Courts in which forged documents are produced or false evidence is led and the conclusions of the Criminal Courts dealing with the private complaint. It is for this reason that the Legislature has entrusted the Court whose proceedings had been the target of the offence of perjury to consider the expediency in the larger public interest, of a criminal trial of the guilty party. *Patel Laljibhai* v. *State of Gujarat*, AIR 1971 SC 1935 : 1971 CRLJ 1437.

[8011] ● ***Scope and purpose of power to dismiss complaint.***—An order of dismissal of a complaint under the section has to be made on judicially sound grounds. It can only be made where the reasons given disclosed that the proceedings cannot terminate successfully in a conviction. Though the Magistrate is not debarred, at that stage, from going into the merits of the evidence, the object of such consideration of the merits of the case could only be to determine whether there are sufficient grounds for proceeding further or not. The mere existence of some grounds which would be material in deciding whether the accused should be convicted or acquitted does not generally indicate that the case must necessarily fail. Such grounds may indicate the need for proceeding further in order to discover the truth after a full and proper investigation. If, however, a bare perusal of a complaint or the evidence led in support of it shows that essential ingredients of the offence alleged are absent or that the dispute is only of a civil nature or that there are such patent absurdities in evidence produced that it would be a waste of time to proceed further, the complaint could be properly dismissed under Section 203. What has to be determined at the stage of issue of process was not the correctness or the probability or improbability of individual items of evidence on disputable grounds, but the existence or otherwise of a *prima facie* case on the assumption of that what was stated could be true unless the prosecution allegations were so fantastic that they could not reasonably be held to be true. *Debendra Nath* v. *State of West Bengal*, AIR 1972 SC 1607 : (1972) 3 SCC 414 : 1972 CrLJ 1037 : 1972 SCD 464.

[8012] ● ***Prohibition against complaint by private aggrieved party.***—The words "to have been committed by a party to any proceeding in any Court" in Section 195(1) (c) mean that the offence should be alleged to have been committed by the party to the proceeding in his character as such party, that is, after having become a party to the proceeding. Where the accused put forward an unknown lady to personate one lady and two of the accused identified that lady as the person impersonated before the sub-registrar in the Registration Office knowing that she was not in fact that particular lady, and after thus securing a sale deed the other accused filed an application before the Tahsildar for mutation of revenue entries in his favour and in those proceedings he used the said forged sale deed as genuine knowing it to be forged. On receipt of notice, the lady impersonated resisted the application by denying having ever sold the plot in question or having ever executed and got registered the alleged sale deed. Thereafter she filed a complaint against the appellants under Sections 465, 468 and 471, IPC. They were acquitted by the Sessions Court and upon appeal the High Court convicted them under Section 465, read with Section 109, IPC. It is contended in Court that even a prosecution for an offence under Section 465, IPC, required complaint by the Revenue Court concerned as such an offence was covered by Section 195(1) (c), CrPC. The contention is not correct. The prohibition contained in Section 195 (1)(c) should be confined only to those cases in which the offences specified therein were committed by a party to the proceeding in the character as such party. Otherwise, documents forged long before the commencement of a proceeding in which they might happen to be actually used or produced in evidence, years later by some other party would also be subject to Sections 195 and 476, CrPC. *Raghunath* v. *State Uttar Pradesh*, AIR 1973 SC 1100 : (1973) 1 SCC 564 : 1973 SCC (Cri) 448 : 1973 CrLJ 858.

[8013] ● ***High Court in revision not justified in directing filing of complaint.***—It is either the Court which tried the original offences or a Court to which the trial Court was subordinate that could make a complaint under Section 211, IPC, for making a false charge. The Court of the Additional District Magistrate is not subordinate to the High Court as provided by Section 195(3), CrPC (Section 195(4) of the new Code). When two Courts below have declined in their judicial discretion to direct the prosecution of the appellant, the High Court on revision was not at all justified in itself directing the filing of the complaint. At best, if it considered that the orders of the two Courts below were tainted with a serious legal infirmity or manifest error resulting in grave miscarriage of justice. It could have after quashing these orders, sent the cases back to the trial Court for reconsideration of the matter in accordance with law. *Santokh Singh* v. *Izhar Hussain*, AIR 1973 SC 2190 : (1973) 2 SCC 406 : 1973 CrLJ 1176 : 1973 SCD 611.

[8014] ● ***Magistrate at stage of issuing process concerned with allegations in complaint.***—It was well-settled by a long catena of decisions of the Supreme Court that at the stage of issuing process the Magistrate was mainly concerned with the allegations made in the complaint or the evidence led in support of it and he was only to be *prima facie* satisfied whether there were sufficient grounds for proceeding against the accused. It was not his province to enter into a detailed discussion of the merits or demerits of the case nor could the High Court go into this matter in its revisional jurisdiction which was a very limited one. In proceedings under Section 202 the accused had got absolutely no *locus standi* and was not entitled to be heard on the question whether process should be issued against him or not. Once the Magistrate exercised his discretion, it was not for the High Court, or even the Supreme Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. Those considerations were totally foreign to the scope and ambit of an inquiry under Section 202 culminating into an order under Section 204 of the Code. The Supreme Court gave four cases (as mentioned in the head note) in which an order of the Magistrate issuing process against the accused could be quashed or set aside. In the instant case the Magistrate clearly applied his mind and had analysed the evidence and was satisfied of the existence of a *prima faice* case and as such he did not pass the order issuing process in a mechanical manner or just by way of routine. On the other hand, the High Court had gone into the whole history of the case, examined the merits of the evidence, the contradictions and improbabilities according to it and after a detailed discussion not only of the materials produced before the Magistrate but also of the documents which had been filed by the defence and it should not have been looked into at the stage when the matter was pending under Section 202, had held that the order of the Magistrate was illegal and was fit to be quashed. The approach of the High Court was entirely wrong. The accused had no *locus stndi* at the stage of Section 202 or 204 and the Magistrate had no jurisdiction to go into any materials or evidence produced by the accused who could be present only to watch the proceedings and not to participate in them. The order of the High Court suffered from a serious legal infirmity and the High Court had exceeded its jurisdiction in interfering in revision by quashing the order of the Magistrate. The appeal was allowed. *Magawwa* v. *Veeranna*, AIR 1976 SC 1947 : (1976) 3 SCC 736 : 1976 SCC (Cri) 507 : 1976 CrLJ 1533.

[8015] ● ***Second complaint—When lies.***—In the present case a complaint was filed before the Magistrate who ordered an inquiry by another Magistrate under Section 202, CrPC. As the matter was pending inquiry and as the complainant was absent and did not show any interest in the inquiry ordered by the Court, the complaint was dismissed under Section 203, CrPC. Subsequently the complainant appeared before the Magistrate and filed an application for recalling his order. But the Magistrate without passing any order on that application, sent the matter to another Magistrate who reported that the inquiry had been completed. Thereafter the magistrate on the basis of the report of the inquiry officer passed orders taking cognizance of the case and summoned the accused. The High Court confirmed the said order. The accused (appellant) appealed to the Supreme Court by special leave. There is no provision in the CrPC empowering a Magistrate to review his own order or recall the same. The subordinate criminal Court has no inherent powers like the High Court. The Magistrate has absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent is to move the Sessions Judge or the High Court in revision. The Magistrate has become *functus officio* and has no power to review or recall that order on any ground whatsoever. The order of recall is entirely without jurisdiction. All subsequent proceedings following upon recalling the said order will fall to the ground including the order summoning the appellant which should also be treated to be a nullity and destitute of any legal effect. It is suggested by the counsel for the respondent that the application given by him for recalling the order of dismissal of the complaint would amount to a fresh complaint. This Court is unable to agree with that contention because there was no fresh complaint and that the settled position of law is that a second complaint could lie only on fresh facts or even on the previous facts only if a special case is made out. The appeal is therefore allowed setting aside the order of the High Court maintaining the order of the Magistrate and the order of the Magistrate summoning the appellant is quashed. *Bindeshwari Prasad Singh* v. *Kali Singh*, AIR 1977 SC 2432 : (1977) 1 SCC 57 : 1977 SCC (Cri) 33 : 1978 CrLJ 187.

[8016] ● ***Complaint that accused took away certified copy meant for complainant.***—Where the complaint was that the accused got the copy which was meant for the complainant, by signing his name, and the complainant also got his copy a few days after eventually, such a small matter could have been resolved by the Magistrate himself if he had perused the complaint carefully and it was certainly not a matter for which a detailed inquiry under Section 202, CrPC, was called for. *Bindeshwari Prasad* v. *Kali Singh*, AIR 1977 SC 2432 : (1977) 1 SCC 57 : 1977 SCC (Cri) 33 : 1978 CrLJ 187 : 1977 CrLR (SC) 42 : 1976 CrAppR (SC) 214 : (1976) 78 Pun LR (D) 295 : (1976) 12 DLT 328 : (1976) 3 CrLT 632 : 1976 MLW (Cri) 190 : (1977) 1 SCR 125 : 1977 Pat LJR 208.

[8017] ● ***For taking cognizance on Police report—Examination of author of report not necessary.***—Investigating Officer a DSP CBI filing a report containing allegations whereon special judge acting under the West Bengal Criminal Law Amendment Special Courts Act 1949 took cognizance without examining the said Investigating Officer, *held* it is police report and for taking cognizance, examination of the author of the report is unnecessary. *State of West Bengal* v. *Bijoy*, AIR 1978 SC 188 : (1978) 1 SCC 173 : 1978 CrLJ 138(SC).

[8018] ● ***Complaint in respect of offence under Section 193, IPC.***—Complaint in respect of an offence under Section 193, IPC, after making an enquiry under Section 340(1), CrPC, 1973, was filed, The complaint was an offshoot of a *habeas corpus* application filed before the High Court of Kerala. An order of the High Court made under sub-section (1) or sub-section (2) of Section 340 is specifically excluded for the purpose of appeal to the superior Court under Section 341(1) of the new CrPC. This, therefore, is a new restriction in the way of the appellant in approaching the Supreme Court under Article 136. Whether *suo motu* or on an application by a party under Section 340(1) of the Code, a Court having been already seized of a matter may be tentatively of opinion that further action against some party or witness may be necessary in the interests of justice. In a proceeding under Section 340(1), the reasons recorded in the principal case, in which a false statement has been made, have a great bearing and indeed action is taken having regard to the over-all opinion formed by the Court in the earlier proceedings. At an enquiry held by the Court under Section 340(1), irrespective of the result of the main case, the only question is whether a *prima facie* case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified offence and whether it is also expedient in the interests of justice to take such action. The party may choose to place all its materials before the Court at that stage, but if it does not, it will not be estopped form doing so later in the trial, in case prosecution is sanctioned by the Court. An enquiry, when made, under Section 340(1), CrPC, is really in the nature of affording a *locus paenitentiae* to a person and if at that stage the Court chooses to take action, it does not mean that he will not have full and adequate opportunity in due course of the process of justice to establish his innocence. It is well settled that the Supreme Court under Article 136 would come to the aid of a party when any gross injustice is manifestly committed by a Court whose order gives rise to the cause for grievance before it. Even when two views are possible in the matter it will not be expedient in the interests of justice to interfere with the order of the High Court unless the Supreme Court is absolutely certain that the two pre-conditions which are necessary for laying a complaint after an enquiry under Section 340 are completely absent. There is no need to interfere with the order of the High Court to scotch the complaint against the appellant at the threshold. *K. Karunakaran* v. *T.V. Eachara Warrier*, AIR 1978 SC 290 : (1978) 1 SCC 18 : 1978 CrLJ 339 : 1978 CrLR (SC) 521.

[8019] ● ***Complaint—Taking of cognizance of offence by Magistrate under Section 190, CrPC.***—While deciding the question of bail, therefore, a Magistrate must be held to be acting as a Court and not in any other capacity, irrespective of the stage which the case has reached by then, that is, whether it is still under investigation by the police or has progressed to the stage of an inquiry or trial by the Magistrate. It at once follows that the taking of cognizance of any offence by a Magistrate under Section 190 of the Code is not a condition precedent for him to be regarded as a Court. *Kamalapati Trivedi* v. *The State of West Bengal,* AIR 1979 SC 777 : (1980) 2 SCC 91 : 1980 SCC (Cri) 347 : 1979 CrLJ 679 : 1979 CrLR (SC) 128.

[8020] ● ***Complainant right to choose Court.***—Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessary if the Court is to exercise its power of transfer. Assurance of a fair trial is the first imperative of the dispensation of justice. Rule is that normally the complainant has the right to choose any Court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the Court may weigh the circumstances. *Maneka Sanjay Gandhi* v. *Rani Jethmalani*, AIR 1979 SC 468 : (1979) 4 SCC 167 : 1979 SCC (Cri) 934 : 1979 CrLJ 458 : (1979) 2 SCR 378 : (1979) 2 SCJ 153 : 1979 UJ (SC) 120 : 1979 MLJ (Cri) 541 : 1979 MLW (Cri) 70.

[8021] ● ***Complaint finding regarding exact offence committed required.***—In a prosecution for an offence under Section 467/109, IPC., under Section 476, CrPC, it was incumbent on the Court filing the complaint to record a clear finding regarding the exact offence which was committed by the appellants. In the absence of such a finding the order filing the complaint cannot be supported in law. Judgment of the Addl. District Judge is quashed. *Har Gobind* v. *State of Haryana*, AIR 1979 SC 1760 : (1979) 4 SCC 482 : 1979 CrLJ 1334 : 1979 CrLR (SC) 462 : 1979 UJ (SC) 661 : 1979 CrAppR (SC) 329.

[8022] ● ***Complaint case.***—On receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and straightway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusions drawn by them therefrom. The Magistrate is not bound by the conclusions drawn by the police and he may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the compliant originally submitted to him and proceed to record the statements upon oath of the compliant and the witnesses present under Section 200 of the Code and thereafter decide whether to dismiss the compliant or issue process. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate may, in such a case, do one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; and (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be. *H.S. Bains* v. *State (U.T. Chandigarh)*, AIR 1980 SC 1883 : 1980 CrLJ 1308 : (1981) 1 SCR 935.

[8023] ● ***Complaint case exclusively triable by Sessions Court.***—At the stage of Ss. 203 and 204, CrPC in the case exclusively triable by the Court of Sessions, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Ss. 200 and 202, CrPC, there is *prima facie* evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground of proceedings" against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the Trial Court. The standard to be adopted by the Magistrate in scrutining the evidence is not the same as the one which is to be kept in view at the stage of framing charges to be applied at the stage of framing charges. A fortiori at the stage of S. 202/203, if there is *prima facie* evidence in support of the allegation in the compliant relating to a case exclusively triable by the Court of Sessions, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Sessions. Even at the stage of framing charges the truth, veracity and effect of the evidence which the complainant produces or proposes to adduce at the trial is not to be meticulously judged. The standard of proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of framing charges.

Although the reasons given by the Magistrate for rejecting the evidence produced by the complainant in the preliminary inquiry against Suraj Bhan in regard to the accusation that he had shot dead Banta Singh, are not devoid of merit, yet, it appears that in meticulously appreciating the evidence, the Magistrate had over-stepped the limits of his discretion. In other words, this is not a case where the Magistrate lacked inherent jurisdiction to pass the impugned order. This is only a case where the Magistrate has committed an error amounting to an irregularity, if not a clear illegality, in the exercise of his jurisdiction. But in the facts of this case the error has not resulted in gross miscarriage of justice. *Kewal Krishan* v. *Sauraj Bhan,* AIR 1980 SC 1780 : 1980 Supp SCC 499 : 1981 SCC (Cri) 438 : 1980 CrLJ 1271 : 1980 CrLR (SC) 534.

[8024] ● ***"In or in relation to proceeding in that Court"—Meaning of.***—Bail proceedings took place before Magistrate *D* and subsequent proceedings before Magistrate *K* commencing with presentation of chalan by Police for prosecution of one *DK*. Both Proceedings are parts of or stages of the same integral whole. *DK* was released on a bail application accompanied by an affidavit purported to have been sworn by one *GRT* as a surety. As the accused failed to appear, *NBW* was issued against him and notice to the surety. Surety appeared and filed a reply in writing contending that he never stood as surety, did not make any affidavit or sign on any application, affidavit or bail bond, that he was a literate while those documents bore thumb-impressions of the surety. After enquiry, the respondent and others were committed for trial and two of the accused convicted under Sections 419, 465 and 471, IPC, *etc.* The bail proceedings and subsequent trial proceedings before the Magistrate were part of entire judicial process and as such the offences relating to the surety bond were committed "in or in relation to" the proceedings before Magistrate *K* for the purpose of taking action under Section 476 of the Code. The High Court erred that the Magistrate was not competent to hold a preliminary enquiry under Section 476, CrPC and/or to make a complaint for prosecution of the respondents in respect of the offences for which they were convicted. Appeal was allowed and case sent back to the High Court for decision afresh. *State of Maharashtra* v. *S.K. Bannu*, AIR 1981 SC 22 : (1980) 4 SCC 286 : 1980 SCC (Cri) 951 : 1980 CrLJ 1280 : 1980 CrLR (SC) 638 : 1980 CrAppR (SC) 385 : 1981 MLJ (Cri) 166 : (1981) 1 SCJ 244 : 1981 SCCrR 173 : (1981) 1 SCR 694.

[8025] ● ***Scope and object of Section 468, CrPC—State or private complainant to abide law.***—Object to put a bar of limitation on prosecutions is clearly to prevent the parties form filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the Court by filing vexatious and belated prosecutions long after the date of the offence. Object which the statute seeks to subserve is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution. It is of the utmost importance that any prosecution, whether by the state or a private complainant, must abide by the letter of law or take the risk of the prosecution failing on the ground of limitation. *State of Punjab* v. *Sarwan Singh*, AIR 1981 SC 1054 : (1981) 3 SCC 34 : 1981 SCC (Cri) 625 : 1981 CrLJ 722 : 1981 CrLR (SC) 289 : 1981 CrAppR (SC) 225 : 83 PunLR 457 : 1981 Chand CrC (SC) 124 : 1981 ACrC 263 : (1981) 8 CrLT 188 : (1981) 2 SCJ 50 : 1981 MLJ (Cri) 394.

[8026] ● ***Complaint case—Magistrate directing investigation.***—In a private complaint, the Magistrate directed investigation under Section 202, CrPC. Report of investigation merely stated that a *prima facie* case was made out against four persons. Except expressing his opinion, no details of investigation made by him were mentioned nor did it refer to any witness examined by him or any document perused by him. As there was no additional material before him except what was already there when he ordered an investigation under Section 202, Magistrate was wrong in taking cognizance of the case and ordering issue of process to the accused merely on the basis of opinion expressed by the investigating officer and without any reference to any further material. *Mohammad Atullah* v. *Ram Saran*, AIR 1981 SC 1155 : (1981) 2 SCC 266 : 1981 SCC (Cri) 419 : 1981 CrLJ 616 : 1981 CrLR (SC) 192 : 1981 BLJ 964 : 1981 Chand CrC (SC) 96 : 1981 UJ (SC) 366 : 1981 CrAppR (SC) 167 : 1981 Srinagar LJ (SC) 34.

[8027] ● ***Complaint under Section 18(9)(vi) of Drugs and Cosmetics Act read with Rule 65(7).***—A complaint under Section 18(a)(vi) of the Act read with Rule 65(7) was filed against a partnership firm along with its partners. The High Court quashed the proceedings on the death of its managing partner on the ground that the complainant did not complain against the remaining partners by making out that they were responsible for the management and conduct of the firm. Extent of their liability would be established by the evidence during trial. The Magistrate perused the partnership deed filed with the complaint petition and *prima facie* found that respondents as well as deceased accused were liable for the offence and proceeded for trial. Judgment of the High Court is erroneous and liable to be set aside. *Drugs Inspector, Bangalore* v. *B.K. Krishnaiah*, AIR 1981 SC 1164 : (1981) 2 SCC 454 : 1981

SCC (Cri) 487 : 1981 CrLJ 627 : 1981 CrLR (SC) 196 : 1981 UJ (SC) 368 : 1981 CrAppR (SC) 218 : 1981 Chand CrC (SC) 115.

[8028] ● ***Abetment of forgery—Private complaint—Maintainability.***—The accused was convicted under Section 467 read with Sections 114 and 193, IPC. The High Court acquitted him holding that the complaint in criminal case ending in the conviction of accused was not filed by the Civil Court. Where in the course of same transaction an offence for which no complaint by a Court is necessary under Section 195 (1)(b), CrPC, and an offence for which, such a complaint is necessary are committed, it is not possible to split up and hold that prosecution of the accused for the offences not mentioned in Section 195(1)(b) should be upheld. Forged sale deed was not produced in the suit filed by the complainant for redemption of mortgage. Abetment of forgery was complete when the forged sale deed was fabricated and registered. No offence under Section 193, IPC, falling within the scope of Section 195(1)(b) of CrPC could be said to have been committed by the accused as the forged sale deed was not at all put in evidence at any stage in the redemption suit filed by the complainant. The Magistrate who committed the accused to the Sessions, could not have taken cognizance of any offence under Section 193, IPC, but the complaint could have been taken on file only for an offence under Section 467 read with Section 114, IPC, and no complaint by the Court for prosecuting the accused for the offence under Section 467 read with Section 114, IPC, is required and he could be validly convicted for that offence on the private complaint. The High Court was not right in holding, that the private complaint was totally not maintainable and in not only acquitting the accused for the offence of forgery but also in finding that he committed an offence under Section 193, IPC. Appeal was allowed so far as the offence under Section 467 read with Section 114, IPC, is concerned and the accused was found guilty. *State of Karnataka* v. *Hemareddy alias Vemareddy*, AIR 1981 SC 1417 : (1981) 2 SCC 185 : 1981 SCC (Cri) 395 : 1981 CrLJ 1019 : 1981 CrLR (SC) 278.

[8029] ● ***Complaint—Prosecution for possessing unaccounted Soda Ash.***—It is alleged by the prosecution that the respondent is a dealer in soda ash. Upon an inspection of his premises on April 13th, 1979 the visiting officer found an unaccounted stock of 13 bags of soda ash, in relation to which, according to the complainant, the respondent could not produce the necessary papers. A complaint was filed alleging the aforementioned fact, though of course not mentioning the order, provision of which was violated. The respondent moved the High Court for quashing the proceedings. It was alleged on his behalf that soda ash is not an essential commodity or an article in respect of which there is any statutory order compelling the dealer in the commodity either to display a list of prices or declare the stock. This submission found favour with the High Court. Surprisingly, counsel appearing on behalf of the State did not point out the order now relied upon. The whole basis of the approach of the High Court gets knocked out once the order is shown to be existing and in force. It would be unwise to ignore the existence of a subsisting order and to dispose of a proceeding as if no such order is there. *State of Bihar* v. *Gulab Chand Prasad*, AIR 1982 SC 58 : (1981) 4 SCC 248 : 1981 SCC (Cri) 827 : 1982 CrLJ 198 : 1982 CrLR (SC) 24 : 1982 CAR 243.

[8030] ● ***Complaint—Order in appeal under Section 341, CrPC—Remedy against Section 482 expressly over-rules bar in Section 341.***—Order passed in appeal under Section 341, CrPC, is not revisable by the High Court under Section 397(2) but it is entitled to examine the matter under Section 482 which expressly overrules the bar contained in Section 341 of the Code. The High Court merely indicated that the case was not a fit case for invoking inherent power without at all applying its mind whether or not it was a fit case for filing complaint. Appeal was allowed and case remitted to the High Court to exercise its powers under Section 482. *Lalit Mohan* v. *Benoyendra Nath*, AIR 1982 SC 785 : (1982) 3 SCC 219 : 1982 CrLJ 625 : 1982 MLJ (Cri) 329(2) : (1982) 1 APLJ (SC) 16 : 1982 1 SCJ 192(1).

[8031] ● ***Magistrate issuing summons to accused.***—Where the Magistrate issued summons to the accused, it was quashed by the Sessions Judge and the same was affirmed by the High Court. The Supreme Court set aside those orders and restored the order issuing summons, and observed that if, eventually, the Magistrate came to the conclusion that no offence was made out against the accused, it was open to him to discharge or acquit the accused, as the case might be. The matter was thus remitted to the trial Court. *Khacheru Singh* v. *State of Uttar Pradesh*, AIR 1982 SC 784 (2) : (1982) 3 SCC 218 : 1982 CrLJ 629 (2) : 1982 ALJ 285 (1) : 1982 MLJ (Cri) 329(1) : (1982) 1 SCJ 191 (2).

[8032] ● ***Certain Rent Control Proceedings pending—Allegation of filing forged and false rent receipt.***—In the instant case, the facts were: Certain Rent Control proceedings were pending between the landlord and a school run by a society of which the appellant and her husband were the Secretary and the Joint Secretary respectively. Those proceedings were for eviction and recovery of arrears. While so, the landlord filed a complaint alleging that some rent receipts had been forged and filed in those proceedings. Whether those receipts were forged or genuine was yet to be finally decided by the Rent Controller. After registering the complaint, recording the complainant's evidence and perusing the various documents filed by the landlord, the Magistrate issued process by summoning the appellant and her husband, for offences under Sections 467/471 read with Section 34, IPC. As the appellants attempt to get it quashed under Section 482, CrPC, by the High Court, this appeal was filed. The question raised was whether the process issued against the appellant should be quashed or not. It is in evidence that the appellant is not a party to the pending proceedings and her husband conducting them on behalf of the school. In the complaint it was also not stated that the appellant took any part in bringing about the lease transaction. It was alleged that her husband filed the forged and false rent receipts and the only averment against the appellant was that as Secretary she had been benefitted from the said forgery and fraud. Such an averment is clearly inadequate and insufficient to fasten liability on her for the alleged offences. Hence no case is made out against the appellant for issuance of process and the same deserves to be quashed. *Manju Gupta* v. *M.S. Paintal*, AIR 1982 SC 1181 : (1982) 2 SCC 412 : 1982 SCC (Cri) 459 : 1982 CrLJ 1393 : 1982 CrLR (SC) 287 : 1982 BLJR 382 : 1982 ACrC 211 : 1982 UJ (SC) 471 : (1982) 22 DLT 217 : 1982 SCCrR 202 : 1982 CrAppR (SC) 180 : 1982 Rajdhani LR 592 : (1982) 2 Ren CJ 193 : 1982 BLJR 415 : 1982 Chand CrC (SC) 86 : 1982 LS (SC) 57 : 1982 (2) Chand LR (Cri) 179 : (1982) 2 SCWR 198.

[8033] ● ***Complaint by Court Whether pre-condition for taking cognizance of such offence by criminal Court.***—Rent Control Officer is one such officer who is authorised by the District Magistrate to exercise, perform and discharge the powers, functions and duties conferred upon him by Chapter III of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction Act, 1972 Act which includes Section 15(1) and (2).

Therefore, the proceeding commencing upon the intimation of a vacancy for release or allotment of the premises will be conducted before the Rent Control Officer. Now, sub-section (2) of Section 34 extracted hereinbefore would show that the expression. 'District Magistrate' which would include any officer authorised by him to exercise, perform and discharge his power, functions and duties, shall be deemed to be a civil Court within the meaning of Sections 480 and 482 of the Code of Criminal procedure, 1898. Sections 345 and 346 of the Code of Criminal Procedure, 1973, are corresponding to Section 480 and 482 of the CrPC 1898. As a corollary it would follow that the Rent Control officer shall be deemed to be a civil Court within the meaning of Sections 345 and 346 of CrPC, 1973 and in view of sub-section (2) of Section 34 of the Rent Act, shall be a civil Court for the purpose of Section 193, IPC, Section 195(3), CrPC provides that the expression 'Court' in Section 195(1)(b)(i) will include a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of the section. Section 195(1)(b)(i) provides a precondition for taking cognizance of an offence under Section 193, IPC, *viz*. a complaint in writing of the Court. In view of the specific provision made in sub-section (2) of Section 34 of the Rent Act that for the purposes of Sections 345 and 346, CrPC., Rent Control Officer, assuming it to be a Tribunal as held by the High Court and not a Court, would be deemed to be a civil Court and, therefore, for purposes of Section 193 and 228, IPC a fortiori any proceeding before it would be a judicial proceeding within the meaning of Section 193, IPC. If, therefore, according the complainant false evidence was given in a judicial proceeding before a civil Court and the persons giving such false evidence have committed an offence under Section 193, IPC in or in relation to proceeding before a Court no Court can take cognizance of such offence except on a compliant in writing of that Court. The grievance is that a false affidavit was filed by the appellants which was receivable as evidence in the allotment proceedings before the Rent Control Officer which as a Tribunal would be as hereinabove discussed, comprehended in the expression 'Court'. If false evidence in the form of affidavits filed by the appellants was given before Rent Control Officer, a civil Court for the purpose of Section 193, IPC that being a judicial proceeding Section 195(1)(b)(i) would be attracted. For the purpose of Section 195(1)(b)(i) a complaint by the Court is a pre-condition for taking cognizance of such offence by a criminal Court. If this pre-condition is not satisfied the Court will have no jurisdiction to take cognizance. *Chandrapal Singh* v. *Maharaj Singh*, AIR 1982 SC 1238 : (1982) 1 SCC 466 : 1982 SCC (Cri) 249 : 1982 CrLJ 1731 : 1982 CrLR (SC) 126.

[8034] ● ***Dismissal of complaints against one of person complained against.***—An inquiry under Section 202 of the Code is not in the nature of a trial for there can be in law only one trial in respect of any offence and that a trial can commence only after process is issued to the accused. The said proceedings are not strictly proceedings between the complainant and the accused. A person against whom a complaint is filed does not become an accused until it is decided to issue process against him. Even if he participates in the proceedings under Section 202 of the Code, he does so not as an accused but as a member of the public. The object of the inquiry under Section 202 is the ascertainment of the fact whether the complaint has any valid foundation calling for the issue of process to the person complained against or whether it is a baseless one on which no action need be taken. The section does not require any adjudication to be made about the guilt or otherwise of the person against whom the complaint is preferred. Such a person cannot even be legally called to participate in the proceedings under Section 202 of the Code. *S.S. Khanna* (*Dr.*) v. *Chief Secretary*, *Patna*, AIR 1983 SC 595 : (1983) 3 SCC 42 : 1983 SCC (Cri) 562 : 1983 CrLR (SC) 329 : 1983 CAR 269.

[8035] ● ***Forgery—Absence of complaint by Court.***—In this case the short question was, whether in the absence of necessary complaint by the civil Court where a money receipt alleged to have been forged was produced, prosecution for offences punishable under Sections 467 and 471 read with Section 34, IPC, would be maintainable. Once it was accepted that Section 463 defined forgery and Section 467 punished forgery of a particular category, the provisions in Section 195(1)(b)(ii), CrPC, would immediately be attracted and on that basis the prosecution would no be maintainable in the absence of a complaint by the Court. The High Court took a wrong view of the matter. As the Court was of the view that if the prosecution was allowed to continue serious prejudice would be caused to the appellants, and they would be called upon to face a trial which would not be sustainable, the appeal was allowed. The complaint case filed against him was quashed. *Gopalakrishna Menon* v. *D. Raja Reddy*, AIR 1983 SC 1053 : (1983) 4 SCC 240 : 1983 SCC (Cri) 822 : 1983 CrLJ 1599 : 1983 CrLR (SC) 449 : (1983) 2 Crimes 584 : 1983 CrAppR (SC) 421 : 1983 AWC 827 : 1983 ACrR 450 : (1983) 2 CrLC 527.

[8036] ● ***Infringement of trade mark—Complaint.***—From a combined reading of Section 4(2) with Section 190 of the CrPC, it transpires that upon a complaint filed by a person setting out facts therein which constitute the offence before a Magistrate specified in Section 190, the Magistrate will be competent to take cognizance of the offence irrespective of the qualifications or eligibility of the complainant to file the complaint. It must, however, be conceded that where a provision to the contrary is made in any statute, which may indicate the qualification or eligibility of a complainant to file the complaint, the Magistrate before taking cognizance is entitled and has power to inquire whether the complainant satisfies the eligibility criteria. Anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance under Section 190 and unless any statutory provision prescribes any special qualification or eligibility criteria of putting the criminal law in motion, no Court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. *Vishwa Mitter* v. *O.P. Poddar*, AIR 1984 SC 5 : (1983) 4 SCC 701 : 1984 CrLJ 1.

[8037] ● ***Complaint by owner of registered trade mark.***—The present complainant, who is not only a dealer in these beedies manufactured and sold by the registered owner of the trade marks, but he is also the constituted attorney of the owners of the registered trade marks. To say that the owner of the registered trade mark can alone file the complaint is contrary to the provisions of the statute and commonsense and reason. Therefore, the order of the learned Magistrate dismissing the complaint at the threshold on the ground that the present appellant has no cause of action to file the complaint is utterly unsustainable and must be quashed and set aside. *Vishwa Mitter* v. *O.P. Poddar*, AIR 1984 SC 5 : (1983) 4 SCC 701 : 1984 SCC (Cri) 29 : 1984 CrLJ 1 : 1983 CrLR (SC) 621.

[8038] ● ***Allegation in complaint not constituting offence—Quashing of.***—One Shankar Lal Bharagava, who was officiating as Stamp Reporter in the Registry of the Allahabad High Court, with the aid of Suresh Chandra Srivastava and Bishan Swarup, who were clerks of Advocates, removed used stamps and out of them reused three Court-fee stamps of the value of Rs. 1,000/- each. When the matter was detected, an enquiry was ordered and the Judicial Department of the High Court reported to the Registrar that Court-fee stamps of the value of Rs. 23,007-50 were missing from another judicial file. The enquiry further revealed that in several other cases also Court-fee stamps had been taken out from the original file and reused in new cases. The Registrar, with the permission of the Chief Justice of the High Court, reported the matter to the I. G. of Police, U.P., who ordered the C.I.D. of U.P. to investigate into the matter and ultimately three charge-sheets were submitted for offences under Sections 262, 263, 467, 471, 420 and 120-B, IPC. The respondents filed an application before the High Court contending that as offences under Sections 467, 471 and 120-B, IPC, fell within the purview of Section 195, CrPC, no prosecution could be launched without the procedure laid down in Section 195 being followed. It was common ground that no complaint as required by the mandatory provisions of Section 195 of the Code having been made, the proceedings could not have proceeded. The High Court held that so far as the offences under Sections 467, 471 and 120-B, IPC, were concerned as they fell within the ambit of Section 195(1)(b)(ii) of the Code, no cognizance could be taken by the Magistrate without a complaint being filed. On the facts mentioned above, it was clear that in the complaint sent by the Registrar to the I.G.P., offences mentioned were offences under Sections, 262, 263, 467, 380, 420 and 471 but from a perusal of the recitals in the original memorandum which formed the basis of the complaint it seems that the only offences which have been made out would be offences under Sections 262, 263, 380 and 420 which are obviously not covered by Section 195 of the Code. The fact that some persons aided and abetted the detaching of the used stamps from the old files and reusing them in the other cases does not involve any process of forgery or use of a forged document. The law is now well settled that where an accused commits some offences which are separate and distinct from those contained in Section 195, Section 195 will affect only the offences mentioned therein unless such offences form an integral part so as to amount to offences committed as a part of the same transaction in which case the other offences also would fall within the ambit of Section 195 of the Code.

The High Court was fully justified in quashing the proceedings against the accused as far as offences under Sections 467, 471 and 120-B, IPC were concerned, not because they were covered by Section 195 of the Code but because allegations contained in the complaint did not constitute these offences. The High Court was further fully justified in directing that other offences mentioned above did not require a complaint under Section 195 and would have to be tried. *State of Madhya Pradesh* v. *Suresh Chandra Srivastava*, AIR 1984 SC 1108 : (1984) 3 SCC 92 : 1984 SCC (Cri) 415 : 1984 CrLJ 926 : 1984 CrLR (SC) 269.

[8039] ● ***Case on police report and on complaint—Clubbing of.***—It is not permissible for the Court under S. 223 of the CrPC to club and consolidate the case on a Police challan and the case on a complaint where the prosecution versions in the Police challan case and the complaint case are materially different, contradictory and mutually exclusive.

In the facts and circumstances of this particular case, the proper course to adopt is to direct that the two cases should be tried together by the learned Additional Sessions Judge but not consolidated, *i.e.*, the evidence should be recorded separately in both the cases one after the other except to the extent that the witnesses for the prosecution who are common to both the cases be examined in one case and their evidence be read as evidence in the other. The learned Additional Sessions Judge should after recording the evidence of the prosecution witness in one case, withhold his judgment and then proceed to record the evidence of the prosecution in the other case. Thereafter, he shall proceed to simultaneously dispose of the cases by two separate judgments taking care that the judgment is one case in not based on the evidence recorded in the other case. *Harjinder Singh* v. *State of Punjab*, AIR 1985 SC 404 : (1985) 1 SCC 422 : 1985 SCC (Cri) 93 : 1986 CrLJ 831 : 1985 CrLR (SC) 66 : (1985) 1 SCWR 311 : (1985) 87 PunLR 103 : 1985 AWC 120 : 1985 ACrR 99 : 1985 SCCrR 178 : 1986 CrAppR (SC) 26 : (1985) 1 ACrLR 454 : 1985 CutCrJ (SC) 43 : (1985) 1 CrLC 413 : 1985 ACrC 36.

[8040] ● ***Warrant case on private complaint—Discharge of accused.***—The CrPC contemplates discharge of the accused by the Court of Session under Section 227 in case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he considers that there is not sufficient ground for proceeding against the accused. Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction...." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "*prima facie*" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a *prima facie* case is made out, charge has to be framed. *R.S. Nayak* v. *A.R. Antulay*, AIR 1986 SC 2045 : (1986) 2 SCC 716 : 1986 SCC (Cri) 256 : 1986 CrLJ 1922 : 1986 CrLR (SC) 266.

[8041] ● ***Complaint against accused for offences under Section 120-B, IPC and Section 5 of Imports and Exports (Control) Act.***—In the instant case, a complaint under Section 120-B, IPC, and Section 5 of the Imports and Exports (Control) Act, 1947 was filed by the Deputy Chief Controller of Imports and Exports and the Metropolitan Magistrate, Delhi took cognizance and issued summons. Attempt to import beef tallow by virtue of transfer of license was one of the main basis of the complaint. Beef tallow was prohibited. From the complaint the part attributed to accused 2 to 9 in the commission of the offence was for their having sat in the Board of Directors meeting and approving the letters of credit and the deed of hypothecation executed by the Managing Director of J.S.V.L. (A-1). The accused filed a petition under Section 482, CrPC, for quashing the complaint. The High Court allowed the same and dismissed the complaint. The High Court Judge was of the view that there was no conspiracy and such a complaint should not have been lodged. The test of the power under Section 482 of the Code is that taking the allegations and the complaint, without adding or subtracting anything, if no offence is made out then only the High Court would be justified in quashing the proceedings and that such a power should be used very sparingly. The High Court Judge quashed the complaint on the ground that the subsequent report by the C.B.I. which had not yet been proved and considered in the background of the allegations made and secondly that some of the parties alleged to be in the conspiracy were not made parties. There are no grounds of quashing the criminal proceedings where on *prima facie* being satisfied the Magistrate had taken cognizance. At that stage it could not be said that no *prima facie* case for trial has been made out. The High Court in the instant case has exceeded that jurisdiction. The Court is not concerned with the truth or otherwise of the allegations made in the complaint that would be investigated at the time of the trial. *J.P. Sharma* v. *Vinod Kumar Jain*, AIR 1986 SC 833 : (1986) 3 SCC 67 : (1986) 2 SCC 281 : 1986 SCC (Cri) 216 : 1986 CrLJ 917 : 1986 CrLR (SC) 244 : 1986 SCCrR 127 : (1986) 2 Crimes 1 : (1986) 2 Supreme 194 : 1986 CrAppR (SC) 98 : (1986) 2 CrLC 184 : 1986 CurCrJ (SC) 199 : (1986) 30 DLT 313.

[8042] ● ***Complaint case—Dismissal for default.***—In this case, the appellants were the accused in a complaint filed by the 1st respondent in the Court of the Judicial Magistrate, I Class, New Delhi, disclosing an offence punishable under Sections 67 and 72-C(1)(a) of the Mines Act, 1952, read with Regulation 106 of the Metalliferous Mines Regulation, 1961. On the date when the accused was summoned to appear, neither the complainant nor the accused were present and so the Magistrate dismissed the complaint in default and for want of prosecution. A week later the complainant filed an application for restoration of the complaint. The Magistrate restored the said complaint and issued summons to the accused. The accused moved the Magistrate that his order restoring the complaint was without jurisdiction since he had become *functus officio* by his first order. The Magistrate rejected the said application as he was of the view that he had inherent powers under the CrPC to review and recall his earlier orders. The revision petition filed before the Additional Chief Judicial Magistrate was dismissed. Another revision before the High Court was also dismissed relying upon an earlier decision of the same Court to the effect that a criminal Court had certain inherent powers, though not specifically mentioned in the Code. No criminal Court had any inherent jurisdiction not provided for in the CrPC. A second complaint is permissible in law if it can be brought within the limitations imposed by the Supreme Court in *Pramatha Nath Taluqdar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 876. Filing of a second complaint is not the same thing as reviving a dismissed complaint after recalling the earlier order of dismissal. So far as the accused is concerned, dismissal of a complaint for non appearance of the complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the Code, a Magistrate cannot exercise any inherent jurisdiction. What the Court has to see is not whether the Code contained any provision prohibiting a Magistrate from entertaining an application to restore a dismissed complaint, but the task should be to find out whether the said Code contained any provision enabling a Magistrate to exercise an inherent jurisdiction which he otherwise did not have. The order of the High Court is set aside and the original order of the Magistrate dismissing the complaint was restored. *A.S. Gauraya* v. *S.N. Thakur*, AIR 1986 SC 1440 : (1986) 2 SCC 709 : 1986 SCC (Cri) 249 : 1986 CrLJ 1074 : 1986 CrLR (SC) 225 : 1986 SCCrR 122 : 1986 East CrC 497.

[8043] ● ***Complaint—Quashing of charge by High Court in revisional or reference power.***—In the instant case, the Magistrate recorded the evidence produced by the complainant against the respondent for an offence of contravention of Section 4((1) of the Sugar (Packing and Marking) Order, 1970, punishable under Section 3 r/w. Section 7 of the Essential Commodities Act, 1955, pursuant to the complaint instituted by the District Magistrate. Having taken into consideration the oral and the documentary evidence, the Magistrate formed the opinion that there was ground for presuming that the accused had committed an offence triable by him and framed a charge. The accused invoked the revisional jurisdiction of the Sessions Judge under Section 435 of the Code (Section 397 of the new Code) and challenged the order of framing a charge against them. The Sessions Judge rejected the same. Thereupon the accused invoked the revisional jurisdiction of the High Court under Section 439 of the Code (Section 401 of the new Code). The High Court allowed the revision application and quashed the charge framed against the accused. The State filed the present appeal by special leave. Since the Magistrate had formed the opinion that there were grounds to presume that the accused had committed the offence and since it could not be said that the prosecution was false, frivolous or vexatious or one which was an abuse of the process of law, the High Court should not have quashed the charge in exercise of the revisional and reference powers. The appeals are allowed and the case remanded to the Magistrate. *State of Uttar Pradesh* v. *Man Mohan*, AIR 1986 SC 1652 : (1986) 2 SCC 587 : 1986 SCC (Cri) 214 : 1986 CrLJ 1245 : 1986 ACrC 271 : 1986 CurCrJ 213.

[8044] ● ***FIR about incident registered suo motu after gap of more than three years—No private complaint filed.***—Where the FIR regarding an incident was registered *suo motu* by the police more than 3½ years later and there was no reason why a private complaint was not made contemporaneously, the witnesses were examined for the first time 1 or 2 months later, chances of conviction were too far-fetched and bleak, allowing such a prosecution to proceed would only be harassment to the parties and wastage of public time. Order permitting withdrawal of such a case is proper. *Tek Chand* v. *Tek Chand*, AIR 1987 SC 349 : (1986) SCC (Supp) 533 : 1987 SCC (Cri) 167 : 1987 CrLJ 329 : JT 1986 SC 943 : 1987 CrLR (SC) 8 : 1987 MLW (Cri) 4 : 1987 (1) Crimes 102 : 1987 SimLC 204 : 1987 CalCrLR (SC) 53 : (1986) 2 UJ (SC) 597 : (1987) 1 Supreme 89 : 1987 Chand CrC (SC) 50 : 1987 CrAppR (SC) 45 : (1987) 1 SCJ 216.

[8045] ● ***Acquittal on private complaint—Interference by Supreme Court.***—Normally, this Court does not interfere with an order of acquittal at the instance of private complaint. Where the High Court allowed the appeal acquitting the appellants without sending for the records of the trial Court and hearing the parties on merits, the procedure adopted is not in consonance with the procedure established by law and results in flagrant miscarriage of justice. Even though the Public Prosecutor conceded that there was no evidence, the High Court had to satisfy itself upon perusal of the records that there was no reliable and credible evidence to warrant the conviction of the accused. The matter was remanded for disposal afresh. *Biswanath Ghosh* v. *State of West Bengal*, AIR 1987 SC 1155 : (1987) 2 SCC 55 : 1987 SCC (Cri) 259 : 1987 CrLJ 1052 : 1987 CrLR (SC) 408 : JT 1987 SC 555 : (1987) 2 SCJ 266 : 1987 SCCrR 141 : 1987 Rajdhani LR 198 : 1987 Cal CrLR (SC) 110 : 1987 ACrR 375 : 1987 ACrC 218 : (1987) 1 CrLC 632 : (1987) 2 ACrLR 155 : 1987 AWC 843 : (1987) 2 ChandLR (Cri) 584 : (1987) 2 RecCrR 113 : 1987 MLW (Cri) 270.

[8046] ● ***Complaint by woman kept in illegal confinement.***—Where a woman complained of having been kept in illegal confinement against her wishes before the Supreme Court but her application was placed before the Court 2½ months after its receipt in the Registry, the Supreme Court deprecated the said practice and directed the person against whom that complaint was made to produce the said woman before the Additional Chief Judicial Magistrate and ordered an enquiry by him into the matter and to report to the Supreme Court. *Nilima Priyadarshina* v. *State of Bihar*, AIR 1987 SC 2021 : 1988 CrLJ 197 : JT 1987 (3) SC 6 : 1987 Pat LJR (SC) 31 : 1987 Cal CrLR (SC) 92 : 1987 East CrC 808 : 1987 BLJ 893.

[8047] ● ***Direction by committee for filing of complaint under Section 178, CrPC.***—According to the committee's own opinion formed in the light of facts and circumstances all those persons to whom notices under S. 8-B of the Commission of Inquiry Act, 1952 are issued have to be examined at the end of the inquiry.

If three persons referred to in the judgment to whom notices under S. 8-B of the Commission of Inquiry Act, 1952 have been issued are to be examined even according to the Committee at the end of the inquiry there is no justifiable reason to deny the same treatment to the petitioners Ms. Kiran Bedi and Jinder Singh who are in the same position as those three persons. The action to the Committee in asking them to be cross-examined at the beginning of the inquiry appears to us to be discriminatory. Mere non-issue of notice to them under S. 8-B ought not to make any difference if they otherwise satisfy the conditions mentioned in S. 8-B. The issue of such a notice is not contemplated under S. 8-B of the Act. It is enough if at any stage the Commission considers it necessary to inquire into the conduct of any person. Such person would thereafter be governed by S. 8-B of the Act. The Committee should have considered whether the petitioners were entitled to be treated as persons governed by S. 8. B of the said Act before asking them to get into the witness box for being cross-examined.

If the Committee had found that the petitioners were covered under S. 8-B, then perhaps they would not have been asked to get into the witness-box for being cross-examined till the end of the inquiry. The Committee would have then asked them to give evidence alongwith others who were similarly placed at the end of the inquiry. Taking into consideration all the aspects of the case we feel that the committee should not have in the circumstances of the case directed the filing of a complaint against either of the petitioners for an offence punishable under S. 178, IPC. The complaint was quashed. *Kiran Bedi* v. *Committee of Inquiry*, AIR 1988 SC 2252 : (1988) 4 SCC 49 : 1988 SCC (Cri) 895 : 1989 CrLJ 303 : 1988 CrLR (SC) 796 : JT 1988 (3) SC 372.

[8048] ● ***Original of partnership deed forged not produced in Court—Absence of complaint from civil Court.***—Where the accused did not file the original partnership deed but filed a copy of the forged deed in the suit in the civil Court and obtained a temporary injunction on the strength of its copy, the defendant filed a police report against the accused alleging that they had committed offences punishable under Sections 465, 468, 471, 474, 120-B and 420, IPC, and a challan was filed before the Magistrate who framing charges against the accused only under Sections 465, 468, 120-B and 420, IPC., but refrained from framing any charge under Sections 471 and 474, IPC, holding that he could not take cognizance under those sections in the absence of a complaint from the civil Court. The State preferred a revision against the Magistrate's order but the same was upheld by the Additional Sessions Judge. The *de facto* complainant moved the High Court under Section 482, CrPC, who reversed the decision holding that as the document was not forged during the period it was in Court custody the bar of Section 195(1)(b)(ii) of the Code was not attracted and directing the Magistrate to frame fresh charges. Thereupon the appellants challenged the order before the Supreme Court. The Supreme Court held that Section 195 of the Code was attracted when such offence was alleged to have been committed in respect of "a document produced or given in evidence in a proceeding in any Court", and accordingly held that since the document alleged to have been forged was not in the present case produced in the Court, the provisions of Section 195(1)(b)(ii) had no application and confirmed the High Court's direction, but on a different ground as indicated. *Sushil Kumar* v. *State of Haryana*, AIR 1988 SC 419 : 1987 Supp SCC 654 : 1988 CrLJ 427 : (1988) 1 SCJ 28 : 1988 Rajdhani LR 28 : 1988 Pat LJR (SC) 1.

[8049] ● ***Commission of inquiry not Court.***—A Commission of Inquiry is not a Court properly so called. A Commission is obviously appointed by the appropriate Government "for the information of its mind" in order for it to decide as to the course of action to be followed. It is, therefore, a fact finding body and is not required to adjudicate upon the rights of the parties and has no adjudicatory function. The Government is not bound to accept its recommendations or act upon its findings. The mere fact that the procedure adopted by it is of a legal character and it has the power to administer an oath will not impart to it the status of a Court.... It is familiar feature of modern legislation to set up bodies and tribunals, and entrust them with the work of a judicial, *quasi*-judicial or administrative character, but they are not Courts in the accepted sense of that term...... The least that is required of a Court is the capacity to deliver a "definitive judgment", and merely because the procedure adopted by it is of a legal character and it has power to administer an oath will not impart to it the status of a Court. That being so, it must be held that a Commission of Inquiry appointed by the appropriate Government udder S. 3(1) of the Commission of Inquiry Act is not a Court for the purposes of S. 195 of the CrPC. *Baliram Waman Hiray (Dr.)* v. *Mr. Justice B. Lentin*, AIR 1988 SC 2267 (2284, 2286) : (1988) 4 SCC 419 : 1988 SCC (Cri) 941 : 1989 CrLJ 306 : 1988 CrLR (SC) 799 : JT 1988 (4) SC 265 : 1988 (3) Crimes 655.

[8050] ● ***Complaint alleging offence under Section 5 of Imports and Exports (Control) Act.***—The appellant who is a Deputy Chief Controller of Imports and Exports filed a complaint alleging commission of offence under Section 5 of the Imports and Exports (Control) Act, 1947 by respondents No 1 and 2. To this complaint Proviso (a) of Section 200 of the CrPC is applicable. Therefore, cognizance was taken of the offence alleged without examining the appellant. An application was filed on behalf of the two accused for recall of the summonses and dismissal of the complaint. The application was dismissed by the Magistrate. His order was affirmed by the High Court and the Supreme Court. Thereafter an application was filed before the Magistrate that the Managing Director be discharged as the company was prepared to prepare its guilt. The Magistrate by a reasoned order dismissed the application and directed that the trial should proceed against both. The order was assailed by the respondents before the High Court. The criticism advanced by the learned Judge against the trying Magistrate is wholly untenable and is perhaps applicable to the learned Judge. If reference had been made to Section 200, proviso (*a*) of the CrPC, what has been advanced as the most impressive ground for quashing the proceedings against the respondents No. 2, could not at all have been accepted. The learned judge of the High Court did note the fact that the licensee was a company but lost sight of the fact that a company by itself could not act obviously the company has to act through same one. In the petition of the complaint there was clear allegation that the Managing Director had committed the offence acting on behalf of the licencee. The order of the High Court has got to be reversed. While we have no sympathy for the respondent No. 2 and we are clearly of the opinion that he has no equity in his favour and the delay after the complaint had been filed has been mostly on account of his *mala-fide* move, we do not think it would be in the interest of justice to allow a prosecution to start 20 years after the offence has been committed. *T.J. Stephen* v. *Parle Bottling Co. (P) Ltd.*, AIR 1988 SC 994 (995, 996) : 1988 Supp SCC 458 : 1988 SCC (Cri) 690 : 1988 CrLJ 1095 : 1988 CrLR (SC) 231.

[8051] ● ***Cognizance of offence—Complained of—Power of Magistrate.***—In this case, the appellant gave a report to the Commissioner of Police, Bangalore, against the 2nd respondent alleging that he had committed the offence of cheating and criminal breach of trust. A case was registered against him as Crime No. 145/ 9180 under Sections 408 and 420, IPC, and was investigated. Subsequently, the succeeding Inspector of Police at the Station sent a 'B' report to the Court stating that further investigation was not required as the case was of a civil nature. Aggrieved by that report, the appellant approached the II Addl. Chief Metropolitan Magistrate, Bangalore, for the report being quashed and permission granted to him to prove the commission of the offences by the 2nd respondent. The Magistrate, after perusing the investigation records, came to the view that *prima facie* case was made out against R-2 and consequently he passed an order for a Calendar case being registered against him for the said offences and for summons being issued to him under Section 204, CrPC. Thereupon, R-2 filed a petition under Section 482 of the Code before the High Court seeking the quashing of the order of the Magistrate. The High Court allowed the petition and set aside the order of the Magistrate on the ground that he had not followed the procedure prescribed by the Code for taking cognizance of the case. The High Court held that on receipt of the 'B' report the Magistrate would have issued notice to the appellant to find out whether he was disputing the correctness of the 'B' report and if so, to comply with the requirements of Section 200 of the Code. The High Court further stated that only after examining the appellant on oath and his witnesses, the Magistrate should have decided whether a case should be registered and process issued to the accused. Aggrieved by the order of the High Court, the appellant preferred this appeal. The position is now well settled that upon receipt of a police report under Section 173(2) of the Code a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was therefore wrong in its view of the matter. The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the Magistrate and the latter had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). The order of the High Court is therefore set aside and that of the Metropolitan Magistrate restored. *India Carat (Pvt.) Ltd.* v. *State of Karnataka*, AIR 1989 SC 885 (890) : (1989) 2 SCC 132 : 1989 SCC (Cri) 306 : 1989 CrLJ 963 : 1989 (2) Crimes 483 : 1989 CrLR (SC) 298 : JT 1989 (1) SC 308.

[8052] ● ***Prosecution witness preferring to write complaint on spot rather than going to Police Station.***—It is also surprising that PW-1 preferred to write down the complaint on the spot rather than run down 100 paces to the Police Station to inform the Police. PW-1 was asked to explain this conduct and he stated that he preferred to write down the complaint as "I had doubt that the Police will not pay any heed and will not take down the report correctly." There was no reason for PW-1 to entertain such a doubt. He does not say that he had any such experience in the past. *State of Uttar Pradesh* v. *Madan Mohan,* AIR 1989 SC 1519 (1522) : (1989) 3 SCC 390 : 1989 SCC (Cri) 585 : 1989 CrLJ 1485.

[8053] ● ***Complaint—Cognizance of by Magistrate.***—Section 482, CrPC empowers the High Court to exercise its inherent powers to prevent abuse of the process of Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482, CrPC. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is *mala fide*, frivolous or vexatious, in that event there would be no justification for interference by the High Court.

The High Court without proper application of the principles that have been laid down by this Court in *Sharada Prasad Sinha* v. *State of Bihar*, AIR 1977 SC 1754 : (1977) 1 SCC 505 : 1977 CrLJ 1146; *Trilok Singh* v. *Satya Deo Tripathi*, AIR 1979 SC 850 and *Municipal Corpn. of Delhi* v. *Purshotam Das*, AIR 1983 SC 158 : (1983) 1 SCC 9 : 1983 CrLJ 172, proceeded to analyse the case of the complainant in the light of all the probabilities in order to determine whether a conviction would be sustainable and on such premises arrived at a conclusion that the proceedings are to be quashed against all the respondents. The High Court was clearly in error in assessing the material before it and concluding that the complaint cannot be proceeded with. In the absence of the circumstances to hold *prima facie* that the complaint is frivolous when the complaint does disclose the offence, there is no justification for the High Court to interfere. *Dhanalakshmi* v. *R. Prasanna Kumar,* AIR 1990 SC 494 (495) : 1991 SCC (Cri) 142 : 1990 CrLJ 320 : 1990 CrLR (SC) 25 : JT 1989 (4) SC 318 : (1990) 1 UJ (SC) 129 : (1990) 1 Crimes 26.

[8054] ● ***Complaint by Principal officer against Master of ship for initiation of inquiry under Section 363 of Merchant Shipping Act.***—The Principal Officer, Mercantile Marine Department filed a complaint against Master of Ship for initiation of an inquiry proceeding under Section 363 of the Merchant Shipping Act, 1955 in respect of a shipping casualty occurring due to sheer negligence and gross incompetence on the part of the Master of the ship. We have to examine whether the complaint was *ex facie* under Section 363 of the Mercantile Shipping Act, 1955. It nowhere mentions that the Central Government had such reason to believe. It nowhere mentions that it was a transmission of the statement of a case to the Court by the Central Government. It also nowhere mentions that the reason to believe had been found otherwise than in the course of a formal investigation into the shipping casualty. On the other hand, in para 2 it says that the complainant is the Principal Officer who is competent person appointed under the Act to complain about the negligence of the accused. There is no doubt that he is not empowered under Section 363. In para 6, the complaint says that the Court under Section 363 has got powers to make an inquiry into the charges of incompetency or misconduct of the accused and para 8 mentions : "The inquiry so as to cancel the certificate of the competency of the master, namely, the accused which has been granted by the Central Government may be recommended under this Act after holding the above said inquiry and thus render justice." Therefore, *prima facie* the complaint does not disclose the ingredients required under Section 363 and the complaint is quashed.

Captain Subash Kumar v. *Principal Officer, Mercantile Marine Deptt., Madras,* AIR 1991 SC 1632 (1639, 1640) : (1991) 2 SCC 449 : 1991 CrLJ 2000 : 1991 CrLR (SC) 267 : JT 1991 (1) SC 658 : (1991) 1 Crimes 830.

[8055] ● ***Private complaint.***—If one reads carefully the provisions relating to trial of summons-cases, the power to drop proceedings against the accused cannot be denied to the Magistrate. Section 204 of the Code indicates that the proceedings before the Magistrate commences upon taking cognizance of the offence and the issue of summons to the accused. When the accused enters appearance in response to the summons, the Magistrate has to take proceedings under Chapter XX of the Code. But the need to try the accused arises when there is allegation in the complaint that the accused has committed the crime. If there is no allegation in the complaint involving the accused in the commission of the crime, it is implied that the Magistrate has no jurisdiction to proceed against the accused.

It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused.

It is important to state that for a Magistrate to take cognizance of the offence as against the Chief Editor, there must be positive averments in the complaint of knowledge of the objectionable character of the matter. The complaint in the instant case does not contain any such allegation. In the absence of such allegation, the Magistrate was justified in directing that the complaint so far as it relates to the Chief Editor could not be proceeded with. To ask the Chief Editor to undergo the trial of the case merely on the ground of the issue of process would be oppressive. *K.M. Mathew* v. *State of Kerala,* AIR 1992 SC 2206 : (1992) 1 SCC 217 : 1992 SCC (Cri) 88 : 1992 CrLJ 3779 : 1992 CrLR (SC) 170.

[8056] ● ***Issue of process—Complaint case.***—The complaint was laid, impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the Court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any *prima facie* case to harass them for vendetta. *Punjab National Bank's* v. *Surendra Prasad Sinha,* AIR 1992 SC 1815 : 1993 Supp (1) SCC 499 : 1992 SCC (Cri) 149 : 1992 CrLJ 2916.

[8057] ● ***Inherent Powers—Exercise of—Quashing of complaint for.***—The High Court can exercise its inherent jurisdiction of quashing a criminal proceeding only when the allegations made in the complaint do not constitute an offence or that the exercise of the power is necessary either to prevent the abuse of process of the Court or otherwise to secure the ends of justice. When the allegations in the complaint *prima facie* constitute the offence against any or all of the respondents in the absence of materials on record to show that the continuance of the proceedings would be an abuse of the process of the Court or would defeat the ends of justice, the High Court would not be justified in quashing the complaint.

In the light of the allegations made in the complaint and the materials produced in support of those allegations by the appellant before the Magistrate, the issue of the process to the respondents No. 1 and 2 who are alleged to have solemnised the second marriage during the subsistence of an earlier valid marriage of the appellant is proper and when process has been issued, the proceedings have to continue in accordance with law against respondents No. 1 and 2. *Chand Dhawan* v. *Jawahar Lal,* AIR 1992 SC 1379, 1382 : (1992) 3 SCC 317 : 1992 SCC (Cri) 636 : 1992 CrLJ 1956 : JT 1992 (3) SC 618 : (1992) 2 Crimes 342 : (1992) 2 UJ (SC) 46.

[8058] ● ***Criminal complaint if counter version to be deployed.***—Each and every suggestion of the defence at the investigation need not lead the investigator to follow it. Had there been a counter version and the suggestion was that the Investigating Officer had wrongly not recorded a cross FIR it might have been different matter. Various avenues were then open to Kirtan Bhuyan and his co-accused to approach the higher Officers in the Police hierarchy or to approach the District Magistrate for the purpose. Furthermore, a criminal complaint could have been filed if the counter version had to be deployed. The suspicion entertained by the defence could, thus, be of no consequence for that alone could not lead to discredit the eye-witnesses to the crime. It was at best a rumour. *Kirtan Bhuyan* v. *State of Orissa,* AIR 1992 SC 1579 (1580) : 1992 CrLJ 2325.

[8059] ● ***Complaint—Offence of bigamy.***—The scope of enquiry under Section 202, CrPC is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should issue or not under Section 204 of the CrPC or whether the complaint should be dismissed by resorting to Section 203 of the CrPC on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. But the enquiry at that stage does not partake the character of a full dress trial which can only take place after process is issued under Section 204 of the CrPC calling upon the proposed accused to answer the accusation made against him for adjudging the guilt or otherwise of the said accused person. Further, the question whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of the enquiry contemplated under Section 202 of the CrPC. To say in other words, during the course of the enquiry under Section 202 of the CrPC, the Enquiry Officer has to satisfy himself simply on the evidence adduced by the prosecution whether *prima facie* case has been made out so as to put the proposed accused on a regular trial and that no detailed enquiry is called for during the course of such enquiry. In the present case, the High Court appears to have exceeded the scope of the enquiry contemplated under Section 202 of the CrPC and has gone into the question of sufficiency of evidence for conviction of the offence of bigamy.

The Learned Counsel for respondents submitted that in the absence of an allegation that the marriage of Darshan Singh with Jagjit Kaur was celebrated in accordance with the customs dispensing with requisite ceremonies and usage applicable to the parties, the alleged first marriage should be held to have been not proved in the eye of law. This submission is not available to him at this stage because that can be determined only at the stage of the trial of the case. *Mohinder Singh* v. *Gulwant Singh,* AIR 1992 SC 1894 (1897) : (1992) 2 SCC 213 : 1992 SCC (Cri) 3161 : 1992 CrLJ 3161 : 1992 CrLR (SC) 136 : JT 1992 (1) SC 542 : (1992) 1 Crimes 603.

[8060] ● ***Action of Police Officer complaint against.***—In the present case, the allegation in the complaint is that while the appellant was called by service of a summons presumably to inquire into allegations of illicit distillation, the respondent had merely used it as an excuse to secure his presence but in fact his real intention was to beat him to prevent him from complaining against those who were paying him "mamool" money. Thus according to the appellant the respondent bore a grudge against him and therefore, he misused his power, issued a summons, secured his presence and then tortured him. He has charged for the commission of offences under Sections 341, 342, 363, 364, 506 (II part) and 307, IPC.

Before a prosecution is terminated as barred by Section 53 of the T.N. District Police Act, 1869, the accused must show that on the allegations made in the complaint it *ex facie* appears that the Act complained of was done under the provisions of the said Act or under the provisions of any other law for the time being in force whereunder the powers are conferred on the police. The prosecution launched against the respondent is in regard to the ill-treatment meted out to the appellant when the latter visited the former in response to the summons.

It was no part of the duty under the T.N. District Police Act, 1869, Criminal Procedure Code or any other law for the time being in force conferring power on the Police to beat and torture the appellant when he presented himself before the respondent in response to the summons. By no stretch of reasoning can it be said that the respondent's action of torturing the appellant was in discharge of any duty or function under the Act or under any other law. It is also difficult to say, if the allegations made are taken at their face value, that the respondent's action was incidental to or in furtherance of his duties and functions under any law. In order to avail of the benefit of Section 53 of the Act, the respondent must show that he acted under the Act or any other law. Merely because the appellant was called through a summons issued under law, the conduct of beating and torturing the appellant on the latter appearing in obedience to the summons cannot establish any *nexus* between the official act of issuance of summons and the action of the respondent on the appearance of the appellant. Unless a relationship is established between the provision of law under which the respondent purports to act and the misdemeanour complained of, the provisions of

Section 53 of the Act will not be attracted. The High Court committed an error in quashing the complaint on the ground that it was barred by Section 53 of the T.N. District Police Act, 1869. *S.P. Vaithianathan* v. *S.K. Shammnganathan,* AIR 1994 SC 1771 : (1994) 4 SCC 569 : 1994 SCC (Cri) 1311 : 1994 CrLJ 2265 : 1994 CrLR (SC) 261 : 1994 (1) Crimes 725.

[8061] ● ***Private complaint—Maintainability.***—Court is barred from taking cognizance of offences mentioned in Sections 172 to 188, I.P. Code except on a written complaint by the public servant concerned—Private complaint not maintainable. If the public servant concerned does not or refuses to make a complaint,, some other public servant to whom he is administratively subordinate can prefer a complaint. *State of U.P.* v. *Mata Bhikh,* AIR 1994 SC 1901 : (1994) 4 SCC 95 : 1994 SCC (Cri) 831.

[8062] ● ***Complaint—Institution of.***—A complaint under Section 20 of the Prevention of Food Adulteration Act, 1954 could be instituted apart from Central or State Government, by a person authorised in that behalf. Such a person who is authorised to institute complaint could, "give his written consent for the prosecution by the Food Inspector," A.K. Roy, Chief Medical Officer, Chandigarh undisputedly, and as is clear from Notification No. 5210-UTF-4-67/9461 issued on 29th April, 1967 by the Chandigarh Administration in exercise of powers conferred by sub-section (1) of Section 20 of the said Act was a person authorised to institute a complaint. Therefore, he could give his consent as well for launching of prosecution. In doing so he was neither delegating his power nor acting contrary to Section 20. He was acting within the scope of authority as a person authorised to institute complaint under Section 20(1) of the Act and has been placed at par with other authorities designated in the sub-section for purposes of granting consent. *Food Inspector, Health Deptt., U.T. Chandigarh* v. *Krishna Dhaba,* AIR 1994 SC 664 (665) : 1994 CrLJ 624 : 1995 SCC (Cri) 172.

[8063] ● ***Complaint by Revenue Court—Offence of forging documents.***—The appellants in all these appeals were tried for offences punishable under Sections 466, 468, 471 read with Section 120-B, I.P. Code, as well as under Section 5(1)(d) of the Prevention of Corruption Act, 1947. The object of the conspiracy was to frustrate the provisions of the newly notified Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 insofar as the provisions affected the interest of the conspirators and thereby to retain the large areas of lands with the leaders of the conspiracy and their relatives, etc. To achieve this object, it is alleged that certain revenue records and the records of the concerned sugar factory were forged and some incorrect entries were made. Regarding the offences committed before the start of the proceedings, no complaint is necessary by the Court concerned either in the old Code or in the new Code. Therefore, the contention that the absence of a complaint by the Revenue Court was a bar for taking cognizance by the criminal Court in respect of these offences which were committed even before the start of the proceedings before the Revenue Court cannot be sustained. *Mahadev Bapuji Mahajan* v. *State of Maharashtra,* AIR 1994 SC 1549 (1550) : 1994 Supp (3) SCC 748 : 1994 CrLJ 1389.

[8064] ● ***Complaint—Framing of charge—Prima facie case when made out.***—If on the basis of materials on record, a Court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage. *State of Maharashtra* v. *Som Nath Thapa,* AIR 1996 SC 1744 : (1996) 4 SCC 659 : 1996 SCC (Cri) 820 : 1996 CrLJ 2448 : 1996 (2) Crimes 64 (SC).

[8065] ● ***Order of ASJ not to be construed as complaint.***—The application under Section 482, CrPC was not filed against filing of complaint but against direction to file complaint. It could not be treated as complaint. Further, Section 340(3) of the CrPC requires that a complaint made under the section could be signed in cases other than the one filed by the High Court by the Presiding Officer of that Court. The order of the Additional District and Sessions Judge, thus, could not be construed as complaint. No appeal could be filed against it under Section 341, CrPC. *Surinder Gupta* v. *Bhagwan Devi*, AIR 1996 SC 509 (510) : (1994) 4 SCC 657 : 1994 SCC (Cri) 1318.

[8066] ● ***Quashing of FIR and complaint by High Court.***—The settled principle of law is that at the stage of quashing an FIR or complaint the High Court is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of the allegations made therein. Of course as has been pointed out in *Bhajan Lal's* case AIR 1992 SC 604, an FIR or a complaint may be quashed if the allegations made therein are so absurd and inherently improbable that no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused but the High Court has not recorded such a finding, obviously because on the allegations in the FIR it was not possible to do so. For the aforesaid reasons, we must hold that the High Court has committed a gross error of law in quashing the FIR and the complaint. *Rupan Deol Bajaj* v. *Kanwar Pal Singh Gill,* AIR 1996 SC 309 (315) : (1995) 6 SCC 194 : 1995 SCC (Cri) 1059 : 1996 CrLJ 381.

[8067] ● ***Complaint—Delay in disposal of.***—The counsel for the appellant on the strength of decision of this Court in *Santosh De* v. *Archana Guha,* (1994) 2 SCC 420 contents that the appellant could not be blamed for not producing evidence after the appearance of the accused because of the dilatory tactics adopted by the accused in raking up a vexatious enquiry under Section 340, CrPC and then to be faulting that no evidence was produced, when there existed preliminary evidence disclosing commission of offence. It appears that the accused deliberately delayed the matter and would not, thus, be entitled to the beneficial employment of Section 245(3) of the CrPC. It shall not be in the interest of justice to discharge the accused for the conduct above exhibited. It is unnecessary to apportion the blame as to the delay in the disposal of the complaint except to state that a substantial part of it was attributable to the accused. *Swarnlata Sarkar* v. *State of West Bengal,* AIR 1996 SC 2158 (2160) : (1996) 4 SCC 733 : 1996 SCC (Cri) 855 : 1996 CrLJ 2885 : JT 1996 (3) SC 537.

[8068] ● ***Private complaint—Production of forged document.***—For taking cognizance of an offence, the document, the foundation for forgery, if produced before the Court or given in evidence, the bar of taking cognizance under Section 195(1)(*b*)(*ii*) gets attracted and the Criminal Court is prohibited to take cognizance of offence unless a complaint in writing is filed as per the procedure prescribed under Section 340 of the Code by or on behalf of the Court. *Surjit Singh* v. *Balbir Singh*, AIR 1996 SC 1592 : (1996) 2 SCC 533 : 1996 CrLJ 2304.

[8069] ● ***Complaint to Magistrate disclosing cognizance offence.***—When a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same under Section 190(1)(a) of the Code and proceed with the same in accordance with provisions of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate Police Station under Section 156(3) for investigation. Once such a direction is given under sub-section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a 'police report' in accordance with Section 173(2) on which a Magistrate may take cognizance under Section 190(1)(b)—but not under 190(1)(a). Since a complaint filed before a Magistrate cannot be a police report in view of the definition of complaint referred to earlier and since the investigation of a 'cognizable case' by the police under Section 156(1) has to culminate in a police report the complaint as soon as an order under Section 156(3) is passed thereon—transforms itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the First Information Report (FIR). As under Section 156(1) the police can only investigate a cognizable 'case', it has to formally register a case on that report.

Whenever a Magistrate directs an investigation on a complaint the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to 'register a case' makes an order of investigation under Section 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the police to investigate into a cognizable 'case' and the Rules framed under the Indian Police Act, 1861 it (the police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, does not in any way stand in the way of a Magistrate to direct' the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the Police would be 'to register a case at the police station treating the complaint as the First Information Report and investigate into the same. *Madhu Bala* v. *Suresh Kumar*, AIR 1997 SC 3104 : (1997) 8 SCC 476 : 1997 CrLJ 3757 : 1997 CrLR (SC) 558 : 1997 (3) Crimes 162.

[8070] ● ***Court at stage of framing charge to consider version of person complaining.***—What the Court has to consider at the stage of framing of the charge is whether the version of the person complaining together with his/her explanation is *prima facie* believable or not. *State of Maha-*

rashtra v. *Priya Sharan Maharaj*, AIR 1997 SC 2041 : (1997) 4 SCC 393 : 1997 SCC (Cri) 584 : 1997 CrLJ 2248 : 1997 CrLR (SC) 462 : 1997 (1) Crimes 275 (SC).

[8071] ● ***Non-appearance of complainant.***—Reading Section 256, CrPC 1973 in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day, the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day, the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned, the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary, then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice. In the present case we have no manner of doubt that the Magistrate should not have resorted to the axing process particularly since the complainant was already examined as a witness on the case besides examining yet another witness for the prosecution. *Associated Cement Co. Ltd.* v. *Keshvanand*, AIR 1998 SC 596 (599) : (1998) 1 SCC 687 : 1998 SCC (Cri) 475 : 1998 CrLJ 856 : 1998 CrLR (SC) 176.

[8072] ● ***Complaint for dishonour of cheque.***—Complainant must be a corporeal person who is capable of making physical presence in the Court. Its corrollary is that even if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the Court and it is that natural person who is looked upon, for all practical purposes, to be the complainant in the case. In other words, when the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as *de facto* complainant to represent the former in Court proceedings. *Associated Cement Co. Ltd.* v. *Keshvanand*, AIR 1998 SC 596 : (1998) 1 SCC 687 : 1998 CrLJ 856 : 1998 CrLR (SC) 176 : 1998 (1) Raj LW 129 : 1998 (1) Crimes 88 : 1998 (119) Pun LR 812.

[8073] ● ***Complaint—Quashing of.***—It is not necessary that a complainant should verbatim reproduce in a body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. *Rajesh Bajaj* v. *State NCT of Delhi*, AIR 1999 SC 1216 (1217) : (1999) 3 SCC 259 : 1999 SCC (Cri) 401 : 1999 CrLJ 1833 : 1999 CrLR (SC) 235 : JT 1999 (2) SC 112.

[8074] ● ***Complaint not mentioning service of notice under Section 138 NI Act.***—Complaint not mentioning that the notice has been served under Section 138 of Negotiable Instruments Act, 1881 is not maintainable. *Shakti Travel & Tours* v. *State of Bihar,* JT 2000 (7) SC 563 : (2000) 4 Crimes 150 (SC) : 2000 (7) Supreme 90.

[8075] ● ***Complaint—Filing of in competent Court.***—This Court could not have assumed jurisdiction by issue of a notice proposing conviction for forgery and making false statements at different stages in the Court punishable under Section 193, IPC without following the procedure prescribed under Sections 195 and 340, CrPC. Primarily, this Court does not exercise any original criminal jurisdiction in relation to offences arising under Section 193, IPC and, secondly, the seriousness of the charge arising under Section 193, IPC requires an elaborate inquiry and trial into the matter by the competent Criminal Court and a summary inquiry by mere issuing a show cause notice and considering affidavits or inquiry reports would not tantamount to a procedure provided under the Criminal Procedure Code.

The order made by this Court convicting the petitioner under Section 193, IPC is, therefore, one without jurisdiction and without following due procedure prescribed under law. Though it is not clear from the impugned order whether the powers under Article 142 of the Constitution were exercised to convict the petitioner under Section 193, IPC, we have proceeded on the assumption, that it is by exercise of that power that the impugned order had been made for there is no other provision enabling the passing of such an order.

To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience. We, therefore, unhesitatingly set aside the conviction of the petitioner for the offence under Section 193, IPC. We also, do not, at this stage, consider it expedient to direct the filing of a complaint in the competent Court as envisaged by Section 340, CrPC because the petitioner has already undergone the sentence imposed upon him for an offence under Section 193, IPC although set aside now by this order and we are upholding his conviction and sentence imposed under Article 129 of the Constitution of India for committing contempt of Court.

For the aforesaid reasons, the order made in writ petitions (criminal) Nos. 356-57 of 1996 convicting the petitioner under Section 193, IPC is recalled and set aside. *M.S. Ahlawat* v. *State of Haryana*, AIR 2000 SC 168 (171) : (2000) 1 SCC 278 : 2000 SCC (Cri) 193 : 2000 CrLJ 388 : 1999 CrLR (SC) 792.

[8076] ● ***Complaint—Filing of.***—It is open to the appellant to file complaint or complaints before the Magistrate concerned in which necessary allegations or accusations of the various offences committed against him can be described. If any such complaint is filed before a Magistrate, the same shall be looked into and the procedure required by law shall be resorted to by the Magistrate concerned. In order to ensure personal protection for the appellant we permit him to make an application before the Magistrate concerned for affording police protection to him if the Magistrate is satisfied that appellant must be given police protection for the effective prosecution of his case, the Magistrate shall pass appropriate orders thereon. *Pinkibasra* v. *State of Punjab*, AIR 2000 SC 1758 : (2000) 9 SCC 46 : 2000 SCC (Cri) 1248 : JT 2000 (2) SC 467.

[8077] ● ***Complaint case—Power of Magistrate.***—The High Court should not have made comments on the averments contained in the complaint as the same remains only in the embryo stage because the complaint has not yet been forwarded by the Magistrate to the police as contemplated in Section 156(3) of the CrPC. Even that apart, any finding on the merits of the case at a stage when investigation is pending, would cause prejudice to the investigating agency as well as the accused concerned. *Om Prakash Chug* v. *State of Haryana*, AIR 2000 SC 2477 (2479) : (2000) 10 SCC 612 : 2000 CrLJ 3486.

[8078] ● ***Inherent power—Quashing of complaint.***—In the instant case the factual score depicts that the respondents approached the petitioner for the purpose of securing Ethambutol Hydrochloride drug in bulk for sale and use in various pharmaceutical drugs and products being manufactured by the respondent-company. It is at this juncture that the petitioner has come out with a definite case that by reason of a promise of maintaining continuous supply of raw materials to the respondents herein for the purpose of manufacturing Ethambutol Hydrochloride and in such a way so as not to cause any interruption or hindrance to the manufacturing activity of the complainant's factory, the complainant-petitioner entered into an agreement. It is on the basis of the said agreement and failure to comply therewith, it is stated that the petitioner herein has lost a substantial amount of money to the extent of about one crore and the sufferance of loss has been by reason of specific assurance and representation which obviously turned out to be false. Misrepresentation on the part of the respondent-accused persons to the complainant, has been the major grievance and a definite and specific case has been made out that such a misrepresentation was intentionally effected since the accused persons were in the know of things that in the event the supplies are not effected, as per the agreement, the complainant is likely to suffer a wrongful loss which, as the complaint proceeds, in the interest of the transaction between the parties, the accused persons were bound to protect. On a careful reading of the complaint, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 415, 418 and 420, IPC cannot be said to be totally absent on the basis of the allegations in the complaint. Whether or not the allegations in the complaint are otherwise correct has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of contract, that does not by itself clothe the Court to come to a conclusion that civil remedy is the only remedy available to the appellant herein. Considering the factual aspect of the matter, we unhesitatingly state that the issue involved in the matter under consideration is not a case in which the criminal trial should have been short-circuited. *Medchl Chemicals & Pharma (P) Ltd.* v. *Biological E. Ltd.*, AIR 2000 SC 1869 : (2000) 3 SCC 269 : 2000 SCC (Cri) 615 : 2000 CrLJ 1487 : 2000 CrLR (SC) 301 : JT 2000 (2) SC 426.

[8079] ● ***Complaints—Investigation of.***—All complaints shall be investigated with equal alacrity and with equal fairness irrespective of the financial capacity of the person lodging the complaint.

Financial crunch of any State treasury is no justification for allowing a private party to supply funds to the Police for conducting such investigation. Augmentation of the fiscal resources of the State for meeting the expenses needed for such investigations is the lookout of the executive. Failure to do it, is no premise for directing a complainant to supply funds to the Investigating Officer. Such funding by interested private parties would vitiate the investigation contemplated in the Code. A vitiated investigation is the precursor for miscarriage of criminal justice. Hence any attempt to create a precedent permitting private parties to support financial assistance to the police for conducting investigation should be nipped in the bud itself.

The Police investigation should necessarily be with the fund supplied by the State. It may be possible for a rich complainant to supply any amount of fund to the Police for conducting investigation into his complaint. But a poor man cannot afford to supply any financial assistance to the Police. It is an acknowledged reality that he who pays the piper calls the tune. So he would call the shots. Its corollary is that somebody who incurs the cost of anything would normally secure its control also. In our constitutional scheme, the Police and other statutory investigation agency cannot be allowed to be hackneyed by those who can afford it. *Navinchandra N. Majithia* v. *State of Meghalaya*, AIR 2000 SC 3275 : (2000) 8 SCC 323 : 2000 SCC (Cri) 1510 : 2000 CrLR (SC) 661.

[8080] ● ***Privately founded police investigation.***—Mere pendency of a civil proceeding before any Civil Court will not be a ground for quashing of the criminal proceeding or not to frame a charge against an accused, even if the assertions in the complaint petition together with the materials produced by the complainant, would constitute an offence. *Maratt Rubber Ltd.* v. *J.K. Marattukalam*, AIR 2000 SC 2017 : (2000) 9 SCC 547 : 2000 CrLJ 2780 : JT 2000 (4) SC 387 : 2000 (4) Crimes 29.

[8081] ● ***Complaint case—Forwarding of—Officer incharge Police station to.***—The complaint filed by the appellant before the Magistrate should necessarily be forwarded to the officer-in-charge of the Police Station concerned as provided in Section 156 of the Code. Such officer has to register an FIR on the allegations contained in the complaint. If there is an aggrieved person on account of the investigation so carried on by the local Police, he can approach either the State Government or the High Court under Article 226 of the Constitution for appropriate orders in the matter. *Om Prakash Chugh* v. *State of Haryana*, AIR 2000 SC 2477 (2478) : (2000) 10 SCC 612 : 2000 CrLJ 3486.

[8082] ● ***Inquiry—Sessions triable cases.***—Section 202 of the CrPC is an enabling provision and it is a discretion of the Magistrate depending upon the facts of each case, whether to issue process straightway or to hold the enquiry. However, in case where enquiry is held, failure to comply with the statutory direction to examine all the witnesses would not vitiate further proceeding in all cases for the reasons that : (*a*) in a complaint filed by a public servant acting or purporting to act in discharge of his official duties, the question of holding inquiry may not arise, (*b*) whether to hold inquiry or not is discretionary jurisdiction of the Magistrate, (*c*) even if he has decided to hold inquiry, it is his further discretion to examine the witnesses on oath. If he decides to examine witnesses on oath in a case triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath, (*d*) it would also depend upon facts of each case depending upon the prejudice caused to the accused by non-compliance of the said proviso (Section 465), and (*e*) that the objection with regard to non-compliance of proviso should be taken at the earlier stage when the charge is framed by the Sessions Court.

At initial stage, if objection is raised and it is found by the Sessions Court that by non-holding of inquiry, prejudice is caused to the accused, he may direct the Magistrate to follow the procedure prescribed under the proviso. It is no doubt true that by the use of the word "shall", it appears that language used in the proviso is of mandatory nature. At the same time, it is a procedural law and it is to be read in context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry under Section 202 is itself discretionary one giving option to examine or not to examine witnesses on oath. Hence, proviso to the said sub-section is required to be read accordingly though couched in mandatory term by using the word "shall". Normally, the procedure prescribed therein should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases. *Rosy* v. *State of Kerala*, AIR 2000 SC 637 (648-649) : (2000) 2 SCC 230 : 2000 SCC (Cri) 379 : 2000 CrLJ 930 : JT 2000 (1) SC 84.

[8083] ● ***Case instituted on complaint—Committing of to Court of Sessions.***—If a case instituted on complaint is committed to the Court of Session without complying with the requirements in Clause (i) of Section 208 of the CrPC how is it possible for the public prosecutor to know in advance what evidence he can adduce to prove the guilt of the accused? If no inquiry under Section 202 is to be conducted, a Magistrate who decides to proceed only on the averments contained in the complaint filed by a public servant (who is not a witness to the core allegation) and such a case is committed to the Court of Session, its inevitable consequence would be that the Sessions Judge has to axe down the case at the stage of Section 226 itself as the Public Prosecutor would then be helpless to state "by what evidence he proposes to prove the guilt of accused". If the offence is of a serious nature or is of public importance, the consequence then would be miscarriage of justice. Thus, I have no doubt that the proviso incorporated in sub-section (2) of Section 202 of the Code is not merely to confer a discretion on the Magistrate, but a compelling duty on him to perform in such cases. I wish to add that the Magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses. Of course, if the complainant requires the help of the Court to summon such witnesses, it is open to the Magistrate to issue such summons, for there is nothing in the Code which prevents the Magistrate from issuing such summons to the witnesses. *Rosy* v. *State of Kerala*, AIR 2000 SC 637 (644) : (2000) 2 SCC 230 : 2000 SCC (Cri) 379 : 2000 CrLJ 930 : JT 2000 (1) SC 84.

[8084] ● ***Complaint—Filing of after expiry of period of limitation.***—In the present case, it is the admitted fact that the complaint was filed only long after the period indicated in Section 161 of the Bombay Police Act, 1951 was over, either with or without sanction from the State Government. Therefore, the complaint is irretrievably barred under the said provision. *K.K. Patel* v. *State of Gujarat*, AIR 2000 SC 3346 (3350) : (2000) 6 SCC 195 : 2000 CrLJ 4592 : 2000 CrLR (SC) 521.

[8085] ● ***Allegations levelled in complaint not disclosing offence.***—In the event, the Court on a perusal of the complaint comes to a conclusion that the allegations levelled in the complaint or charge-sheet on the face of it does not constitute or disclose any offence as alleged, there ought not to be any hesitation to rise up to the expectation of the people and deal with the situation as is required under the law. Frustrated litigants ought not to be indulged to give vent to their vindictiveness through a legal process and such an investigation ought not to be allowed to be continued since the same is opposed to the concept of justice which is paramount. *Medchl Chemicals & Pharma (P) Ltd.* v. *Biological E. Ltd.*, AIR 2000 SC 1869 : (2000) 3 SCC 269 : 2000 SCC (Cri) 615 (618) : 2000 CrLJ 1487 : 2000 CrLR (SC) 301 : JT 2000 (2) SC 426.

[8086] ● ***Allegations in complaint not making out case.***—Where a company committed offence under Section 138, Negotiable Instruments Act, 1881, then not only the company but also every person who at the time when the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. It follows that a person other than the company can be proceeded against under those provisions only if that person was incharge of and was responsible to the company for the conduct of its business. Allegations made in the complaint do not either in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence the appellant was incharge of and was responsible to the company for the conduct of its business. *K.P.G. Nair* v. *Jindal Menthol India Ltd.,* 2000 CrLR (SC) 778 : JT 2000 (51) SC 519 : 2001 (2) Crimes 132.

[8087] ● ***Power of—Magistrate to take cognizance of offence under Section 200, CrPC on complaint.***—I. (a) Under Section 200, Magistrate has jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present;

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses;

(c) In such case, the Court may issue process or dismiss the complaint.

II. (a) The Magistrate instead of following the procedure stated above, may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the Police Officer or by other person authorised by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction of investigation by the Police Officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant under Section 204 (2) before issuance of the process.

(c) The irregularity or non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later. *Rosy* v. *State of Kerala*, AIR 2000 SC 637 (650) : (2000) 2 SCC 230 : 2000 SCC (Cri) 379 : 2000 CrLJ 930 : JT 2000 (1) SC 84.

[8088] ● ***Magistrate not to take cognizance of complaint on move presentation.***—Mere presentation of the complaint in the Court cannot be held to mean that its cognizance had been taken by the Magistrate. If the complaint is found to be premature, it can await maturity or be returned to the complainant for filing later and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed. *Narsingh Das Tapadia* v. *Goverdhan Das Partani*, AIR 2000 SC 2946 : (2000) 7 SCC 183 : 2000 SCC (Cri) 1326 : 2000 (4) Crimes 12.

[8089] ● ***Complaint filed 25 days after expiry of period of limitation.***—The mere fact that the complaint was filed 25 days after the expiry of the period of limitation, did not entitle the accused to seek his discharge under Section 245, CrPC because the complainant has, under law, a right to seek for extension of time under Section 473, CrPC. The complainant could satisfy the Magistrate on the facts and circumstances of the case that the delay was explainable which was occasioned on account of their *bona fide* belief to obtain the sanction for the purpose of filing the complaint. *Rakesh Kumar Jain* v. *State*, AIR 2000 SC 2754 (2757) : (2000) 7 SCC 656 : 2000 CrLJ 3973 : 2000 CrLR (SC) 649.

[8090] ● ***Complaint by petitioner still to be investigated.***—In the instant case the petitioner had only filed a complaint under Section 156(3), CrPC before the Court of Special Sessions Judge. It is still to be investigated and found out by that Court whether the complaint lodged before that Court was false and had been made with the necessary intention or knowledge to induce the Court to exercise its lawful power so as to cause injury to the respondents. Once those ingredients are established and the charge is found to have been proved, then alone the Court can take cognizance of the offence and proceed in the manner directed by the High Court by the impugned judgment. But the stage at which such directions have been issued is premature. *Subash Chandra* v. *State of Uttar Pradesh,* (2000) 9 SCC 356 : JT 2000 (2) SC 26 : 2001 (3) Crimes 63 (SC).

[8091] ● ***Inquiry report by officer of Railway Protection Force under Section 8 of Railways Property (Unlawful Possession) Act mere complaint to Magistrate.***—Respondents, who are the employees of the Railways, were caught red-handed on 25-3-1987 while carrying away Railways cement unlawfully for sale. Upon inquiry, offences under the Railways Property (Unlawful Possession) Act, 1966 were held proved against the accused persons. Inquiry report (complaint) under the Act was filed by M.I. Khan, Inspector, RPF, Samastipur, against the accused persons in the Court of Judicial Magistrate. The accused persons filed applications before the Magistrate praying for their discharge on the ground that S. I. of Railway Protection Force, who submitted charge-sheet was not a "Police Officer" within the meaning of Section 173 of the Code and upon his report submitted in the Court, the Magistrate had no jurisdiction to take cognizance. The prayer was rejected by the Magistrate. *State of Bihar* v. *Chandra Bhushan Singh*, AIR 2001 SC 429 (430, 431) : (2001) 2 SCC 241 : 2001 SCC (Cri) 338 : (2001) CrLR (SC) 98.

[8092] ● ***Initiation of inquiry for offence under Railway Property (Unlawful Possession) Act be only on basis of complaint.***—The offences under the Railway Property (Unlawful Possession) Act, are non-cognizable which cannot be investigated by a Police Officer under the Code. The result is that initiation of inquiry for an offence inquired into under this Act can be only on the basis of a complaint by an officer of the Force, as was actually done in this case. On plain reading of the order of the Magistrate, issuing summons to the respondents keeping in view the allegations made in the complaint and sworn statement of the appellant, it appears to us that a *prima facie* case is made out at that stage. There are no special features in the case to say that it is not expedient and not in the interest of justice to permit a prosecution to continue.....The High Court could not say at that stage that there was no reasonable prospect of conviction resulting in the case after a trial. Having regard to the facts of the instant case and in the light of decisions of this Court, we have no hesitation in holding that the High Court committed a manifest error in quashing the criminal proceedings exercising jurisdiction under Section 482, CrPC. *M.N. Damani* v. *S.K. Sinha*, AIR 2001 SC 2037 (2039, 2040) : (2001) 5 SCC 156 : 2001 SCC (Cri) 823 : 2001 CrLJ 2571.

[8093] ● Arbitrator cannot be termed to be a Court within the meaning of Section 195, CrPC, as such, question of applicability of Section 340, CrPC in a proceeding before the Arbitrator does not and cannot arise. *Manohar Lal* v. *Vinesh Anand*, AIR 2001 SC 1820, 1827 : (2001) 5 SCC 407 : 2001 SCC (Cri) 1322 : 2001 CrLJ 2044.

[8094] ● ***Dismissal of complaint term—Sufficient grounds.***—In case of a complaint under Section 200, CrPC or IPC, a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses, if any, to ascertain whether a *prima facie* case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The words "sufficient ground" used under Section 202 have to be construed to mean the satisfaction that a *prima facie* case is made out against the accused and not sufficient ground for the purpose of conviction. *S.N. Palanitkar* v. *State of Bihar*, AIR 2001 SC 2960 (2963) : (2002) 1 SCC 241 : 2001 CrLJ 4765 : 2001 CrLR (SC) 751.

[8095] ● ***Condition for making complaint under Section 340, CrPC.***—The first condition, for filing a complaint under Section 340, CrPC is that a person who has given a false affidavit or evidence in a proceeding before a Court and secondly, in the opinion of the Court it is expedient in the interest of justice to make an inquiry against such a person in relation to the offence committed by him. There is no material or record to show that there was any application of mind by the Court that it was expedient in the interest of justice to make an inquiry and file a complaint against the appellant. The judgment does not show that the Court applied its mind regarding the second condition as to whether it is expedient in the interest of justice to make an inquiry into the false evidence given by the appellant and a complaint is to be filed. In the absence of application of mind in regard to expediency for filing complaint against the appellant, the order passed by the High Court directing the Prothonotary and Senior Master of the High Court to file a complaint against the appellant was vitiated. *B.K. Gupta* v. *Damodar H. Bajaj*, (2001) 9 SCC 742 : 2001 CrLJ 3297 : JT 2001 (4) SC 422.

[8096] ● ***Complainant to file complaint under Section 200, CrPC and then produce relevant material.***—Once the trial has come to an end by convicting Rajasekaran under Section 304-A, IPC it could not be open for the investigating agency to further investigate into the matter in pursuance to a complaint of the complainant or a complaint being made by some other person. This being the position, there does not remain any material on the basis of which the High Court could have come to the conclusion that a wrong man has been convicted and the real accused is still at large and then directed criminal proceedings against Govindaraji. The complainant could have filed a complaint under Section 200 and then produced the relevant materials. In that case, the Magistrate could have proceeded with the complainant's case. *N.R. Govindaraji* v. *S. Venkatachalam,* 2002 CrLJ 263 (SC) : 2001 (1) CCR 68 : (2001) 1 SLT 267 (2).

[8097] ● ***Complaint case—Cognizance.***—It is well settled that when Police after investigation files a final form under Section 173 of the CrPC the Magistrate may disagree with the conclusion arrived at by the Police and take cognizance in exercise of power under Section 190 of the CrPC. The Magistrate may not take cognizance and direct further investigation in the matter under Section 156 of the CrPC. Where the Magistrate accepts the final form submitted by the Police, the right of the complainant to file a regular complaint is not taken away and in fact on such a complaint being filed the Magistrate follows the procedure under Section 201 of the CrPC and takes cognizance if the materials produced by the complainant make out an offence. *Kishore Kumar Gyanchandani* v. *G.D. Mehrotra*, AIR 2002 SC 483 : (2001) 3 Crimes 205.

[8098] ● ***Court under no obligation to afford opportunity of hearing to claimants before filing complaint.***—Reading of sub-section (1) of Section 340, CrPC makes it clear that the hub of this provision is formation of an opinion by the Court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion, the Court is empowered to hold a preliminary inquiry. It is not per-emptory that such preliminary inquiry should be held. Even without such preliminary inquiry, the Court can form such an opinion when it appears to the Court that an offence has been committed in relation to a proceeding in that Court. Even when the Court forms such an opinion it is not mandatory that the Court should make a complaint. But once the Court decides to do so, then the Court should make a finding to the effect that on the fact situation, it is expedient in the interest of justice that the offence should further be probed into. The person against whom the complaint is made, has a legal right to be heard whether he should be tried for the offence or not, but such a legal right is envisaged only when the Magistrate calls the accused to appear before him. The person concerned has then the right to participate in the pre-trial inquiry envisaged in Section 239 of the CrPC. It is open to him to satisfy the Magistrate that the allegations against him are groundless and that he is entitled to be discharged. The scheme delineated above would clearly show that there is no statutory requirement to afford an opportunity of hearing to the persons against whom that Court might file a complaint before the Magistrate for initiating prosecution proceedings. *Pritish* v. *State of Maharashtra*, AIR 2002 SC 236 (240) : (2002) 1 SCC 253 : 2002 CrLJ 548.

[8099] ● ***Complaint—Lodging of.***—It is well settled that in criminal law that a complaint can be lodged by anyone who has become aware of a crime having been committed and thereby set the law into motion. In respect of offences adverted to in Section 195, CrPC there is a restriction that the same cannot be entertained unless a complaint is made by a Court because the offence is stated to have been committed in relation to the proceedings in that Court. Section 340, CrPC is invoked to get over the bar imposed under Section 195, CrPC. In ordinary crimes not adverted to under Section 195, CrPC, if in respect of any offence, law can be set into motion by any citizen of this country, we fail to see how any citizen of this country cannot approach even under Section 340, CrPC. For that matter, the wordings of Section 340, CrPC are significant. The Court will have to act in the interest of justice on a complaint or otherwise. Assuming that the complaint may have to be made at the instance of a party having an interest in the matter, still the Court can take action in the matter otherwise than on a complaint, that is, when it has received information as to a crime having been committed covered by the said provision. Therefore, it is wholly unnecessary to examine this aspect of the matter. We proceed on the basis that the respondent has *locus standi* to present the complaint before the Designated Judge. *N. Natarajan* v. *B.K. Subba Rao*, AIR 2003 SC 541 : (2003) 2 SCC 76 : 2003 CrLJ 820 : JT 2002 (10) SC 1 : 2002 (9) Scale 16.

[8100] ● ***Second complaint on same facts.***—It is settled law that there is no statutory bar in filing a second complaint on the same facts. In a case where a previous complaint is dismissed without assigning any reasons, the Magistrate under Section 204, CrPC may take cognizance of an offence and issue process if there is sufficient ground for proceeding. As held in *Pramatha Nath Taluqdar's* case (supra) second complaint could be dismissed after a decision has been given against the complainant in previous matter upon a full consideration of his case. Further, second complaint on the same facts could be entertained only in exceptional circumstances, namely, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced. *Mahesh Chand* v. *B. Janardhan Reddy*, AIR 2003 SC 702 : (2003) 1 SCC 734 : 2003 CrLJ 866 : JT 2002 (10) SC 123 : (2003) 1 Crimes 1 (SC).

[8101] ● ***Power of Court to award compensation.***—Sub-section (1) of Section 357 deals with a situation when a Court imposes a fine or a sentence (including sentence of death) of which fine also forms a part. It confers a discretion on the Court to order as to how the whole or any part of fine recovered is to be applied. For bringing in application of sub-section (1) of Section 357 it is a statutory requirement that fine is imposed and thereupon make further orders as to the disbursement of the said fine in the manner envisaged therein. If no fine is imposed, sub-section (1) of Section 357 has no application. In the case at hand no fine was imposed by the trial Court of the High Court. Sub-section (3) on the other hand deals with the situation where fine does not form part of the sentence imposed by a Court. In such a case, the Court when passing a judgment can order the accused persons to pay by way of compensation such amount as may be specified in the order to the person who has suffered a loss or injury by reason of the act of which the accused person has been so convicted and sentenced. The basic difference between sub-sections (1) and (3) is that in the former case, the imposition of fine is the basic and essential requirement, while in the latter even the absence thereof empowers the Court to direct payment of compensation. Such power is available to be exercised by an appellate Court or by the High Court or Court of Session when exercising revisional powers. Sub-section (5) deals with a situation when the Court fixes the compensation in any subsequent civil suit relating to the same matter. While awarding compensation the Court is required to take into account any sum paid or recovered as compensation under Section 357 of the Code. The power of the Court to award compensation to victims under Section 357 is not ancillary to other sentences but is in addition thereto. *Mangilal* v. *State of M.P.*, AIR 2004 SC 1280 : (2004) 2 SCC 447 : 2004 SCC (Cri) 1085 (1090).

[8102] ● ***Complaint—Proper person—Defamation—Proper person.***—It was submitted that the imputations were mainly against the father of the complainant, and, therefore, a complaint ought to have been made by the father of the complainant. Reference was made to Section 199, CrPC. *Held*, on perusal of the compound it was found that similar defamatory words were used against the complainant also apart from his father and, therefore, the right of the complainant to move the Court and lodge a complaint before the competent Magistrate could not be challenged. *Ram Swarup* v. *Mohd. Javed Razack*, AIR 2005 SC 2005 : (2005) 10 SCC 393 : 2005 SCC (Cri) 1549 (1550) : 2005 CrLJ 1725 : 2005 (1) Crimes 345.

[8103] ● ***Dismissal of complaint.***—If the High Court was of the opinion that the order passed by the Magistrate dismissing the complaint was cryptic or without reasons, the Court should have remitted back the case to the Magistrate for redecision with a direction to apply his mind and decide the matter in accordance with law. *Mai Koal Fibres Ltd.* v. *ICICI Bank Ltd.*, (2005) 12 SCC 229 : (2006) 1 SCC (Cri) 545.

[8104] ● ***No particular format of complaint.***—There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprits be suitably be dealt with is a complaint. *Mohd. Yousuf* v. *Afaq Jahan*, AIR 2006 SC 705 : (2006) 1 SCC 627 : (2006) 1 SCC (Cri) 460 (469) : 2006 CrLJ 788 : 2006 (1) Crimes 81.

[8105] ● ***Stay of complaint (S. 210 CrPC).***—It is clear that before Section 210 can be invoked, the following conditions must be satisfied.

(i) there must be a complaint pending for inquiry or trial;

(ii) investigation by the police must be in progress in relation to the same offence;

(iii) a report must have been made by the police officer under Section 173; and

(iv) the Magistrate must have taken cognizance of an offence against a person who is accused in the complaint case. *Sankaran Moitra* v. *Sadhna Das*, AIR 2006 SC 1599 : (2006) 4 SCC 584 : (2006) 2 SCC (Cri) 358 (392) : JT 2006 (4) SC 34.

[8106-07] ● ***Dismissal of complaint on merits—Second complaint, in identical facts when can be entertained.***—An order of dismissal under Section 203, CrPC is however no bar to the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances. The exceptional circumstances are (a) where the previous order was passed on incomplete records (b) or on a misunderstanding of the nature of the complaint (c) or the order which was passed was manifestly absurd, unjust or foolish or (d) where new facts which could not with reasonable diligence, have been brought on the record in the previous proceedings. *Poonam Chand Jain* v. *Fazru*, AIR 2010 SC 659 : (2010) 2 SCC 631 : 2010 CrLJ 1423 (1426) (SC) : (2010) 1 Crimes 151. [*Pramathanath Talukdar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 876 : 1962 Supp (2) SCR 297 : (1962) 1 Crimes 770 **rel. on**].

[8108] ● ***Dismissal of complaint by magistrate—Reasons to be recorded.***—Section 203, CrPC empowers the Magistrate to dismiss the complaint if, after considering the statements made by the complainant and the witnesses on oath and the result of the inquiry or investigation, if any made under Section 202(1), he is satisfied that there is no sufficient ground for proceeding. The exercise of this power is hedged with the condition that the magistrate should record brief reasons for dismissing the complaint. *Shivjee Singh* v. *Nagendra Tiwari*, AIR 2010 SC 2261 : (2010) 7 SCC 578 : 2010 (3) Crimes 188 (SC).

[8109] ● ***Second complaint—Maintainability.***—The second complaint in this case was on almost identical facts which was raised in the first complaint and which was dismissed on merits. So the second complaint is not maintainable. This Court finds that the core of both the complaints is the same. Nothing has been disclosed in the second complaint which is substantially new and not disclosed in the first complaint. No case is made out that even after the exercise of due diligence the facts alleged in the second complaint were not within the application of the first complainant. In fact such a case could not be made out since the facts in both the complaints are almost identical. Therefore, the second complaint is not covered within exceptional circumstances explained in *Pramatha Nath* (*supra*). In that view of the matter the second complaint in the facts of this case, cannot be entertained. *Poonam Chand Jain* v. *Fazru*, AIR 2010 SC 659 : (2010) 1 SCC 631 : 2010 CrLJ 1423 : 2010 (1) Crimes 151 (SC).

[8110] ● ***Clubbing of complaint.***—In the instant case, keeping in view the totality of the circumstances and the sequence in which the two incidents occurred, taking into consideration the evidence of drivers and conductors/cleaners of the vehicles involved in the first incident and the evidence V.A.O. (PW 7), we reach the inescapable conclusion that the second occurrence was nothing but a fall out of the first occurrence. The damage caused to the public transport vehicles and the consequential burning of the University bus remained part of one and the same incident. Merely because two separate complaints had been lodged did not mean that they could not be clubbed together and one charge-sheet could not be filed. *C. Muniappan* v. *State of Tamil Nadu*, AIR 2010 SC 3718 (3727, 3728) : (2010) 9 SCC 567.

COMPOUNDING

[8111] ● ***Compounding of offence.***—The major offences for which the accused have been convicted are no doubt non-compoundable but the fact of compromise can be taken into account in determining the quantum of sentence. *Ram Pujan* v. *State of U.P.*, AIR 1973 SC 2418 : (1973) 2 SCC 456 : (1973) SCC (Cri) 870 : 1973 CrLJ 1612.

[8112] ● ***Permission to compound offence.***—The offence under Section 324, IPC is compoundable with the permission of the Court. As it is stated that the parties have amicably settled the matter, it would be in the fitness of things if permission to compound the offence is granted. The permission is accordingly granted. *Bhim Singh* v. *State of U.P.*, AIR 1974 SC 1744 : (1974) 4 SCC 97 : 1974 CrLJ 1285 (1286).

[8113] ● ***Compounding of non-compoundable offence—Not permissible.***—"We reiterate that the course adopted in *Ram Pujan* v. *State of U.P.*, (1973) 2 SCC 456 : (1973) SCC (Cri) 870 and *Mahesh Chand* v. *State of Rajasthan*, 1991 SCC (Cri) 159 : JT 1988 (1) SC 618 was not in accordance with law. However, considering the fact that the parties have settled their dispute outside the Court and the fact that 10 years have elapsed from the date of the incident and the further fact that the appellants have already undergone 3 months' imprisonment as per the sentence imposed by them, we think that the ends of justice would be met if the sentence of imprisonment is reduced to the period already undergone besides imposing a five of Rs. 5000 on each of the accused under Section 326 read with Section 34, IPC." *Surendra Nath Mohanty* v. *State of Orissa*, AIR 1999 SC 2118 : (1999) 5 SCC 238 : 1999 SCC (Cri) 998 : 1999 CrLJ 3496.

[8114] ● ***Compounding.***—The incident involving Sections 324/149, 323/149 and 148, IPC took place in the year 1979 and at present parties are having cordial relations and have settled their dispute, this would be a fit case for reducing the period of sentence to the period already undergone. *Bachhu Singh alias Surendra Babu* v. *State of U.P.*, 2004 SCC (Cri) 1124 (1125).

COMPOUNDING OF OFFENCE/COMPOSITION (SECTION 320, CrPC)

[8115] ● ***Composition of offence when permissible under law.***—If a person is charged with an offence, then unless there is some provision for composition of it, the law must take its course and the charge enquired into resulting either in conviction or acquittal. If composition of an offence was permissible under the law, the effect of such composition would depend on what the law provided for. If the effect of composition is to amount to an acquittal then it may be said that no stigma should attach to the character of the person, but unless that is expressly provided for, the mere rendering of compensation would not amount to the vindication of the character of the person charged with the offence. *Biswahan Das* v. *Gohan Ghendra Hayrika*, AIR 1967 SC 895 : 1967 CrLJ 828.

[8116] ● ***Fact of compromise between accused and injured can be taken into account in determining quantum of sentence even if offence non-compoundable.***—The major offence for which the accused have been convicted are no doubt non-compoundable but the fact of compromise can be taken into account in determining the quantum of sentence. *Ram Pujan* v. *State of U.P.*, AIR 1973 SC 2418 : (1973) 2 SCC 456 : 1973 SCC (Cri) 870 : 1973 CrLJ 1612.

[8117] ● ***Compounding of offence on grant of permission by Court.***—In the instant case, the Court granted permission for compounding of an offence which can be compounded with the permission of the Court and an offence which cannot be compounded. The said permission was one indivisible permission for the offences under Scion 420, IPC and Section 13 of the Maharashtra Act. As no valid permission could be granted for the compounding of an offence under Section 13 of the Maharashtra Act the permission would have to be held invalid its entirety. It is not permissible in such an event to sever the permission into two parts and to uphold it so far as the offence under Section 420, IPC is concerned and hold it to be invalid in respect of the offence under Section 13 of the Maharashtra Act. *Ramesh Chandra J. Thakur* v. *A.P. Jhaveri*, AIR 1973 SC 84 : (1973) 3 SCC 884 : 1973 SCC (Cri) 566 (570-571) : 1973 CrLJ 201 : 1973 CrLR (SC) 14.

[8118] ● ***Offence under Section 324, IPC Compoundable.***—The offence under S. 324, IPC is compoundable with the permission of the Court. As it is stated that the parties have amicably settled the matter, it would be in the fitness of things if permission to compound is granted. *Bhim Singh* v. *State of Uttar Pradesh*, AIR 1974 SC 1744 : (1974) 4 SCC 97 : 1974 SCC (Cri) 354 : 1974 CrLJ 1285 : 1973 CrLR (SC) 569 : 1973 UJ (SC) 754.

[8119] ● ***Settlement of subject matter of appeal.***—At the hearing of appeal before this Court, there has been a settlement of the subject-matter of the appeal and it has been agreed that the appellant shall deposit in a scheduled bank within four months from today a sum of Rs. 16,000 in the name of respondent No 2 under the guardianship of respondent No. 1. Respondent No. 1 would-be entitled to receive interest every month on that amount for the maintenance of respondent No. 2 till he attains majority. Looking at all the facts, it can be said that the settlement arrived at is reasonable and in the interest of respondent No. 2. The parties are, therefore, allowed to enter into this settlement. *Bhoomi* v. *Leela Rajan*, AIR 1977 SC 700 (701) : (1977) 4 SCC 596 : 1977 SCC (Cri) 671 : 1977 CrLJ 342.

[8120] ● ***Permission to compound offence—Grant of.***—If a conviction for non-compoundable offenses is altered to one under compoundable offence in the instant case from Section 307 to Section 326, IPC, permission to compound the offence can be granted. *Shakuntala Sawhney* v. *Kaushelya Sawhney*, (1980) 1 SCC 63 : (1979) 3 SCR 639.

[8121] ● ***Compounding of offence—Permission granted for.***—*Permission for compound offence.*—In the instant case the accused was charged with offences under Sections 325 and 452, IPC. The former offence can be compounded with the permission of the Court. Permission is granted to the parties to compound the said offence. The effect of that is the acquittal of the petitioner in view of the provisions of law contained in Section 320(8) of CrPC for the offence under Section 325. *Rajinder Singh* v. *State (Delhi Administration)*, AIR 1980 SC 1260 : 1980 Supp SCC 337 : 1981 SCC (Cri) 277.

[8122] ● ***Compounding of offence grant of permission for.***—The appellant has been convicted of offence under Section 325, IPC and Sections 120 and 121 of the Railways Act and has been sentenced to rigorous imprisonment for six months on the first count, a fine of Rs. 25/- on the second and a fine of Rs. 75/- on the third. He has compounded the offence first above mentioned with the injured person whose affidavit in that behalf is on the record. We grant permission to the parties to compound the offence and acquit the appellant of the charge under Section 325, IPC. The appeal is accepted to that extent and is dismissed for the rest so that conviction for offences under Sections 120 and 121 of the Railways Act and the sentence of fine imposed in that behalf shall stand, along with the direction that the appellant shall suffer simple imprisonment for 15 days in case the fines are not paid. *Abdul Sattar* v. *State of M.P.*, AIR 1981 SC 1775 (2) (1776) : 1981 SCC (Cri) 633 : 1981 CrLJ 1705 (1) : 1981 CrLR (SC) 7.

[8123] ● ***Permission to compound offence.***—In this case, the appellants have amicably settled their dispute and it has been assured to the Court that happy relationship will be established in the student community. For these permission to compound the offences is granted and the composition as for the terms set out in the consent *precipe* is accepted. In view of the composition both the appeals are allowed and the conviction and sentence of the appellants are set aside. *Bhupendra Singh* v. *State of Madhya Pradesh*, AIR 1981 SC 1240 : 1980 Supp SCC 352 : 1981 SCC (Cri) 280 : 1981 CrLJ 751 : 1981 CrLR (SC) 116.

[8124] ● ***Composition of offences.***—In the instant case, the offence disclosed against the appellants is one under Section 324 read with Section 325, IPC. These offences are compoundable with the permission of the Court. The parties have made a request that they should be allowed to compound the case and they have also filed a composition deed in the High Court. In view of this, the permission to compound the offence is granted and in consequence the appeal is allowed. *Fahimuddin* v. *State of Uttar Pradesh*, AIR 1981 SC 2008 (3) : (1982) 27 SCC 174 (2) : 1981 SCC (Cri) 378 : 1981 CrLJ 1690 : 1981 CrLR (SC) 318.

[8125] ● ***Compounding of offence with permission of Court.***—The conviction of the petitioner is under Section 325 and 425, IPC. The former offence can be compounded with the permission of the Court. We grant permission to the parties to compound the said offence. The effect of that is the acquittal of the petitioner in view of the provision of law contained in Section 320 (8), CrPC for the offence under Section 325. The other offence under Section 452 is not compoundable. Under the circumstances, while maintaining conviction of the petitioner under the said provision of law we reduce the sentence to the period already undergone. *Rajendra Singh* v. *State* (*Delhi Administration*), 1981 SCC (Cri) 277 (278).

[8126] ● ***Offence non-compoundable.***—In this case the accused have entered into a compromise with the persons injured in the occurrence, the ends of justice would be met if the sentences of imprisonment passed on the appellants are reduced to periods undergone by them. The offences in this case were non-compoundable. *Malkiat Singh* v. *State of Punjab,* (1982) 3 SCC 371 (2) : 1983 SCC (Cri) 52 (2) : 1983 CrLJ (SC) 531 (1).

[8127] ● ***Offence under Section 324 read with Section 325, IPC compoundable with permission of Court.***—The offences under Section 324 read with Section 325, IPC are compoundable with the permission of the Court. Since permission has been granted to the other accused to compound the offences, we grant permission to the parties herein to compound the offence. *Mainuddin* v. *State of Uttar Pradesh*, (1982) 3 SCC 367 (2) : 1983 SCC (Cri) 48 (2) : 1983 CrLR (SC) 527 (1).

[8128] ● ***Permission to compound offence—Grant of.***—In view of the fact that the parties are clearly related, permission to compound the offences under Sections 324 and 325, IPC is granted. *Hindu Singh* v. *State of Uttar Pradesh,* (1982) 3 SCC 368 (2) : 1983 SCC (Cri) 49 : 1983 CrLR (SC) 528.

[8129] ● ***Compounding of offence—Sanction of.***—In appeal the conviction is converted from one under Section 307, IPC to that under Sections 325/34, IPC the compounding of offence is sanctioned as the parties have settled their differences. *Ram Shanker* v. *State of Uttar Pradesh,* 1983 SCC (Cri) 60.

[8130] ● ***Composition of offences.***—Victim voluntarily entered into a composition in respect of offences under Sections 323, 324, and 325 read with Section 34, IPC to restore friendly and good neighbourly relations with the accused and rejecting compensation offer. In view of the chastened attitude of the accused and commendable attitude of the victim composition is acceptable. *Ramji Lal* v. *State of Haryana,* (1983) 1 SCC 368 : 1983 SCC (Cri) 189 : 1983 CrLJ (SC) 118.

[8131] ● ***Offences—Compounding of.***—Section 320, CrPC, 1973 which deals with "compounding of offences" provides two tables therein, one containing description of offences which can be compounded by the person mentioned in it, and the other containing descriptions of offences which can be compounded by the person mentioned in it, and the other countering descriptions of offences which can be compounded by the person mentioned in it, and the other containing descriptions of offences which can be compounded with the permission of the Court by the person indicated therein. Only such offences as are included in the said two tables can be compounded and none else. The offence under Section 326 is admittedly, non-compoundable and hence we do not accede to the request of the learned counsel to permit the same to be compounded.

Note.—In this case the counsel invited attention of the apex Court to the decision of the Court. *Y. Suresh Babu* v. *State of A.P.,* JT 1987 (2) SC 361. **TO THE SAME EFFECT :** (1) *Mahesh Chand* v. *State of Rajasthan,* AIR 1988 SC 2111 : 1990 (Suppl) SCC 681 : 1989 CrLJ 121.

[8132] ● ***Permission to compound offence—Grant of permission for.***—In this special leave petition challenging the validity of the conviction under Section 307, IPC, the parties wanted to have the offence compounded and they wanted this Court to permit them to do so. The accused were acquitted by the trial Court but convicted by the High Court. The offence is not compoundable under law but the parties wanted to treat it as a special case in view of the peculiar circumstances of the case. One of the accused is a practising lawyer in the lower Court. There was a counter case arising out of the same transaction and that was already compromised. In view of the peculiar circumstances, and the circumstances under which it was committed, it would be proper that the trial Court should permit them to compound the offence. The trial Judge was directed accordingly. *Mahesh Chand* v. *State of Rajasthan*, AIR 1988 SC 2111 : 1990 Supp SCC 682 : 1989 CrLJ 121.

[8133] ● ***Compounding of non-compoundable offence of public nature.***—If a criminal case is declared to be non-compoundable then it is against public policy to compound it and the agreement to that end is wholly void in law. *Union Carbide Corporation* v. *Union of India,* AIR 1992 SC 248 (279) : (1991) 4 SCC 584 : 1991 Supp (1) SCR 251.

[8134] ● *Compromise decree—Passing of amounts to compounding of offence of cheating.*—In the facts of the instant case, there is enough justification for the High Court to hold that the case was basically a matter of civil dispute. The Banks had already filed suits for recovery of the dues of the Banks on account of credit facility and the said suits have been compromised on receiving the payments from the companies concerned. Even if an offence of cheating is *prima facie* constituted, cheating compounding of offences of such offence is a compoundable offence and compromise decrees passed in the suits instituted by the Banks, for all intents and purposes, amounts to compounding of the offences of cheating. It is also to be noted that a long time has elapsed since the complaint was filed in 1987. It may also be indicated that although such FIRs were filed in 1987 and 1989, the Banks have not chosen to institute any case against the alleged erring officials despite allegations made in the FIRs considering that the investigations had not been completed till 1991 even though there was no impediment to complete the investigations and further investigations are also pending and also considering the fact that claims of the Bank have been satisfied and the suits instituted by the Banks have been compromised on receiving payments, we do not think that the said complaints should be pursued any further. *Central Bureau of Investigation* v. *Duncans Agro Industries Ltd., Calcutta*, AIR 1996 SC 2452 : (1996) 5 SCC 591 : 1996 SCC (Cri) 1045 (1061) : 1996 CrLJ 3501 : 1996 (3) Crimes 60.

[8135] ● *Compounding of offence—Cannot be claimed as of right.*—Sub-section (2) of Section 279, Income-tax Act, 1961 is a provision which enables the Chief Commissioner or the Director General to compound any offence either before or after the institution of proceeding. There is no warrant in interpreting this sub-section to mean that before any prosecution is launched either a show cause notice should be given or an opportunity afforded to compound the matter. The enabling provision cannot give a right to a party to insist on the Chief Commissioner or the Director General to make an offer of compounding before the prosecution is launched. *Union of India* v. *Banwari Lal Agarwal*, AIR 1999 SC 196 : (1998) 7 SCC 652 : 1998 SCC (Cri) 1702.

[8136] ● *Compounding of offences.*—In *Y. Suresh Babu* v. *State of A.P.*, JT (1987) 2 SC 361 case it was specifically observed that the said case "shall not be treated as a precedent" In latter case (MaheshChand) offence under Section 307, IPC was permitted to be compounded with the following observations :

> "We give our anxious consideration to the case and also the plea put forward for seeking permission to compound the offence. After examining the nature of the case and circumstances under which the offence was committed, it may be proper that the trial Court shall permit them to compound the offence".

When the decision in Mahesh Chand *State of Rajasthan,* 1990 (Supp) SCC 681 was rendered, attention of the Hon'ble Judges was not drawn to the aforesaid legal prohibition. Nor was attention of the Judges who rendered the decision in Y. Suresh Babu drawn. Hence those were decisions rendered per *in curiam. Ram Lal* v. *State of Jammu and Kashmir*, AIR 1999 SC 895 (895) : (1999) 2 SCC 213 : 1999 CrLJ 1342 : 1999 CrLR (SC) 123.

[8137] ● *Settlement of dispute by partition.*—Considering the fact that the parties have settled their dispute outside the Court and the fact that 10 years have elapsed from the date of the incident and the further fact that the appellants have already undergone 3 months' imprisonment, the ends of justice would be met if the sentence of imprisonment is reduced to period already undergone besides imposing a fine of Rs. 5000/- on each of the accused under Section 326 read with Section 34. *Surendra Nath Mohanty* v. *State of Orissa*, AIR 1999 SC 2181 (2182) : (1999) 5 SCC 238 : 1999 SCC (Cri) 998 : 1999 CrLJ 3496 : 1999 CrLR (SC) 324.

[8138] ● *Compounding of non-compoundable offence—Not permissible.*—"We reiterate that the course adopted in *Ram Pujan* v. *State of U.P.*, (1973) 2 SCC 456 : 1973 SCC (Cri) 870 and *Mahesh Chand* v. *State of Rajasthan*, 1991 SCC (Cri) 159 : JT 1988 (1) SC 618 was not in accordance with law. However considering the fact that the parties have settled their dispute outside the Court and the fact that 10 years have elapsed from the date of the incident and the further fact that the appellants have already undergone 3 months imprisonment as per the sentence imposed by them, we think that the ends of justice would be met if the sentence of imprisonment is reduced to the period already undergone besides imposing a fine of Rs. 5000/- on each of the accused under Section 326 read with Section 34, IPC" *Surendra Nath Mohanty* v. *State of Orissa*, AIR 1999 SC 2181 : (1999) 5 SCC 238 : 1999 SCC (Cri) 998 : 1999 CrLJ 3496 : 1999 (3) Crimes 37.

[8139] ● *Offences compounding of with permission of Court.*—The concept of "plea bargaining" is not recognised and is against public policy under our criminal justice system. Section 320, CrPC provides for compounding of certain offences with the permission of the Court and certain others even without permission of the Court. Except the above, the concept of negotiated settlement in criminal cases is not permissible. This method of short-circuiting the hearing and deciding the criminal appeals or cases involving serious offences requires no encouragement. Neither the State nor the public prosecutor nor even the Judge can bargain that evidence would not be led or appreciated in consideration of getting flu bite sentence by pleading guilty. *State of U.P.* v. *Chandrika,* AIR 2000 SC 164 (165) : (1999) 8 SCC 638 : 2000 CrLJ 384.

[8140] ● ***Offence under Section 326, IPC not compoundable.***—Offence under Section 326, IPC, is not compoundable and, therefore, cannot be compounded. Application for compounding of offence is therefore rejected. However, in view of facts that occurrence had taken place about 21 years back and complainant and accused being close relative are now living amicably, sentence is reduced to period already undergone. *Jalaluddin* v. *State of Uttar Pradesh,* JT 2000 (10) SC 305.

[8141] ● ***Permission for compounding of offence—Grant of.***—In the instant case, the respondent was convicted under Section 325, IPC. The High Court granted benefit of probation. The order of the High Court was challenged. During pendency of appeal the parties have come to terms and settled their grievances. An affidavit of the Panchayat Pradhan witnessing the settlement has also been filed. Permission for compounding the offence is granted and respondent is acquitted. *Reshma* v. *Jai Narain,* JT 2000 (10) SC 279.

[8142] ● ***Warring spouses coming to terms.***—When this appeal was pending for Special Leave the warring spouses came to terms. An affidavit has been sworn to by the aggrieved wife in which she said that she had come to terms with her husband and would prefer to have a peaceful life with him and expressed the apprehension that if the sentence is to be undergone by him for the remaining period, the expected peace would elude the couple. We do feel that in view of the subsequent developments, the sentence already undergone by the appellant can be treated as sufficient for the offence found against him. *Raghumunda Satya Narayana* v. *State of A.P.*, AIR 2000 SC 3420 (3421) : (2000) 9 SCC 59 : 2000 SCC(Cri) 1161 : 2000 CrLJ 2779.

[8143] ● ***Compromise between parties.***—Some of the appellants in this appeal have been convicted under Section 307, IPC and others under Section 307 read with Section 149, IPC. They have also been convicted under Section 323 and Section 323 read with Section 149, IPC. They have been sentenced to suffer rigorous imprisonment for three years for the offence punishable under Section 307, IPC. Only point now urged by appellants is that the appellants and PWs-3, 4 and 5 who were injured in the incident, are close relatives, they have now settled their dispute, their relations have now become cordial and, therefore, their sentence may be reduced. Considering the near relationship of the parties and the fact that there is a genuine compromise between the parties, we reduce the sentence of the appellants to the period already undergone even though we maintain their conviction. *Pappu* v. *State of Punjab*, AIR 2000 SC 3633 (3634).

[8144] ● ***Compounding of offence—Application for.***—In this case 2 years' sentence has been awarded by the trial Court. Victim and the appellant have now come to terms and an application for compounding the offence has been filed by the complainant. Matter has been settled and victim's grievance has been redressed. Application for compounding offence is allowed. *Vuyyuru Ramachandra Rao* v. *State of A.P.,* 2000 (4) CCR 103 (SC).

[8145] ● ***Compromise by assailants and victim.***—The appellant, in the present case, was found guilty of offence under Sections 147, 323/149, 325/149 and 304 Part II/49 by the trial Court. The High Court maintained the order of trial Court except to the setting aside of the conviction under Section 304, Part II. During pendency of SLP, both the assailants and the victim entered into a compromise. A joint application was made by them for condonation of offences. Appeal was allowed on the basis of joint application. *Barsati* v. *State of Uttar Pradesh,* JT 2000 (7) SC 380 : 2000 (4) Crimes 40 (SC).

[8146] ● ***Permission grant of—To compounding offence.***—In the instant case, the appellant was convicted under Section 307, IPC by trial Court. Appellate altered the conviction to Section 324, IPC. During the pendency of appeal an application for compounding of offence was filed. Concerned Sessions Judge directed to verify the contents. Seeing the report that the accused is maintaining and treating well his mother/complainant, permission to compound offence is given. Appellant is acquitted and directed to maintain his mother well throughout her life. *Mulukuri Seva Prasad* v. *State of A.P.,* JT 2000 (2) SC 38 : (2000) 3 SLT 6 : (2001) 3 Crimes 50 (SC).

[8147] ● ***Permission for compounding offence—Grant of.***—In the present case, the appellant was convicted under Section 354, IPC. The appellant and the victim have now come to terms. Permission for compounding offence is granted. *Vadhuri Anjaiah* v. *State of A.P.*, 2001 (3) Crimes 342 (SC).

[8148] ● ***Offence under Section 376, IPC non-compoundable.***—Both parties have sworn affidavits that matter involving offences under Sections 325/323, IPC has been compounded between appellants and victim. Appellants are acquitted. Offence under Section 376, IPC is not compoundable. *Mohammed Balal Mian* v. *State of Bihar,* 2001 (3) Crimes 419 (SC) : 2001 (5) Supreme 470 : (2001) 3 SLT 324.

[8149] ● ***Compromise by parties.***—Keeping in view the finding recorded by the trial Court which on appreciation have been accepted by the High Court. Conviction of the appellants for offences under Sections 323/343/355 and 365, IPC is well merited. Accordingly no interference with the order of conviction is called for. The counsel for the appellants submits that the parties have since compromised and have resolved all their differences and are now having cordial relations. This position is not disputed by learned counsel appearing for the opposite side. While maintaining conviction of the appellants under Sections 323/343/355 and 365, IPC we reduce the substantive sentence to the period already undergone by them, but maintain the sentence of fine. *Murugesan Ganapathy Velar,* (2001) 10 SCC 504 : 2003 SCC (Cri) 1032 : 2002 CrLJ 260.

[8150] ● ***Compromise under S. 138, N. 9 Act, 1881.***—The appellant was convicted for the offence punishable under Section 138 of the N. 9 Act, 1881. The appellant and the complainant settled the matter amicably and memo of settlement was produced by the parties and the statement was signed by the parties. The conviction and sentences were set aside. *Kishore Kumar* v. *J.K. Corporation Ltd.*, (2004) 13 SCC 494 : (2006) 1 SCC (Cri) 348 (349).

[8151] ● ***Compounding of offence u/s. 324, IPC.***—In the instant case an application for compounding offence under Section 324, IPC was filed. The counsel for the complainant stated that he had no objection to compounding the offence. The compounding was permitted. *Avinash Shetty* v. *State of Karnataka*, (2004) 13 SCC 375 : (2006) 1 SCC (Cri) 316 (317).

[8152] ● ***Complete scheme provided under Section 320, CrPC for compounding of offences punishable under IPC.***—For compounding of the offences punishable under IPC, a complete scheme is provided under Section 320 of the Code. Sub-section (1) of Section 320 provides that the offences mentioned in the table provided thereunder can be compounded by the persons mentioned in column 3 of the said table. Further, sub-section (2) provides that the offences mentioned in the table could be compounded by the victim with the permission of the Court. As against this, sub-section (9) specifically provides that "no offence shall be compounded except as provided by this section". In view of the aforesaid legislative mandate, only the offences which are covered by Table 1 or Table 2 as stated above can be compounded and the rest of the offences punishable under IPC could not be compounded. *Bankat* v. *State of Maharashtra*, AIR 2005 SC 368 : (2005) 1 SCC 343 : 2005 SCC (Cri) 316 (318) : 2005 CrLJ 646.

[8153] ● ***Compounding permissible only in relation to cases enumerated under Section 320, CrPC.***—The counsel appearing on behalf of the respondents submitted that as the parties had settled their disputes and grievances and good relationship had been restored between them, it would be just and expedient to grant the prayer made on behalf of the appellant. The Apex Court held as under :—

> "Compounding is permissible only in relation to cases enumerated under Section 320 of the Code of Criminal Procedure and not the present nature. The present case relates to brutal murder. So far we have heard learned counsel for the appellant, we are tentatively of the view that it was not at all a case for acquittal. In view of this, for the present, it is not possible to permit the appellant to withdraw the appeal which would amount to permit the prosecutor to withdraw from prosecution and it is well settled that the same is not an empty formality. In the facts and circumstances of the case we propose to go on with further hearing of the appeals and examine thoroughly the evidence adduced for coming to final conclusion as to whether it was a case for acquittal or the High Court should have recorded conviction of the respondent. Only thereafter we shall pass final order upon the prayer for withdrawal". *Kamma Otukunta Ram Naidu* v. *Chereddy Pedda Subba Reddy*, 2005 SC (Cri) 849.

[8154] ● ***Compromise reached between parties—Offence allowed to be compounded.***— In the instant case, the matter was settled between the parties happily and a joint application was filed by the appellant and the respondent under Section 320(5), CrPC for compounding the under offence Section 500, IPC compromise reached between the parties and the offence was allowed to be compounded. Direction were passed as to the payment of the settled money. *K. Kandasamy* v. *K.P.M.V.P. Chandrasekaran*, AIR 2005 SC 2485 : (2005) 4 SCC 349 : 2005 SCC (Cri) 1024 : 2005 CrLJ 2597 : 2005 (2) Crimes 167.

[8155] ● ***Compromise between parities offence permitted to be compounded.***—The appellant was convicted by the trial Court under Section 138 of the Negotiable Instruments Act, 1881 and sentenced to undergo simple imprisonment for a period of one month and to pay compensation to the time of Rs. 39000; in default to undergo simple imprisonment for a further period of six months. The Court confirmed the conviction and sentence. When the matter was taken to the High Court, the criminal revision application was dismissed. A joint petition of compromise was filed by the parties before the Supreme Court in which it was stated that they had settled their dispute and grievances. In view of the facts stated in the compromise petition, the Supreme Court permitted the parties to compound the offence. *Sailesh Shyam Parsekar* v. *Baban alias Vishwanath S. Godge*, (2005) 4 SCC 160 : 2005 SCC (Cri) 1321.

[8156] ● ***Compounding of offence under Section 326—Not permissible.***—Compounding of offence under Section 326 cannot be compounded in view of provision of Section 320(9), CrPC. *Bankat* v. *State of Maharashtra,* AIR 2005 SC 368 : (2005) 1 SCC 343 : 2005 CrLJ 646 (647, 648) : (2004) 4 Crimes 390.

[8157] ● ***Compromise, recording of.***—A joint petition of compromise was filed on behalf of the parties in which prayer was made for recording the compromise. Held, the offence under Section 307 is a non-compoundable one, therefore, compromise cannot be recorded, but at the same time it is well settled that while awarding sentence, the effect of compromise can be taken into consideration. In the instant case the appellant remained in custody for a period of about 14 months and there was no allegation that he assaulted the deceased. In the facts and circumstances of the case the ends of justice would be met in case the sentence of imprisonment awarded by the trial Court and reduced by the High Court is further reduced to the period already undergone. *Badri Lal* v. *State of M.P.*, (2005) 7 SCC 55 : 2005 SCC (Cri) 1597 (1598).

[8158] ● ***Offence u/s. 325, IPC—In order to restore relationship between parties compounding of offence was allowed.***—The appellant was convicted under Section 325, IPC and sentenced to two years' R. 9 and a fine of Rs. 10,000/- by the order of the High Court. During the pendency of the instant appeal the complainant died. The parties stated that in order to restore good relationship between them, they had compromised the matter. The prayer for compounding the offence was allowed. *Pritam Singh* v. *State of Haryana*, (2005) 11 SCC 566 : (2006) 2 SCC (Cri) 120.

[8159] ● ***Joint petition for compromise before Supreme Court—Compromise held lawful.***—In the instant case the role appellant-accused was convicted by her separate orders passed by the Trial Court under Section 138 of the Negotiable Instruments Act, 1881. He was further convicted in both the cases under Section 420, IPC. Both the parties filed joint petition for compromise before the Supreme Court. The Supreme Court held that the compromise was lawful. *Sayeed Ishaque Memon* v. *Ansari Naseer Ahmad*, (2005) 12 SCC 140 : (2006) 1 SCC (Cri) 533 (534).

[8160] ● ***Compromise of offence under S. 138, N. 9 Act, 1881.***—In the instant case, the appellants-accused were convicted by all the three Courts under Section 138, Negotiable Instruments Act, 1881 and sentenced. The appellant-accused stated before the Supreme Court that the offence had been compounded by paying the entire dues to the complainant by the appellant-accused. An application jointly signed was filed seeking permission to compound the offence. It was held that "Section 147, Negotiable Instruments Act, as amended makes the offence compoundable and we find no ground to reject the prayer for compounding the offence." *Cochin Hotels Co. (P.) Ltd.* v. *Kairali Granites*, (2005) 12 SCC 234 : (2006) 1 SCC (Cri) 547.

[8161] ● ***Compounding of non-bailable offence.***––Though the offence under Section 457, IPC is not compoundable, but taking into consideration the effect of compounding, it would be just and expedient to reduce the sentence of imprisonment to the period already undergone. *Sanjit Datta* v. *State of Tripura,* (2006) 13 SCC 294 : (2007) 3 SCC (Cri) 172.

[8162] ● ***No case made out under Section 384, IPC—Settlement between parties accepted.***—Having regard to the facts and circumstances, it is not necessary to go into the contentious issue in the instant case, as no case has been made out for proceeding against the appellant under Section 384, IPC. In that view of the matter there was absolutely no reason as to why the settlement arrived at by and between the parties could not have been accepted as the same would not come within the purview of sub-section (9) of Section 320, CrPC. *Dhananjai* v. *State of Bihar,* 2007 CrLJ 1440 (1442) : 2007 (1) Crimes 299 (SC) : 2007 (2) SCR 206.

[8163] ● ***Offences under N.I. Act are compoundable.***—In offences under Section 138 of the Negotiable Instruments Act, normally compounding of offence should not be denied. Parliament, presumably, also realised this aspect and inserted Section 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. Under Section 147 of the said Act every offence punishable under the Act shall be compoundable. *Vinay Devanna Nayak* v. *Ryot Seva Sahakari Bank Ltd.,* AIR 2008 SC 716 : (2008) 2 SCC 305 : 2008 CrLJ 805 (808).

[8164] ● ***Sections 320(1) and (2), CrPC—Scope.***—Sub-section (1) of Section 320 specifies offences which are compoundable in nature, whereas sub-section (2) specifies the offences which are compoundable with the permission of Court. *Rumi Dhar* v. *State of West Bengal,* AIR 2009 SC 2195 : (2009) 6 SCC 364 : 2009 (5) SCR 553.

[8165] ● ***Object of Section 320.***—The object of Section 320 CrPC., which would not in the strict sense of the term apply to a proceeding under the Negotiable Instruments Act, 1881, gives the parties to the proceedings an opportunity to compound offences mentioned in the table contained in the said section, with or without the leave of the Court, and also vests the Court with jurisdiction to allow such compromise. By virtue of Sub-Section (8), the Legislature has taken one step further in vesting jurisdiction in the Court to also acquit the accused/convict of the offence on the same being allowed to be compounded. Inasmuch as, it is with a similar object in mind that Section 147 has been inserted into the Negotiable Instruments Act, 1881, by amendment, an analogy may be drawn as to the intention of the Legislature as expressed in Section 320(8) CrPC, although the same has not been expressly mentioned in the amended section to a proceeding under Section 147 of the aforesaid Act. *K.M. Ibrahim* v. *K.P. Mohammed*, AIR 2010 SC 276 : (2010) 1 SCC 798 : 2009 (15) SCR 1300 : 2009 (4) Crimes 271.

[8166] ● ***Non-compoundable offences.***—The offences under Section 384 and 506 are non-compoundable. The prayer made by the complainant and the accused jointly for compounding of the said offences cannot be accepted. *Kanpi Rasheed* v. *State of Andhra Pradesh,* JT 2009 (3) SC 100 : 2009 (4) Scale 30.

[8167] ● ***Settlement between parties for reduction of sentence.***—The settlement arrived at between the parties regarding sentence can be considered, while maintaining conviction. *Puttaswamy* v. *State of Karnataka,* (2009) 1 SCC 711 : 2008 (17) SCR 272.

[8168] ● ***Offences of criminal breach of trust and cheating—Interim order.***—In a case involving offences of criminal breach of trust and cheating, the Court was directed to deal with matter appropriately in case the parties file necessary application for compounding of offences under Section 320, CrPC. The interim order passed by the Court was directed to be continued for 3 months so that necessary steps may be taken. *Raja Ram Kashyap* v. *State of Uttar Pradesh,* (2009) 7 SCC 84.

[8169] ● ***Compounding of offence under Negotiable Instruments Act.***—In view of the non-obstante clause the compounding of offences under the N.I. Act is controlled by Section 147 of the Act and the scheme contemplated by Section 320, CrPC will not be applicable in the strict sense since the latter is meant for the specified offence under IPC. *Damodar S. Prabhu* v. *Syed Babulal H.*, AIR 2010 SC 1907 : (2010) 5 SCC 663 : 2010 CrLJ 2860.

CONCEALMENT

[8170] ● ***Concealment.***—It is settled law that levy of penalties and prosecution under Section 276-C of the Income-Tax Act, 1961 are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under Section 276-C is automatic. *K.C. Builders* v. *Assistant Commissioner of Income Tax*, (2004) 2 SCC 731 : 2004 SCC (Cri) 1092 (1103) : JT 2004 (2) SC 100 : (2004) 2 Crimes 48.

CONCEALING AN OFFENDER (S. 207, IPC)

§ (See "HARBOURING OF OFFENDERS")

CONCEALMENT OF ABDUCTED PERSON (S. 368, IPC)

[8171] ● ***Concealment of abducted person.***—To constitute an offence under Section 368 the prosecution must establish the following three ingredients: (1) The person in question has been kidnapped. (2) The accused knew that the said person had been kidnapped. (3) The accused having such knowledge, wrongfully conceals or confines the person concerned. That the accused had the knowledge, that the child had been kidnapped is an inference to be drawn by the Court from the various circumstances. So also whether there has been wrongful concealment or confinement under Section 368 is a matter to be considered from the facts and the circumstances of a particular case. *Saroj Kumari* v. *State of Uttar Pradesh,* AIR 1973 SC 201 : (1973) 3 SCC 669 : 1973 CrLJ 267.

[8172] ● ***Wrongful concealment of child.***—In this appeal by the first accused on certificate against the judgment and order of the Allahabad High Court, confirming the conviction and sentence for an offence under Section 368, IPC, the facts were : A-2 was kidnapped a minor child of Srimathi Gomti Devi on 6.11.63. A-2 was the sister of an Aya working in the hospital where P.W.1 gave birth to a male child on the previous evening. She was noticed on that evening moving near about the bed of P.W.1 and on being accosted by P.W. 12, A-2 told the latter that she was waiting to see some patient in the ward. By about 4-00 A.M. the next day, A-2 took away the new born male child from P.W.1 on the representation, that the staff nurse wanted to do the cord dressing of the child. Believing her representation, P.W. 1 allowed her to take the child. As the child was not returned to the ward even after the lapse of 1½ hours, P.W.1 informed the sister on duty about the same. A search was made for A-2 as well as the child in the hospital premises, in vain. Thereupon the doctor as well as the Superintendent of the hospital were informed. After preliminary enquiries by the Superintendent, the matter was reported to the police. At about 9-00 A.M., the child was recovered from the first floor of the house occupied by the appellant (A-1) as a tenant. At the time of the seizure of the child the appellant was lying on the cot, with the child beside her and A-2 was sitting in their company in the same room. The child was identified by the mother and other hospital authorities as the child was in the hospital's dress and also having the ticket number given in the hospital. A-2 was convicted under Section 363 and A-1 under Section 368. Their convictions were confirmed by the High Court. The appellant denied that the child had been recovered from her room and further pleaded that A-2 was not at all with her in her room. She further pleaded, that the case was foisted on her by the landlady of the house who was inimical to her. It was contended for the appellant that she had nothing to do with A-2 as established by the evidence and that the child might have been brought to her room by A-2 and she came on a visit, and that the prosecution had not established that she had any knowledge that the child had been kidnapped and that, less in any event, she was not guilty of having wrongfully concealed or kept the child in confinement.

The contentions of the counsel for the appellant could not be accepted in the face of the concurrent findings by both the Courts that at the time of the recovery the child was in the same bed occupied by the appellant and in their company in the same room where A-2 was also present. When the police party went to that room, she had absolutely no explanation to offer for the presence of the child with her. The three ingredients of the offence of Section 368 were fully established. That the child was kidnapped by A-2 was amply established. That the appellant had the knowledge that the child had been kidnapped was an inference to be drawn by the Court from the various circumstances. The child was less than 15 hours old. The appellant admittedly had no child of her own and A-2, it had been established, had not delivered a child within 15 days of 5-11-63. On account of the false denial of the appellant regarding the recovery of child from her room and A-2 not being present in her room at the material time, the only legitimate inference that could be drawn, as done by the two Courts, was that the appellant should have had the knowledge that the child had been kidnapped from the lawful custody of its mother. Wrongful concealment of the child was clearly established by the evidence. Hence the conviction was upheld. *Saroj Kumari* v. *State of Uttar Pradesh,* AIR 1973 SC 201 : (1973) 3 SCC 669 : 1973 CrLJ 267.

CONCEALMENT OF CRIME

[8173] ● ***Concealment of crime.***—Provided there is affirmative proof of a participation by him in the act charged, evidence of a desire or a disposition on the part of accused to conceal the crime is admissible even though it tends to prove another and distinct crime, this being true as to an act which owing to the circumstances may or may not be criminal. 22 Corp Jur Sec. 955.

CONCEALMENT OF FACTS FROM COURT

[8174] ● ***Concealment of facts from Court.***—Special Judge issued notice requiring the petitioner to show cause why action be not taken against him for concealing the fact that he had earlier filed a complaint in the Court of Chief Judicial Magistrate which was not mentioned by him in his complaint under Section 156(3), CrPC.

Petitioner filed his objections to the show cause notice, but the Special Sessions Judge (DAA), Farrukhabad, by order dated 14/15-01-1999, initiated proceedings against the petitioner for an offence under Section 182 of the IPC, allegedly on the ground that the petitioner had concealed the material facts from the Court and had not mentioned that he had earlier filed an application in respect of the same incident before the Chief Judicial Magistrate, Farrukhabad. It was held that mere non-mention of the complaint already filed in the Court of Chief Judicial Magistrate, in the petition filed under Section 156(3), CrPC before the Special Sessions Judge (DAA), Farrukhabad, would not be enough. *Subash Chandra* v. *State of Uttar Pradesh* , 2001 (3) Crimes 63 (SC).

CONCESSION

[8175] ● ***Public Policy bars inquiry as to what transpired in High Court.***—The Court cannot launch into any inquiry as to what transpired in High Court. Public Policy bars it. Judicial decorum restrains it. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation".

The Court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court.

The Supreme Court cannot allow the statement of the Judges to be contradicted by statement of Bar or by affidavit or other evidence.

If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was statement that had been made in error.

That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. A party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment. *State of Maharashtra* v. *Ramdas Srinivas Nayak,* AIR 1982 SC 1249 : (1982) 2 SCC 463 : 1982 SCC (Cri) 498 : 1982 CrLJ 1581 : (1983) 1 Crimes 335.

[8176] ● ***Trial Court not discussing the relevant evidence at all.***—During the arguments, the prosecutor did not think it proper to press for the offence punishable under Section 302 read with Section 34 of Penal Code. According to the prosecutor the only case made out was for offences punishable under Sections 306 and 498A read with Section 34, IPC. The trial Court endorsed the view of the Public Prosecutor and did not discuss the relevant evidence at all on the charge of Section 302 and recorded a finding of acquittal in that behalf. He also held that the charge of Section 201, IPC also did not survive. The State filed an appeal against their order of acquittal and the High Court on appeal castigated the Trial Judge for having gone merely on the statement of the Public Prosecutor without applying his own mind on the evidence. The High Court examined the evidence afresh. *Prabhudayal* v. *State of Maharashtra,* AIR 1993 SC 2164 : (1993) 3 SCC 573 : 1993 CrLJ 2239 : (1993) 2 Crimes 473.

[8177] ● ***Concession.***—A wrong concession made by a counsel before the Court cannot bind the parties when statutory provisions clearly provide otherwise. *Union of India* v. *Mohanlal Likumal Punjabi*, AIR 2004 SC 1704 : (2004) 3 SCC 628 : 2004 SCC (Cri) 844 (845) : JT 2004 (2) SC 528 : (2004) 2 Crimes 82.

CONCLUSIVE EVIDENCE

[8178] ● ***Conclusive evidence.***—Where evidence which is made conclusive is adduced, the Court has no option but to hold that the fact exists. If that were not so, it would be meaningless to call a particular piece of evidence as conclusive evidence. Once the law says that certain evidence is conclusive it shutout any other evidence which would detract from the conclusiveness of that evidence. *Somawanti* v. *State of Punjab,* AIR 1963 151 (152) : 1963 (2) SCR 774 : 1963 (33) CC 745.

[8179] ● ***Conclusive proof and conclusive evidence—No difference between two expressions.***—Statute may use of expression 'Conclusive Proof' where the object is to make a fact non-justifiable. But the legislature may use some other expression such as 'conclusive evidence' for achieving the same result. There is thus no difference between these two expressions the aim of both being to give finality to the establishment of the existence of a fact from the proof of another. *Somawanti* v. *State of Punjab,* AIR 1963 SC 151 : 1963 (2) SCR 774 : 1963 (33) CC 745.

[8180] ● ***Presumption when conclusive.***—A presumption in itself is not evidence but only makes a *prima facie* case for the party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When the presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence. When the party against whom the presumption is to be drawn has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. *Sodhi Transport* v. *State of Uttar Pradesh,* AIR 1986 SC 1099 (1105-1106) : (1986) 2 SCC 486 : 1986 SCC (Tax) 410 : (1986) 2 UJ (SC) 147 : 1986 Tax LR 2347.

[8181] ● ***Certificate of purchase conclusive proof of assignment.***—Certificate of purchase issued by the Taluka Board in the conclusive proof of assignment to the tenant of the right, title and interest of the landowner over the holding or the portion thereon to which the assignment relates, which can be discarded only if it is inaccurate or its face or is procured collusively. *Cheeranthoodika Ahmed Kutty* v. *Parambar Mariakutty Umma,* AIR 2000 SC 1853 : (2000) 2 SCC 417.

[8182] ● ***Conclusive proof.***—When the Legislature chose to employ the expression that a certain fact "shall be exclusive proof" of another fact, normally, the parties are disabled from disrupting such proof. This can be discerned from the definition of the expression "conclusive proof" in Section 14 of the Evidence Act. But Section 112, Evidence Act itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties has no access to each other at the time when the child could have been begotten, the presumption could be rebutted. *Kanti Devi* v. *Pashi Ram,* AIR 2001 SC 2226 : (2001) 5 SCC 311 : 2001 SCC (Cri) 892 (895-896).

CONCURRENT

[8183] ● ***Concurrent.***—It is significant to note that under Section 397, Cr.P.C., 1973 while the High Court and the Sessions Judge have the concurrent powers of revision, it is expressly provided under sub-section (3) of that section that when an application under that section has been made by any person to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by either of them. This is the position explicitly made clear under the new Code with regard to revision when the authorities have concurrent powers. *Gurcharan Singh* v. *State (Delhi Administration),* AIR 1978 SC 179 (183) : (1978) 1 SCC 118 : 1978 SCC (Cri) 41 : 1978 CrLJ 129 : 1978 CrLR (SC) 1137 : (1978) 2 SCR 358.

[8184] ● ***Concurrent power of revision.***—Similar was the position under Section 435(4) of the old Code with regard to concurrent revision powers of the Sessions Judge and the District Magistrate. Although under Section 435(1) of the old Code the High Court, a Sessions Judge or a District Magistrate had concurrent powers of revision, the High Courts jurisdiction in revision was left untouched. There is no provision in the new Code excluding the jurisdiction of the High Court in dealing with an application under Section 439(2), CrPC to cancel bail after the Sessions Judge had been moved and an order had been passed by him granting bail. The High Court has undoubtedly jurisdiction to entertain the application under Section 439(2), Cr.P.C. for cancellation of bail notwithstanding that the Sessions Judge had earlier admitted the appellants to bail. *Gurcharan Singh* v. *State (Delhi Administration),* AIR 1978 SC 179 (183, 184) : (1978) 1 SCC 118 : 1978 SCC (Cri) 41 : 1978 CrLJ 129 : 1978 CrLR (SC) 137.

[8185] ● ***Concurrent conclusion.***—In the present case the findings of authorities below are arrived at on a reasonable and legitimate assessment of the evidence on record. The High Court however, came to the conclusion that the initial burden of proving that the goods in question were smuggled, lay on the department which according to it, was not discharged by the Department. The conclusion of the High Court is obviously based on a misappreciation of the evidence that was already considered by the lower authorities. The High Court not only erred in re-appreciating the evidence already considered by the authorities below but in that process committed a further error of substituting its subjective opinion in the place of the findings of the authorities below. The finding of the High Court that the concurrent conclusions of the statutory authorities were either not based on evidence or were perverse, is unsustainable. *Union of India* v. *Rajendra Prabhu,* AIR 2001 SC 1672 : 2001 SCC (Cri) 745 (750) : (2001) 4 SCC 472 : JT 2001 (4) SC 79.

CONCURRENT FINDINGS

[8186] ● ***Concurrent findings.***—Ordinarily, the Supreme Court will not interfere with a concurrent finding of fact. But when the finding omits to notice an important circumstance which clearly refutes the finding and which swings the balance the other way, it is the duty of the Court not to let that finding stand. The accused in this case was charged with the offence of murder. The prosecution case was that at the time of the incident he was wearing a coat bearing minute stains of blood which had been recovered from his house. This coat had two buttons. One prosecution witness had clearly remembered that at the time when he had seen the accused shortly after the incident, he was wearing a coat having only one button, and another witness was definite that the accused was *not* wearing a coat at that time. Under these circumstances, the concurrent finding that the blood-stained coat recovered from the house of the accused was worn by him at the time of the offence was put aside in considering the facts proved against the accused. *Kashmira Singh* v. *State of Madhya Pradesh,* AIR 1952 SC 159 : 1952 CrLJ 839 : 1952 SCA 474 : 1952 SCJ 201 : 1952 SCR 526 : 1952 MWN 402 : 1952 (1) MLJ 754 : 1952 MWN (Cri) 106 : 1952 AWR (Supp) 64.

[8187] ● ***Concurrent finding of facts.***—When the trial Court and the High Court in appeal arrive at concurrent findings of fact based upon the evidence of witnesses whom they find to be reliable, the Supreme Court will not ordinarily disturb such findings. However, if in any case conviction of the accused person is based on findings of fact which rest on the testimony of a single prosecution witness, and the Supreme Court finds that the lower Courts have accepted the evidence of such witness in disregard of various taints and infirmities from which it suffers, and that they have departed from the settled rule of prudence that in the absence of independent corroboration such evidence should not be accepted as being sufficient for the purpose of conviction, it is a fit case for interference with the order of conviction. *Hanumant Govind Nargundkar* v. *State of Madhya Pradesh,* AIR 1952 SC 343 : 1953 CrLJ 129 : 1952 SCA 623 : 1952 SCJ 509 : 1952 SCR 1091 : 1952 (2) MLJ 631 : 1952 AWR (Supp) 109 : 1953 MWN 347.

[8188] ● ***Concurrent findings of facts.***—The Supreme Court is not a third Court of fact, and consistently with its normal practice, it will decline to interfere with concurrent findings and conclusions on facts save in exceptional circumstances in which a grave injustice would otherwise result. In the absence of compelling reasons for doing so, the Court will not interfere with the conclusions of the lower Courts which are based on appreciation of the evidence of the prosecution witnesses, and will refuse to substitute its own appreciation of such evidence for that of the lower Courts unless it finds they have clearly erred in their appreciation of such evidence. *Damodaran, K.* v. *State of Trav. Cochin,* AIR 1953 SC 462 : 1953 CrLJ 1928 : 1953 KerLT 295.

[8189] ● ***Supreme Court accepts concurrent finding of fact by lower Court.***—In an appeal by special leave under Article 136, it is the general practice of the Supreme Court to accept concurrent findings of fact by the lower Courts as correct, and the Court will not depart from that practice unless there are strong reasons for doing so.

Hector T. Huntley v. *Emp.*, AIR 1944 FC 66, distinguished on the ground that in that case the High Court had differed from the findings of fact of the lower Court, and hence when the case came up before the Federal Court there were no concurrent findings of fact by the Courts below. *Mahadev Dhanappa Gunaki* v. *State of Bombay,* AIR 1953 SC 179 : 1953 CrLJ 902 : 1953 SCA 685 : 1953 SCJ 229 : 1953 (1) MLJ 615 : 55 PunLR 307 : 55 BomLR 513.

[8190] ● ***Supreme Court not to disturb concurrent decisions of Courts below.***—The Supreme Court will not in appeal disturb the concurrent decisions of the Courts below merely for the reason that it feels that from the facts on record it might have drawn a conclusion different from theirs. In other words, the Supreme Court will not constitute itself into a third Court of facts. *Vijendrajit Ajodhya Prasad Goel* v. *State of Bombay,* AIR 1953 SC 247 : 1953 CrLJ 1097 : 1953 SCA 395 : 1953 SCJ 328 : 1953 AWR (Supp) 70 : 1953 MWN 552.

[8191] ● ***Supreme Court not go behind concurrent finding on question of fact.***—If the trial Court and the High Court in appeal came to the concurrent finding on a question of fact, the Supreme Court will not ordinarily go behind that finding in an appeal by special leave under Article 136. In the instant case, the accused was convicted under Section 302/149, Penal Code, and on appeal, the High Court confirmed the conviction. In the appeal to the Supreme Court, the conviction was sought to be challenged on the following grounds, namely, *(a)* that the name of the accused had not been given in the first information report, *(b)* that there were no marks of any injury on the person of the accused, and *(c)* that his plea of alibi had been wrongly rejected. The points urged on behalf of the accused were material only for the purpose of appreciation of evidence, and since the Courts below had accepted the evidence of the prosecution witnesses and had come to a concurrent finding that the accused was a member of an unlawful assembly and had taken part in inflicting the injuries on the deceased, the Court would not go behind those findings in the absence of any adequate reason shown for doing so. The appeal was rejected. *Thakur Prasad* v. *State of Madhya Pradesh,* AIR 1954 SC 30 : 1954 CrLJ 261.

[8192] ● ***Supreme Court will not interfere with concurrent findings of Courts below.***—In the instant case, the High Court had on appeal confirmed the order of conviction under Section 406, Penal Code, made by a Magistrate against the accused. The points for determination were all purely of fact, and they depended only on appreciation of oral evidence. On appeal, the Supreme Court held that there was no ground for interference, as the arguments of the appellant all turned on what was essentially a matter of appreciation of evidence as to which the findings of the Courts below were concurrent. Conviction was upheld and the appeal was dismissed. *Narayan Tewary* v. *State of West Bengal,* AIR 1954 SC 726 : 1954 CrLJ 1808.

[8193] ● ***Supreme Court not to differ from concurrent finding of fact.***—In the present case both the Courts below had arrived at the finding that the injuries inflicted on the deceased were caused by the accused on a particular date and that, those were the injuries which were responsible for his death. The proceedings had concluded on the basis, that the injuries which resulted in the death of the deceased had been inflicted on that date, and the prosecution case on that point had not been challenged during the trial. The accused could not be allowed to suggest for the first time in the Supreme Court, on the strength of some discrepancies found on the record, that apart from the occurrence of the date which had been deposed to by the witnesses, there must also have been some other later incident which was really responsible for the ultimate death of the deceased after 20 days. *Inder Singh Bagga Singh* v. *State of Pepsu,* AIR 1955 SC 439 : 1955 CrLJ 1014.

[8194] ● ***Concurrent findings of fact—Supreme Court not to interfere with.***—In an appeal by special leave, the Supreme Court will not convert itself into a third Court of facts, and will not interfere with the concurrent findings of fact arrived at by the Courts below, except, except for special reasons. *Gurbaksh Singh* v. *State of Punjab,* AIR 1955 SC 320 : 1955 CrLJ 869.

[8195] ● ***Concurrent findings of fact—Interference.***—In an appeal by special leave, consistently with its well established practice, the Supreme Court will not interfere with concurrent findings of fact of the trial Court as well as the High Court. Applying this principle the Court refused in the present case to interfere with a concurrent finding that the accused had forged a signature on a certain document. *Ram Narain* v. *State of Punjab,* AIR 1955 SC 322 : 1955 CrLJ 871.

[8196] ● ***Concurrent findings of fact arrived at by Courts below—Not to be reagitated.***—In an appeal by special leave under Article 136, it is not open to the appellant to re-agitate questions of fact. The concurrent findings of facts arrived at by the Courts below must be accepted by him as binding and the Supreme Court will be slow to disturb them in an appeal under Article 136 unless there are special circumstances in the case which require it to do so. *Kunjilal* v. *State of Madhya Pradesh,* AIR 1955 SC 280 : 1955 CrLJ 730 : 1955 (2) MLJ (SC) 96 : 1955 SCJ 592 : 1955 SCR 872 : 1955 NagLJ 84 : 1955 MWN 707 : 1955 AWR (Supp) 97.

[8197] ● ***Concurrent findings of fact by Courts below—Supreme not to go behind.***—When the Courts below have carefully examined the evidence of the eye-witnesses directly incriminating the accused and have accepted that evidence as being true and reliable, the Supreme Court will not, in an appeal by special leave against the judgment of the High Court confirming the conviction of the accused, allow the appellant to go behind the concurrent findings of the Courts below on questions of fact, unless there are some special circumstances which justify such a course. *Chhutanni* v. *State of Uttar Pradesh,* AIR 1956 SC 407 : 1956 CrLJ 797.

[8198] ● ***Findings of fact—Interference.***—The Supreme Court will not ordinarily interfere with the findings of fact of the Courts below. However, if a clear question of law arises on the findings arrived at by the High Court, and the appellant contends that the conclusion of the High Court was erroneous, the Supreme Court will exercise its power of interference. *Ram Shankar Singh* v. *State of Uttar Pradesh,* AIR 1956 SC 441 : 1956 CrLJ 322.

[8199] ● ***Supreme Court not to interfere with concurrent findings of fact by Courts below.***—In an appeal by special leave under Article 136, the Supreme Court will not ordinarily interfere with concurrent findings of fact by the Courts below, and it will not interfere with an order of conviction unless it is satisfied that some established principle of law has been disregarded and a grave injustice has been done. In the present case, the conviction of the accused on the charge of murder was based on his retracted confession. The Court examined the evidence on record and found that the confession had been wrongly accepted as being voluntary in spite of circumstances which threw a doubt on its voluntary character, and that in disregard of established principles, the necessity of independent corroboration to a retracted confession had been overlooked. Under these circumstances, it was a fit case for interference. The appeal was allowed, and the conviction was set aside. *Nathu* v. *State of Uttar Pradesh,* AIR 1956 SC 56 : 1956 CrLJ 152.

[8200] ● ***Concurrent findings of fact.***—Following its usual practice, the Supreme Court will decline to interfere with concurrent findings of fact where there is ample evidence which, if believed, is sufficient to support those findings. The Court refused to allow the appellants in the present case to go into the question of the credibility of the prosecution witnesses on whose evidence the lower Courts had relied or to attack the correctness of the findings of fact which were based on that evidence. *Mathew, K.C.* v. *State of Trav. Cochin,* AIR 1956 SC 241 : 1956 CrLJ 444 : 1956 SCA 175 : 1956 SCJ 213 : 1956 (2) SCR 1057 : 1956 AWR (Supp) 34 : 1956 (1) MLJ (SC) 130 : 1956 KerLT 355 : 1956 ALT 506.

[8201] ● ***Supreme Court not to interfere with concurrent findings.***—In an appeal by way of special leave, the Supreme Court does not usually interfere with the concurrent findings of fact arrived at by the Courts below, unless something substantial is shown to persuade it to go behind those findings. *Khacheru Singh State of Uttar Pradesh,* AIR 1956 SC 546 : 1956 CrLJ 950.

[8202] ● ***Finding of fact when can be reopened by Supreme Court.***—When a finding of fact by the trial Court is based on the testimony of eyewitnesses whom that Court considers to be true and reliable, and the High Court in appeal has concurred with that finding, the Supreme Court will not, in an appeal under Article 136, allow such a finding to be reopened, unless it is so perverse or opposed to principles of natural justice as to be revolting to judicial conscience. *Niranjan Singh* v. *State of Uttar Pradesh,* AIR 1957 SC 142 : 1957 CrLJ 294 : 1957 SCA 75 : 1957 SCJ 69 : 1957 SCR 734 : 1957 ALJ 233 : ILR (1956) 2 All 745 : 1957 (1) MLJ (Cri) 1 : 1957 AWR (HC) 258.

[8203] ● ***Concurrent finding—Accused guilty of offence.***—When there are concurrent findings of the Courts below that the accused are guilty of the offence of which they are charged, and the facts proved in the case are sufficient to sustain those findings, the Supreme Court will not allow the appellant in the appeal by special leave to attack those findings unless there are some special circumstances in the case to show that those findings were not justified. *Ram Chandra* v. *State of Uttar Pradesh,* AIR 1957 SC 381 : 1957 CrLJ 559.

[8204] ● ***Concurrent findings of fact—Interference.***—In an appeal by special leave under Article 136, the Supreme Court will not ordinarily allow the accused to canvass the correctness of concurrent findings of the Courts below as regards the degrees of the guilt of the several accused in the case or the offence which has been proved against each accused. However, the question as to the offence which an accused has committed on the facts proved in the case, and as to the particular section or sections of a penal law under which he can justifiably be convicted on the evidence against him, is a question purely of law and not of fact. If in any case the Supreme Court finds that the High Court has erred in arriving from the proved facts in the case at the appropriate section, under which the accused could be convicted, or that the High Court has refused to give him the benefit of any exception to which on proved facts he is entitled, it is a fit case for interference in the exercise of the discretion vested in the Court under Article 136. In such a case, in order to avert the grave injustice which would otherwise be done, the Court must set aside the conviction as it stands and convict the accused of the particular offence of which, on the facts proved in the case, he is guilty. It could not be alleged that in doing so the Court has disturbed a finding of fact. Applying these principles, conviction of the accused in the present case under Section 302, Penal Code, was set aside and was reduced to one under Section 304, Part I. *Dharman State of Punjab,* AIR 1957 SC 324 : 1957 CrLJ 420.

[8205] ● ***Conviction based on concurrent findings of facts.—Interference with.***—In a criminal appeal by special leave under Article 136, the Court will not ordinarily allow the appellant to raise questions of fact, and will be slow to interfere with the concurrent findings of fact of the lower Courts on which the conviction is based. However, it would be a fit case for interference if such findings of fact are vitiated by errors of law, or if they are opposed to established principles of judicial approach or of natural justice, or are so wholly unjustified or perverse as to be revolting to judicial conscience. In the present case, the Supreme Court found that the Courts below had grievously erred in two important respects. First, they had failed to take into consideration various material contradictions between the evidence of the approver in Court and his police statement which branded his evidence as utterly unreliable, and secondly they had failed to consider the salient and grave irregularities in recording the confession of an accused which threw a serious doubt upon its voluntary character. It is a fit case for interference. Conviction is set aside. *Sarwan Singh Rattan Singh* v. *State of Punjab,* AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCJ 699 : 1957 AWR (Supp) 99 : 1957 MPC 781 : (1957) 1 MLJ (Cri) 672.

[8206] ● ***Concurrent findings of fact—Interference by Supreme Court—When.***—Ordinarily, the Supreme Court does not interfere with concurrent findings of fact. It will refuse to exercise its extraordinary powers of interference under Article 136 with such findings unless the appellant is able to satisfy it, that such finding involves some substantial question of law on which the Courts below have erred, such as, when evidence which under the law is inadmissible has been accepted and the conviction of the accused has been based upon it. *Badri Rai* v. *State of Bihar,* AIR 1958 SC 953 : 1958 CrLJ 1434 : 1958 SCJ 117 : 1959 MLJ (Cri) 25 : 1958 ALJ 909 : 1958 AWR(HC) 861 : 1959 BLJR 50 : 1959 ACrR 44.

[8207] ● ***Concurrent findings of Courts below—Supreme Court not to go behind.***—The practice of the Supreme Court is that ordinarily it will not allow the appellant to go behind the concurrent findings of fact of the Courts below. It will not depart from that practice in any case unless the appellant is able to show valid grounds for its doing so. *Mulk Raj* v. *State of Bihar,* AIR 1959 SC 902 : 1959 CrLJ 1219 : 1959 AWR (HC) 18 : 1960 ACrR 37.

[8208] ● ***Concurrent finding of fact—Supreme Court when refuse to interfere with.***—The appellant cannot be allowed to go behind the concurrent findings of the Courts below which are essentially findings of fact, unless he can show that they are vitiated by some error of law. In the absence of any such special circumstance, the Supreme Court will refuse to interfere with a concurrent finding of fact, in accordance with its usual practice. *Bhinka* v. *Charan Singh,* AIR 1959 SC 960 : 1959 CrLJ 1223 : 1959 ALJ 557 : 1959 AWR (HC) 440 : 1959 ACrR 337.

[8209] ● ***Supreme Court not to review evidence on concurrent conclusions of fact of Court's below.***—It is the settled practice of the Supreme Court that when the concurrent conclusions of the Courts below are conclusions of fact, it will not normally enter upon a review of the evidence on which they are founded, unless when,

(a) the trial is vitiated by an illegality or irregularity of procedure, or

(b) the trial is held in a manner violative of the principles of natural justice resulting in an unfair trial, or

(c) the trial has otherwise resulted in gross miscarriage of justice.

If, in any case, none of any of these three possibilities could be suggested, and the conclusion of the Court of the first instance that the charge of any offence is proved against the accused is affirmed by the High Court in appeal, then, such conclusion will be accepted by the Supreme Court without allowing the appellant to re-open the case on facts. *Shambhu Nath Singh* v. *State of Bihar,* AIR 1960 SC 725 : 1960 CrLJ 1144 : 1960 BLJR 236.

[8210] ● ***Concurrent findings of Courts below—Interference by Supreme Court—When.***—It is the well established practice of the Supreme Court that in a case in which the trial Court as well as the High Court on appeal have carefully considered the evidence adduced by the prosecution as well as the accused, and have accepted the prosecution case, the Supreme Court will not interfere on questions of fact with the concurrent findings of both the Courts below except under exceptional circumstances. *Shri Ram* v. *State of Maharashtra,* AIR 1961 SC 674 : 1961 (1) CrLJ 760 : (1961) 1 SCJ 677 : (1961) AWR(HC) 201 : 1961 ALJ 202 : 1961 ACrR 84 : (1961) 1 MLJ (SC) 221 : 1961 MLJ (Cri) 342 : (1961) 1 AnWR (SC) 221 : 1961 MPC 255 : 1961 BLJR 231 : (1961) 1 KerLR 352 : 1961 MPLJ 1101 : 1961 NagLJ 517 : 63 BomLR 434.

[8211] ● ***Concurrent findings of Court's below—Exercise of power by Supreme Court under Article 136.***—Where there are concurrent findings of all the lower Courts on a question of fact, the Supreme Court will not, in the exercise of its powers under Article 136, be prepared to differ from that finding in the absence of any permissible ground for doing so. *Pyare Lal Bhargava* v. *State of Rajasthan,* AIR 1963 SC 1094 : 1963(2) CrLJ 178 : 1963 SCD 341 : 1963 ALJ 459 : 1963 BLJR 407 : 1963 AWR(HC) 374 : 1963 ACrR 192.

[8212] ● ***Concurrent findings of fact by trial Court as well as High Court.***—In a case in which the accused is charged with the offence of forgery, if there are concurrent findings of fact by the trial Court as well as the High Court in appeal that the accused put the signatures of another person on the relevant documents and thus made the person deceived, do certain acts in the belief that the documents were genuine, the Supreme Court will, in the appeal under Article 136, follow the usual practice of the Court and accept those findings as they are finding of fact based upon relevant evidence. *Bansal, G.S.* v. *Delhi Administration,* AIR 1963 SC 1577 : 1963(2) CrLJ 439 : (1963) KerLR 169 : 66 PunLR 60 : 1964 AWR(HC) 9.

[8213] ● ***Supreme Court not to re-assess evidence and findings of both Courts below when.***—In an appeal under Article 136, ordinarily the Supreme Court does not re-assess the evidence and re-examine the findings of fact reached by the Courts below particularly where there are concurrent findings by both the Courts below.

But where the appeal is from an order of conviction based solely on circumstantial evidence, and the question is whether the circumstances which are established are sufficient to lead to the irresistible conclusion that the accused is guilty and whether the conviction of the accused which is based solely on those circumstances is justified, the Court may in a case consider it expedient to examine the whole evidence for itself in order to satisfy itself as to whether the conviction is rightly based. *Raghav Prapanna Tripathi* v. *State of Uttar Pradesh,* AIR 1963 SC 74 : 1963 (1) CrLJ 70.

[8214] ● ***Concurrent findings of Courts below —Interference with—When.***—In the present case, the question was whether the accused had discharged the burden of proof which rested on him under Section 9 of the Foreigners Act to prove that he was not a foreigner. For this purpose, the accused had led evidence of witnesses who spoke to the fact that the accused was born in India and continued to reside in India after the date of the commencement of the Constitution and was thus an Indian citizen. The trial Court as well as the Sessions Court in appeal considered this evidence in the light of probabilities and rejected the same as being unworthy of credence, and reached the conclusion that the accused had failed to prove that he was a citizen of India and therefore not a foreigner. In revision, the High Court refused to interfere with that finding, and confirmed the conviction of the accused for the offence under Section 14 of the Foreigners Act. In view of the concurrent finding of the Courts below, in the absence of any permissible ground for interference with that finding under Article 136, the said finding cannot be interfered with. *Fateh Mohammad* v. *Delhi Administration,* AIR 1963 SC 1035 : (1963) 2 CrLJ 55 : 1963 (2) SCA 441 : (1963) 2 SCJ 687 : 1963 MLJ (Cri) 621.

[8215] ● ***Concurrent findings of Courts below based on appreciation of evidence.***—Where both the Courts below have examined the evidence given by the eye-witnesses and have accepted that evidence, as being consistent, cogent and probable it is not open to the appellant in the appeal to the Supreme Court under Article 136 to contend that the Court should re-appreciate that evidence and decide for itself whether the view taken by the High Court is right or not. The concurrent findings of the Courts below which are based on the appreciation of the oral evidence cannot ordinarily be challenged in an appeal under Article 136. *Darya Singh* v. *State of Punjab,* AIR 1965 SC 328 : 1965 (1) CrLJ 350 : 1964 SCD 87 : (1964) 3 SCR 397 : (1964) 2 SCJ 319 : 1964 MLJ (Cri) 503 : 1964 AWR (HC) 532 : 1964 ACrR 394.

[8216] ● ***Appreciation of evidence—Concurrent findings of fact.***—It is against the practice of the Supreme Court in an appeal by special leave to embark on an assessment of the evidence when two Courts have already assessed it and come to concurrent conclusions therefrom. *Charan Singh* v. *State of Uttar Pradesh,* AIR 1967 SC 520 : 1967 CrLJ 525 : 1967 MLW (Cri) 61.

[8217] ● ***Concurrent finding when already reached—Supreme Court not to consider evidence for third time.***—Where the two lower Courts accepted the evidence against the accused and convicted him in a case under Section 302, IPC, the Supreme Court will not ordinarily consider the evidence for a third time but since in the appeal against acquittal of another accused the entire evidence was read over, the Supreme Court had to appraise the evidence in relation to the convicted accused also. *State of Rajasthan* v. *Kartar Singh,* AIR 1970 SC 1305 : (1970) 2 SCC 61 : 1970 CrLJ 1144 : 1970 SCD 724 : 1970 SCCrR 499.

[8218] ● ***Supreme Court not to reappraise evidence concurrently accepted by two Courts below.***—Though normally the Supreme Court does not reappraise the evidence concurrently accepted by the two Courts below, in view of the strong suspicious circumstances pointed out regarding the truth of the evidence given by five P.Ws., the Supreme Court considered it necessary in the interests of justice to consider their evidence more critically. *D. Dasaradharami Reddy*

v. *State of A.P.,* AIR 1971 SC 1461 : (1971) 3 SCC 247 : 1971 CrLJ 1139 : 1971 UJ (SC) 584.

[8219] ● ***Supreme Court not to interfere with finding of lower Court.***—The Supreme Court ordinarily does not re-appreciate the evidence unless it is satisfied that exceptional and special circumstances exist for doing so. The Court must be satisfied that as a result of serious misappreciation of the evidence by the trial Court and the High Court substantial and grave injustice has been done. *Yusuf* v. *State of Bihar,* AIR 1971 SC 1405 : (1971) 2 SCC 366 : 1971 CrLJ 1117 : 1971 SCD 1060 : 1971 CrAppR (SC) 366.

[8220] ● ***Concurrent finding of fact—Finding binding and final.***—Where the High Court on appeal, after appraising the testimony of the eyewitnesses and considering the attending circumstances and the probabilities of the case also agreed with the conclusions of the trial Court, the finding on that point on which both the Courts below have agreed is binding on the Supreme Court and must be accepted as final and not open to re-assessment. *Raj Kishore* v. *State of Bihar,* AIR 1971 SC 1058 : (1970) 3 SCC 467 : 1971 CrLJ 921 : 1971 SCD 62 : (1971) 2 SCCrR 356.

[8221] ● ***Current findings of Court below—Interference by Supreme Court—When.***—Where the case of the prosecution has been accepted by the trial Court and the High Court and as there are concurrent findings, the Supreme Court does not ordinarily interfere with such findings. However, where it is contended that certain circumstances were either not taken into consideration by the High Court or were not given due weight, and if those circumstances were taken into consideration the concurrent findings could not be sustained, the Supreme Court would interfere. The previous history of a dispute is a neutral factor and cannot displace the oral evidence relied on by the High Court. *Shital Singh* v. *State of Bihar,* AIR 1971 SC 1309 : (1970) 3 SCC 232 : 1971 CrLJ 1090 : 1971 SCD 56 : 1970 UJ(SC) 869.

[8222] ● ***Concurrent conclusions of Courts below when not tainted with any infirmity.***—Concurrent conclusions of Courts below when not tainted with any infirmity are binding on the Supreme Court.

Normally the Supreme Court does not proceed to review the evidence in criminal appeals unless there is some illegality or grave irregularity or some serious lapse on the part of the Court below, in marshalling or evaluating the evidence and feels justified in adopting such a course in the larger interests of justice. The concurrent conclusions of Courts below when not tainted with any infirmity are binding on the Supreme Court. *P. Uka Naran* v. *K. Karsan,* AIR 1971 SC 759 : (1971) 3 SCC 232 : 1971 CrLJ 651 : 1971 UJ(SC) 528 : (1971) 2 SCCrR 452 : 1971 CrAppR (SC) 122.

[8223] ● ***Concurrent unanimity as to appraisal of evidence both by trial Court and High Court.***—Where there was a concurrent unanimity as to the appraisal of the evidence both by the trial Court and the High Court, there can be no question of a fresh assessment of that evidence by the Supreme Court in view of its well-established practice not to do so, except on certain exceptional grounds. *Janak Singh* v. *State of Uttar Pradesh,* AIR 1972 SC 1853 : 1972 CrLJ 1177.

[8224] ● ***Concurrent findings of fact regarding participation by accused persons.***—Where concurrent findings of fact were given on the basis of the evidence of the injured men, corroborated by a previous statements so far as the accused were concerned as also by the evidence of another person employed on the date of the occurrence, they cannot be challenged in an appeal by special leave. *Lakshmi Tiwari* v. *State of Bihar,* AIR 1972 SC 1058 : (1972) 3 SCC 122 : 1972 CrLJ 776 : (1972) 2 SCJ 522 : 1972 MLJ (Cri) 653.

[8225] ● ***Concurrent findings of fact—Supreme Court not to reappraise evidence.***—Where there are concurrent findings regarding the credibility of witnesses for the prosecution the Supreme Court will not re-appraise that evidence unless it is shown that the assessment of the said evidence by both the lower Courts is perverse or manifestly unreasonable or they have failed to take into account some crucial and vital piece of evidence. In case the order made by the Courts below is one of acquittal, the Supreme Court would be still more reluctant to interfere with the appraisement of the evidence. *State of Uttar Pradesh* v. *Ram Manorath,* AIR 1972 SC 701 : (1972) 3 SCC 215 : 1972 CrLJ 500.

[8226] ● ***Concurrent findings of fact arrived at by trial Court and appellate Court.***—Though the Supreme Court in an appeal under the Article is reluctant to reopen concurrent findings of fact arrived at by the trial Court and the appellate Court, it will interfere in a case where certain Court proceedings and other documentary evidence did not get proper attention resulting in the misjudgment of their respective positions of the parties. Where it is impossible to say that the appellants were not at any rate under a *bona fide* belief that they were entitled to the possession of the land in question and that being so there was no question of their having trespassed into the said land or formed an unlawful assembly for committing theft of the standing crop therein or of their having committed theft of the said crop. The dispute between the parties was such that a civil Court would have more appropriately decided it. The entire question of possession and even title was thus in an extremely fluid state and therefore the question of the respondent's possession on the date of the incident in question was not beyond controversy. The appeal was, therefore, allowed and the conviction set aside. *Ram Ekbal* v. *Jaldhari,* AIR 1972 SC 949 : (1972) 3 SCC 841 : 1972 CrLJ 584.

[8227] ● ***Appreciation of evidence.***—Where the lower Courts did not consider the circumstance under which the noses of the wife of the first appellant and of PW 3 were cut and convicted the appellant for an offence under Sections 326/34, IPC, the Supreme Court altered the same to one under Sections 355/34, IPC, observing that it was more inclined to accept the version of the first appellant, namely, that PW 3 had developed intimacy with the wife of the 1st appellant and because of that enmity the appellants caught hold of the wife of the 1st appellant and cut her nose and that on hearing her cries the PW 3 came near his house and then he was also caught hold of and his nose was cut as well. *Dhondey* v. *State of Uttar Pradesh,* AIR 1972 SC 1273 : (1972) 4 SCC 729 : 1972 CrLJ 871.

[8228] ● ***Appraisement of evidence and concurrent acceptance of.***—The non-mention of the injuries on the person of the two accused in the prosecution evidence would not justify interference by the Supreme Court with the appraisement of the evidence by the trial Court and the High Court and concurrent acceptance of the same. *Ramlagan Singh* v. *State of Bihar,* AIR 1972 SC 2593 : (1973) 3 SCC 881 : 1973 CrLJ 44.

[8229] ● ***Supreme Court to examine evidence in appeal when.***—Where the judgment of the trial Court and of the High Court proceed principally on assumptions not fully supportable on the material on the record, it is just, fair and proper for the Supreme Court to examine the evidence itself especially when it is found that there is a serious lacuna in the case wholly due to the inefficient and perfunctory investigation by the investigating agency. In cases of road accidents by fast moving vehicles it was ordinarily difficult to find witnesses who would be in a position to affirm positively the sequence of vital events during the few moments immediately preceding the actual accident, from which its true cause could not be ascertained. Apart from the eye-witnesses, the only person who could be considered to be truly capable of satisfactorily explaining as to the circumstances leading to the accidents like the present was the driver himself or in certain circumstances to some extent the person who was injured. In the present case the person who died in the accident was obviously not available for giving evidence. The Bhaiya was also not produced as a witness, on the basis of which it was contended that the *bona fides* and the fairness of the prosecution as also the trustworthiness of the version given by the other witnesses was questionable. On the non-examination of the Bhaiya alone, it was contended, the prosecution case should have failed and the Supreme Court felt that there was considerable force in that submission. The investigating officer seemed to have acted without the requisite sense of responsibility essential for a fair and just police investigation into serious accidents like the present, with the result that important evidence which was available and should easily have been forthcoming was not brought before the Court for wholly inadequate, if not flimsy, reasons. Examination of the marks of wheels on the road would have been very useful in appreciating other evidence. What was more surprising was that no evidence on the state of the traffic on the road at the relevant time and on the height of the verb was produced by the prosecution which would have given a clearer picture of the position and in more satisfactorily appreciating the circumstances in which the accident occurred. If there was meagre traffic, there was a greater likelihood of the appellant being able to see the running Bhaiya more clearly and otherwise if traffic was heavy. This reflected a high degree of inefficiency on the part of the investigating agency. The High Court itself observed that the road at that time was more than normally crowded. If that were so, the question would be as to from how much distance the appellant was able to see the Bhaiya running in his anxiety to cross the road. The satisfactory nature of the explanation of the driver to absolve him of his criminal liability for the accident should in such circumstances be appraised in the light of the entire evidence on record. The appellants explanation, even though not conclusive, did, in the absence of the testimony of the Bhaiya and of at least some, out of the passengers of the bus who could have thrown some helpful light, left fair scope for reasonable doubt about his guilt. Though the appellate Court thought of examining Bhaiya, that idea was, however, dropped as the appellant's counsel did not agree. He could have been examined as a Court witness. On the existing record, the evidence was inadequate and unsafe for convicting the appellant. It was entirely due to the faulty and inefficient investigation. The appeal was allowed. *N.S. Ghobe* v. *State of Maharashtra,* AIR 1973 SC 165 : (1973) 4 SCC 23 : 1973 CrLJ 235 : (1973) 2 SCWR 845.

[8230] ● ***Concurrent finding as to recovery of currency notes.***—When the accused was convicted under Section 161 and Section 420, IPC, and also under Section 5(1) read with Section 5(2) of the Prevention of Corruption Act, it was contended that there was no evidence to show that the accused received the amount from the complainant or that it was received as illegal gratification, the Supreme Court refused to interfere with the concurrent finding of the lower Courts that he received the amount as illegal gratification and the currency notes were recovered from the shirt pocket of the accused. It was also observed that it was difficult to believe the version of the accused that the complainant put the currency notes in his pocket forcibly and against his wish and that too in the presence of a number of persons who according to him were present at that time near him, the evidence regarding which was disbelieved by the two lower Courts. *Durga Dass* v. *State of Himachal Pradesh,* AIR 1973 SC 1379 : (1973) 2 SCC 213 : 1973 CrLJ 1138.

[8231] ● ***Concurrent finding of fact—Supreme Court not to interfere.***—Where the two Courts below have appraised the evidence correctly, their conclusion is not open to further re-examination by Supreme Court by way of independent re-appraisal of the evidence for itself.

Where the question of statutory presumption in respect of the offence under Section 5(1)(d) of the Prevention of Corruption Act was not available, was not raised in the Courts below and it also escaped the attention of both the Special Judge and the High Court, the Supreme Court would be fully justified in taking notice of that argument as it goes to the root of the matter relating to the conviction of the accused under Section 5(1)(d) and 5(2) of the Act. *B.C. Goswami* v. *Delhi Admn.,* AIR 1973 SC 1457 : (1974) 3 SCC 85 : 1973 SCC (Cri) 796 : 1974 CrLJ 243 : 1973 SCD 691.

[8232] ● ***Supreme Court not to reappraise evidence—When.***—The Supreme Court does not normally reappraise the evidence especially when the appreciation by the trial Court as well as by the High Court is unexceptionable and it is not possible to hold that their conclusions are open to any serious challenge. *Nanhey* v. *State of Uttar Pradesh,* AIR 1973 SC 224 : (1973) 2 SCC 317 : 1973 CrLJ 273.

[8233] ● ***Concurrent finding as to rash and negligent driving of accused.***—Where according to the findings of the three Courts below the accused was found to be both rash and negligent, under Article 136 the Supreme Court will not appraise the evidence to see how far the concurrent conclusion of the Courts below is justified. *Jagdish Chander* v. *State of Delhi,* AIR 1973 SC 2127 : (1973) 2 SCC 203 : 1973 SCC (Cri) 770 : 1973 CrLJ 1393.

[8234] ● ***Concurrent findings of fact in Sessions Court and High Court last word.***—Under the Article, re-assessment of evidence is not permissible in the ordinary course. Concurrent findings of fact in the Sessions Court and the High Court must normally be the last word. *Mohanlal* v. *State of Uttar Pradesh,* AIR 1974 SC 1144 : (1974) 4 SCC 607 : 1974 SCC (Cri) 643 : 1974 CrLJ 800.

[8235] ● ***Concurrent finding of fact—Interference by Supreme Court.***—The power under Article 136, extraordinary inamplitude but exceptional in its exercise, goes into action only to avert miscarriage of justice and rarely operates to undo concurrent findings of fact, if perversity is not present. *Som Parkash* v. *State of Delhi,* AIR 1974 SC 989 : (1974) 4 SCC 84 : 1974 SCC (Cri) 215 : 1974 CrLJ 784 : 1974 SCD 249.

[8236] ● ***Re-appreciation of evidence—Not permissible in absence of manifest injustice or perversity.***—The Supreme Court will not ordinarily re-weigh the evidence or re-examine loopholes and lacunae unless satisfied that there has been some perversity, gross misreading or manifest injustice. Where the Court which has seen the witnesses, and the appellate Court which has reviewed the matter over again, have found no good reason to discard the prosecution version, the Supreme Court will not interfere. *Gian Singh* v. *State of Punjab,* AIR 1974 SC 1024 : (1974) 4 SCC 305 : 1974 SCC (Cri) 406 : 1974 CrLJ 789. **TO THE SAME EFFECT :** (1) *Bhoori Singh* v. *State of Punjab*, AIR 1974 SC 1256 : (1974) 4 SCC 754 : 1974 SCC (Cri) 664 : 1974 CrLJ 929.

[8237] ● ***Concurrent findings of fact—Interference with.***—In an appeal by special leave under Article 136 and in the exercise of its special jurisdiction under that Article, the Supreme Court does not normally disturb concurrent findings of fact or review the evidence unless grave and exceptional circumstances exist and there has been a failure of justice. Nevertheless, if the findings of the Courts below are manifestly vulnerable and unsound in regard to certain matters, the Supreme Court will reopen the case and reappraise the evidence only to the extent necessary for examination of those matters. *Bhoori Singh* v. *State of Punjab*, AIR 1974 SC 1256 : (1974) 4 SCC 754 : 1974 SCC (Cri) 664 : (1974) CrLJ 929.

[8238] ● ***Concurrent findings of fact—Interference by Supreme Court.***—After going through the evidence on record the Supreme Court came to the conclusion that the super-structure of the prosecution case was based on the testimony of two alleged eye-witnesses whose evidence was not only of an inherently unreliable nature but the artificial and incredible version of the shooting put forward by them were too unnatural to be accepted. It was quite unsafe to convict the appellant on their testimony despite some circumstances which raised grave suspicion against the appellant. Suspicion, however grave, could not be a satisfactory basis for convicting an accused person. Inferences from failure to surrender or even absconding of the appellant and the lack of interest shown by his brother or other relations of the appellant in obstructing the prosecution of the appellant could not possibly prove the guilt of the appellant. Sufficient number of very significant features of evidence on record dealt with by the Supreme Court were ignored by the High Court and the trial Court. The Supreme Court was, therefore, compelled to reassess the evidence and allowed the appeal setting aside the conviction of the appellant for murder as well as for the alleged illegal possession of the gun. *Dadar Singh* v. *State of Punjab*, AIR 1974 SC 1193 : (1975) 4 SCC 272 : 1974 CrLJ 908.

[8239] ● ***Concurrent findings of fact—Interference in appeal by special leave.***—Where it is difficult to hold, after considering the totality of evidence, that the concurrent findings of fact given by the Courts below as regards the proof of guilt of each accused beyond reasonable doubt are really erroneous, the Supreme Court will not interfere with such findings though one may not agree with the assessment of the evidence of each witness individually either by the trial Court or by the High Court. *Guli Chand* v. *State of Rajasthan*, AIR 1974 SC 276 : (1974) 3 SCC 698 : 1974 SCC (Cri) 222 : 1974 CrLJ 331.

[8240] ● ***Concurrent finding of fact about receipt of currency notes.***—Where the investigating officer (Assistant Superintendent of Police) deposed in his chief-examination that the "sanction of the competent authority" was obtained and that statement was not challenged on behalf of the appellant, in cross-examination, this objection cannot be allowed to be challenged as invalid in a special appeal.

So also an objection that there has not been a legal investigation in that the Assistant Superintendent of Police who was below the rank of Deputy Superintendent of Police carried out the investigation without the order of a Magistrate of I Class as required by Section 5A of the Prevention of Corruption Act can be allowed to be raised in a special appeal. Further, generally a conviction is not vitiated because of such contravention unless the accused is shown to have been prejudiced.

The concurrent finding of fact that the currency notes recovered from the pocket of the appellant's jacket were not planted there by the investigating officer but were put there by the appellant after receiving them from the complainant, cannot be allowed to be challenged in a special leave appeal. Once the recovery is proved, a presumption arises under Section 4(1) of the Act that the appellant accepted or obtained the currency notes as a motive or reward such as is mentioned in Section 161, IPC. *Nanak Chand* v. *State of Himachal Pradesh*, AIR 1974 SC 765 : (1974) 4 SCC 218 : 1974 SCC (Cri)387 : 1974 CrLJ 660 : (1974) 1 SCWR 605 : 1974 CurLJ 127.

[8241] ● ***Supreme Court not to go into question of fact and appreciate evidence.***—One of the witnesses was a share-holder of the society and was not cross-examined by the Prosecution. His evidence was disbelieved because if his evidence was true he would naturally have told the office-bearers of the Society about the payment by the accused to the Secretary and the case would have been asked to be dropped by the society but no such thing has been done. It was not known wherefrom the Magistrate drew that inference. No such question was asked from the witness and there was no material to support that observation. Another witness was disbelieved on the ground that he did not report to the higher authorities when the police did not hear when he represented to them of the false implication of the accused. The criticism was invalid, for it depended upon a person's nature whether he should write or not to high officers in a particular case. As regards the third witness the criticism was that he did not remember any other transaction done at his shop by him on that day when the accused was alleged to have paid the amount to the Secretary and also that he should have advised the accused to obtain a receipt from the Secretary, or got the payment entered in the registers of the Society. The Sessions Court and the High Court disbelieved the DWs. like the trial Court. It seemed that the defence version could not be disbelieved merely because if the money had not been paid, as stated by the appellant, it would have been expected that the non-payment would be known to the President and the Cashier much sooner. The only foolish thing the appellant did was that he delivered the money and did not take the receipt form Mahnga Ram. The evidence to the DWs. had been disbelieved on pure conjectures and surmises. It was not common that the persons who were witnesses to a transaction go about complaining to the higher authorities if the transaction was impugned. A person could not be allowed to be convicted on mere suspicion and hence the appeal was allowed. *Des Raj* v. *State of Punjab*, AIR 1974 SC 2292 : (1971) 3 SCC 235 : 1971 SCC (Cri) 443 : 1974 CrLJ 1531 : 1971 UJ (SC) 540.

[8242] ● ***Assessment of evidence of one and only eye-witness—Concurrent finding of fact.***—Where the evidence of the only eye-witness was not properly assessed by the Courts below, the Supreme Court will interfere with a concurrent finding of fact and reverse the finding of guilt.

A serious infirmity from which the evidence of Nakuldeo suffered was that admittedly several people from the neighbourhood met him at his house after the murder of his brother but he did not disclose the names of the assailants to any one whatsoever. The other members of his family also did not mention the names of the assailants to any one of those persons. Nakuldeo was a man of 24 and at the material time he was employed at the Air Force Station, Agra. It was impossible to accept his claim that he was so overwhelmed by grief that he could not even mention the names of the assailants to any one. The incident had taken place on a dark night and there were no lights either in the courtyard or in the house, with the help of which the assailants could be seen and identified. The significant failure on his part was only consistent with the conclusion that he was unable to identify them. In his evidence he deposed that he was able to identify the assailants of his brother with the light of his torch which he flashed while his brother was being assaulted, but it was surprising that he failed to mention about the torch light in his statement in writing to the police given about 9 hours later. But that statement was never disclosed at the trial by the prosecution while the High Court condoned that lapse by saying that the statement tendered by him was copied *verbatim* in the case diary. On a perusal of that diary, the High Court found that the statement in the diary contained a reference to the torch light flashed by Nakuldeo. If that be so, it was difficult to appreciate how the statement in the case diary could be said to be a *verbatim* reproduction of the statement submitted by Nakuldeo. The witness had no compunction in implicating one of the accused falsely and if so there should be strong reason available for accepting his testimony implicating the others. The Supreme Court did not agree with the High Court that the statement in the fardbeyan given by the chowkidar that Nakuldeo was overcome by grief, furnished an adequate explanation for the omission on his part and on the part of the other members of his family to disclose the names of the assailants. Further, it was impossible to believe that none from the large crowd of the villagers who had gone to Nakuldeo's house after the murder, had the ordinary courtesy or curiosity to inquire whether the assailants were known. In view of the serious infirmities in his evidence and even assuming that Nakuldeo flashed his torch light, it was a very tall claim to accept that in a frightened state of mind he could identify as many as eight persons and furnish a description of their weapons. The conviction and sentence were set aside. *R.P. Thakur* v. *State of Bihar*, AIR 1974 SC 284 : (1974) 3 SCC 664 : 1974 SCC (Cri) 194 : 1974 CrLJ 335.

[8243] ● ***Concurrent findings case of public servant taking bribe.***—There was no dispute on the point that the five rupee currency note was received by the appellant. According to the prosecution it was received as a bribe, while according to the appellant, he had received the same as the complainant wanted five one rupee currency notes *in lieu* of that currency note. One of the persons present at the time of recovery of the note from the pocket of the appellant deposed that the accused merely kept quiet while no suggestion was put to another witness that he received the currency note from the complainant with a view to give him change. It was also in evidence that the appellant looked perplexed and did not come out with any explanation at the time of search and recovery of the currency note. It was only much later in the day, more than a few hours after the recovery, that he came out with the version of receiving it with a view of give change. The above plea of the appellant was the result of an after-thought. In view of the concurrent findings of both the lower Courts, arrived at, on due appraisement of the evidence adduced in the case, there was no cogent ground to interfere with the same. The appeal was dismissed. *Sultan Ahmad* v. *State of Bihar*, AIR 1974 SC 1828 : (1974) 4 SCC 252 : 1974 SCC(Cri) 414 : 1974 CrLJ 895.

[8244] ● ***Concurrent findings of fact—Normal rule no interference.***—Normally, the Supreme Court would not interfere with the concurrent finding of facts recorded by the Courts below. The evidence revealed that the currency note was not recovered from the person of the appellant that the Dy. S.P. did not actually see the passing of the note from the complainant to the accused, but it was produced by the panch witness after the Dy. S.P. had finished the search, saying that the accused threw it on the ground. The offer of bribe was made, according to the prosecution at two places. Evidence about the first offer consisted of the statements of the complainant and another panch witness but the latter turned hostile. Complaints against the present complainant about his overcharging the customers on the sale of stamps, he being a stamp-vendor, were being investigated into by the appellant, a police constable, at that time. So he should be having grudge against the appellant. There was thus no independent reliable corroboration of the statements of the complainant and another as regards the first offer. In that background, there should be unimpeachable evidence as to the passing of the currency note from the complainant to the appellant. The circumstances narrated above, cast doubt on that story. As there was no corroboration of the evidence of the trap witnesses (complainant and the panch witness), the appellant is given the benefit of doubt and appeal is allowed. *Darshan Lal* v. *Delhi Administration*, AIR 1974 SC 218 : (1974) 3 SCC 595 : 1974 SCC (Cri) 73 : 1974 CrLJ 307 : (1974) 2 SCJ 236.

[8245] ● ***Death due to rash and negligent driving—Concurrent findings of fact.***—The Supreme Court is not a regular Court of appeal to which every judgment of the High Court in a criminal case may be brought up for scrutinising its correctness. It is not the practice of the Supreme Court to reappreciate the evidence for the purpose of examining whether the finding of fact concurrently arrived at by the High Court and the subordinate Courts is correct or not. It is only rare in and exceptional cases where there is some manifest illegality or grave and serious miscarriage of justice that the Supreme Court would interfere with such finding of fact. Where not only was the appreciation of the oral evidence by all the three Courts below was eminently correct but there were also certain tell-tale circumstances which clearly supported the findings reached by them and as such the Supreme Court refused to interfere. *Duli Chand* v. *Delhi Admin.*, AIR 1975 SC 1960 : (1975) 4 SCC 649 : 1975 SCC (Cri) 663 : 1975 CrLJ 1732.

[8246] ● ***Questions of fact—Concurrent findings by Courts below.***—Where two Courts of fact have dealt with pure questions of fact and have come to a certain conclusion, the Supreme Court in an appeal by special leave will not upset the conclusion of the High Court and re-appraise the evidence for itself. *Gajendra Singh* v. *State of Uttar Pradesh*, AIR 1975 SC 1703 : (1975) 4 SCC 241 : 1975 SCC (Cri) 499 : 1975 CrLJ 1494.

[8247] ● ***Concurrent finding of fact based on evidence.***—The Supreme Court will not interfere with a concurrent finding of fact based on appreciation of evidence. *Mehtab Singh* v. *State of Madhya Pradesh*, AIR 1975 SC 274 : (1975) 3 SCC 407 : 1975 SCC (Cri) 36 : 1975 CrLJ 290.

[8248] ● ***Concurrent finding of fact—Interference.***—As a rule of practice, the Supreme Court is loath to disturb a concurrent finding of fact unless it is shown that the finding is manifestly erroneous, clearly unreasonable, unjust or illegal or violative of some fundamental rule of procedure or natural justice. *Kartarey* v. *State of Uttar Pradesh*, AIR 1976 SC 76 : (1976) 1 SCC 172 : 1975 SCC (Cri) 803 : 1976 CrLJ 13.

[8249] ● ***Concurrent findings of fact—Interference by Supreme Court—When.***—It was quite surprising that it should have escaped the notice of the trial Court and the High Court that the Head Constable being the first informant could have investigated into the same case. He was not authorised to investigate such an offence being an officer below the rank of a Dy. S.P. After noticing that he was not authorised to do so, he forwarded the papers to the Dy. S.P. who then re-investigated the case and ultimately filed the charge-sheet. Though no importance need be attached to that fact, as that might not affect the validity of conviction, that infirmity was bound to reflect on the credibility of the prosecution case. Then again the Head Constable did not make any effect to get independent respectable witnesses for making the seizure of the bundle of currency notes but the seizure memo was signed by the said Head Constable and his subordinate police constables. These was evidence that two other persons of the village were also present at that time. The seizure memo did not also contain the circumstances in which the cash was seized or any reference made to the conversation supposed to have taken place between the appellant and the Head Constable in connection with the offer of the bribe. The whole episode was shrouded in secrecy and There was nothing but the evidence of police constables to support it. It could not be said to be free from reasonable doubt. The story that when the Head Constable refused to accept the bribe of Rs 40/- or Rs 50/-, the appellant should have immediately taken out the entire bundle of currency notes of Rs 510/- which was with him and offered it by way of bribe, was quite unnatural and the Supreme Court would hesitate considerably before founding a conviction upon it. In view of the above infirmity, the Supreme Court allowed the appeal setting aside the conviction of the appellant. *Bhagwan Singh* v. *State of Rajasthan*, AIR 1976 SC 985 : (1976) 1 SCC 15 : 1975 SCC (Cri) 737 : 1976 CrLJ 713 : 1975 CLR (SC) 502.

[8250] ● ***Concurrent findings of fact—Interference by Supreme Court—When.***—The Supreme Court is generally loath to interfere with the concurrent findings of fact recorded by the Courts below, reappraise the evidence for itself and then take a view different from that taken by them. But in a gross case where there appears to have been a miscarriage of justice by the wrong application of the well-settled principles of law, then it would be obliged to go into the facts and take its own view of the matter. In this case, the convictions of persons whose guilt had not been proved beyond reasonable doubt and the whole prosecution case was very shaky and doubtful because of some inherent defects and improbabilities, the Court would be unable to sustain their convictions. Though the motive was established and the FIR was lodged at the time and place it purported to have been lodged, there were serious infirmities regarding the arrest of the appellants and the recoveries of the fire-arms from them. It could not be believed that the appellants after the lapse of several hours found the field a convenient place for hiding and went there all armed. The High Court did not deal with the question of the doubtful nature of the arrest of Nachhettar Singh and the recovery of a rifle from him. The recovery memos for empty cartridges have not been proved properly and no explanation was given for the non-examination of the respectable witnesses who signed them. No explanation was given for the delay of five weeks in sending the fire-arms and the empties to the Ballistic Expert. From the evidence of the Expert, four empty cartridges were not fired from the gun said to have been recovered from appellant Balwant Gir. The biggest loophole in the prosecution case was that no rifle injury was found on any of the victims. The Doctors' evidence confirmed the same. The appellant Nachhettar Singh was alleged to have shot dead LP with his rifle but no rifle injury was found on him. So also rifle injuries were not found on the other two deceased persons. There was no answer to the big question as to how the three empty cartridges of 8 mm said to have been recovered from the place of occurrence were found by the Expert to have been fired from Nachhettar's rifle and yet no rifle injury was found on any of the victims and although the rifle was used on two of them according to the FIR and on all the three according to the evidence in Court. The High Court, therefore, committed a grave error in not scanning their evidence in the background of the serious infirmities. It tried to separate the grain from the chaff and thought that it had succeeded in doing so. But it did so wrongly. The various infirmities and defects in the prosecution referred to above had broken the grain of the story and mixed it with chaff to such an extent that it was almost impossible to separate them and find the appellants to be guilty. *Nachhettar Singh* v. *State of Panjab*, AIR 1976 SC 951 : (1976) 1 SCC 750 : 1976 CrLJ 691.

[8251] ● ***Interference with concurrent finding of fact.***—Ordinarily, as a matter of fact, the Supreme Court does not go behind a concurrent finding of fact unless such finding is clearly unreasonable or manifestly erroneous or illegal. *Chandmal* v. *State of Rajasthan*, AIR 1976 SC 917 : (1976) 1 SCC 621 : 1976 SCC (Cri) 120 : 1976 CrLJ 679 : 1976 CrLR (SC) 7 : 1976 CrAppR (SC) 32 : 1975 WLN 717.

[8252] ● ***Interference by Supreme Court with findings of fact.***—The Supreme Court not being an ordinary Court of criminal appeal does not interfere on pure question of fact. It is only in very special cases where the Court satisfied that the High Court has committed an error of law or procedure as a result of which there has been a serious miscarriage of justice that the Supreme Court would interfere with the concurrent findings of the High Court and trial Court. The assessment of evidence by the High Court would be taken by the Supreme Court as final, unless it is vitiated by any error of law or procedure, by the principles of natural justice, by errors of record or misreading of evidence, non-consideration of glaring inconsistencies in the evidence which demolish the prosecution case, or where the conclusion of the High Court is manifestly perverse and unsupportable and the like. *Dalbir Kaur* v. *State of Punjab,* AIR 1977 SC 472 : (1976) 4 SCC 158 : 1976 SCC (Cri) 527 : 1977 CrLJ 273 : 1976 CrLR (SC) 417 : 1977 SC CrR 46 : (1977) 1 SCJ 54 : 1976 CurLJ (Cri) 204 : 1977 MLJ (Cri) 50.

[8253] ● ***Supreme Court not to embark on reappreciation of evidence and interfere with concurrent view.***—It would not be right for the Supreme Court to embark on a reappreciation of the evidence and to interfere with the concurrent view taken in regard to the evidence by the Courts below. *Ashok Kumar* v. *State of Punjab,* AIR 1977 SC 109 : (1977) 1 SCC 746 : 1977 SCC (Cri) 177 : 1977 CrLJ 1641976 CrLR (SC) 473 :

1977 SC CrR 29 : 1977 CrAppR (SC) 26 : : 1976 UJ (SC) 873 : (1977) 4 CrLT 4.

[8254] ● ***Concurrent findings of fact—Practice of Supreme Court.***—In the instant case the prosecution alleged that the prosecutrix who was a fully grown up lady and habituated to sexual intercourse and was pregnant, was raped by three persons one after the other against her will and with great force and that as a result she had abortion 4 or 5 days after the occurrence. All the accused were convicted under Section 376, IPC, and the same was confirmed by the High Court. Hence, this special leave appeal. The Sessions Judge as also the High Court completely overlooked some striking facts and glaring defects appearing in the prosecution evidence which vitiated the findings of fact. Ordinarily the Supreme Court does not interfere with the concurrent findings of fact arrived at by the Courts below. None of the Courts below tried to examine the possibility which was clearly suggested by the evidence of the prosecution itself that the appellants might have had sexual intercourse with the prosecutrix, not against her will but with her consent and also with the connivance of her husband. The Sessions Judge dismissed the plea of consent on the ground that it was not pleaded by the accused, completely losing sight of the fact that in a criminal case the accused was not bound by his pleading and it was open to him to prove his defence even from the admissions made by the prosecution witnesses or the circumstances proved in the case. The High Court also did not consider that aspect at all. Such a wrong approach by both the Courts below had resulted in a serious miscarriage of justice to the accused calling for the interference by the Supreme Court. *Pratap Misra* v. *State of Orissa*, AIR 1977 SC 1307 : (1977) 3 SCC 41 : 1977 SCC (Cri) 447 : 1977 CrLJ 817 : 1977 CrLR (SC) 233 : 1977 SCCrR 258 : 1977CurLJ (Cri) 102.

[8255] ● ***Supreme Court not to interfere with findings record by Courts below.***—Normally the Supreme Court is slow to interfere with the findings of the fact recorded by the High Court and the Sessions Court and if two views of the evidence are reasonably possible the Supreme Court would refrain from upsetting the judgment of the High Court But where the Supreme Court disagrees with the conclusion of the lower Courts that a particular witness was an eye-witness to the occurrence and where there was nothing more in the case against the accused, the conviction could not be sustained. *C. Singh* v. *State of Haryana*, AIR 1977 SC 386 : (1976) 1 SCC 879 : 1977 SCC (Cri) 215 : 1977 CrLJ 243 : 1975 CrLR (SC) 463 : 1975 SCCrR 468 : 1975 CrAppR (SC) 306 : 1975 BBCJ 730 : 1976 Chand LR (Cri) (SC) 66 : 1975 UJ (SC) 576 : 1975 ACrC 282 : 1975 Cur LJ 577 : (1975) 2 CrLT 487.

[8256] ● ***Concurrent finding of lower Courts that eye-witnesses reliable witnesses.***—Where in a case of murder and robbery with deadly weapons, both the Courts below accepted the evidence of the eye-witnesses which was corroborated by the medical evidence and the evidence of the ballistic expert, and certain recoveries of incriminating objects, the Supreme Court declined to interfere with the convictions. *Natthu* v. *State of Uttar Pradesh,* AIR 1977 SC 2096 : (1977) 4 SCC 293 : 1977 SCC (Cri) 571 : 1977 CrLJ 1578 : 1977 CrLR (SC) 378.

[8257] ● ***Concurrent findings of two Court's below.***—Interference with concurrent findings of two Courts, the Supreme Court would be most reluctant in the absence of any special circumstances. *Union of India* v. *Prafulla Kumar*, AIR 1979 SC 366 : (1979) 3 SCC 4 : 1979 SCC (Cri) 609 : 1979 CrLJ 154 : (1979) CrLR (SC) 666 : (1979) SCCrR 140 : (1979) 1 SCJ 424 : (1979) 2 SCR 229 : (1979) 2 SCWR 97 : 1979 MLJ (Cri) 361 : 1979 CurLJ (Cri) 35 : (1979) 47 CutLT 385 : 1979 CrAppR (SC) 72 : 1979 MLW (Cri) 86.

[8258] ● ***Concurrent finding of fact—Interference if open.***—Concurrent finding of fact was given by the trial Court and High Court. Merely because the deceased did not give any other name except the name of the appellant in the dying declaration, because after naming the appellant the deceased became speechless, the statement of the informant who proved the dying declaration cannot be distrusted as he clearly mentioned that the appellant instigated the assault on the deceased in his FIR which was lodged within an hour of the occurrence. Enmity between the informant and the accused was immaterial when his testimony was corroborated by other independent evidence. Appeal was dismissed. *Tirath Ram* v. *State of Uttar Pradesh,* AIR 1979 SC 1440 : 1980 Supp SCC 406 : 1979 SCC (Cri) 501 : 1980 CrLJ 825.

[8259] ● ***Concurrent findings of fact—When to be disturbed.***—Concurrent findings of fact cannot be disturbed save on enormity improbability. Petition was dismissed. *Som Nath* v. *State of Haryana,* AIR 1980 SC 1226 : (1980) 3 SCC 301 : 1980 SCC (Cri) 681 : 1980 CrLJ 925 : 1980 CrLR (SC) 194 (1) : 1980 UJ (SC) 421 : 1980 CrAppR (SC) 124 (2) : 1980 CurLJ (Cri) 91 : 1980 ACrR 274.

[8260] ● *Concurrent findings of fact—Not to be interfered with by Supreme Court.*—Concurrent findings of fact will not be interfered with by the Supreme Court. Mere circumstance that two or more Courts have taken the same view of facts could not shut out all further inquiry into the correctness of that view. Concurrence is not an insurance against charge of perversity though a strong case had to be made out in order to support the charge that findings of fact recorded by more than one Court were perverse, that is to say, they were such that no reasonable tribunal could have recorded them. Merit of the normal rule that concurrent findings ought not to be reviewed by the Supreme Court consisted in the assumption that it is not likely that two or more tribunals would come to the same conclusion unless it was a just and fair conclusion to come. *Dudhnath Pandey* v. *State of Uttar Pradesh,* AIR 1981 SC 911 : (1981) 2 SCC 166 : 1981 SCC (Cri) 379 : 1981 CrLJ 618 : 1981 CrLR (SC) 353 : 1981 ALJ 228 : 1981 CrAppR (SC) 152 : 1981 ACrR 165 : 1981 ACrLJ 1 : 1981 AWC 297.

[8261] ● *Concurrent findings of fact acquire deterrent sanctity and finality.*—Concurrent findings of fact acquire a deterrent sanctity and tentative finality. Supreme Court should rarely invoke the special jurisdiction under Article 136 which is meant mainly to correct manifest injustice or errors of law of great moment. *Rafiq* v. *State of Uttar Pradesh,* AIR 1981 SC 559 : (1980) 4 SCC 262 : 1980 SCC (Cri) 947 : 1980 CrLJ 1344 : 1981 BLJR 101 : 1981 (7) ALR 120 : 1981 CurLJ (Cri) 121 : (1981) 1 SCR 402.

[8262] ● *Concurrent finding of fact not to be reopened in appeal.*—A concurrent finding of fact could not be reopened in an appeal by special leave unless it was established: (1) that the finding of fact was based on no evidence or (2) that the finding was perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value, or (3) the finding was based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it, or (4) some vital piece of evidence which would tilt the balance in favour of the convict had been over looked, disregarded or wrongly discarded. In the present case the finding of guilt recorded by the Sessions Court as *affirmed* by the High Court was challenged mainly on the basis of minor discrepancies in the evidence. Over much importance could not be attached to minor discrepancies. Discrepancies which did not go to the root of the matter and shook the basic version of the witnesses, therefore, could not be annexed with undue importance. More so, when the all important "probabilities factor" echoed in favour of the version narrated by the witness. *Bhoginbhai Hirjibhai* v. *State of Gujarat*, AIR 1983 SC 753 : (1983) 3 SCC 217 : 1983 SCC (Cri) 728 : 1983 CrLJ 1096 : 1983 CrLR (SC) 396 : (1983) 2 Crimes 232 : 1983 BujLH 792 : 1983 (2) 24 BujLR 1073 : 1983 IJR (Cri) 126 : 1983 CrAppR (SC) 343 : 1983 (2) ChandLR (Cri) 509 : (1983) 2 CrLC 252 : (1983) 2 SCWR 190.

[8263] ● *Concurrent finding of fact—Interference by Supreme Court.*—Normally, the Supreme Court did not interfere with the concurrent findings of fact of the Courts below, in the absence of very special circumstances or gross errors of law committed by the High Court. But where the High Court ignored or overlooked the crying circumstances and proved facts, violated and misapplied the well established principles of criminal jurisprudence, of decisions rendered by the Supreme Court on appreciation of circumstantial evidence and refused to give benefit of doubt to the accused despite facts apparent on the face of the record or on its own findings, or tried to gloss over them without giving any reasonable explanation, or committed errors of law apparent on the face of the record which resulted in serious and substantial miscarriage of justice to the accused, it was the duty of the Supreme Court to step in and correct the legally erroneous decision of the High Court. *Sharad* v. *State of Maharashtra*, AIR 1984 SC 1622 : (1984) 4 SCC 116 : 1984 CrLJ 1738 : (1984) 2 Crimes 235.

[8264] ● *Offence proved beyond reasonable doubt, Supreme Court not to interfere with sentences passed by Courts below.*—Where the accused were convicted by the Courts below on the finding that the offences charged against them had been proved beyond any reasonable doubt and there was no illegality or any question of principle involved in sentencing them, the Supreme Court will not interfere with the sentences passed by the Courts below. *Gopal* v. *State of Tamil Nadu*, AIR 1986 SC 702 : (1986) 2 SCC 93 : 1986 CrLJ 801 : 1986 CrLR (SC) 105 : (1986) 1 Crimes 448.

[8265] ● *Accused not to escape conviction when.*—Where all the accused but one were acquitted, and even though there was no evidence that the remaining accused caused one of the fatal injuries, he cannot escape conviction under Section 302, read with Section 34, IPC, when his participation with three other assailants in the attack on the deceased had been established beyond doubt. *Subash* v. *State of Uttar Pradesh,* AIR 1987 SC 1222 : (1987) 3 SCC 331 : 1987 SCC (Cri) 573 : 1987 CrLJ 991 : 1987 CrLR (SC)

368 : (1987) 2 SCJ 303 : (1987) 1 (1) IJRep 627 : 1987 East CrC 436 : 1987 ACrR 541 : 1987 AWC 1201 : 1987 IJR 217.

[8266] ● ***Common intention—Presence of motive.***—In the present case, A-1 and A-2 were convicted for murder, A-1 under Section 302, IPC and A-2 under Section 302 r/w Section 34, IPC, by the trial Court. On appeal to the High Court, the conviction of A-1 was confirmed, while A-2 was acquitted on the grounds that no stab injuries were found on the deceased at the corresponding places where A-2 was said to have stabbed the deceased, and that the doctor had stated that all the stab injuries found on the dead body could have been caused, by one and the same weapon. The acquittal of A-2 (respondent herein) was challenged in this appeal.

The defence of both the accused was one of total denial. Both were interested in getting the ancestral house for themselves, and hence they would have nurtured a common grievance against the deceased for the support we were extending to the other claimants who were not willing to forgo their share in the house. The occurrence took place in broad daylight, witnessed by P. Ws. 10 and 11. The A.S.I. recorded a statement from PW-10 without delay, and it contained a full narrative of the occurrence and the case was registered and the special report had reached the Magistrate with appreciable promptitude. Both the accused were arrested on the same day. In view of the above features, there could be no doubt, that both the accused had jointly perpetrated the crime and they had caused the stab wounds on the deceased. There were absolutely no grounds on the basis of which any differentiation could be made in construing the evidence of the PWs. as between A-1 and A-2, for holding that the evidence was clinching as against A-1 but was of a doubtful nature as against A-2. Coming to the medical evidence, as both the accused had used weapons of the same kind, *viz.*, daggers, all the stab injuries could have been caused by the same weapon and the doctor's opinion could not detract the case against A-2 in any manner. The High Court was in error in taking the view that a person convicted under Section 302 read with Section 34, IPC, stood on a very different footing from a person convicted under Section 302, IPC. It failed to see that when an offence was committed in furtherance of the common intention of two or more accused, then every one of them was as much guilty as the other and it was not necessary that every one of them should have participated in the commission of the offence to the same extent and degree, as the other person or persons accused of the offence had acted. Even if injuries 1 and 2, which were the fatal injuries had been inflicted by A-1 and not by A-2, the latter would be as much guilty of the offence of murder as the former, because of the common intention forged between the two. The acquittal of the respondent was set aside, and his conviction and sentence recorded by the trial Court were restored. *State of Punjab* v. *Surjit Singh*, AIR 1987 SC 1045 : (1987) 1 SCC 520 : 1987 SCC (Cri) 216 : 1987 CrLJ 845 : (1987)1 Crimes 252.

[8267] ● ***Concurrent findings of fact by Courts below—That there was fish on board.***—Maritime Zones of India (Regulation of Fishing By Foreign Vessels) Act (1981), Sections 13, 22 & 25. Maritime Rules (1982), R. 16.

Where it was contended that at the time of apprehension of the trawlers, no fish was found on board and the net was not wet, that there was no evidence that fish on board was seized nor there was any evidence to show what had happened to the first or who put the fish in the hold of the trawlers and that no presumption under Section 22 of the Act could be drawn, that the trawlers were engaged in fishing within the exclusive Economic Zone of India in contravention of the provisions of the Act and the Rules made thereunder, this contention could not be considered in the appeal by special leave as there had been concurrent findings by the trial Court as well as by the High Court that there was fish on board which included the hold of the trawlers. *C.T. Shang* v. *S.D. Baijal*, AIR 1988 SC 603 : 1988 SCC(Cri) 162 : 1988 CrLJ 855 : (1988) 1 Crimes 524 : (1988) 1 SCWR 128 : (1988) 90 Bom LR 56 : (1988) 1 ACrLR 468.

[8268] ● ***Common intention—Sharing of.***—Where two of the appellants were very much known to the eye-witnesses, non-mention of their names in the evidence as to their participation in firing upon the deceased throws a great doubt as to their sharing of the common intention and as such their convictions cannot be sustained. *Hare Krishna Singh* v. *State of Bihar*, AIR 1988 SC 863 : (1988) 2 SCC 95 : 1988 CrLJ 925.

[8269] ● ***Special leave—Grant of—Does not entitle parties to open out and argue whole case.***—Where the appeals are by special leave under Article 136 and the conclusions of the Courts below are supported by acceptable evidence, the Supreme Court will not exercise its overriding powers to interfere with the decision appealed against and will also not consider the contentions to re-appreciate the evidence which has been believed by the Courts below. The grant of special leave does not entitle the parties to open out and argue the whole case and they are not entitled to contest all the findings recorded by the Courts below unless it is shown by error apparent on the record that substantial and grave injustice has been done. *Appabhai* v. *State of Gujarat,* AIR 1988 SC 696 : 1988 Supp SCC 241 : 1988 CrLJ 848 : (1988) 1 Crimes 606.

[8270] ● ***Common intention—Constructive liability.***—Mere presence along with the other accused who committed murder is certainly not adequate to hold that he shared a common intention with the others, especially when he had not assisted them or even uttered any words of instigation. The fact that he surrendered along with the other accused at the police station may well be due to the fact that he might have thought if otherwise he would be incurring the wrath of the other accused and also inviting the suspicion of the police about his complicity. *Rangaswami* v. *State of T.N.*, AIR 1989 SC 1137 : 1989 Supp (1) SCC 686 : 1989 CrLJ 875.

[8271] ● ***Acquittal of co-accused by giving benefit of doubt.***—In this case though the appellant and the accused Gokul were individually charged under Sections 302 and 436, IPC, they were convicted only under the alternative charges under Section 302 read with Section 34 and Section 436 read with Section 34, IPC by the Sessions Judge. But the High Court acquitted Gokul of both the charges while confirming the conviction and sentences awarded to the appellant. The appellant's convictions can be sustained, only if the High Court had sustained the convictions awarded to accused Gokul also. Inasmuch as the High Court has given the benefit of doubt to accused Gokul and acquitted, it follows that the appellant's convictions for the two substantive offences read with Section 34, IPC cannot be sustained because this is a case where the co-accused is a named person and he has been acquitted, and by reason of it the appellant cannot be held to have acted conjointly with anyone in the commission of the offences. It, therefore, follows that even if the evidence of the PWs. did not suffer from any infirmity, though it was found to be so, the acquittal of the other named accused Gokul would stand in the way of the appellant being convicted constructively under Section 34, IPC, for the substantive offences. The appeal was, therefore, allowed. *Sukhram* v. *State of Madhya Pradesh,* AIR 1989 SC 772 : 1989 Supp (1) SCC 214 : 1989 CrLJ 838 : 1989 JabLJ 121.

[8272] ● ***Common intention—Overt act done in furtherance of.***—A few accused persons ambushed the victims and when victim came to the place of occurrence they surrounded him to take retaliation to an earlier incident. One accused stabbed the victim to death. The other accused might not know from before that the stabbing accused was carrying knife. It was *held* that the second accused cannot be roped by common intention or common object by the aid of Section 34 or Section 149 of IPC. Decision of Patna High Court Reversed. *Ramvilas Singh* v. *State of Bihar*, AIR 1989 SC 1593 : 1989 (3) SCC 605 : 1989 CrLJ 1782 : JT 1989 (2) SC 101 : (1989) 2 Crimes 368.

[8273] ● ***Supreme Court not to substitute findings of fact.***—Ordinarily the Supreme Court exercising jurisdiction under Article 136 is slow in substituting its findings of fact in place of those recorded by the Courts below. However, this does not mean that this Court has no power to do so. The discretion conferred by Article 136 is wide enough to permit this Court to interfere even on facts is suitable cases if the approach of the Courts below has resulted in grave miscarriage of justice. By way of self-imposed discipline, this Court does not ordinarily reappreciate or reassess the evidence unless it is of opinion that the approach of the Courts below has resulted in failure of justice necessitating correction. If the Courts below have misread the evidence or have ignored vital pieces of evidence resulting in miscarriage of justice, it becomes the duty of this Court to interfere in the interest of administration of justice. The present case is one such which calls for interference.

In this case under Section 395, IPC, the approach of the Courts below in doubting the capacity of PWs. 1 and 2 to possess Rs. 73,600/- and requiring them to prove how PW-2 had over a period of 10 years saved the said amount notwithstanding the fine of Rs. 33,600/- by the police at her residence was wrong when their case was that Rs. 40,000/- was robbed from them by the 7 accused. The Supreme Court convicted A-1, 4 and 7 only under Section 392, IPC while confirming the acquittal of the other accused. *Suryamoorthi* v. *Govindaswamy,* AIR 1989 SC 1410 : (1989) 3 SCC 24 : 1989 CrLJ 1451.

[8274] ● ***Concurrent finding not to be brushed aside.***—The concurrent findings reached by both the Courts below on evidence cannot be lightly brushed aside and unless it is shown that the findings are against the weight of evidence or are vitiated by any legal error, this Court does not interfere with them as a matter of course, especially when they are based on appreciation of evidence of eye-witnesses found to be acceptable by both the Courts below. *Ram Sanjiwan Singh* v. *State of Bihar,* AIR 1996 SC 3265 : (1996) 8 SCC

552 : 1996 SCC (Cri) 701 (706) : 1996 CrLJ 2525 : JT 1996 (4) SC 502.

[8275] ● ***Concurrent finding of fact—Interference.***—As this appeal arises under Article 136, Constitution of India, judgments of the Sessions Court as well as the High Court wherein concurrent findings of fact had been reached by both the Courts on appreciation of the evidence of the injured eye-witnesses as well as other eye-witnesses, cannot be assailed by making an effort to get the entire evidence re-appreciated as if this is a third appeal on facts. In view of the settled legal position, this Court has to see whether the findings of fact reached by the High Court agreeing with the appreciation of evidence by the Sessions Court suffer from any patent error of law or have resulted in miscarriage of justice which can call for this Courts' interference in appeal. *Ramanbhai Naranbhai Patel* v. *State of Gujarat*, (2000) 1 SCC 358 : 2000 SCC (Cri) 113 (118) : 1999 CrLJ 5013 : 2000 CrLR (SC) 138.

[8276-78] ● ***Constitution of India Article 134—Concurrent findings of fact.***—Both the trial Court and the High Court arrived at concurrent findings on the basis of the evidence of PWs 1, 5 and 6 and other witnesses that the appellant was the assailant of the deceased and that concurrent findings of fact arrived at on the basis of evidence by the trial Court and the High Court are not normally interfered with by the Supreme Court in appeal. But as has been held by this Court in *A. Subair* v. *State of Kerala*, [(2009) 6 SCC 587 : 2009 AIR SCW 3994 : 2009 CrLJ 3450], when the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence and the judgments of the Courts below will have to be interfered with. This Court has also held in *Mankamma* v. *State of Kerala* [(2009) (10) SCC 164 : AIR 2010 SC 499 : 2009 AIR SCW 7053] that ordinarily this Court does not interfere in a matter by reappreciating the evidence but when it is found that the evidence has been appreciated by the High Court in a mechanical manner and without proper consideration of facts and without proper consideration of facts and circumstances on record, this Court will have to reappreciate the evidence in the interest of justice. This is one such case in which both the trial Court and the High Court have mechanically relied on the evidence of PWs 1, 5 and 6 that it was the appellant who had attacked the deceased with an axe in the Court premises without appreciating that it was unsafe to rest conviction upon the evidence of PWs 1, 5 and 6 with regard to the identification of the assailant. *Siddanki Ram Reddy* v. *State of A.P.*, AIR 2010 SC 3000 : (2010) 7 SCC 697 : 2010 CrLJ 3910 (3915) : (2010) 3 Crimes 286.

CONCURRENTLY

[8279] ● ***Application to High Court under Sections 482 & 427, CrPC that sentences in both the cases be directed to run concurrently.***—Where neither the trial Court nor the High Court while passing the judgment of conviction and sentence indicated that the sentences passed against the appellant in both the cases shall run concurrently or Section 427, CrPC would be attracted. The High Court would not order, in exercise of its powers under Section 482, CrPC that sentences shall run concurrently. *M.R. Kudwa* v. *State of Andhra Pradesh,* AIR 2007 SC 568 : (2007) 2 SCC 772 : 2007 (1) SCC (Cri) 648 : 2007 CrLJ 763 (765) : 2007 (1) Crimes 50.

[8280] ● ***Not necessary for Court to direct that both sentences shall run concurrently.***—It is not incumbent upon the Court to direct in a case that both the sentences shall run concurrently and not consecutively. *M.R. Kudwa* v. *State of Andhra Pradesh*, AIR 2007 SC 568 : (2007) 2 SCC 772 : 2007 (1) SCC (Cri) 648 : 2007 (1) Crimes 50.

CONCURRENT SENTENCE

[8281] ● ***Concurrent sentence.***—Section 427 relates to administration of criminal justice and provides the procedure for sentencing. The sentencing Court is, therefore, required to consider and make an appropriate order as to how the sentence passed in the subsequent case is to run, whether it should be concurrent or consecutive. The basic rule of thumb over the years has been the so called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the tow offences are quite different.

In this appeal the primary challenge to the sentence is based on the assumption that the two cases against the appellant, under the Gold (Control) Act, and the Customs Act pertain to the same subject-matter. It is alleged that the appellant was prosecuted under the two enactments in respect of seizure of 7,000 tolas of gold. On this basis, reference is also made to Section 428, Cr PC claiming set off.

The submission is misconceived. The material produced by the State unmistakably indicates that the two offences are quite distinct and different. The case under the Customs Act may, to some extent, overlap the case under the Gold (Control) Act, but it is evidently on different transactions. The complaint under the Gold (Control) Act relates to possession of 7,000 tolas of primary gold prohibited under Section 8 of the said Act. The complaint under the Customs Act is with regard to smuggling of gold worth Rs. 12.5 crores and export of silver worth Rs. 11.5 crores. On these facts, the Courts are not unjustified in directing that the sentences should be consecutive and not concurrent. *Mohd. A. Hussain* v. *Asst. Collector, Customs (Prevention), Ahemadabad,* AIR 1988 SC 2143 : (1988) 4 SCC 183 : 1989 CrLJ 283 : (1988) 3 SCJ 577 : (1988) 3 Crimes 291 : (1988) 2 ACrR 687 : 1988 AWC 1379 : (1988) 29 GujLR 1436 : (1988) 37 ELT 163 : (1988) ECR 545 : (1988) 18 ECC 341.

[8282] ● ***Concurrent or consecutive sentence—Subsequent sentence to run consecutive to first one.***—The appellant was given the maximum sentences of seven years in the previous case under the Gold (Control) Act. The conviction was based on the plea of guilty. The latter sentence under the Customs Act was also on the plea of guilty. Generally, it is both proper and customary for Courts to give credit to an accused for pleading guilty to the charge. But no credit need be given if the plea of guilty in the circumstances is inevitable or the accused has no alternative but to plead guilty. The accused being caught red handed is one such instance. The first case under the Gold (Control) Act against the appellant falls into the latter category. The plea of guilty in that case was inevitable. The Court was therefore justified in awarding the maximum sentence. But the second case under the Customs Act is not of that type. The prosecution has to prove many things in it. There are 18 other accused facing trial in that case. The appellant, however, pleaded guilty, perhaps on legal advice. The enormity of the crime is relevant for measuring the sentence. But the maximum sentence awarded in one case against the same accused is not irrelevant for consideration while giving the consecutive sentence in the second case although it is grave. The Court has to consider the totality of the sentences which the accused has to undergo if the sentences are to be consecutive. The totality principle has been accepted as a correct principle for guidance. The trial Magistrate in this case has properly considered all aspects including the plea of guilty and given good reasons for awarding four years R.I. That means in all the appellant has to undergo 11 years of imprisonment which by itself is quite long enough in a man's life. The High Court took a narrow view of the whole matter with the enormity of the crime on the forefront. It enhanced the sentence to the maximum of 7 years prescribed under Section 135 of the Act. The result is that the appellant has to serve in all 14 years. The broad expanse of discretion left by legislation to sentencing Courts should not be narrowed only to the seriousness of the offences. No single consideration can definitively determine the proper sentence. The Court must 'recognise, learn to control and exclude' many diverse data. In consecutive sentences, in particular, the Court cannot afford to be blind to imprisonment which the accused is already undergoing. The appeal was allowed restoring the judgment of the trial Court. *Mohd. A. Hussain* v. *Asst. Collector, Customs (Prevention), Ahemadabad*, AIR 1988 SC 2143 : (1988) 4 SCC 183 : 1988 CrLJ 283 : (1988) 3 SCJ 577 : (1988) 3 Crimes 291 : (1988) 2 ACrR 687 : 1988 AWC 1379 : (1988) 29 GuJLR 1436 : (1988) 37 ELT 163 : (1988) ECR 545 : (1988) 18 ECC 341.

[8283] ● ***Subsequent sentence to run concurrently.***—Sub-section (1) of Section 427, CrPC provides for the situation when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or life imprisonment. In other words, sub-section (1) of Section 427, CrPC deals with an offender who while undergoing sentence for a fixed term is subsequently convicted to imprisonment for a fixed term or for life. In such a situation, the first sentence, being for a fixed term, expires on a definite date which is known when the subsequent conviction is made. Sub-section (1) says that in such a situation, the date of expiry of the first sentence which the offender is undergoing being known, ordinarily the subsequent sentence would commence at the expiration of the first term of imprisonment unless the Court directs the subsequent sentence to run concurrently with the previous sentence. Obviously, in cases covered by sub-section (1) where the sentence is for a fixed term, the subsequent sentence can be consecutive unless directed to run concurrently. Sub-section (2), on the other hand, provides for an offender "already undergoing sentence of imprisonment for life" who is sentenced on a subsequent conviction to imprisonment for a term or for life. It is well settled since the decision of this Court in *Gopal Vinayak Godse* and reiterated in *Maru Ram* that imprisonment for life is a sentence for the remainder of the life of the offender unless the remaining sentence is commuted or remitted by the appropriate authority. This being so at the stage of sentencing by the Court on a subsequent conviction, the earlier sentence of imprisonment for life must be understood in this manner and, therefore, there can be no question of a subsequent sentence of imprisonment for a term or for life running consecutively which is the general rule laid down in sub-section (1) of Section 427. As rightly contended by Shri Garg, and not disputed by Shri Lalit, the earlier sentence of imprisonment for life being understood to mean as a sentence to serve the remainder of life in prison unless commuted or remitted by the appropriate authority and a person having only one life span, the sentence on a subsequent conviction of imprisonment for a term or imprisonment for life can only be superimposed to the earlier life sentence and certainly not added to it since extending the life span of the offender or for that matter anyone is beyond human might. It is this obvious situation which is stated in sub-section (2) of Section 427 since the general rule enunciated in sub-section (1) thereof is that without the Court's direction the subsequent sentence will not run concurrently but consecutively. The only situation in which no direction of the Court is needed to make the subsequent sentence run concurrently with the previous sentence is provided for in sub-section (2) which has been enacted to avoid any possible controversy based on sub-section (1) if there be no express direction of the Court to that effect. Sub-section (2) is in the nature of an exception to the general rule enacted in sub-section (1) of Section 427 that a sentence on subsequent conviction commences on expiry of the first sentence unless the Court directs it to run concurrently. The meaning and purpose of sub-sections (1) and (2) of Section 427 and the object of enacting sub-section (2) is, therefore, clear.

In the instant case the only question is of the meaning and effect of the direction in this Court's judgment dated September 30, 1983. It is obvious that the direction of this Court must be construed to harmonise with Section 427(2), CrPC which is the statutory mandate apart from being the obvious truth. The subsequent sentence of imprisonment for life has, therefore, to run concurrently with the earlier sentence of imprisonment for life awarded to the petitioner. The real exercise is to construe the last sentence in the direction which reads as under:

> "We, therefore, direct that in case any remission or commutation in respect of his earlier sentence is granted to him the present sentence should commence thereafter."

It is in the background of this ultimate direction that the preceding portion has to be read. This last sentence in the direction means that in case, any remission or commutation is granted in respect of the earlier sentence of life imprisonment alone then the benefit of that remission or commutation will not *ipso facto* be available in respect of the subsequent sentence of life imprisonment which would continue to be unaffected by the remission or commutation in respect of the earlier sentence alone. In other words, the operation of the superimposed subsequent sentence of life imprisonment shall not be wiped out merely because in respect of the corresponding earlier sentence of life imprisonment any remission or commutation has been granted by the appropriate authority. The consequence is that the petitioner would not get any practical benefit of any remission or commutation in respect of his earlier sentence because of the superimposed subsequent life sentence unless the same corresponding benefit in respect of the subsequent sentence is also granted to the petitioner. It is in this manner that the direction is given for the two sentences of life imprisonment not to run concurrently.

The ultimate direction contained in the last sentence is obviously for this purpose. So construed the direction of this Court in the judgment dated September 30, 1983 in Criminal Appeal No. 418 of 1982 fully harmonises with Section 427(2), CrPC. This is the clarification we make of this Court's judgment dated September 30, 1983 in Criminal Appeal No. 418 of 1982. *Ranjit Singh* v. *Union Territory of Chandigarh,* AIR 1991 SC 965 (970, 971) : (1991) 4 SCC 304 : 1991 SCC (Cri) 965 : 1991 CrLJ 3354 : 1991 CrLR (SC) 799 : JT 1991 (3) SC 550 : 1991 (3) Crimes 414.

[8284] ● ***Several offences—Benefit of all sentences to run concurrently.***—The appellants in this case are two. 1st appellant was convicted in 4 different cases. The occurrence in all of which took place between 27-3-1990 and 7-5-1990. The offence found against him in all the cases was under Section 395 of the IPC and in each case he was sentenced to undergo rigorous imprisonment for 7 years. If he is not given the benefit in exercise of the discretion conferred under Section 427 of the CrPC, he may have to undergo a very long period of 28 years in Jail. The second appellant was convicted in 5 different cases the occurrence in all of which took place between 21/10/1989 and 7/5/1990. He was also found guilty under Section 395, IPC and was sentenced to undergo rigorous imprisonment for a period of 7 years in each case. If the benefit conferred under Section 427 is not extended to him, he may have the undergo imprisonment for a total period of 35 years in jail. On the other hand, we allow the appellants to have the benefit of all sentences to run concurrently, he would be out by now after serving only imprisonment for a period of 7 years awarded in one case. Both course are unacceptable. If the appellants would undergo a total period of 14 years of imprisonment in respect of all the convictions passed against them that will be sufficient to meet the ends of justice. *Ammavasai* v. *Inspector of Police, Valliyanur*, AIR 2000 SC 3544 (3544-3545) : (2000) 9 SCC 749 : 2000 CrLJ 4057 : JT 2000 (7) SC 430.

CONDUCT IN BRIBE CASES

[8285] ● ***Conduct in bribe cases.***—It is the prosecution case that after the appellant had come back at 8.00 p.m., the contractor and his son went to the house and met the appellant in his drawing room in the first floor of his house. Thereafter, the contractor's son came down and went to the car. Then Verma and the contractor's son took the fruits and sweets to the drawing room of the appellant. According to the evidence of contractor's son, it took about ten minutes and during these ten minutes the contractor and the appellant were sitting in the appellant's drawing room. It is difficult to believe that the payment of the bribe money could be deferred for ten minutes till the arrival of fruits and sweets. It is also difficult to believe that the appellant would accept bribe in the presence of Verma who had carried the fruits to the drawing room of the appellant. *G.V. Nanjundiah* v. *State (Delhi Administration),* AIR 1987 SC 2402 : 1987 Supp SCC 266 : 1988 SCC (Cri) 77 (86) : 1988 CrLJ 152 : 1987 CrLR (SC) 580 : JT 1987 (4) SC 313 : (1987) 3 Crimes 217.

[8286] ● ***Person would not accept bribe in presence of stranger.***—As per the allegation of the contractors and other members of the raiding party the contractor purchased a basket of fruits and also some cartons of sweets so as to justify the entrance of Verma into the house of the appellant. It was arranged that Verma would also be a witness to the handing over of the bribe money to the appellant. This is also a very unusual and unnatural feature in the prosecution story. It is a common sense that person would not accept bribe in the presence of a stranger. One significant fact that may be pointed out here is that although it is alleged that the appellant had agreed to be present in his house at 7.00 p.m. for the purpose of taking bribe, he was absent and came back at 8.00 p.m.. In this case the foundation of the prosecution case and the subsequent events complied with the unusual behaviour of the contractor in purchasing sweets and fruits for the appellant casts a great doubt on the prosecution story. *G.V. Nanjundiah* v. *State (Delhi Administration),* AIR 1987 SC 2402 : 1987 Supp SCC 266 : 1988 SCC (Cri) 77 : 1988 CrLJ 152 : 1987 CrLR (SC) 580 : JT 1987 (4) SC 313 : (1987) 3 Crimes 217.

CONDUCT OF ACCUSED

[8287] ● ***Conduct of accused.***—There was no direct evidence of the offence and the facts showed that the appellant had greater motive to commit the offence than the other persons, one of them being son-in-law and the other the grandson, and further the conduct of the appellant was far more pre-judicial in view of the daffadar and the chowkidar both preventing him from taking the dead body for cremation because they suspected foul play and the insistence of the appellant to take the body of the old woman for cremation as early as possible, in spite of his being prevented from doing so. The appellant, therefore far from establishing his innocence certainly showed that he was aware of the manner in which the old woman had met with her death and was most anxious to dispose of the dead body so as to avert any suspicion or proof her having met with an unnatural death as it was finally reported by the civil surgeon on postmortem examination. *Kutuhal Yadav* v. *State of Bihar*, 1954 SC 720 (723) : 55 CLJ 1802.

[8288] ● ***Conduct of accused after arrest.***—If the prosecution evidence as to the circumstances in which a bribe was accepted is itself unreliable or not free from doubt, the conduct of the accused immediately after his arrest, for example, that he did not rebut the charge that he had accepted a bribe or did not give explanation can be of no avail to the prosecution. Once the substantive evidence is rejected as unworthy of credit, the alleged conduct of the accused must be referred to some innocent reason. Different persons react in differently in the same circumstances, and in the absence of satisfactory evidence the Court cannot treat the case against the accused as proved or further advanced merely because he failed to say anything in his defence immediately after he was told that he had accepted it. *Zwingalee Ariel* v. *State of Madhya Pradesh*, AIR 1954 SC 15 : 1953 CrLJ 230.

[8289] ● ***Evidence in respect of person or his conduct when admissible.***—The evidence in respect of a person or his conduct is admissible only if it relates to a person who is a party to the action. *Sardul Singh Caveeshar* v. *State of Bombay*, AIR 1957 SC 747 : 1957 CrLJ 1325 : 1958 SCR 161 : 1957 (1) Mad LJ (Cri) 739.

[8290] ● ***Accused by his conduct when puts trial into jeopardy.***—A fair trial being the main objective of criminal procedure, if the Court is satisfied that there has occurred a threat to the continuance of a fair trial by reason of the activities of the accused subsequent to his release on bail, that threat must be removed by committing the accused to custody during the pendency of the trial, whatever be the classification of the offence of which he is charged. An accused who by his conduct puts the fair progress of a trial into jeopardy and indulges in activities which subvert it, cannot be allowed to contend that the Court has no power to look into his activities and must allow him free scope to do whatever he pleases, merely because the offence in respect of which he is being tried happens to fall under the classification of bailable offence. It is the bounden duty of a Court to take all measures necessary for removing obstructions and impediments which tend to defeat the fair progress of a criminal trial, and if necessary for that purpose, to cancel a bail previously granted to an accused, whatever be the character of the offence of which he is being tried. *Talab Haji Hussain* v. *Madhukar Purshottam Mandkar*, AIR 1958 SC 376 : 1958 CrLJ 701 : 1958 SCR 1226 : 1958 SCA 672 : 1958 MLJ (Cri) 512 : (1958) 2 MLJ (SC) 37.

[8291] ● ***Conduct of accused in hiding out of fear of being arrested.***—Subsequent conduct of the accused in that he was absconding for several days after the occurrence of murder has no evidentiary value by way of corroboration to the evidence as to his guilt when it is shown that he kept himself in hiding out of fear of being arrested for commission of another offence. *Khushal Rao* v. *State of Bombay*, AIR 1958 SC 22 : 1958 CrLJ 106.

[8292] ● ***Conduct of accused in trial.***—A criminal trial of course is not an inquiry with the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. *Anant Chintaman Lagu* v. *State of Bombay*, AIR 1960 SC 500 : 1960 CrLJ 682 : 1960 (2) SCR 460 : 1960 Mad LJ (Cri) 493.

[8293] ● ***Contemporaneous conduct—Evidence of.***—Evidence of contemporaneous conduct is always admissible as a surrounding circumstances; but evidence as to subsequent conduct of parties is inadmissible. *Bhaskar Waman* v. *Shrinarayan*, AIR 1960 SC 301 : 1960 SCJ 327 : (1960) 2 SCR 117.

[8294] ● ***Conduct of accused that of sane person.***—Where the plea of legal insanity is set up by the accused, and his defence is that his case comes within the Exception laid down in Section 84 of the Penal Code, what the Court primarily has to consider is whether, at the time of the commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. But for determining whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the Penal Code, the Court has to consider the circumstances which preceded, attended and followed the crime. Factors which are relevant for the purpose are, (*a*) the motive for the crime, (*b*) the previous history of the mental condition of the accused, (*c*) the evidence as to the state of his mind at the time of the offence, (*d*) the evidence as to what happened immediately before and after the incident which throws a light on the state of his mind, and (*e*) the subsequent events pointing to the conduct of the accused. The effect of all this evidence has to be considered in arriving at the conclusion whether the accused has discharged the burden which lies upon him to establish that his case comes within the Exception laid down in Section 84 of the Penal Code.

In the present case, there was evidence to show that the accused had taken a disliking to his wife and a few days before the date of the incident he had written to her father asking him to take away his daughter, and that though the father had promised to take her away before Chaitra Sudi 1, he had not done so, and the murder took place on the night before that date.

Though it was stated in the Court that since 4 or 5 years before the incident, the accused was getting fits of insanity, the father of the accused admitted that the accused was not treated by any doctor. Further, only a month and a half prior to the incident, the accused had been called by the father from Ahmedabad where he was working to go to his father's village to manage his father's shop during the absence of his father for some days from the village. These facts showed that in the case of the accused that he had periodical fits of insanity since last 4 or 5 years before the incident was an afterthought.

The subsequent events made it quite clear that plea of insanity put up for the first time at the time of the trial was a belated afterthought and a false case. When he was interrogated at the chora by the police inspector after he was taken there, he said he was willing to make a confession. The officer had deposed that he was completely sane and was giving rational answers to all his questions. A panchnama had been made of the condition of his body and his clothes and there was nothing therein pointing to insane condition which would surely have been noticed by the panchas. Thereafter the accused was sent to the Medical Officer for examination. The doctor had not noticed anything indicative of insanity. On the same day he was sent to a Magistrate for making a confession. The Magistrate asked him the necessary questions and the Magistrate found that he was responding like a normal person. Even during the committal proceeding no suggestion was made on behalf of the accused that he was insane. Finally when he was sent to the mental hospital for being kept under observation, by the Sessions Judge, the Superintendent had reported that he was capable of understanding the proceeding of the Court and making his defence in Court. All these facts clearly established that his entire conduct after the time when he killed his wife right up to the time when sessions proceedings commenced was that of a sane person. *Dahyabhai Maganbhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1963 : 1964 (2) CrLJ 472 : (1964) 7 SCR 361.

[8295] ● ***Subsequent conduct of accused.***—Subsequent conduct may also be exculpatory conduct of the accused person which is equally admissible because an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission. *A. Nagesia* v. *State of Bihar*, AIR 1966 SC 119 : 1966 CrLJ 100 : (1966) 1 Andh LT 430.

[8296] ● ***Conduct of appellant in absconding.***—Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances in each case. Normally, evidence for sustaining a conviction it can scarcely be held has a determining link in completing the chain of circumstantial evidence which must admit of no other hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt he was being wrongly suspected and he tried to keep out of the way, this circumstance can be considered to be necessarily evidence of guilty mind attempting to evade justice. It is not inconsistent with his innocence. The behaviour and conduct of the appellant, Judged by normal standards is not suggestive of his involvement in such heinous crime unless he was an experienced criminal (of which there is no suggestion) with extra-ordinary balance of mind and a disciplined control ever his senses and faculties. *Matru* v. *State of Uttar Pradesh*, AIR 1971 SC 1050 : (1971) 2 SCC 75 : 1971 CrLJ 913 : 1971 SCC (Cri) 391.

[8297] ● ***Conduct of accused in absconding.***—The disappearance of the accused after the commission of the alleged crime is a circumstance which in the absence of any plausible explanation might be taken against him. *Thilamma* v. *State of Mysore*, AIR 1971 SC 1871 : (1970) 2 SCC 105 : 1971 CrLJ 1314 : (1971) 1 SCJ 726.

[8298] ● ***Fact showing conduct of accused—Admissibility.***—Where an accused gives information to the Investigating Officer that he purchased murder weapon from a particular dealer and takes the Investigating Officer and the Panchas to the place of the dealer and points him out, the information is inadmissible under Section 27. However, the evidence of the Investigating Officer and the panchas that the accused has taken them to the dealer and pointed him out and as corroborated by the dealer himself is admissible under Section 8 as conduct of the accused. *Himachal Pradesh Administration* v. *Om Prakash*, AIR 1972 SC 975 : (1972) 1 SCC 249 : 1972 CrLJ 606 : 1972 SCD 128 : (1972) 1 SCJ 691 : (1971) 1 SCWR 819.

[8299] ● ***Conduct of accused when clothes of girl caught fire.***—On the other hand, the immediate conduct of the accused tends to negative the possibility of her suicide. When people rushed to the house on hearing her cries, they did not appear to have noticed that anything was being done by the accused which could be regarded as sympathy to the girl. The accused were sitting in the verandah quietly. Being in the house they should have been the first to go near the girl when her clothes had caught fire. But the evidence shows that there were no visible signs on the persons of any of the accused to suggest that they helped the girl when her clothes caught fire. No attempt was made by them to call the Doctor or to send for relations. On the other hand, when girl was telling her interrogators that the three accused had poured kerosene on her and set her clothes on fire the accused did not so much protest and declare that she had committed suicide and was blaming them unjustly. *Lallubhai Devchand Shah* v. *State of Gujarat*, AIR 1972 SC 1776 : (1971) 3 SCC 767 : 1972 SCC (Cri) 13 : 1972 CrLJ 828 : 1972 UJ (SC) 177.

[8300] ● ***Conduct of accused by identifying wrong person.***—But for the identification by the appellant that Phulpati was chaukas the sub-registrar would have not registered the document. The conduct of the appellant in denying the factum of identification by him of Phulpati as

Chaukas in the Trial Court and his plea in the High Court and in this Court that he identified Phulpati as Chaukas because he thought Chaukas alone could have come alongwith Dharma, Puran and Bhagwani to execute the mortgage deed and that he had no reason to think the lady whom he identified as Chaukas was Phulpati are telling circumstances. *Molar* v. *State of Haryana*, AIR 1973 SC 1413 : (1973) 2 SCC 430 : 1973 SCC (Cri) 826 : 1973 CrLJ 1124.

[8301] ● ***Conduct of accused—Relevancy.***—Prosecutor cannot take benefit from merely suspicious circumstances that the accused did not surrender or was not traceable for nearly one year. *Datar Singh* v. *State of Punjab*, AIR 1974 SC 1193 : (1975) 4 SCC 272 : 1974 CrLJ 908.

[8302] ● ***Conduct of accused after occurrence.***—The conduct of the accused after the occurrence also as to show that it was he and none else who was responsible for the murder of S. Had it been some one else, who had committed the murder, the accused would have raised hue and cry instead of sitting quietly outside the quarter. The accused would have also in the event rushed to the police station and made a report almost before the occurrence. The accused, however, did nothing of the kind. *Sitaram* v. *State of M.P.*, (1975) 4 SCC 171 : 1974 CrLR (SC) 384.

[8303] ● ***Conduct of appellant in not revealing identity of person entrusting gold bars.***—The appellant was arrested on April 9, 1967 by the Railway Police at the Bombay Central Railway Station as he was hurriedly trying to get into the compartment of the train. It appears that the manner in which he was trying to enter the compartment and his nervousness on being questioned by a Railway CID, Police Officer, aroused suspicion so the appellant was detained. On search of his person nine gold bars with foreign markings were found secreted. He had put forward an incredible story of having been entrusted with so much gold by one Pannalal whose identity was not established and whose address was not revealed by the appellant. According to the appellant, Pannalal had just met him by chance. It is incredible that any person would entrust gold valued at about Rs. 40,000 on which Rs. 17,000 was payable as duty alone to a youngster who was an utter stranger to him even if the carrier was to get Rs. 100/- for the risk undertaken. *Labhchand Dhanpat Singh Jain* v. *State of Maharashtra*, AIR 1975 SC 182 : (1975) 3 SCC 385 : 1975 SCC (Cri) 11 (14) : 1975 CrLJ 246 : 1975 CrLR (SC) 105 : (1975) 2 SCR 907 : 1975 UJ (SC) 75.

[8304] ● ***Absconder—Who is.***—To be an "absconder" in the eye of law it is not necessary that a person should have run away from his home. It is sufficient if he hides himself to evade the process of law, if the hiding place be his own home. *Kartarey* v. *State of Uttar Pradesh*, AIR 1976 SC 76 : (1976) 1 SCC 172 : 1976 CrLJ 13 : 1976 CrLR (SC) 690.

[8305] ● ***Conduct of accused relevant under Section 8 of Evidence Act.***—The conduct of the accused would be relevant under Section 8 of the Act if his immediate reactions to the illegal overture of the complaint or his action in inserting unwanted something in his pocket were revealed in the form of acts accompanied then and there or immediately thereafter by words or gesture reliably established. *Mahasingh* v. *State (Delhi Administration)*, AIR 1976 SC 449 : (1976) 1 SCC 644 : 1976 SCC (Cri) 135 : 1976 CrLJ 346 : 1976 CrLR (SC) 86.

[8306] ● ***Conduct of accused in rushing deceased to Hospital.***—In the instant case the accused immediately took the deceased to the Civil Hospital which, according to the High Court, was meant merely to cloak his guilt. We are indeed surprised that the High Court should have taken such a perverse view of the matter. If the accused had himself administered the poison to Shantibai he would be the last person to take her to the Hospital and thereby take the chance of the deceased being cured or of regaining consciousness, in which case the deceased would have implicated the appellant. The conduct of the accused in rushing her to the Hospital is more consistent with his innocence rather than with his guilt. *Ram Das* v. *State of Maharashtra*, AIR 1977 SC 1164 : (1977) 2 SCC 124 : 1977 SCC (Cri) 254 (259) : 1977 CrLJ 955 : 1977 CrLR (SC) 173.

[8307] ● ***Conduct of appellant in refusing to open door about midnight.***—In the instant case, the police went to arrest appellant, he did not open the door for the purpose of letting in the police. But this cannot be regarded as an incriminating circumstance when it is remembered that the time at which the police went to the house of appellant was about midnight and there was nothing unnatural in appellant refusing to open the door at such an unearthly hour. *Caetano Piedade Fernandes* v. *Union Territory of Goa*, AIR 1977 SC 135 : (1977) 1 SCC 707 : 1977 SCC (Cri) 154 (160-161) : 1977 CrLJ 167 : 1976 CrLR (SC) 393.

[8308] ● ***Conduct of appellants waiting near dead body.***—It is difficult to believe that during the period of 10 minutes, the appellants should be patiently waiting near the dead body of the deceased. It is not as if the appellants were trying to burn the dead body of the deceased or to bury it. They were, according to the witness, gazing at the dead body as if they were hypnotized or entranced by it. *Caetano Piedade Fernandes* v. *Union Territory of Goa, Daman and Dieu, Panaji, Goa*, AIR 1977 SC 135 : (1977) 1 SCC 707 : 1977 SCC (Cri) 154 (159) : 1977 CrLJ 167 : 1976 CrLR (SC) 393.

[8309] ● ***Conduct of accused not to save wife from further assault.***—It is inconceivable that the young couple while alone inside the inner room at night would keep the door of the house open to enable thieves to enter. The accused and his wife were alone inside the room and she was found to have 7 incised wounds, five of which were on the neck. It is impossible to conceive that the accused would not be roused from sleep even on the first assault with a knife on his wife sleeping near him on the floor, if an outsider had attacked her all of a sudden or in the process of snatching her ornaments. It would be natural then that the accused would see the thief or thieves inside the room and would come to her help to save her from further assault. Such a conduct of the accused is not revealed in the evidence. *Umedbhai Jadavbhai* v. *State of Gujarat*, AIR 1978 SC 424 : (1978) 1 SCC 228 : 1978 SCC (Cri) 108 (113) : 1978 CrLJ 489 : 1978 CrLR (SC) 72.

[8310] ● ***Conduct of accused and statement to Police Officer—Distinction between.***—A statement by the accused and his pointing out the *corpus delicti* may not strictly answer Section 27 of the Act, still then the conduct may be relevant under Section 8 of the Act. *Prakash Chand* v. *State*, AIR 1979 SC 400 : (1979) 3 SCC 90 : 1979 CrLJ 329 : 1979 Mad LJ (Cri) 419 : 1979 SCCr R 48 : 1979 UJ (SC) 17.

[8311] ● ***Conduct of accused in remaining silent.***—It is for the prosecution to prove its case affirmatively and it cannot gain any strength from the conduct of the accused in remaining silent. *Nagappa Dondiba Kalal* v. *State of Karnataka*, AIR 1980 SC 1753 : (1980) Supp SCC 336 : 1981 SCC (Cri) 278 (279) : 1980 CrLJ 1270 : 1980 CrLR (SC) 160.

[8312] ● ***Conduct of thieves in leaving biggest article containing loot.***—What is natural by the est of common experience is that a biggest article containing the loot would be left by the thieves where it lies. They would not take it with them, while running away in order to escape from the clutches of the people who were chasing them. *State of Rajasthan* v. *Sukhpal Singh*, AIR 1984 SC 207 : (1983) 1 SCC 393 : 1983 SCC (Cri) 213 (218) : 1983 CrLJ 1923 : 1983 CrLR (SC) 54.

[8313] ● ***Conduct of thieves in leaving box containing currency notes.***—The box containing the currency notes, which part of the loot was not left in the car as a matter of sweet volition. The respondents had no option save to abandon it in the car in which they were travelling, when the car met with an accident and they were surrounded by the Police and the public. *State of Rajasthan* v. *Sukhpal Singh*, AIR 1984 SC 207 : (1983) 1 SCC 393 : 1983 SCC (Cri) 213 (218) : 1983 CrLJ 1923 : 1983 CrLR (SC) 54.

[8314] ● ***Conduct of appellant in not calling immediate help of doctors.***—In the instant case much reliance seems to have been placed by the High Court on the circumstance that accused No. 1 did not call for the immediate help of doctors Dr. Shrikant Kelkar (PW-26) and Dr. (Mrs) Anjali Kelkar (PW-27) who were residing in the same building. In a matter of this magnitude it would be quite natural for the members of the appellants family to send for their own family doctor who was fully conversant with the ailment of every member of the family. Secondly, Dr. Shrikant Kelkar was a skin specialist whereas Dr. (Mrs) Anjali Kelkar was a paediatrician and the appellant may have genuinely believed that as they belonged to different branches, they were at all suitable to deal with such a serious case. The High Court was, therefore, wrong in treating this circumstance as an incriminating conduct of the appellant. *Sharad Birdhichand Sarda* v. *State of Maharashtra*, AIR 1984 SC 1622 : (1984) 4 SCC 116 : 1984 SCC (Cri) 487 (550, 551) : 1984 CrLJ 1738 : 1984 CrLR (SC) 296 : 1984 (2) Crimes 235.

[8315] ● ***Conduct of accused to take assessee inside house.***—Another circumstance upon which the High Court relied was that the accused was not likely to have talked with PWs 2 and 3 for as long as 40 minutes if he accepting a bribe. He would have merely received the money and sent them away. The very fact that he was talking to them for nearly 40 minutes indicated that no bribe was given or taken. On the other hand, we consider that this is a strong circumstance against the accused. The accused knew that PW-2 was an assessee who had a pending case before him. If the assessee paid him a visit after 8.00 p.m. at his residence, one would expect the accused to immediately suspect the reason for the visit and to turn away at once or at least within a few minutes after his coming to his house. Instead of that, he takes them inside the house, talks to them for nearly 40 minutes. This conduct of the accused is clearly against his innocence. *State of Gujarat* v. *Raghunath Vamanrao Baxi*, AIR 1985 SC 1092 (1095) : (1985) 3 SCC 45 : 1985 SCC (Cri) 304 : 1985 CrLJ 1357 : 1985 CrLR (SC) 260.

[8316] ● ***Conduct of husband.***—Conversely in a case the murder of the wife was committed in the night of 16/17th of a month; the husband slipped from the house on 17th morning to his sister's house in the morning of 17th; returned in the evening and stayed in the night in a hotel under a pseudonym. The conduct of the husband-accused was taken by the Supreme Court into consideration in deciding whether the charge against him has been proved or not. *Ram Avtar* v. *State (Delhi Administration)*, AIR 1985 SC 1692 : 1985 Supp SCC 410 : 1985 CrLJ 1865.

[8317] ● ***Conduct of Station House Officer in creating false record.***—In a case a victim who was severely injured while being in police custody made a dying declaration before a Magistrate to whom he was brought by the police for a remand order. The dying declaration implicated the station House Officer as instrumental to the beating that latter resulted in his death. To evade his involvement the station House Officer made two false records in his diary- namely that he had been absent in the police station the time when the injury was inflicted upon the victim, and secondly, the victim was involved in a dacoity. This act of creating false records translated as a conduct which indicated the involvement of the station House Officer in the crime. *State of Uttar Pradesh* v. *Ram Sagar Yadav*, AIR 1985 SC 416 : (1985) 1 SCC 552 : 1985 SCC (Cri) 127 : (1985) 1 Crimes 344 : 1985 Cr App R (SC) 68 : 1985 All Cr C 79.

[8318] ● ***Conduct of accused persons to put end to deceased's life.***—The evidence of the witnesses clearly indicates that the accused persons appeared to be indifferent even when Sudha had been aflame. If the mother-in-law was really interested in a child being born to Sudha — an event likely to happen within a few days thereafter — she would have been the most disturbed person at the sight of fire on the body of Sudha. Similarly, Laxman must have been terribly upset and would not have been leaving any stone unturned to bring safety to Sudha. The evidence of the prosecution witnesses is indicative of the position that there was no sense of grief or anxiety in their conduct and, therefore, the neighbours who gathered had to take the lead in the matter and provided relief to her. Thus Sudha died not as an outcome of an accidental fire but on account of a designed move on the part of the members of the family of the accused person to put an end to her life. *State (Delhi Administration)* v. *Laxman Kumar and Indian Federation of Women Lawyers* v. *Shakuntala*, AIR 1986 SC 250 : (1985) 4 SCC 476 : 1986 SCC (Cri) 2 (27, 28) : 1986 CrLJ 155 : 1985 CrLR (SC) 501 : (1985) 2 Crimes 758.

[8319] ● ***Conduct of accused remaining indifferent when deceased aflame.***—It is significant that Subhash had made a statement as reiterated by the prosecution witnesses that he had nothing to do with what happened to deceased, and on that ground had declined to enter into the taxi when Sudha was being removed to the Hospital. Even such statement has been reported earlier. Mr. Garg appearing for the appellant contended that in view of the fact that Subhash stood and waited exhibiting a conduct of indifference when positive action for help to Sudha was warranted, he must be imputed with sufficient motive and be ranked at par with the accused persons. We are however prepared to give the benefit of doubt treating his case to be on the border line. *State (Delhi Administration)* v. *Laxman Kumar and Indian Federation of Women Lawyers* v. *Shakuntala*, AIR 1986 SC 250 : (1985) 4 SCC 476 : 1986 SCC (Cri) 2(29) : 1986 CrLJ 155 : 1985 CrLR (SC) 501 : (1985) 2 Crimes 758.

[8320] ● ***Unnatural conduct of accused after commission of murder.***—The evidence of PW-2 is natural and truthful and amply corroborated by the evidence of the neighbours who had seen the accused coming out to the verandah, the accused washing his hands and putting on a shirt and going over to the house of the Corporation Councillor for seeking his advice.

If someone else who had been the assailant the reaction and the conduct of the accused would have been entirely different. He would have called out the neighbours for help and he would not have washed himself or put on his dress and walked composedly to the house of the Corporation Councillor. *State of Kerala* v. *Bahuleyan*, AIR 1987 SC 482 : (1986) 4 SCC 124 : 1986 SCC (Cri) 361 (365) : 1986 CrLJ 1579 : 1986 CrLR (SC) 473 : (1986) 3 Crimes 364.

[8321] ● ***Conduct of accused in putting out flames.***—It is also urged that the appellant would not have put out the flames if he had already set fire to his wife. This argument overlooks the fact that after the arrival of PW-3 on the scene, the appellant could not have remained a passive spectator, to the plight of his wife. *Surinder Kumar* v. *State (Delhi Administration)*, AIR 1987 SC 652 : (1987) 1 SCC 467 : 1987 SCC (Cri) 181 (183) : 1987 CrLJ 537 : 1987 CrLR (SC) 567 : 1987 (1) Crimes 250.

[8322] ● ***Conduct of accused falsely telling villagers including her brother-in-law that deceased gone away from village.***—In a murder case where the deceased was murdered in his bedroom by a blow with an axe on the neck while he was asleep, as a result of which, the head was decapitated from the body, the conduct of the accused, wife of deceased, in putting the villagers including her brother-in-law or a false track by telling them that deceased had gone away from the village and had not returned was held clearly admissible under Section 8 of the Evidence Act. *Basanti* v. *State of Himachal Pradesh*, AIR 1987 SC 1572 : (1987) 3 SCC 227 : 1987 CrLJ 1869 : 1987 CrLR (SC) 302 : JT 1987 (2) SC 281.

[8323] ● ***Conduct of respondent No. 1 in coating article of pure gold to make it appear as if it was of silver.***—The conduct of respondent 1 in coating the article of pure gold to make it appear as if it was of silver was itself a conduct which could have provided the basis for entertaining a reasonable belief that it was smuggled gold inasmuch as gold of this purity is manufactured only in foreign countries which have sophisticated equipment. *State of Gujarat* v. *Mohanlal Jitamlji Porward*, AIR 1987 SC 1321 : (1987) 2 SCC 364 : 1987 SCC (Cri) 364 (370) : 1987 CrLJ 1061 : 1987 CrLR (SC) 235 : JT 1987 (2) SC 783 : (1987) 2 SCR 677 : (1987) 2 Crimes 1.

[8324] ● ***Conduct of accused putting villagers including her brother in law on false track.***—There is evidence that Smt. Basanti put the villagers including her brother-in-law Maloo, PW-27, on a false track by telling them that deceased Prabhu Ram had gone away from the village and had not returned. That conduct of her was clearly admissible under Section 8, Evidence Act as a part of *res gestae* as an evidence of conduct immediately after the occurrence. *Basanti* v. *State of Himachal Pradesh*, AIR 1987 SC 1572 : 1987 SCC (Cri) 473 (476).

[8325] ● ***Post crime conduct of accused.***—The post crime conduct of the accused cannot also be lost sight of. The plea *alibi* has not been pursued. It has been proved that the accused was not available in the town after the occurrence till 24 November, 1977. It is on record that the accused could not be traced and proceedings under Ss. 82/83, CrPC were initiated. The warrant of arrest ssued against the accused returned unserved. Thereafter proclamation was made and his property was attached. That was on 23rd November, 1977. He appeared on the next day in the Police Station Kotwali. *State of Uttar Pradesh* v. *Anil Singh*, AIR 1988 SC 1998 (2004) : 1988 SCC (Cri) 48 : 1989 CrLJ 88 : 1989 CrLR (SC) 49 : JT 1988 (3) SC 491 : (1988) 3 Crimes 367.

[8326] ● ***Conduct of accused after committing robbery and murder.***—It is strange that the accused-Laxmi Raj Shetty who was merely a clerk in the Bank should have gone and stayed in Hotel chola Sheraton a five star hotel, on the night in question unless it was for purposes of safety as he was carrying the huge amount of about Rs. 14 lakhs in the suitcase and the skybag. There is evidence to show that the accused filled up the application form for reservation of the first class ticket Ex P-37 and signed the same as "K.L.R. Shetty" giving the name and address as Shivaram Shetty, Kodial Bail Bangalore, *i.e.,* of his father. The stay of the accused at Hotel Chola Sheraton at Madras on the night of the both the whole of the 21st till his departure on the 22nd morning under the assumed name of Mohanraj, the act of leaving Madras on the 22nd morning by train in a first class compartment under the name of his father Shivaram Shetty, giving a wrong address, are facts which speak of themselves. *Laxmi Raj Shetty* v. *State of Tamil Nadu*, AIR 1988 SC 1274 : (1988) 3 SCC 319 : 1988 SCC (Cri) 633 (657) : 1988 CrLJ 1783 : 1988 CrLR (SC) 305 : JT 1988 (2) SC 180 : (1988) 2 Crimes 107.

[8327] ● ***Subsequent conduct of accused 3 in surrendering at Police Station.***—As regards the subsequent conduct of A-3 in surrendering at the Police Station, it cannot warrant a conclusion that there was a prior meeting of minds between A-3 on the one hand and A-1 and A-2 on the other and it was on account of a consensus reached between them that the victims had been attacked at the Bazar street and thereafter all the three of them went together to the Police Station to surrender themselves. It may well be that A-3 may have thought that if he did not go to the Police Station when A-1 and A-2 were themselves going, he would be incurring their displeasure and also inviting the suspicion of the Police authorities about his complicity in the offences. In such circumstances, A-3 cannot be held constructively liable for the acts of A-1 and A-2". *Rangaswami* v. *State of Tamil Nadu*, AIR 1989 SC 1137 : 1989 SCC (Cri) 617 (620, 621) : 1989 CrLJ 875 : 1989 CrLR (SC) 331 : JT 1989 (1) SC 508 : (1989) 1 Crimes 692.

[8328] ● ***Unusual or unnatural conduct of accused previous or subsequent to occurrence.***—"If the conduct of the accused in relation to the crime comes into question, the previous and subsequent conduct are also relevant facts. Therefore, the absence of ordinary course of conduct of the accused and human probabilities of the case also would be relevant." *Mulakh Raj* v. *Satish Kumar*, AIR 1992 SC 1175 : (1992) 3 SCC 43 : 1992 SCC (Cri) 482 (486) : 1992 CrLJ 1529 : JT 1992 (2) SC 554.

[8329] ● ***Conduct of absconding of accused till night.***—The circumstances regarding the presence of the respondent in the house of PW-26 and the act of his sending PW-17, PW-26 and PW-27 to the market for making purchases have been sought to be proved by the testimony of PW-17, PW-26 and PW-27. PW-26, has consistently deposed that the respondent was living in her house and on January 12, 1979, he gave Rs. 30 to her and asked her to purchase clothes for the children to be worn on the festival of "Sankranthi". She further deposed that she left the house alongwith her daughter PW-27. PW-17, has deposed that he went to the market to buy "Heralikayi" at the asking of the respondent. The statement of these three witnesses have been relied upon by the Trial Court in proving the circumstance that the respondent was alone in the house with his wife and two children. The Trial Court further relied upon the evidence of these witnesses to prove the circumstance that the respondent manipulated to send the three witnesses out of the house on the pretext of buying clothes and "Heralikayi" from the market. All the above circumstances would prove that the respondent alone had killed his wife and the prosecution brought home the offence against the respondent. *State of Karnataka* v. *Lakshminaiah*, AIR 1993 SC 100 : 1992 Supp (2) SCC 420 : 1992 SCC (Cri) 755 (757, 759) : 1992 CrLJ 3997 : JT 1992 (4) SC 326 : (1992) 2 UJ (SC) 565 : (1992) 2 Crimes 1130.

[8330] ● ***Conduct of accused while deceased burning.***—Meera was found on fire at about 2.30 or 2.45 a.m. while she was burning the three accused who alone were inside came out of the room and stood in the verandah chit chatting unconcerned about her plight. None of them tried to help Meera. The accused were totally indifferent to what was happening to Meera. *State of Uttar Pradesh* v. *Ashok Kumar Srivastava*, AIR 1992 SC 840 : (1992) 2 SCC 86 : 1992 SCC (Cri) 241 (250) : 1992 CrLJ 1104 : 1992 CrLR (SC) 144 : 1992 (1) Crime 576.

[8331] ● ***Conduct of appellant in going to each tea stall.***—It is curious that the appellant claimed to have gone to each tea stall for tea just to enable them to note his movements. The normal human conduct would be to avoid anybody noticing him either before or after committing the offence. *Varkey Joseph* v. *State of Kerala*, AIR 1993 SC 1892 : 1993 Supp (3) SCC 745 : 1993 SCC (Cri) 1117 (1124) : 1993 CrLJ 2010 : JT 1993 (3) SC 163.

[8332] ● ***Conduct of accused in approaching Sarpanch.***—A sarpanch being a man of authority, it was nothing unnatural in the accused approaching him as to what he had done. *Dharma* v. *Nirmal Singh*, AIR 1996 SC 1136 (1139) : (1996) 7 SCC 471 : 1996 SCC (Cri) 444 : 1996 CrLJ 1631 : JT 1996 (4) SC 608.

[8333] ● ***Conduct of accused on receiving message of death of wife.***—"It is also an admitted position that he had news of his wife's death in the Court at 11.00 a.m. He did not disclose the name of the informer. Alongwith another two Advocates, *i.e.,* PW-5 and another, he went to the Police Station at 2.10 p.m. on September 27, 1985 to lodge the written first information report, Ex KA-3. A reading of Ex KA-3 is quite interesting. He merely mentions that while he was in Court at 11.00 am, he received the message that his wife had died and he went to the house and after seeing her dead body he went to the Police Station and lodged his report. There is no explanation as to where he was moving or what he was doing from 11.00 a.m. to 2.10 p.m. and why he had lodged the report at 2.10 p.m. when he had received the message of the death of his wife at 11.00 a.m." *State of Uttar Pradesh* v. *Ramesh Prasad Misra*, AIR 1996 SC 2766 (2768, 2769) : (1996) 10 SCC 360 : 1996 SCC (Cri) 1278 : 1996 CrLR 4002.

[8334] ● ***Conduct of husband of delaying in lodging FIR.***—After the marriage the deceased was staying with her husband and had spent hardly five months and was having into 6 months pregnancy. There was no suggestion even of her being of loose character. If the stranger had really come and stayed in the house and committed murder by strangulation, would he have burnt the dead body so as to create evidence to alert the neighbour to come and catch him? It would be abhorrent to the common sense to believe it. Yet another circumstances to disbelieve this theory is that having committed the murder at mid-night, would he have waited till 8.00 a.m. and left the house after day break so as to secure evidence of his presence and of having committed the murder? Under these clinching impossible human conduct, the theory of stranger's coming to the house staying with the deceased during the intervening night of 27 September 1985 and of committing her murder is a false one. *State of Uttar Pradesh* v. *Rameseh Prasad Misra*, AIR 1996 SC 2766 (2768) : (1996) 10 SCC 360 : 1996 SCC (Cri) 1278 : 1996 CrLJ 4002.

[8335] ● ***Conduct of husband of deceased.***—In the instant case it is most distressing to note that the practicing advocates PW-6 and DW-2 with a view to exculpate the first respondent from the clutches of law have without any compunction. spoken false hood and have no regard for truth. DW-2 has spoken falsely that after the first respondent got the news of the death of his wife he was often fainting and swooning which was not even spoken by the first respondent in his S. 313, statement. On his own showing, the first respondent had argued bail applications and attended other cases even after he had the news of the death of his wife. In those circumstances, the plea of fainting and occasional unconsciousness is incompatible with stone-hearted Ramesh Prasad Misra. He did not exhibit normal human conduct of an innocent man, *i.e.*, he should have been shocked to hear the news of the death of his young wife, married just five months back and an expectant mother of his child, in his absence, he should have rushed home to find out the cause for the death and search out whether crime was for gain, etc. and immediately swing into action and make the Police to investigate into the crime. On the other hand, although he had the news at 11 a.m. he went to the Police Station at 2.10 p.m. after finding no escape to further delay the reporting to the Police of the crime. This conduct is inconsistent and incompatible with normal human behaviour of an innocent man but seems to be one of the clever demeanour. The evidence of DW-2 regarding occasional faints and swooning and ultimate unconsciousness is a bunch of tissues of his unsavoury to be accepted. *State of Uttar Pradesh* v. *Ramesh Prasad Misra*, AIR 1996 SC 2766 : (1996) 10 SCC 360 : 1996 SCC (Cri) 1278 : 1996 CrLJ 4002.

[8336] ● ***Conduct of accused in giving false information about accidental death of deceased.***—"...conduct of the appellants (accused) who gave false explanation that the deceased died due to accidental burn injuries is again an important circumstance against the accused. (DW-4) was asked to go and lodge a report that Pratibha sustained accidental burn injuries. This was done only with a view to misguide the investigating agency and to take a plea that the incident was communicated to the Police at the earlier opportunity without there being any time to concoct the same. Having held the guilty of the appellants proved in the present case, we are of the opinion that the conduct of the appellants in giving false information about accidental burn injuries sustained by Pratibha is a circumstance which prosecution has rightly pressed into service and held proved by the Courts below." *Baldev Krishan* v. *State of Haryana*, AIR 1997 SC 1666 (1670, 1671) : (1997) 4 SCC 486 : (1997) SCC (Cri) 575 : 1997 CrLJ 1162 : 1997 CrLR (SC) 361 : JT 1997 (2) SC 39.

[8337] ● ***Conduct of teacher carrying dagger.***—It has rightly been contended that accused No. 2 being a teacher was not supposed to carry a dagger at night and to accompany accused No. 1 also carrying a dagger and wait in darkness for the deceased. *Krishnan* v. *State of Kerala*, AIR 1997 SC 383 (387) : (1996) 10 SCC 508 : 1996 SCC (Cri) 1375 : 1996 CrLJ 4444.

[8338] ● ***Conducting of son in searching revolver and some of valuable articles missing from house.***—The accused Manmohan Singh was found coming down from the first floor by stair case when son of deceased returned from the shop. Manmohan Singh appeared to be nervous by seeing son of the deceased and by giving false excuse about his not going to the shop he had hurriedly left the place. The son of the deceased, after reaching the first floor, discovered his mother lying dead. In our view the conduct of the son in searching the revolver and some of the valuable articles missing from the house is not at all unusual for which a doubt may be entertained against the veracity of son of the deceased. *Manmohan Singh* v. *State of Punjab*, AIR 1997 SC 1773 (1778) : 1997 SCC (Cri) 917 : 1977 CrLJ 1632 : 1997 CrLR (SC) 175 : JT 1997 (2) SC 72.

[8339] ● ***Conduct of husband in not trying to put out flames.***—If the appellant's wife died on account of an accident or by committing suicide, the appellant would have certainly attempted to put out the flames and take her to the hospital. The above answers given by the appellant show that he was totally indifferent. That conduct of the appellant is undoubtedly a circumstances to be taken into account for deciding the question whether the appellant was guilty. *C.V. Govindappa* v. *State of Karnataka*, AIR 1998 SC 792 (794-95) : (1998) 2 SCC 763 : 1998 SCC (Cri) 683 : 1998 CrLJ 1107 : 1998 CrLR (SC) 79.

[8340] ● ***Conduct of eye-witnesses in chasing accused and proceeding to Police Station.***—Mohan Lal and Prabhunarain have stated that while they were standing in front of a shop, the accused came there and snatched the wrist watch and ran away in the car in which they had come. They have further stated that they chased the accused for some time in a jeep but they did not stop the car of the accused and decided to proceed to the police station as they were afraid of the dacoits. They noted the number of the car and went straight to the police station. This conduct of the witnesses cannot be regarded as unnatural.

There is no material to show that the accused knew that they were chased. They had, therefore, no reason to suspect that the jeep would go to the Police Station and Police would be informed. They had already travelled a distance of 23 Kms. and they might have considered it safe to take a halt there. Therefore, the prosecution version cannot be said to be improbable. *Om Prakaash* v. *State of Rajasthan*, AIR 1998 SC 1220, 1221 : (1998) 3 SCC 183 : (1998 SCC (Cri) 696 : 1998 CrLJ 1636 : 1998 CrLR (SC) 164 : JT 1998 (1) SC 395.

[8341] ● ***Conduct of accused—No. 1 in Jail as under trial.***—Before the Civil Court it was pointed out that A-1 is a graduate in Engineering coming from a good family background and in the Jail also he was running Indira Gandhi National Open University and National Open School Study Centre for the past five years and that he completely dedicated towards this noble cause. By taking into consideration the age, character, antecedents and his conduct during the period of his remaining in Jail as under-trial, the learned Judge has taken a lenient view. In view of the aforesaid background of accused No. 1 and the fact that he was already undergone sentence of six-and-a-half years, we reduce the sentence to the period already undergone. We further set aside the order imposing a fine of Rs. 20,000 each for the offences punishable under S. 5 of TADA Act. If the fine has already been paid, the same be refunded. *Ghulam Nabi War* v. *State of N.C.T. of Delhi*, AIR 2000 SC 1799 (1802) : (2000) 9 SCC 13 : 2000 SCC (Cri) 1135 : 2000 CrLJ 2223 : 2000 CrLR (SC) 397 : JT 2000 (4) SC 594.

[8342] ● ***Conduct of accused not divorced from totality of circumstances.***—It is an admitted case that the appellant was in a highly inebriated stage when he approached the deceased when the demand for sparing her ornaments was made by him. When she refused to oblige, he poured kerosene on her and wanted her to lit the matchstick. When she failed to do so, he collected the matchbox and ignited one match-stick but when flames were up he suddenly and frantically poured water to save her from the tongues of flames. This conduct cannot be seen divorced from the totality of the circumstances. Very probably, he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not have alerted his senses to bring water in an effort to rescue her. We are inclined to think that all what the accused thought of was to inflict burns to her and to frighten her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. *Kalu Ram* v. *State of Rajasthan*, AIR 2000 SC 3630 (3631) : (2000) 10 SCC 324 : 2000 CrLR (SC) 18.

[8343] ● ***Conduct of witness.***—"If the witnesses had torches in their hands and they were running towards the well on the village path or through the fields, the natural impulse would be to flash the torches so as to make the path visible and also to attempt to have a view of the place of the incident wherefrom the cries had emanated. If the torches were lighted, the assailants would not keep on standing but would rather take to their heels in which case they would not have been identified. The High Court is right in observing that the case appears to be one of blind murder and false implication of the accused persons who are three real brothers so as to avenge the enmity generated by the land dispute." *Surendra Pratap Chauhan* v. *Ram Naik*, AIR 2001 SC 164 (167, 168) : (2000) 10 SCC 226 : 2001 CrLJ 98.

[8344] ● ***Conduct of appellant suspicious during relevant time.***—The conduct of the first appellant also shows that this is a case of murder. PW-8 deposed that on the date of incident at about 3.30 pm the appellant came to him and told that his wife had sustained burn injuries. When PW-8 asked him how she sustained the burn injuries the first appellant told him that she had died also. PW-8 is related to the deceased Narayanibai as she was the sister of the mother-in-law of PW-8. PW-8 went to the house of the first appellant and gave him Rs. 200 to purchase material for the funeral of the deceased. He advised the first appellant to give a statement before the Police before performance of the funeral. It is pertinent to note that the appellant did not tell PW-8 that his wife had committed suicide. His conduct during the relevant time is totally suspicious. *Jawahar Lal* v. *State of Madhya Pradesh*, AIR 2001 SC 2209, 2210 : (2001) 5 SCC 300 : 2001 SCC (Cri) 887 : 2001 CrLJ 2923 : 2001 CrLR (SC) 592.

[8345] ● ***Conduct of accused in going to house of prosecution witness.***—The conduct of the accused in going to the house of prosecution and giving false news about the commission of offence by some other person further aggravates the guilt pointing finger at the accused. *State of Rajasthan* v. *Kheraj Ram*, (2003) 8 SCC 224 : 2003 SCC (Cri) 1979.

[8346] ● ***Conduct of accused.***—The incident in question had taken place on 6.4.1986 and the accused was arrested only on 11.4.1986, nearly four days thereafter. It is extremely difficult to believe that a person who is involved in such a serious crime like murder would still be wearing clothes which are blood-stained even four days after the murder which fact is opposed to normal human conduct. *Khalil Khan* v. *State of M.P.*, AIR 2003 SC 4670 : (2003) 11 SCC 19 : 2004 SCC (Cr) 1052 : 2003 CrLJ 5046 : (2003) 4 Crimes 293.

[8347] ● ***Conduct of Pardanashin Lady in accompanying deceased.***—In view of the fact that PW-4 has admitted that she is a *pardanashin* lady, her accompanying the deceased alone at the time of incident itself is a doubtful circumstance; more so in the background of the fact that her husband and mother-in-law were available in the house when she left the house. *Khima Vikamshi* v. *State of Gujarat*, AIR 2003 SC 1326 : (2003) 9 SCC 420 : 2003 SCC (Cri) 1825 (1827) : 2003 CrLJ 2025 : (2003) 2 Crimes 296.

[8348] ● ***Conduct of accused after incident.***—It is true that the conduct of the accused persons after the incident had taken place is very unnatural and creates a strong suspicion against them but that by itself is not sufficient to convict the accused, especially when no strong motive to put an end to the life of a son/brother is made out. *State of Orissa* v. *Babaji Charan Mohanty*, AIR 2003 SC 3926 : (2003) 10 SCC 57 : 2004 SCC (Cri) 785 : 2003 CrLJ 3744 : JT 2003 (6) SC 529 : (2003) 3 Crimes 265.

[8349] ● ***Conduct of accused in not attending funeral of deceased.***—One of the circumstances relied by the trial Court is the fact that the accused persons did not attend the funeral of the deceased after their bodies were released from the hospital. From their absence at the time of the funeral, the trial Court has drawn an inference against the appellants which according to the Court indicated the guilty conscience of the appellants. The trial Court herein failed to take note of the fact that in the first information report lodged with the Police by the family of the deceased the appellants and other members of the family who have since been acquitted, were accused of murdering the deceased and her children. A case in this regard was also sought to be registered. PW-14, who is the maternal uncle of the deceased, and also a retired senior IAS Officer in his evidence stated : "My statement before the Police then was that Devinder Kaur and her two children had been murdered by the accused by setting fire to them. This was the information which was given to me that day". In such a situation when a murder charge is levelled against an accused, it is hardly possible to expect the accused to be present at such funeral. Therefore, this circumstance also cannot be taken as an incriminating circumstance or a circumstance which corroborates the other evidence led by the prosecution against the accused. *Sakatar Singh* v. *State of Haryana*, AIR 2004 SC 2570 (2578) : (2004) 2 JCC 78 : 2004 CrLJ 2076 : (2004) 3 Crimes 234.

[8350] ● ***Different people react differently.***—Different people react differently to a given situation and from the fact that the witness did not choose to fall on the body of his father or carry his dead body from where it was lying, by itself cannot be a ground to reject his evidence. His presence at the place of incident also cannot be treated as a chance presence inasmuch as he is a resident of that village though his father stayed in Deoria. Learned counsel for the appellant submitted that it is an admitted fact that this witness has stated that he is an educated person and according to this witness the complaint in question was not written down by him but by his brother-in-law which is also an unnatural conduct indicating that he might not have been present at the time of incident. We do not think that this could not also be a ground to suspect the presence of this witness at the time and place of incident. This witness in his evidence has stated that since his brother-in-law was available who was also a literate, he dictated the complaint to him which was scribed by his brother-in-law and we do not find anything unnatural in this conduct either. *Jaishree Yadav* v. *State of U.P.*, AIR 2004 SC 4443 : (2005) 9 SCC 788 : (2006) 1 SCC (Cri) 160 (170) : 2004 CrLJ 4826 : 2004 (3) Crimes 286.

[8351] ● ***Conduct of accused—Relevancy.***—The conduct of the accused person is relevant, if such conduct influences or is influenced by an fact in issue or relevant fact. The evidence of the circumstances, simpliciter, that the accused pointed out to the police-officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8, Evidence Act irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of section or not. *A.N. Venkatesh* v. *State of Karnataka*, 2005 SCC (Cri) 1938 (1944).

[8352] ● ***No evidence to show that the accused was absconding.***—The High Court furthermore commented upon the conduct of the appellant in evading arrest from 4.10.1998 to 21.10.1998. The investigating officer did not say so. He did not place any material to show that the appellant had been absconding during the said period. He furthermore did not place any material on record that the appellant could not be arrested despite attempts having been made therefor. Why despite the fact, the appellant who had been shown to be an accused in the first information report recorded by himself was not arrested is a matter which was required to be explained by the investigating officer. He admittedly visited the place of occurrence and seized certain material objects. The investigating officer did not say that he made any attempt to arrest the appellant or for that matter he had been evading the same. He also failed and/or neglected to make any statement or bring on record any material to show as to what attempts had been made by him to arrest the appellant. No evidence furthermore has been brought by the prosecution to show as to since when the appellant made himself unavailable for arrest and/or was absconding. *P. Mani* v. *State of T.N.*, AIR 2006 SC 1319 : (2006) 3 SCC 161 : (2006) 2 SCC (Cri) 36 (41) : 2006 CrLJ 1629 : 2006 (2) Crimes 9.

[8353] ● ***Victim committing suicide—Accused appellant not raising any hue and cry.***—The prosecution story was that the Accused No. 1 Guneshbhai poured kerosene oil on the body of the deceased and appellant mother-in-law lighted the match stick. The deceased received burn injuries, and died. Her dying declaration was recorded by the Executive Magistrate in which she named both the accused appellants. The defence case was that the deceased had committed suicide. The defence case to that effect was disbelieved for good reasons as because she was pregnant and she had a daughter aged 2 and 1½ years. The appellants did not raise any hue and cry which would have been their natural conduct if the deceased had committed suicide. The plea of suicide was rejected. The conviction of the appellant mother-in-law under Section 302 IPC was sustained. *Maniben* v. *State of Gujarat,* AIR 2007 SC 1932 : (2007) 10 SCC 362 : 2007 CrLJ 3187 (3190).

[8354] ● ***Wife Committed suicide—Though husband was present in house, he made no effort to save her life.***—Where there was evidence that the accused husband tortured her wife for not bringing adequate dowry, though he was present in house, when the deceased committed suicide, he did not make any effort to save her life, even did not call the doctor, the conduct of the accused was apathetic, which was an additional link in the ocular version of PWs, Section 1 Evidence Act was held attracted in the case, the conviction of the husband for offence under Section 306 IPC and Section 4 of the Dowry Prohibition Act 1961 was sustained. *Arvind Kumar* v. *State of Madhya Pradesh,* AIR 2007 SC 2674 (2006) 12 SCC 306 : 2007 CrLJ 3741 (3744).

[8355] ● ***Accused requesting medical officer to inform police in regard to circumstances in which his wife received injuries.***—The conduct of the appellant/accused in not requesting the medical officer in the hospital to inform the police in regard to the circumstances in which he and his wife had received injuries is not a circumstance which point to the guilt of the accused. *Vikramjit Singh* v. *State of Punjab,* 2007 (1) SCC (Cri) 732 : 2007 CrLJ 1000 (1005) : 2007 (1) Crimes 181 (SC).

[8356] ● ***Unnatural conduct of witness.***—PW 1 had not accompanied the deceased to the hospital and waited at the spot for about 40 minutes before he left for police station to lodge FIR. This is an unnatural conduct. In a normal course he could have either accompanied the deceased or could have, immediately gone to the police station which was not for away from the place of occurrence. *State of Uttar Pradesh* v. *Mushtaq Alam,* AIR 2007 SC 2672 : (2007) 11 SCC 215 : 2007 CrLJ 3741 (3741) : (2007) 3 Crimes 262.

[8357] ● ***Unnatural conduct of accused.***—It is against natural human conduct that the act sodomy would be committed at 8 O'clock in the morning and that too continuously for seven days. *Gauri Shankara Swamigalu* v. *State of Karnataka,* AIR 2008 SC 2349 : (2008) 14 SCC 411 : 2008 CrLJ 3042 (3045) (SC) : 2008 (2) Crimes 81 (SC).

[8358] ● ***Criminal trial—Not an enquiry into conduct of accused.***—A criminal trial is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, the piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. *Sidhartha Vashisht* v. *State, NCT of Delhi*, AIR 2010 SC 2352 : (2010) 6 SCC 1

CONDUCT OF ADVOCATE

[8359] ● ***Conduct of advocate.***—An advocate instead of arming himself with armoury of precedents, was armed with licensed revolver and was attending the Courts with licensed fire-arm. His conduct being not consistent with dignity of legal profession is to be deprecated. *U.P. Sales Tax*

Service Association v. *Taxation Bar Association*, AIR 1996 SC 98 : (1995) 5 SCC 716.

CONDUCT OF CLOSE RELATIVES OF VICTIM

[8360] ● ***Conduct of close relatives of victim.***—It is well known that the close relatives of murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant. Had the deceased been killed by some other person, the natural conduct of the witnesses, who were related to the deceased on her parent's side would have been to offer sympathy to the accused and help him in the apprehension of the real culprit rather than to falsely involve him in the murder of his wife. *State of Uttar Pradesh* v. *S. Dass*, AIR 1972 SC 677 : (1792) 3 SCC 201 : 1972 SCC (Cri) 275 : 1972 SCCr R 511 : 1972 UJ (SC) 526.

[8361] ● ***Conduct of children and wife of deceased.***—"The deceased alongwith his daughter PW-2 aged 15 years and son PW-3 aged 13 years had gone to his lands for eating Hurda in the morning. On their return when they were passing through the fields of accused-respondents, all the five respondents attacked Umrao and gave him as many as 15 injuries with blunt as well as sharp-edged weapons. PW-2 and PW-3 who witnessed the occurrence, left the deceased on the spot and went back home to inform their mother. The mother thereafter contacted some of her relations including Balapathi and the village authorities and in the process, it took her about 3/4 hours. . . . . .

The conduct of the children and the wife of the deceased was unnatural. In the first instance both the children could not have left their father alone after he had been beaten mercilessly. In any case, after knowing from her children about the occurrence, instinctively the wife should have rushed to the place of occurrence immediately. Thus, the prosecution story sounds improbable." *State of Karnataka* v. *Bahu*, AIR 1994 SC 31 (32) : 1994 CrLJ 18.

[8362] ● ***Conduct of mother.***—There was a delay of 5 days in lodging the first information report. On her own admission, PW-2 Tejinder Kaur was told by the appellant while taking away the girls on 18-3-1984 at about noon time that he was going to kill them. She, however, kept quite. She did not protest, let alone raise any hue and cry so as to prevent the appellant from taking away the daughters for killing them. She did not even disclose to anyone as to what the appellant had told her even though the appellant did not return home at night. On 19th March, she learnt at about 6.30 a.m. from her mother-in-law Ajmer Kaur, a co-conspirator with her husband that the appellant had killed the two daughters and thrown them in the canal. She still kept quite and not only did she not raise any hue or cry, she did not inform anyone including her parents and Satya Walia, PW-3, who had admittedly met her on that day about the incident. This conduct is rather unnatural for a mother.

PW-2 also admitted that she alongwith her mother-in-law had visited Gurdwara Rara Saheb on 20th March, 1984 itself and had seen the mortal remains of her child and that the appellant had also told her on returning home on 20-3-1984 that he had killed the girls, but still she did not lodge any complaint with the Police or inform anyone about it. PW-2 could give no explanation for her silence. *Balwinder Singh* v. *State of Punjab*, AIR 1996 SC 607, 609, 610 : 1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59 : 1996 CrLJ 883 : JT 1995 (8) SC 81.

[8363] ● ***Conduct of sons.***—PWs 9 and 10 are the sons of Ram Pal who are alleged to have been present at the time of the incident. But their conduct, as revealed from their evidence shows that they could not have been eye-witnesses to the incident. If they were present on spot and had seen the assault on their father Ram Pal and uncle Kanahiya, they would have accompanied them in the Police Van to the Hospital. That would have been natural conduct on their part. But curiously enough they did not accompany them to the Hospital. *Hari Chand* v. *State of Delhi*, AIR 1996 SC 1477 (1484) : (1996) 9 SCC 113 : 1996 CrLJ 1701.

[8364] ● ***Unnatural behaviour of witness.***—PW-3 though closely related to the deceased, did not inform about what he had seen to anyone at all except to PW-4, who has in his deposition belied the statement of PW-3 and stated that PW-3 had not told him as to how the deceased had died. According to PW-3, he did not raise any alarm when injuries were being caused to the deceased and though the Police Station, Sadeq is at a distance of 5 kms. from the village and he besides being relative of the deceased is also the Sarpanch of the village, he did not go to lodge any report. He admitted that he had not informed any lambardar or any other person in the village about the incident. During the cross-examination, he also admitted that he had not even informed the parents of Pritam Kaur about her death and did not even disclose what he had seen at the house of Kartar Singh, to his wife. Not only did he keep quite about it on the date of the occurrence but on his own showing, even on the next day, he did not convey the information to anyone till his statement came to be recorded during the inquest proceedings at the cremation ground. The Trial Court rightly commented upon the unnatural behaviour of the witness and held that he had no occasion to witness the incident and his evidence was not at all reliable. *Mukhtiar Singh* v. *State of Punjab*, AIR 1996 SC 836 (838) : (1996) 7 SCC 155 : 1996 SCC (Cri) 239.

[8365] ● ***Conduct of brother of wife of deceased.***—Even regarding the fact that PW-1 did not make a hue and cry at the scene, it cannot be counted against the credibility of his testimony, for, he would have been dumbfounded at the sight of the ghastly attack made on his brother-in-law. That apart, he would have instinctively avoided going forward at that stage. *K. Naga Subba Reddy* v. *Public Prosecutor of A.P. Court*, AIR 2000 SC 3480 (3483-84) : (2000) 9 SCC 21 : 2000 SCC (Cri) 1140 : 2000 CrLJ 3452.

[8366] ● ***Conduct of son.***—It is contended that the conduct of Hardip Singh was not natural. He took to his heels when his father was being assaulted and he made no efforts to protect his father which was natural for a son. But then Hardip Singh has stated that accused also wanted to assault him and to protect himself, he ran from the spot. Statement of Hardip Singh is cogent and reliable. *Narinder Singh* v. *State of Punjab*, AIR 2000 SC 2212, 2118 : (2000) 4 SCC 603 : 2000 SCC (Cri) 855 : 2000 CrLJ 3462 : JT 2000 (4) SC 306.

[8367] ● ***Family members became dumb founded on account of murder and threats.***—Where an account of the threat extended by the accused after they had killed one person of the family and threatened others, the witnesses family members, became dumb founded and could not shout, the conduct of the witnesses would not be unnatural and they would not be called untrustworthy. *Shivappa* v. *State of Karnataka,* AIR 2008 SC 1860 : (2008) 11 SCC 337 : 2008 CrLJ 2992 (2997).

[8368] ● ***Son of deceased though present on spot made no effort to save his father.***—Where the presence of the son of the deceased on the spot is proved, his evidence/presence would not be doubted, merely because made no attempt whatsoever to save his father from being further assaulted. *Mahmood* v. *State of Uttar Pradesh,* AIR 2008 SC 515 : (2007) 14 SCC 16 : 2008 CrLJ 696 (701) (SC).

CONDUCT OF CONTEMNOR

[8369] ● ***Conduct of contemnor.***—The conduct and writings of the contemner constitute serious interference with the administration of justice, since his sole object in giving publicity to the defamatory allegation against the High Court Judges is to deter them from deciding cases against him or against those in whom he is apparently interested. The apology tendered by him is an eye-wash, a make belief, and cannot be accepted. In fact, there is no apology to accept because he has resiled from it. He is penitent for having apologised to the High Court Judges whose character he has assailed without the semblance of sincerity of purpose or purity of means. He is not penitent for his conduct. For the reasons above-said the contemnor is convicted under Section 12 of the Contempt of Courts Act, 1971. *National Textile Workers Union* v. *P.R. Ramakrishnan*, AIR 1983 SC 759 : (1983) 3 SCC 105 : 1983 SCC (Cri) 572 (576, 577) : 1983 CrLJ 1102 : 1983 CrLR (SC) 314 : (1983) 3 SCR 12 : (1983) 1 Crimes 1161.

CONDUCT OF INNOCENT PERSON OR THIRD PERSON

[8370] ● ***Conduct of innocent person called by police and interrogated.***—Any person even if innocent and not connected in any way with a gruesome crime which had recently occurred and was the talk of the town, if called by Police and interrogated as a suspect, would be scared and be apprehensive of the likelihood of his being implicated in the crime. Placed in such situation if a villager, unaware of the law, happens to ask a person, who he feels knows things better than what he himself does, as to what would be the period of incarceration to be suffered by any person for such an offence, the impulse for enquiry may be the outcome of a feeling of nervousness or mere inquisitiveness; such an enquiry is not necessarily suggestive of the working of a criminal mind. *Subhash Chand* v. *State of Rajasthan*, (2002) 1 SCC 702 : 2001 (7) Supreme 585 : (2001) 4 Crimes 315.

[8371] ● ***Conduct of third person.***—The conduct of a third person in any event is wholly irrelevant unless the same has a direct nexus in proving the crime. *Vikramjit Singh* v. *State of Punjab*, (2006) 12 SCC 306 : 2007 (1) SCC (Cri) 732 : 2007 CrLJ 1000 (1005) : 2007 (1) Crimes 181.

CONDUCT OF JUDGE

[8372] ● ***Conduct of judge.***—Members of Bar Association met and resolved that the Chief was acting in a most partisan manner under the influence of the Allahabad Bar. The text of the resolution was this—"The Action Committee is of the opinion that the Chief Justice is acting in the discharge of administrative power under cl. 14 of the U.P. High Courts (Amalgamation) Order, 1948 in a most partisan manner under the influence of Allahabad Bar quite unbecoming of the office which he holds." The High Court discharged its notice observing "It is a matter of regret that contemners who are prominent members of the Avadh Bar, should have themselves embarked on the path of vilifying the Chief Justice of this Court and that we do not want to be over-sensitive in the matter, keeping in surrounding circumstances in which the contumacious act was .... by them and also keeping in view the fact that it was a single act of Chief Justice for which the attack was made, we do not propose to punish contemnors for the contumacious conduct for which we have adjudged guilty, though we express our strong disapproval of that conduct and hope that the indiscretion will not be repeated."

The members of the Bar did not act with dignity in regard to the resolution. *Hargovind Dayal Srivastav* v. *G.N. Verma*, AIR 1977 SC 1334 : (1977) 1 SCC 744 : 1977 SCC (Cri) 175 : 1977 CrLJ 1003 : (1977) 2 SCR 601.

[8373-74] ● ***Resolution passed by Bar Council against conduct of Judge.***—The question cropped up in a case whether any Bar Council or Bar Association has the right to pass resolution against the conduct of a Judge perceived to have committed misbehaviour and if so, what is its effect on independence of judiciary. The Apex Court held that independent judiciary is must essential when liberty of citizen is in danger. It then becomes the duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived) undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own.

The Judge cannot retain his earlier passive judicial rule when he administers the law under the Constitution to give effect to the constitutional ideals. The extraordinary complexity of modern litigation requires him not merely to declare the rights of citizens but also to mould the relief warranted under given facts and circumstances and often command the executive and other agencies to enforce and given effect to the order, writ or direction or prohibit them to do unconstitutional acts. In this ongoing complex of adjudicator process, the role of the Judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and reality. Therefore, the Judge is required to take judicial notice of the social and economic ramification, consistent with the theory of law. Thereby, the society demands active judicial roles which formerly were considered exceptional but now a routine The Judge must act independently, if he is to perform the functions as expected of him and he must feel secure that such action of him will not lead to his own downfall. The independence is not assured for the Judge but to the Judged. Independence to the Judge, therefore, would be both essential and proper. Considered Judgment of the Court would guarantee the Constitutional liberties which would thrive only in an atmosphere of judicial independence. Every endeavour should be made to preserve independent judiciary as a citadel of public justice and public security to fulfil the Constitutional role assigned to the Judges.

Articles 124(4) and 121 would thus put the nail squarely on the projections, prosecutions or attempts by any other forum or group of individuals or Associations, statutory otherwise, either to investigate or enquire into or discuss the conduct of a Judge or the performance of his duties and on/off Court behaviour except as per the procedure provided under Articles 124(4) and (5) of the constitution, and Act and the Rules. Thereby, equally no other agency or authority like the CBI, Ministry of Finance, the Reserve Bank of India [Respondents Nos. 8 to 10] as sought for by the petitioner, would investigate into the conduct or acts or actions of a Judge. No *mandamus* or direction would be issued to the Speaker of Lok Sabha or Chairman of Rajya Sabha to initiate action for impeachment.

When its allegations are against a Judge of High Court, the Bar Association could take up the matter with the Chief Justice of the High Court and await his response for the action taken thereunder for a reasonable period. In case the allegations are against Chief Justice of a High Court, the Bar should bring them directly to the notice of the Chief Justice of India. On receipt of such complaint, the Chief Justice of India would in the same way act as stated above *qua* complaint against a Judge of the High Court, and the Bar would await for a reasonable period the response of the Chief Justice of India.

It would thus be seen that yawning gap between proved misbehaviour and bad conduct inconsistent with the high office on the part of a operating Judge/Chief Justice of a High Court could be disciplined regulation through in-house procedure. This in-house procedure would be the constitutional gap and would yield salutary effect. *C. Ravichandaran Iyer* v. *Justice A.M. Bhattacharjee*, (1995) 5 SCC 457 : 1995 SCC (Cri) 953 : 1995(5) Scale 142(2).

[8375] ● ***Conduct of subordinate judiciary.***—We must not be understood as meaning that any conduct of a subordinate judicial officer unbecoming of him and demanding a rebuff should be simply overlooked. But there is an alternative safer and advisable course available to choose the conduct of a judicial officer, unworthy of him, having come to the notice of a Judge of the High Court hearing a matter on the judicial side, the *lis* may be disposed of by pronouncing upon the merits thereof as found by him but avoiding in the judicial pronouncement criticism, of, or observations on the "conduct" of the subordinate judicial officer who had decided the case under scrutiny. Simultaneously, but separately in-office proceedings may be drawn up inviting attention of Hon'ble Chief Justice to the facts describing the conduct of the subordinate Judge concerned by sending a confidential letter or note to the Chief Justice. It will thereafter be open to the Chief Justice to deal with the subordinate judicial officer either at his own level or through the inspecting Judge or by placing the matter before the Full Court for its consideration. The action so taken would all be on the administrative side.

The subordinate judge concerned would have an opportunity of clarifying his position or putting faith the circumstances under which he acted. He would not be condemned unheard and if the decision be adverse to him, it being on administrative side, he would have some remedy available to him under the law. He would not rendered remedies. *In the matter of "K" a judicial officer*, AIR 2001 SC 972 : (2001) 3 SCC 54 : 2001 CrLJ 1157 : JT 2001 (2) SC 397.

CONDUCT OF POLICE

[8376] ● ***Conduct of police.***—Strongly enough, neither of the constables, going into the house after hearing someone crying in the house of deceased asked the daughter-in-law of the deceased as to who had killed the deceased nor did she tell them as to who were the assailants. It is impossible to understand this conduct on the part of constables. They were policemen and when they were told by the daughter-in-law that the deceased had been killed, their immediate query would have been : how was he killed and who killed him? But according to constables they did not inquire about the names of the assailants at that time, nor did they make any inquiry from the relatives of the deceased. It is only after one of the constables came back to the house of the deceased, after leaving the other constable to guard the dead body, that he asked the daughter-in-law and was informed that the appellants had killed the deceased. This is indeed strange and unnatural conduct on the part of constables and it is difficult to accept the testimony. *Caetano Piedade Fernandes* v. *Union Territory of Goa, Daman and Dieu, Panaji, Goa*, AIR 1977 SC 135 : (1977) 1 SCC 707 : 1977 SCC (Cri) 154 (160) : 1977 CrLJ 167 : 1977 CrLR (SC) 393.

[8377] ● ***Conduct of sub-Inspector to follow Jeep.***—On seeing the witnesses, the accused ran away. PW-7 brought his jeep and he alongwith PWs-1, 6 and 10 and others took the injured in the jeep and proceeded towards the primary health unit. On the way they had to pass in front of the Police Station. There they found PW-14, Narayan Devisingh, PSI standing. PW-14 stopped the jeep and saw the injured person who was unconscious. He also accompanied them in the jeep to PW-2, Dr. Sham, Assistant Medical Officer who after examination opined that the condition of the injured was serious and that at that time he could give only some life saving medicines and he advised to take the injured to the Hospital, PW-2 also accompanied them. If on the way PW-14 the Sub-inspector also followed them there is nothing unusual. *Nagappa Fakirappa Goudar* v. *State of Karnataka*, AIR 1994 SC 953 : 1994 SCC (Cri) 621 : 1994 CrLJ 1200 : 1994 CrLR (SC) 100 : JT 1994 (1) SC 99 : (1994) 1 Crimes 577.

[8378] ● ***Custodial death—Police applicable only can explain circumstances.***—"Rarely in cases of Police torture or custodial death, direct ocular evidence of the complicity of the Police personnel would be available, when it observed that "direct" evidence about the complicity of these respondents was not available. Generally speaking, it would be Police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is unknown that the Police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other Police witnesses feigned ignorance about the whole matter." *State of Madhya Pradesh* v. *Shyamsunder Trivedi*, (1995) 4 SCC 262 : 1995 SCC (Cri) 715 (724, 725).

CONDUCT OF RAPE VICTIM

[8379] ● ***Statement of prosecutrix after occurrence of rape admissible.***—Statement of prosecutrix soon after occurrence of rape is admissible and relevant as evidence of conduct under Section 8 and also as corroboration of evidence of prosecutrix in Court under Section 157. *Chander Kala* v. *Ram Kishore*, AIR 1985 SC 1268 : (1985) 4 SCC 212 : 1985 CrLJ 1490 (SC) : (1985) 2 Crime 642.

[8380] ● ***Character or reputation of victim of rape not relevant for conviction.***—"It has been urged by the learned defence counsel that the victim Suman Rani was a woman of questionable character and easy virtue with lewd and lascivious behaviour and as such her version is not worthy of acceptance. After considerable debate on the merits of the case, the argument was confined only with regard to the quantum of sentence. After meticulously examining the entire matter, this Court came to the conclusion that the proviso to S. 376(2), IPC could be invoked having regard to the peculiar facts and circumstances of the case coupled with the conduct of the victim and the mandatory sentence provided under the penal provision is not called for. At this juncture, we would like to point out that the very confirmation of the conviction accepting the sole testimony of the victim Suman Rani rejecting the arguments of the defence Counsel is itself a clear indication that this Court was of the view that the character or reputation of the victim has no bearing or relevance either in the matter of adjudging the guilt of the accused or-imposing punishment under S. 376, IPC. We would like to state with all emphasis that such factors are wholly alien to the very scope and object of S. 376 and can never serve either as mitigating or extenuating circumstances for imposing the sub-minimum sentence with the aid of the proviso to S. 376(2) of the IPC....

We have neither characterised the victim, Suman Rani as a woman of questionable character and easy virtue nor made any reference to her character or reputation in any part of our judgment but used the word "conduct" in the laxigraphical meaning for the limited purpose of showing as to how Suman Rani had behaved or conducted herself in not telling anyone for about 5 days about the sexual assault...." *State of Haryana* v. *Prem Chand*, AIR 1990 SC 538 : (1990) 1 SCC 249 : 1990 SCC (Cri) 93 (95) : 1990 CrLJ 454 : 1990 CrLR (SC) 66 : JT 1989 (4) SC 544 : (1990) 1 Crimes 275.

[8381] ● ***Testimony of prosecutrix—Appreciation of.***—A girl, in a tradition found non-permissive society in India would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate to her teachers and others over powered by a feeling of shame and her natural inclination would be to avoid talking about to any one lest the family name and honour is brought into controversy. Therefore, her informing to her mother only on return to the parental house and no one else at the examination centre prior thereto is an accord with the natural human conduct of a female. The Courts must while evaluating evidence remain alive to the fact that in a case of rape no self respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. *State of Punjab* v. *Gurmit Singh*, AIR 1996 SC 1393 : (1996) 2 SCC 384 : 1996 CrLJ 1728.

CONDUCT OF SYMPATHISER OF ACCUSED

[8382] ● ***Conduct of sympathiser of accused.***—PW-13 did nor at all protest as to why the deceased was being taken out of taxi to a lonely place instead of being taken to the hospital for treatment of injuries. Thus by his deliberate silence he tried to assist the accused in executing their nefarious plan, particularly being a relation of the approver, he was thus if not an accomplice, at least a sympathizer of the accused. Therefore, we are not to place any reliance on the testimony of PW-13. *Mukhtiar Kaur* v. *State of Punjab*, AIR 1980 SC 1871 : (1980) 2 SCC 369 : 1980 SCC (Cri) 456 (458) : 1980 CrLJ 1420 : 1980 UJ (SC) 640 : 1980 Cr App R (SC) 261.

CONDUCT OF UNDERTRIAL

[8383] ● ***Conduct of undertrial.***—Before the trial Court it was pointed out that A-1 is a graduate in Engineering coming from a good family background and in the Jail also he was running Indira Gandhi National Open University and National Open School Study Centre for the past five years and that he completely dedicated towards this noble cause. By taking into consideration the age, character, antecedents and his conduct during the period of his remaining in Jail as under-trial, the learned Judge has taken a lenient view. In view of the aforesaid background of accused No. 1 and the fact that he was already undergone sentence of six-and-a-half years, we reduce the sentence to the period already undergone. We further set aside the order imposing a fine of Rs. 20,000 each for the offences punishable under S. 5 of TADA Act. If the fine has already been paid, the same be refunded. *Ghulam Nabi War* v. *State of N.C.T. of Delhi*, AIR 2000 SC 1799 (1802) : (2000) 9 SCC 13 : 2000 SCC (Cri) 1135 : 2000 CrLJ 2223 : 2000 CrLR (SC) 397 : JT 2000 (4) SC 594.

CONDUCT OF VICTIM

[8384] ● ***Conduct of victim.***—Although the deceased was conscious at the place of occurrence at the time when he was put on the lorry and also at the time when he was brought to the nursing home and was in a position to speak he did not disclose the names of the assistants to anybody. This conduct of the deceased can be explained only on two hypothesis, namely, either the deceased was not conscious at all and was not in a position to talk to anybody or that even though he was conscious he did not disclose the occurrence to anybody because under the stress and strain of the assault which took place immediately at a time when darkness had set in and there was little moonlight, he was not able to identify the assailants. No third inference can be spelt out from the conduct of the deceased in not disbelieving the name of the assailants on these three occasions. *K. Ramachandra Reddy* v. *Public Prosecutor*, AIR 1976 SC 1994 : (1976) 3 SCC 618 : 1976 SCC (Cri) 473 (480) : 1976 CrLJ 1548 : 1976 CrLR (SC) 286.

[8385] ● ***Culpability of accused not established.***—"The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not touched 18 years of age, but still she was in the age of discretion, sensible and aware of the intention of the accused—Shyam, that he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam—The appellant on her own and in that sense there was no "taking" out of the guardianship of her mother. The culpability of neither Shyam, A-1 nor that of Suresh, A-2, in these circumstances, appears to be established." *Shyam* v. *State of Maharashtra*, AIR 1995 SC 2169 : 1995 SCC (Cri) 851 (852) : 1995 CrLJ 3974.

[8386] ● ***Conduct of person attacked by dacoits.***—"...a person who was attacked by dacoits and had seen his colleagues being shot dead could not be expected to act in a cool and collected manner. He was a frightened person and had thought fit to first go to the tube-well of Raja Ram as he was having a licensed gun. Such a conduct can hardly be regarded as unnatural. Moreover, nothing was suggested to the Investigating Officer in the cross-examination that FIR was prepared later on." *State of Uttar Pradesh* v. *Bhoora*, AIR 1998 SC 254 (256) : (1998) 1 SCC 128 : 1998 SCC (Cri) 265 : 1998 CrLJ 478 : 1998 CrLR (SC) 1 : JT 1997 (8) SC 737.

CONDUCT OF WITNESS

[8387] ● ***Conduct of witness.***—It has been argued that Bachan Singh and Gurmail Singh would run away and would remain present near the scene of occurrence after the assailants commenced their attack. This submission is not well-founded. Gurmail Singh is the son of Amar Singh deceased while Bachan Singh is the nephew of Mustan Singh and cousin of Mohinder Singh. Gurmail Singh and Bachan Singh would naturally be interested to know the fate of their close relatives who were being attacked by the assailants. There would be consequently nothing surprising in the act of Gurmail Singh and Bachan Singh stopping at a safe distance and from there looking behind and seeing the assault on the three deceased persons. The High Court on careful scrutiny of the evidence of Bachan Singh and Gurmail Singh found the same to be natural and probable. This Court sees no cogent ground to take a different view. *Roop Singh* v. *State of Punjab*, AIR 1973 SC 2617 : (1974) 3 SCC 307 : 1973 SCC (Cri) 933 (938) : 1973 CrLJ 1778 : 1973 CrLR (SC) 615.

[8388] ● ***Conduct of father of deceased.***—The conduct of Mohan Singh, has been crticised before this Court and it is argued that there was something unnatural about it. Mohan Singh, even though he is father of Surat Singh, it is pointed out, did not go with Surat Singh from Jandiala Health Centre to Jullunder Hospital. We find noting unnatural in above conduct of Mohan Singh because Mohan Singh after taking Surat Singh to the Health Centre must have been anxious to make a report about this occurrence at the Police Station. Reference was made by the trial Court to the statement of Mohan Singh that he had changed his clothes which had got bloodstained before he went with Surat Singh to the Health Centre and thereafter to the Police Station. In this respect we find that different individuals often react differently in a grave situation. It may be that some others in the situation in which Mohan Singh was might not have changed their clothes before going to the Health Centre and the Police Station. The fact that Mohan Singh acted differently and changed his clothes would not go to show that his account of the actual of occurrence is not trustworthy. *Bishan Singh* v. *State of Punjab*, AIR 1973 SC 2443 : (1974) 3 SCC 288 : 1973 SCC (Cri) 914 (920) : 1973 CrLJ 1778 : 1973 CrLR (SC) 578.

[8389] ● ***Conduct of Police Officer.***—Where there was no acceptable evidence to fasten the appellant with the crime of murder and the mention of his name in the FIR must be ascribed to the bitter enmity and rivalry between the informant and the appellant, and in view of the unsatisfactory FIR, the conduct of the police officers present on the scene in not apprehending the appellant immediately, the only conclusion possible is that the name of the appellant was not given by anybody at the time of the occurrence and the evidence of the eye-witnesses cannot be accepted. *Sadaram* v. *State of Madhya Pradesh*, AIR 1974 SC 2294 : (1971) 3 SCC 448 : 1971 SCC (Cri) 691 : 1975 CrLJ 23.

[8390] ● ***Conduct of husband of deceased.***—It is difficult to believe that the appellant was so inflamed with passion as to demand sexual intercourse with the deceased who happened to be the wife of his cousin, and that too, not while she was alone, but in the presence of her husband. *Salveraj* v. *State of Tamil Nadu*, AIR 1976 SC 1970 : (1976) 4 SCC 343 : 1976 SCC (Cri) 620 (624) : 1976 CrLJ 1541 : 1976 CrLR (SC) 344 : 1976 UJ (SC) 737.

[8391] ● ***Conduct of husband not making attempt to save deceased.***—When Natesan, husband of the deceased entered the house he saw the appellant standing with a knife in his hand and asking the deceased to have sexual inter course with him. In any event when Natesan came into the house he would have run away and not continued to want that the deceased should submit to sexual intercourse with him. On seeing this explosive situation that the appellant is demanding sexual intercourse and was threatening her with a knife in his hand. And yet he did not step out of the house and shout for help he did not even try to go to the rescue of the deceased. He silently and shamefacedly watches his wife being murdered by the appellant. He was not alone in the house. Manisekaran, had come in the meantime, with the result that there were two persons on his side and yet, both of them quietly watched the proceedings without making any attempt to save the deceased. This conduct is highly unnatural. *Salveraj* v. *State of Tamil Nadu*, AIR 1976 SC 1970 : (1976) 4 SCC 343 : 1976 SCC (Cri) 620 (622, 623) : 1976 CrLJ 1541 : 1976 CrLR (SC) 344 : 1976 UJ (SC) 737.

[8392] ● ***Conduct of wife.***—According to wife of deceased, Phoola Bai, original accused 8 and 9 came to her house around 10 pm to 11 pm and told her husband, Dewan Singh that he was required by one Prabhu. On this intimation, Dewan Singh immediately started in company of accused 8 and 9 for going to the house of Prabhu. Phoola Bai then said that she followed her husband. This strike as utterly unnatural. If Dewan Singh had the slightest suspicion of any foul play he would not have readily agreed to accompany the original accused 8 and 9. If Dewan Singh going with accused 8 and 9 would raise little or no suspicion, it is difficult to believe that for no rhyme or reason Phola Bai would follow Dewan Singh. She does not say that she had any suspicion. Evidence of Phoola Bai that she followed. Dewan Singh, appears to be utterly unnatural and a serious doubt arising out of this unnatural conduct instead of being dispelled gets the reinforced and strengthened by the contents of FIR. *Babbar* v. *State of Madhya Pradesh*, AIR 1979 SC 1042 : (1979) 4 SCC 74 : 1979 SCC (Cri) 743 (744) : 1979 CrLJ 908 : 1979 CrLR (SC) 15.

[8393] ● ***Conduct of wife of deceased—Eyewitness.***—Ram Singh (PW-10) is the uncle of deceased and Gandharv (PW-11) is the cousin of deceased Phoola Bai went from the scene of occurrence to the house of Ram Singh, which would mean that the first person she approached after she had witnessed the brutality committed on her husband was no stranger to her but a near relation. She was asked by Ram Singh as to who was killed; to which she replied that the dead body of her husband was lying near Modi's house. She does not say who were the assailants of Diwan Singh. Ram Singh immediately sent for Gandharv Singh (PW-11) and in his presence Phoola Bai spoke that Diwan Singh was killed.

The names of the assailants were not given. If Ram Singh and Gandharv Singh, the two near relations of deceased Diwan Singh, were approached within a couple of minutes after the occurrence and if Phoola Bai was a witness to the occurrence as she claims to be, the most natural conduct on her part would be to give the names of the assailants to Ram Singh and Gandharv. The evidence of Ram Singh and Gandharv Singh would show that even though Ram Singh asked the specific question as to who killed Diwan Singh, the only information that Phoola Bai gave was that the dead body of her husband was lying near the house of Modi. Could this be the conduct of the eye-witness, particularly of the wife, who claims to be a witness to the brutal assault on her husband and who claims to have identified the assailants? This lacuna renders the evidence of Phoola Bai, Lachhman and Kanhaiya utterly unworthy of belief. *Babboo* v. *State of Madhya Pradesh*, AIR 1979 SC 1042 : (1979) 4 SCC 74 : 1979 SCC (Cri) 743 : 1979 CrLJ 1908 : 1979 CrLR (SC) 15 : 1979 Cr App R (SC) 134.

[8394] ● ***Conduct of accused.***—The cumulative effect of the circumstances clearly show that the deceased was actually put on the ground and then run over by the cart driven by Jaspal Singh. At the same time the conduct of Jaspal Singh in meeting the witness in the Hospital and taking steps to bear the expenses of the treatment of the deceased clearly shows that they had no clear intention to cause the murder of the deceased. *Jaspal Singh* v. *State of Punjab*, AIR 1979 SC 1708 : (1980) 1 SCC 487 : 1979 SCC (Cri) 920 (923) : 1979 CrLJ 1386 : 1979 CrLR (SC) 487 : 1979 Cr App R (SC) 345 : 1979 UJ (SC) 718.

[8395] ● ***Conduct of husband.***—If the appellant was present in the house at the time when Geeta was assaulted, it becomes necessary to examine his conduct without shifting the burden of proof on him.

If the mistress of the house was killed by robbers we should have thought that, the appellant would raise a hue and cry at least after the robbers had made good their escape but he did nothing of the kind and a little while later he quietly walked to the neighbour and narrated out the story that a few "Badmashes" introduced into the house and killed Geeta and her son. Not only does the conduct of the appellant corroborate the evidence of Sunil, but the very pattern of the crime corroborates that it is the appellant who committed it. *Suresh* v. *State of Uttar Pradesh*, AIR 1981 SC 1122 : (1981) 2 SCC 569 : 1981 SCC (Cri) 559 (562) : 1981 CrLJ 1746 : 1981 CrLR (SC) 378 : (1981) 3 SCR 259.

[8396] ● ***Conduct of school teacher.***—It is incredible that if Shrinarayan Sharma and the ladies saw the appellant in the house, they would not exchange a single word with him. The dead body was lying close by in a bath-room and any normal human being would have instinctively inquired of the appellant as to how it was that the dead body was lying in his house. None of the four persons who entered the appellant's house made any attempt whatsoever to elicit any information from him as to how Sunita came to be lying dead in the bath-room. It is alleged that everyone saw the appellant sleeping on a cot in the courtyard, but it is strange that none talked to him at all. One can understand the ladies not having the courage to talk to the appellant. But it is difficult to believe that Shrinarayan Sharma, a 45 year old school teacher could also not dare so much, as to ask, the appellant, without making any accusation against him as to how the dead body of the girl came to be in the bathroom. *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*, AIR 1981 SC 765 : (1981) 2 SCC 35 : 1981 SCC (Cri) 315 : 1981 CrLJ 325 : 1981 CrLR (SC) 616 : (1981) 2 SCR 384.

[8397] ● ***Past conduct of person be taken into account in making detention order.***—The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed largely from prior events showing tendencies or inclinations of a person that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the national economy. *Hemlata Kantilal Shah* v. *State of Maharashtra*, AIR 1982 SC 8 : (1981) 4 SCC 647 : (1982) SCC (Cri) 16 (24-26) : 1982 CrLJ 150. **TO THE SAME EFFECT :** (1) *Saraswathi Seshagri* v. *State of Kerala*, AIR 1982 SC 1165 : (1982) 2 SCC 310 : 1982 SCC (Cri) 423 : 1982 CrLJ 1251 : 1982 CrLR (SC) 252 : 1982 UJ (SC) 389.

[8398] ● ***Conduct of neighbours.***—PW-2 and her husband PW-6 are next door neighbours. They deposed : At mid-night they heard some noise from the house of Namdeo. They woke up and opened their door. They found accused coming out from the house of Namdeo. In cross-examination both of them admitted that they could identify the accused in the dark night from behind from a distance of 20 to 24 feet when the accused turned his face. They did not question him. They did not report to anybody in the village nor did they give this information even to the

Police when it came to the village. Although they were the next door neighbours they did not go to the house of Laxmi even when they found that the household utensils were lying scattered. It looks improbable that they would recognise the accused at the dead of night from behind during the twinkling of an eye. The conduct of these witnesses in not informing the Police what they had heard or saw at mid-night and their omission to report about it to anybody in the village are also significant. In the circumstances, it is unsafe to rely on their testimony. *Gambhir* v. *State of Maharashtra*, AIR 1982 SC 1157 : (1982) 2 SCC 351 : 1982 SCC (Cri) 431 : 1982 CrLJ 1243 : 1982 CrLR (SC) 275 : 1982 UJ (SC) 475 : 1982 Cr App R (SC) 155.

[8399] ● ***Conducted exhibited by witnesses not natural.***—The learned counsel contended that the conduct exhibited by PW-2 and PW-7 is not natural and their version does not fit it with the natural conduct of the kith and kin of the deceased. He submitted that the mother did not raise a hue and cry when she found that her son was shot at or at least when she apprehended that the assailant was about to shoot her son. Time and again this Court said that no fixed pattern of natural conduct can be laid down as different witnesses would react in different manner in the same situation vide *Rana Pratap* v. *State of Haryana,* AIR 1983 SC 680 : 1983 CrLJ 1272. *Vijay Pal Singh* v. *State of NCT of Delhi*, AIR 2001 SC 2405 : (2001) 10 SCC 45 : 2001 CrLJ 3294.

[8400] ● ***Conduct of person witnessing murder.***—Every person who witnesses a crime reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Some run away to keep themselves removed from the spot. Some others rush to PO to rescue the victim, even going to the extent of counter-attacking the assailant. Every one reacts in his own peculiar way, there being no set rule of natural reaction. Evidence of a witness cannot be discarded on the ground of his not reacting in a particular manner. *Rana Pratap* v. *State of Haryana*, AIR 1983 SC 680 : (1983) 3 SCC 327 : 1983 CrLJ 1272.

[8401] ● ***Conduct of prosecution witnesses.***—PW-1 who stated before the Court that he had seen the appellant attacking the deceased with an axe did not disclose that such an incident had taken place to anybody on that day. He further stated that he disclosed the facts relating to the occurrence to Baneshwar Pradhan and Kandunia Pradhan. PW-2, Rosani, is the wife of PW-3, Markanda, who gave information to the Police. She no doubt stated before the Court that she was present at the time of occurrence and saw the appellant attacking the deceased. She too did not disclose that such an incident had taken place to anybody in the village. Her husband according to her, returned to the village on the next day from a place called Gonasika to which he had gone earlier. She did not tell him that such an incident had taken place after his return on the next day and according to her she did not mention the fact to him out of fear. The conduct PW-1 and PW-2 in not telling anybody about the incident on the date of the incident also makes their evidence not worthy of acceptance. *Sonia Bahera* v. *State of Orissa*, AIR 1983 SC 491 : (1983) 2 SCC 327 : 1983 SCC (Cri) 444 (447) : 1983 CrLJ 829 : 1983 CrLR (SC) 262.

[8402] ● ***Conduct of friend of deceased.***—Tohid, Rajendra, Chhotey Bhaiya and the deceased were friends of each other and according to the prosecution the deceased, Ram Pratap Singh had sent Tohid to purchase bus tickets and had directed him to meet him at Chungi Naka. He had further told Tohid PW-16 that he was apprehending danger to his life from the accused persons so he would get into the bus at the Toll Barrier. The prosecution further alleged that after the occurrence took place Ram Pratap Singhs dead body was lying at the octroi barrier when Tohid arrived at the scene. Rajendra Singh PW-14 has stated that neither Tohid asked nor he told him the names of the assailants. This conduct is highly improbable and unnatural. *Awadesh* v. *State of Madhya Pradesh*, AIR 1988 SC 1158 : (1988) 2 SCC 557 : 1988 SCC (Cri) 361 (368) : 1988 CrLJ 1154 : 1988 CrLR (SC) 269.

[8403] ● ***Conduct of witnesses to serious crime.***—Witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror-stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances The Court cannot reject their evidence merely because they have behaved or reacted in an unusual manner. Every person who witnesses a murder reacts in his own way, some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help, others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. These may be some of the reactions. There may be still more. Even a man of prowess may become pusillanimous by witnessing a serious crime. *Appabhai* v. *State of Gujarat*, AIR 1988 SC 696 : 1988 SCC (Cri) 559 (564) : 1988 CrLJ 848 : 1988 CrLR (SC) 178 : JT 1988 (1) SC 249 : 1988 (1) Crimes 606.

[8404] ● ***Conduct of injured witness.***—The injured witness PW-6 sustained 21 incised wounds. This cannot be disputed. However, his subsequent conduct and various statements made by him during investigation and trial render the entire prosecution story suspect. He is the only eye-witness to the incident. He made a statement on June 3, 1976, which is marked as Ex D-3. In this he gives a version different from one given to the Police. As per this statement, he has said that he went alongwith Prahlad and Jiwan from Delhi in order to recover the girl, in relation to whom the offence took place. At the time of cross-examination, he gave an affidavit (Ex D-4) dated June 29, 1976, which purports to bear his thumb-impression according to which he is reported to have said that the Police were getting statements by him recorded at their pleasure and were trying to protect the real culprits, namely, Jiwan and Prahlad. He is alleged to have put his thumb-impression upon an application of the same date addressed to the Judicial Magistrate offering to give statement before the Court. This application is Ex D-5 which was also produced when he was cross-examined. Exhibit D-6 dated July 1, 1976 is another affidavit to the same effect. He engaged a lawyer, examined as DW-3 who filed a complaint in the Court of Judicial Magistrate against Jiwan and Prahlad on July 26, 1976 which is exhibit D-7. This complaint was ultimately dismissed for default on August 4, 1976. . . . After giving our full consideration we find that the prosecution has not come to the Court with the true story and the conduct of PW-6 leaves considerable doubt in our mind as to what really happened. In our opinion the appellants are entitled to the benefit of doubt. *Chhita* v. *State of Rajasthan*, 1987 Supp SCC 639 : 1988 SCC (Cri) 133 (134) : 1988 CrLR (SC) 254.

[8405] ● ***Conduct of witnesses 4 and 5 in running away in different directions and PW-1 to 3 in choosing to stand near house.***—"We find nothing strange in the conduct of PWs-4 and 5 in running away in different directions and in PWs-1 to 3 choosing to stand near the house itself, because different people react in different ways in situations of emergency and crisis. It is not as if PWs-4 and 5 went running in different directions and PWs-1 to 3 stayed at the same place pursuant to any plan of action formulated by them. PW-4 could have thought that safety lay in running away in one direction and PW-5 may have thought differently of the matter. It cannot, therefore, be said that the running away of PW-4 towards the house of Sharnappa Sahukar has been introduced only to make it appear that she had actually seen the attack on D-1." *Pattad Amarappa* v. *State of Karnataka*, AIR 1989 SC 2004 : 1990 SCC (Cri) 179 (190) : 1989 CrLJ 2167 : 1989 CrLR (SC) 603 : JT 1989 (3) SC 246 : (1989) 3 Crimes 39.

[8406] ● ***Conduct of—Prosecution witness No. 3.***—The evidence of PW-3, far from evoking any suspicion stands fully corroborated by PWs-5 and 8 and by Kishori's statement Ex Ka-3. His conduct in taking Kishori to the Police Station in the morning also proves his concern for Kishori's life and his loyalty to her. There were, therefore, no materials at all for the High Court to hold that PW-3 has masterminded the prosecution case and, hence, his evidence is unworthy of acceptance. *State of Uttar Pradesh* v. *Chet Ram*, AIR 1989 SC 1543 : (1989) 2 SCC 425 : 1989 SCC (Cri) 388 : 1989 CrLJ 1785 : 1989 CrLR (SC) 314 : (1989) 2 Crimes 13.

[8407] ● ***Conduct of brother of deceased.***—"It is also surprising that PW-1 preferred to write down the complaint on the spot rather than run down 100 paces to the Police Station to inform the Police. PW-1 was asked to explain this conduct and he stated that he preferred to write down the complaint" as I had doubt that the Police will not pay any heed and will not take down the report correctly". There was no reason for PW-1 to entertain such a doubt. He does not say that he had any such experience in the past.". *State of Uttar Pradesh* v. *Madan Mohan*, AIR 1989 SC 1519 : (1989) 3 SCC 390 : 1989 SCC (Cri) 585 (591) : 1989 CrLJ 1485 : 1989 CrLR (SC) 451 : JT 1989 (2) SC 158 : (1989) 2 Crimes 467.

[8408] ● ***Conduct of father-in-law.***—The prosecution case that D-1 to D-4 came out of PW-6's house one after the other and ran in different directions and were chased by different sets of accused and attacked and that PWs 29 and 30 continued to remain in the house till the last, was decried by the appellants' counsel as being an artificial and improbable version. This argument overlooks the fact that D-1 to D-4 who were inside the house would have felt afraid to come out in a body lest they become easy targets for attack by the accused. They may have thought that they have better chances of escape if they came out of the house one by one instead of all of them coming out together. For the same reason they would also have run in different directions. *Pattad Amarappa* v. *State of Karnataka*, AIR 1989 SC 2004 : 1990 SCC (Cri) 179 : 1989 CrLJ

2167 : 1989 CrLR (SC) 603 : JT 1989 (3) SC 246 : 1989 (3) Crimes 39.

[8409] ● ***Conduct of respondents.***—PW-3 knowing the hostility of the respondents towards him would not have wanted to risk his life by taking Kishori to the station during night time. In contrast with the conduct of PW-3, the respondents despite being Kishori's nephews and her immediate neighbours, had not done anything to take Kishori to the police station or the hospital. If they are innocent as they claim to be, and had no quarrel with Kishori, they should have the first to go to her house and take her to the police station or the hospital. The High Court was therefore grievously wrong in construing the delay in the taking of Kishori to the police station as meaning that the attack on Kishori should have gone unnoticed till the morning hours and, therefore the evidence of PWs 3, 5 and 8 is not worthy of acceptance. *State of Uttar Pradesh* v. *Chet Ram*, AIR 1989 SC 1543 : (1989) 2 SCC 425 : 1989 SCC (Cri) 388 (396) : 1989 CrLJ 1785 : 1989 CrLR (SC) 314 : (1989) 2 Crimes 13.

[8410] ● ***Conduct of nephew of deceased in running away from scene of occurrence.***—The unnatural conduct of Ajoy, PW-3, which has come to notice from the record is that though he was present alongwith the deceased at the time of occurrence, he made no attempt to save his uncle from the assault. He did not even continue to stay there, though of course according to him, he ran for his life on being advised so by his uncle. *Anil Phukan* v. *State of Assam*, AIR 1993 SC 1462 : (1993) 3 SCC 282 : 1993 SCC (Cri) 810 (813) : 1993 CrLJ 1796 : JT 1993 (2) SC 290 : (1993) 1 Crimes 1180.

[8411] ● ***Conduct of nephew of deceased in not lodging FIR.***—PW-3, did not himself lodge the FIR. Of course, he gave information about the occurrence to PW-4, PW-5, PW-7 and others immediately after the occurrence describing the manner of assault and the names of the assailants but why he did not lodge the FIR has not been explained by him. *Anil Phukan* v. *State of Assam*, AIR 1993 SC 1462 : (1993) 3 SCC 282 : 1993 SCC (Cri) 810 (813) : 1993 CrLJ 1796 : JT 1993 (2) SC 290 : (1993) 1 Crimes 1180.

[8412] ● ***Conduct of nephew of deceased.***—"The deposition of PW-4, who is the sister of PW-3, to the effect that when Ajay, PW-3, came running to the house, he told her that her uncle had been killed by Anil and his brothers does not stand scrutiny because admittedly according to PW-3 himself, when he ran from the place of occurrence, the deceased was still alive and as a matter of fact he was alive even when the wife of the deceased and other neighbours reached there and brought him to the house. It was only at the house while the deceased was kept in the verandah that he succumbed to the injuries. There could have been, therefore, no occasion for Ajay, PW-3, to have told his sister PW-4, that her uncle had been "killed" by Anil and his brothers. This also shows that Ajay, PW-3 has the tendency to exaggerate matters." *Anil Phukan* v. *State of Assam*, AIR 1993 SC 1462 : (1993) 3 SCC 282 : 1993 SCC (Cri) 810 (814) : 1993 CrLJ 1796 : JT 1993 (2) SC 290 : (1993) 1 Crimes 1180.

[8413] ● ***Conduct of informant.***—"The conduct of Gopi Singh in taking the bicycle on which the deceased brother was riding, for lodging FIR and for going to a shop ahead the Police Station for purchasing a piece of paper, has been rightly explained by the High Court and in our view no unusual conduct can be inferred against Gopi Singh. Therefore we do not find any reason to interfere with the judgment of the High Court." *Kalyan Singh* v. *State of Uttar Pradesh*, AIR 1994 SC 491 : 1994 SCC (Cri) 59 (63) : 1993 CrLR (SC) 651 : JT 1993 (5) SC 694 : (1993) 3 Crimes 561.

[8414] ● ***Conduct of eye-witness.***—The conduct of the witness is highly unnatural. When he has seen one of the appellants inflicting injuries one would expect him to raise an alarm or at least inform the kith and kin of the deceased so that they can go for the rescue of the victim, which he did not do. Though we cannot call him entirely a false statement but in the absence of any other corroborative evidence we think it is highly unsafe to accept his evidence. *Surjit Singh* v. *State of Punjab*, AIR 1994 SC 110 (112) : 1993 CrLJ 3901.

[8415] ● ***Conduct of prosecution witnesses 18 and 20.***—"The oral dying declaration is no doubt an important piece of evidence. But it should be free from all infirmities. There is no other corroboration worth mentioning. Further, as mentioned above, the conduct of PWs-18 and 20 is highly unnatural and they say that for three days they did not inform anybody about the alleged oral dying declaration. We find that it is highly unsafe to base the conviction on the oral dying declaration because of the many infirmities pointed out. . . . There is no explanation as to why he has not informed anybody earlier. He admitted in the cross-examination that the deceased was not speaking clearly and he was vomitting at that time. He further added that the tongue of the deceased was out of the control. To the same effect is the evidence of PW-20. He also came forward with this version only on Monday. Now we have the evidence of one more important witness PW-26 who is the Sarpanch of the village. He deposed that after coming to know about the occurrence he went to the place of occurrence and found the deceased lying on the cot and he stated that he did not inquire anything from the deceased. He further stated that PWs-18 and 20 were present. He does not say that either of them mentioned anything about the oral dying declaration." *Ramsai* v. *State of Madhya Pradesh*, AIR 1994 SC 464 (466) : 1994 CrLJ 138.

[8416] ● ***Conduct of husband.***—Different person react differently under given circumstances. It is difficult to lay down a hard and fast rule as to how and in what manner a person would react and to achieve his motive could go to what extent in the commission of crime under a particular circumstances. It is not possible to measure up the extent of his feelings, sentiments and desire and say as to what compelled him to commit a particular crime. There may be persons who under frustration and on mere trifling domestic matters take decision to commit a serious crime, while others may approach it with cool and calm mind and think more dispassionately before taking any hazardous and serious steps. It all depends as to how a person reacts in a given circumstance and it is he alone who best knows his intention and motive to commit a crime and the extent thereof. *S.C. Bahri* v. *State of Bihar*, AIR 1994 SC 2420 : (1995) Supp (1) SCC 80 : 1994 CrLJ 3271 (SC) : (1994) 2 Crimes 1027.

[8417] ● ***Conduct of brother of injured.***—PW-5 brother of injured, who claimed to be an eye witness has not explained as to why he could not lodge the report at the Police Station at the earliest opportunity. PW-5 also did not accompany the injured to the Hospital, which is rather an unusual conduct considering that he is the brother of the appellant. *Satguru Singh* v. *State of Punjab*, AIR 1995 SC 2449 (2450) : 1995 CrLJ 4165.

[8418] ● ***Conduct of eye-witness young man of 20 years.***—Who, had seen the accused taking out the knife and the deceased lying in injured condition. Normally, Mahendra Singh should have reported the matter to the family of the deceased but he was a young man of 20 years at that time and he became so perplexed by the aforesaid incident that he behaved in an unusual manner. But simply on that account, his testimony need not be discarded. That Mahendra's evidence is convincing and deserves credence. *Narayan Singh* v. *State of Madhya Pradesh*, AIR 1995 SC 2177 (2178) : 1995 CrLJ 3977.

[8419] ● ***Conduct of younger daughter.***—"We cannot lose sight of the fact that PW-2 who was aged only 19 years, had lost her father and brother just then and it was not unlikely of her first to apprise her relations of the same and seek their help at that hour of her distress. The High Court, however, observed that if really PW-3 was there nothing prevented PW-2 to go to the Police Station accompanied by him as he was the Sarpanch of his village instead of getting in touch with her maternal uncles. Simply because PW-2 did not react in the way the High Court thought she should have, it ought not have made a ground for drawing adverse conclusions against her conduct, which was clearly normal and natural." *State of Punjab* v. *Surja Ram*, AIR 1995 SC 2413 : 1995 Supp (3) SCC 419 : 1995 SCC (Cri) 937 (941, 942) : 1995 CrLJ 4161.

[8420] ● ***Conduct of—Prosecution witness.***—Considered in the light of natural and probable human conduct, it was only expected of PWs-3 and 4 to first report the incident to Wasawa Ram, father of the deceased and await his arrival before taking any other action. No exception can, therefore, be taken to such reaction of PWs-3 and 4 nor can it be said there was an unexplained delay in lodging the FIR raising thereby a doubt about the *bona fides* of the prosecution case. *Sat Pal* v. *State of Punjab*, AIR 1996 SC 201 (202) : 1996 SCC (Cri) 11 : 1996 CrLJ 406.

[8421] ● ***Conduct of eye-witness.***—In the instant case it was a natural conduct to first speak to the offender having found that Ravinder Jit had not only been assaulted but was perhaps raped. *Dharma* v. *Nirmal Singh*, AIR 1996 SC 1136 (1138) : (1996) 7 SCC 471 : 1996 CrLJ 1631 : JT 1996 (4) SC 608.

[8422] ● ***Conduct of prosecution witness No. 1.***—". . .there was no unusual conduct on the part of PW No. 1 by not attempting to prevent accused No. 1. From his evidence, it is quite evident that when accused No, 2 intended to cause further injury on the person of the deceased, he tried to prevent accused No. 2 and while he was engaged in tussle with accused No. 2, accused no. 1 stabbed the deceased. PW-1 also deposed that he also proceeded towards the deceased to save him from accused No. 1 after overpowering accused No. 2 but by that time, accused No. 1 had given fatal blows to the deceased and run away." *Krishnan* v. *State of Kerala*, AIR 1997 SC 383 (387) : (1996) 10 SCC 508 : (1996) SCC (Cri) 1375 : 1997 CrLR (SC) 38 : 1996 CrLJ 4444 : JT 1996 (7) SC 613.

[8423] ● ***Conduct of brother's wife.***—The evidence of "S" is not at all reliable and trustworthy.

There being sufficient accommodation in her house, there was no need for her to go to neighbour's house and sleep there during those nights. Her evidence that the accused and the deceased had come together stands corroborated by the evidence of "M" and also by the fact that the dead body was found from her house. Her explanation that the accused being the elder brother of her husband, she was afraid of him and as her husband was out of the town, she had thought it fit to sleep at night at the neighbour's place, cannot be regarded as unbelievable. She was a young woman aged 28 years. She was observing "ghunghat". her husband was away on duty. Under these circumstances conduct cannot held to be unnatural. *Lekhraj* v. *State of Gujarat*, AIR 1998 SC 242 : 1998 CrLJ 396 (397, 398) (SC) : (1997) 4 Crimes 263.

[8424] ● ***Conduct of husband.***—In the instant case, the neighbours have witnessed the incident, after the wife of the appellant came running out of the house and fell on the ground. Attempt had been made before this Court to discredit their evidence by contending that none of them took any steps to inform the police we do not find anything unnatural in the conduct of the witnesses. They were more keen on the appellants wife being taken to the hospital and given a proper treatment and inform her close relatives. Information to the police was given by the doctor in the hospital who is examined as PW-6. *C.V. Govindappa* v. *State of Karnataka*, AIR 1998 SC 792 (795) : (1998) 2 SCC 763 : 1998 SCC (Cri) 683 : 1998 CrLJ 1107 : 1998 CrLR (SC) 79 : JT 1998 (1) SC 193.

[8425] ● ***Past—Event conduct of witness.***—PW-9, a passenger in the bus in his evidence said that he saw the appellants attacking the deceased with chopper and knives. The trial Court pointed out that he did not inform the members of the family of the deceased nor did he bring this matter to the notice of the police. The Sessions regarded the above as a conduct incompatible with the normal behaviour of a person witnessing such a crime.

Such a remarks on the conduct of a person who witness the murderous attack is least justified in the realm of appreciation of evidence.

This Court has said time and again that the post event conduct of a witness varies from person to person. It cannot be a cast iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any violence and their behaviour and conduct would, therefore, be different. *Rammi alias Rameshwar* v. *State of Madhya Pradesh*, AIR 1999 SC 3544 (3546) : (1999) 8 SCC 649 : 2000 SCC (Cri) 26 : 1999 CrLJ 4561 : JT 1999 (7) SC 247 : (1999) 4 Crimes 32.

[8426] ● ***Conduct of sister of deceased in not disclosing as to how deceased received burn.***—If really, she had come to know through Chandrakanta that her husband had poured kerosene over her she would not have failed to inform the Police. When Dr. Rita Choudhary had come to treat Chandrakanta, this witness did not tell her anything about how she had received burns though Dr. Rita Choudhary had tried to ascertain that from Chandrakanta. She had not disclosed to anyone how her sister had received burn and his explanation for not doing so in that Devender told him not to give correct information to any one. It is difficult to accept this explanation because she did not give any reason. *Ramesh Prasad* v. *State of Bihar*, AIR 2000 SC 398 (401) : (1999) 9 SCC 433 : 2000 CrLJ 503 : 1999 CrLR (SC) 694.

[8427] ● ***Conduct of sister of deceased in not informing Police.***—In her cross-examination PW-4 sister of Chandrakanta deposed even though her house was situated only 50 yards away from the house of Chandrakanta and that the Lohardaga Police Station was only 100 yards away, she had not gone to the Police Station or tried to inform the Police. She also admitted that neither her sister Chandrakanta had said anything to Dr. Rita Choudhary regarding who had poured kerosene oil on her body nor she had told the Doctor that her husband had set her on fire. She denied that one Saroj had gone with them in the car to Ranchi, but she was contradicted by her Police statement. She also admitted that she had not told Dr. Sahu, to whom Chandrakanta was first taken, or to the Doctor at RMCH Hospital, where they had gone subsequently, under what circumstance her sister had received burns. *Ramesh Prasad* v. *State of Bihar*, AIR 2000 SC 398 (400) : (1999) 9 SCC 433 : 2000 CrLJ 503.

[8428] ● ***Conduct of brother-in-law of deceased.***—Version of (PW-3), who accompanied Asha Kumari is that while going to Ranchi Chandrakanta and Asha Kumari were on the back seat of the car and he and Davendra Prasad had sat in the front and that on their way to Ranchi, Chandrakanta was repeatedly saying that her husband had poured kerosene oil on her body and set her ablaze. During his cross-examination, he tried to conceal the presence of Saroj in the car by stating that he did not remember whether Saroj had accompanied them to Ranchi. He also evaded giving clear answers by stating that he did not remember whether he had not referred to the presence of Asha Kumari in his statement recorded under S. 164, CrPC and whether he had stated to the Police that the appellant and his family members had burnt the deceased to death by conspiring. *Ramesh Prasad* v. *State of Bihar*, AIR 2000 SC 398 (400) : (1999) 9 SCC 433 : 2000 CrLJ 503 : 1999 CrLR (SC) 694.

[8429] ● ***Conduct of eye-witnesses unnatural.***—In the instant case, the appellants who are three in number had gone to the spot to commit the murder of Shambhu Rai who, according to the prosecution story, was scrapping grass with three close relations, PW-10, PW-16 and PW-17. The appellants, on reaching at the spot, gave out loudly that they would commit the murder of Shambhu Rai. At that stage, all the four would have immediately reacted and tried to save Shambhu Rai, if not actually involving themselves into a practical combat with the assailants. The absence of injury on those three persons, who claim themselves to be eye-witnesses, is explained by all the three by saying that the assailants gave out that they had come to commit the murder of Shambhu Rai so as to wipe out the family of Awardh Ram. The remaining persons, namely, (PW-10), (PW-16) (PW-17) moved away leaving Shambhu Rai all alone who was shot at by Suresh Rai and then given dagger blows by his co-appellants. This is unbelievable that three of the persons who were scraping grass with the deceased would meekly move away so as to facilitate the killing of Shambhu Rai by the appellants. Their conduct is unnatural. *Suresh Rai* v. *State of Bihar*, AIR 2000 SC 2207 (2211) : (2000) 4 SCC 84 : 2000 SCC (Cri) 764 : 2000 CrLJ 3457 : JT 2000 (4) SC 12.

[8430] ● ***Conduct of witness to bring jeep not unnatural.***—Soon after the incident PW-2 had gone to bring a jeep for taking the injured to hospital. That conduct cannot be regarded as unnatural. *M. Thomas alias Joyi* v. *State of Kerala*, AIR 2000 SC 3545 (3545) : JT 2000 (7) SC 389.

[8431] ● ***Testimony of witnesses not to be brushed aside as doubtful conduct.***—If the Criminal Court is to view the testimony of the witness as unnatural it would be easy to brush it aside with the stereotyped reasoning that those persons had no cause to remember having seen the man with the girl accompanying him. Such a reasoning overlooks the broad aspect that a human mind, on hearing about any shocking incident, would have the tendency to recollect any previous event which could have had a connection with that incident. If as a matter of fact those witnesses had occasion to see a crying girl of that age on the very day of the gruesome episode as happened in this case, there is nothing improbable in those witnesses remembering the person who was seen in the company of that girl. If they had immediately informed the police that they noticed a similarly—aged girl crying in the company of an utter stranger of that locality that cannot be brushed aside as a doubtful conduct. *State of Maharashtra* v. *Suresh*, (2000) 1 SCC 471 : 2000 SCC (Cri) 263 : 2000 CrLR (SC) 122 : 2000 Cr App R (SC) 85.

[8432] ● ***Conduct of eye-witnesses.***—"It is the prosecution case that Guila Ram, PW-11, is healthier than the respondent. His conduct, in case he was actually accompanying his grandmother, is rather unnatural. He saw the respondent advancing towards his grandmother with an axe in one hand and a jayee in the other, yet he took no steps to save his grandmother. He did not try to ward off the blows inflicted on the 70 years old woman in any manner whatsoever. He admitted during the cross-examination that he did not cover the body of his grandmother by putting himself over her body but went on to explain that he did not do so as he was frightened and had even defecated at that place itself in his own dhoti. This explanation, however appears to be an after thought and an attempt to improve upon the prosecution case at the stage of trial. *State of Rajasthan* v. *Magni Ram*, AIR 2001 SC 2430 : (2001) 9 SCC 589 : 2001 CrLJ 3283.

[8433] ● ***Conduct behaviour of witness.***—Human behaviour vary from man to man. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each given case. How a man would behave in a particular situation, can never be predicted. In the given circumstances, the behaviour of Joginder Singh, PW-3 sleeping on the roof of the house of Sukhwant Singh; after seeing the accused armed with weapons and hearing of firing, jumping from the roof and running towards his village Mastewala to inform his father and family members instead of loitering around in the village Dholewala and informing somebody risking his life, is quite natural. One should not forget that the incident had happened at 1.00 A.M. and that at that odd time, nobody would be readily available to be informed without loss of time. In the process, the life of the witness would be at great risk. *Bachhittar Singh* v. *State of Punjab*, AIR 2002 SC 3473 : (2002) 8 SCC 125 : JT 2002 (7) SC 413 : (2003) 1 Crimes 144 (SC).

[8434] ● ***Conduct of parents.***—Human nature is very complex. Different persons react differently under pressure or in times of sudden bereavement or grief. The shock suffered by a parent having seen his daughter dead in an unnatural manner can in some cases prevent immediate outpouring of reasons. Each case would have to be tested on its own facts and no hard and fast rule can be laid down in this behalf. *Alamgir Sani* v. *State of Assam*, AIR 2003 SC 2108 : (2002) 10 SCC 277 : 2003 CrLJ 4917 : 2002 (9) Scale 708.

[8435] ● ***Conduct of witnesses not coming forward to rescue victim.***—In the instant case, the Accused appellant alleged to have surrounded the deceased were armed with deadly weapons and they inflicted several injuries resulting in spot death of deceased. PW-9 and PW-10, who were present on the spot at the time of incident did not come to rescue of the deceased. Both of them were unarmed and bare-handed and accused persons were armed with deadly weapons. In such a situation, instinct of self-preservation can be dominant instinct conduct of witnesses in not coming to rescue of the deceased cannot be a ground for discarding their evidence. *Such Singh* v. *State of Punjab*, AIR 2003 SC 3617 : (2003) 7 SCC 643 : 2003 SCC (Cri) 1697 : 2003 CrLJ 3876 : JT 2003 (6) SC 348 : (2003) 3 Crimes 272 (SC).

[8436] ● ***Conduct of witnesses not unnatural.***— The High Court in the instant case was not justified in doubting the evidence of the witness on the ground that while running away, they could not have turned back and seen the assault upon the deceased which cannot be said to be either improbable or unnatural conduct of the witnesses, especially when the deceased was the father of PW-1 *Kamma Otu Kunta Ram Naidu* v. *Chereddy Pedde Subba Reddy*, AIR 2003 SC 3342 : (2003) 11 SCC 293 : 2004 SCC (Cri) 155 (160) : 2003 CrLJ 4967.

[8437] ● ***Conduct of prosecution witness unnatural.***—The conduct of PW-3 appears to be rather unnatural. He did not disclose what he had seen to anyone that night, and for the first time on the next day at about 4.00 p.m. he disclosed the fate of his being an eyewitness to the investigating officer. According to him he went to see the deceased who had fallen down near his house. When he was there, PW-2 also came and pulled out the knife from the body of the deceased and kept it there. Thereafter PW-2 rushed to inform the brother of the deceased. From his deposition it does not appear that he talked to PW-2 at all about the occurrence. Moreover, PW-2 has not stated that he met PW-3 when he had gone to the place where the deceased had fallen. He does not even state that he had pulled out the knife from the body of the deceased and kept it near the body of the deceased. What however appears to be rather unnatural is the fact that thereafter when several persons came to the place where the injured was lying, he did not disclose to them about his having seen the occurrence. *Joseph* v. *State of Kerala*, (2003) 11 SCC 223 : 2004 SCC (Cri) 93 (99) : 2003 CrLJ 2543.

[8438] ● ***Conduct of eye-witness not accused.***— Conduct of eye-witness is not chasing the accused persons could not be said to be unreasonable in view of the fact that the accused persons were armed. *State of U.P.* v. *Nowab Singh*, AIR 2004 SC 1511 : (2005) 9 SCC 84 : 2005 SCC (Cri) 33 (40) : 2004 CrLJ 331.

[8439] ● ***Conduct of witness.***—It is now well settled by various decisions of this Court that different persons act differently in a given situation. According to PW-1 and PW-3, they were threatened and chased away after the deceased was assaulted. They might not have, out of fear, ventured to go back to the field. They came to know of the death of Abdul Rahman from others. They got a report prepared with the assistance of one Anwar and left for the police station. It may be correct that in the aforementioned situation some other persons might have gone to the place of occurrence with their relatives and other villagers, but only because the did not do so, it would not by itself be a pointer to the fact that their testimonies cannot be relied upon for any purpose whatsoever. *Hafiz* v. *State of U.P.*, AIR 2006 SC 632 : (2005) 12 SCC 599 : (2006) 1 SCC (Cri) 647 (654) : 2006 CrLJ 522 : 2005 (4) Crimes 128.

[8440] ● ***Eye-witness—Unnatural conduct.***— The entire prosecution story hinges on the evidence of PWs 30 and 33. A bare reading of their evidence however shows that it cannot be relied upon. Clearly the two were chance witnesses and have not been able to explain the circumstances which brought them to the place of incident at 6.30 a.m. PW 30 Kishore deposed that he had seen the incident along with PW 33 Dhanaji Tukaram Mane from a distance of about 50 feet while he was one kilometer away from village Veeravade on the Pakani Veeravade road. Concededly all the accused, the deceased and the two eye-witnesses belonged to village Veeravade and were thus co-villagers known to each other. The conduct of this witness is truly amazing. As per his evidence he reached Veeravada about half an hour after the incident but he did not inform anybody as to what had transpired till the 18th or 19th January, 1997 when his statement under Section 161 of the CrPC was recorded by the Police. He further stated in his cross-examination that he had gone to the police voluntarily and had not been summoned. The statement of PW 33 is even more unreliable. He admitted that he was the first cousin of the deceased and that after witnessing the murder had gone on to village Akola to meet his sister and had returned to Veeravade after several days. He also admitted in his cross-examination that the house of the deceased was only 150 feet away from his house and that he had not informed anybody about the murder till the 19th of January, 1997 on which he was confronted with his statement under Section 161 of the CrPC wherein he had stated that he had returned to village Veervade on the day after the incident. We find it absolutely impossible to accept that this witness could have gone to village Akola after having been a witness to the brutal murder of his cousin and had not even informed anyone from the family of the deceased living only 150 feet away about the incident till 19-1-1997. It is true, as has been contended by Mr. Hegde, that some allowance must be made for the fact that the incident had spilt over to two States or that the two witnesses had been so overtaken by fear on account of the two warring political groups in the village. We find, however, that PW 30 gave no explanation as to why he had kept quiet for almost six days whereas PW 33 did, in a stray sentence, depose that he had been scared to talk to anyone about the murder. To our mind, this explanation is unacceptable as this witness had tried to hide the fact that he had returned to village Veeravade from village Akola the day after the incident, and being the first cousin of the deceased, and living only 100 feet away from the latter's house, still did not inform the family or anybody in the village about the murder for a period of six days. This bespeaks on absolutely unnatural conduct. *Jai Singh* v. *State of Karnataka,* (2007) 10 SCC 788 : 2007 CrLJ 2434 (2435, 2436).

[8441] ● ***Silence of witness.***—Though silence of a witness *per se* may not render prosecution version suspect, in the present case what has been disclosed by PW 2, the so called child witness is also not found credible, particularly when considered in the background of PW 1's evidence. *State of Madhya Pradesh* v. *Bacchudas,* AIR 2007 SC 1236 : (2007) 9 SCC 135 : 2007 CrLJ 1661 (1662) : (2007) 2 Crimes 58.

[8442] ● ***Young boy seeing assault, frightened and rushed to village.***—Witnesses young boy seeing assault on three persons receiving serious injuries, got frightened and rushed to village to inform deceased's grand father, conduct not unnatural. *Mahesh Janardhan Gonnade* v. *State of Maharashtra,* 2008 AIR SCW 4231 : (2008) 13 SCC 271 : 2008 CrLJ 3602 (3615) : (2008) 2 Crimes 145.

CONFESSION

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1. CONFESSION

[8443-44] ● ***Confessions Deliberate and voluntary.***—Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law." *Taylor's Treatise on the Law of Evidence, Vol. I.*

> "[A] confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession.....". *Pakala Narayana Swami* v. *Emperor*, AIR 1939 PC 47 : 40 CrLJ 364.

[8445] ● *Statement by accused confession if statement in terms admits commission of crime.*—A statement made by an accused person is a "confession" within the meaning of that term as used in the Evidence Act, only if the statement *in terms* admits the commission of a crime or of the facts which constitute a crime, by himself.

A statement made by an accused person is *not* a 'confession' within the meaning of the Act, and cannot be used as a confession :

1. if, read as a whole, it is of an exculpatory character and suggests that the death of the deceased was caused by accident or by some other circumstance unconnected with his own actions; or
2. if it does not contain a direct admission in terms of the commission of an offence; a statement is not a confession merely because the Court considers that it can infer from the statement an admission of the commission of an offence; or
3. if the statement merely contains an admission of an incriminatory circumstance not amounting to admission of a crime, however grave that circumstance may be. *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 351 : 1953 CrLJ 154 : 1953 SCR 94 : 1952 SCJ 545.

[8446] ● *Dying declaration not confession.*—Sometimes, attempts have been made to equate a dying declaration with the evidences of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not restricted. But in our opinion, it is not right in principle to do so. Though under Section 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice, illustration (b) to Section 114 of the Act, lays down as a rule of prudence based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law.

The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has been made by a person whose antecedents are as doubtful as in the other cases, that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of confession or an approver. *Khushal Rao* v. *State of Bombay*, AIR 1958 SC 22 : 1958 CrLJ 106 : 1958 All WR (SC) 38 : 1958 Mad LJ (Cri) 100.

[8447] ● *Statement by accused—When amounts to confession.*—A statement made by an accused person amounts to a confession only when it admits *in terms* the commission of an offence by himself or substantially all the facts constituting that offence. An admission even of a gravely incriminating fact connected with the offence, or of circumstances which merely suggest an inference of the guilt of the accused, is not a 'confession' in the eyes of law, however conclusive that fact may be or however strong the inference suggested by that circumstance. It is only when the statement of the accused can be read as a plenary admission of guilt in straight and clear terms that it can be taken as a confession of the commission of a crime, and then only could it be used for the purpose of resting a conviction upon it.

In the present case, the accused was charged and convicted under Section 165-A of the Penal Code. The case has arisen out of an inquiry into the activities of one *R,* a clerk in a Government department, against whom it had been found that he had issued false permits for bricks in the names of persons who had not applied for them or received them. *R*'s superior in office had held the inquiry, and the accused made before him two statements, of which the first was actually the complaint on which the inquiry had started. It read: "I stood in need of bricks. I made a request to *R* for a permit. He took Rs. 300 from me and gave me four permits. (From the counterfoils seized from *R*'s office, all these permits were proved to be in the names of fictitious persons.) I could not get the bricks and so I met *R* at his office. I learnt later that he had been suspended. I request that the bricks be caused to be given to me, or my money may be refunded." Some time later, the accused made a further statement in which he stated, "Even before this, *R* had given a permit for bricks to one *L.* For this he had received Rs. 150."

The two documents, read together, did suggest an inference that the accused had paid Rs. 300 to *R* by way of a bribe, but it could not be said that they are a clear admission that at the very time when the accused made the payment he knew that a bribe would get his work done and that the payment was made as a bribe. There was no evidence to show that the accused knew about the deal with *L* at the very time when he paid the money to *R* and not later, and even the second document left that question in doubt. A conviction of an accused can no doubt be based upon his confession, but in that case, it is a necessary condition of the use of a statement made by the accused for that purpose that the statement must be an admission of guilt in unequivocal terms. The two documents in the present case were not of such a nature as to enable the Court to hold that they were a plenary admission of payment of money to a public servant as a bribe for doing a favour, and even though they raised a strong suspicion as to the intention of the accused in making the payment to *R,* they could not be used as a confession, and the lower Courts had erred in using them as such and in basing the conviction upon them. Conviction was set aside, and the accused was acquitted. *Om Prakash* v. *State of Uttar Pradesh*, AIR 1960 SC 409 : 1960 CrLJ 544.

[8448] ● ***Confession when not voluntary.***—Accused person's knowledge that Police could record his statement under law and his desire to soften the attitude of the authorities by making the statement do not establish that he was coerced or compelled to make the statement. A person of the position, grit and intelligence of Dalmia could not be so coerced. A person making a confession may be guided by any considerations which, according to him, would benefit him. Dalmia must have made the statement after weighing the consequences which he thought would be beneficial to him. His making the confession with a view to benefit himself would not make the confession not voluntary. A confession will not be voluntary only when it is made under some threat or inducement or promise, from a person in authority. Nothing of the kind happened in this case and the considerations mentioned in the High Court's judgment do not justify holding the confession to be not voluntary. *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821 : (1962) 2 CrLJ 805 : 1963 (1) SCR 253.

[8449] ● ***Confession—Essentials of.***—Sections 24 to 30 of the Evidence Act deal with the admissibility of confessions by accused persons in criminal cases. But the expression "confession" is not defined. The Judicial Committee in *Pakala Narayanaswami*, v. *Emperor,* 66 Ind. App. (AIR 1939 PC 47) has defined the said expression thus : "A confession is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence." A scrutiny of the provisions of Sections 17 to 30 of the Evidence Act discloses that statement is a genus, admission is the species and confession is the sub-species. Shortly stated, a confession is a statement made by an accused admitting his guilt. The dictionary meaning of the word "statement" is "the act of stating, reciting or presenting verbally or on paper." The term "statement" therefore includes both oral and written statement. Is it also a necessary ingredient of the term that it shall be communicated to another? The dictionary meaning of the term does not warrant any such extension; or the reason of the rule underlying the doctrine of admission or confession demands it. Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of the relevant evidence, presumably on the ground that, as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or confession does not depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission or confession, as the case may be.

In "*A Treatise on the Law of Evidence*" by TAYLOR, 11th Edn. Vol. I, the following statement appears at page 596 :

"What the accused has been overheard muttering to himself, or saying to his wife or to any other person in confidence, will be receivable in evidence." In "*The Principles of the Law of Evidence*" by W.M. BEST, 12th Edn. at page 454, it is stated much to the same effect thus :

> "Words addressed to others, and writing, are no doubt the most usual forms; but words uttered in soliloquy seem equally receivable."

We also find the following passage in "PHIPSON on *Evidence*", 7th Edn. at page 262:

> "A statement which the prisoner had been overheard muttering to himself, if otherwise than in his sleep, is admissible against him, if independently proved."

All these passages establish that communication to another is not a necessary ingredient of the concept of "confession". We, therefore, hold that a statement, whether communicated or not, admitting guilt is a confession of guilt. But, there is a clear distinction between the admissibility of an evidence and the weight to be attached to it. A confessional soliloquy is a direct piece of evidence. It may be an expression of conflict of emotion; a conscious effort to stiffle the pricked conscience; an argument to find excuse or justification for his act; or a penitent or remorseful act of exaggeration of his part in the crime. The tone may be soft and low; the words may be confused; they may be capable of conflicting interpretations depending on witnesses, whether they are biased or honest, intelligent or ignorant, imaginative or prosaic, as the case may be. Generally they are mutterings of a confused mind. Before such evidence can be accepted, it must be established by cogent evidence what were the exact words used by the accused. Even if so much was established, prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may only be used as corroborative piece of evidence. In the instant case, circumstances found by the High Court led to the only conclusion that the accused must have committed the murder. No other reasonable hypothesis was or could be suggested. Further 3 witnesses had deposed that they clearly heard the accused say when he opened the door of the house and came out at 6 o'clock in the morning of the fateful day that he had "finished Sunderpatti, his daughter-in-law, and thereby finished the daily quarrels." We hold that that extra-judicial confession is relevant evidence; it certainly corroborates the circumstantial evidence adduced in the case. *Sahoo* v. *State of Uttar Pradesh*, AIR 1966 SC 40 : 1966 CrLJ 68 : (1966) 2 SCJ 172.

[8450] ● ***Statements not confession recorded by—Magistrate.***—The statements are not confessions recorded by a Magistrate under Section 164 of the Code of Criminal Procedure but are statements made in answer to a notice under Section 171-A of the sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinised to finding out if they were made under threat or promise from some one in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received, also against a co-accused jointly tried with him. Section 30 of the Evidence Act does not limit itself to confessions made to Magistrate, nor do the earlier sections do so and hence there is no bar to its proper application to the statements such as we have here. *Haroom Haji Abdulla* v. *State of Maharashtra*, AIR 1968 SC 832 : 1968 CrLJ 1017.

[8451] ● ***Inculpatory part of statement— Acceptance of.***—In this case the exculpatory part of the statement in Ex. 6 is not only inherently improbable but is contradicted by the other evidence. According to this statement, the injury which the appellant received was caused by the appellant's attempt to catch hold of the hand of Lal Mohan Sharma to prevent the attack on the victim. This was contradicted by the statement of the accused himself under Section 342, CrPC to the effect that he had received the injury in a scuffle with a herdsman. The injury found on his body when he was examined by the doctor on 13th October 1961 negatives both these versions. Neither of these versions accounts for the profuse bleeding which led to his washing his clothes and having a bath in the river Patro, the amount of bleeding and the washing of the blood-stains being so considerable as to attract the attention of Ram Kishore Pandey, PW 17 and asking him about the cause thereof. The bleeding was not a simple one as his clothes all got stained with blood as also his books, his exercise book and his belt and shoes. More than that the knife which was discovered on his person was found to have been stained with blood according to the report of the Chemical Examiner. According to the post-mortem report this knife could have been the cause of the injuries on the victim. In circumstances like these there being enough evidence to reject the exculpatory part of the statement of the appellant in Ex. 6 the High Court had acted rightly in accepting the inculpatory part and piecing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime. *Nishi Kant Jha* v. *State of Bihar*, AIR 1969 SC 422 : (1969) 1 SCC 347 : 1969 CrLJ 671 : 1969 (2) SCR 1033 : 1969 Mad LJ (Cri) 456.

[8452] ● ***Confession not made on account of inducement or coercion.***—It is clear that the appellant had spent four days in judicial custody and he was not under the influence of the investigating agency for at least four days. Again he had 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one it would be used against him.

The appellant, in answer to question No. 77 regarding the confession merely said that he did not make the confession. He did not say that the confession was made on account of any inducement or coercion on the part of the police. *Abdul Razak Murtaza Dafadar* v. *State of Maharashtra*, AIR 1970 SC 283 : (1969) 2 SCC 234 : 1970 CrLJ 373 : 1970 (1) SCR 551.

[8453] ● ***Confession to Police Officer.***—Confession made to Police which found the basis of FIR is not admissible in evidence. *Khatri Hemraj Amulakh* v. *State of Gujarat*, AIR 1972 SC 922 : (1972) 3 SCC 671 : 1972 CrLJ 626.

[8454] ● ***Incriminating fact not confession.***—Incriminating fact without establishing the guilt of the maker is not a confession. *Kanda Padayachi* v. *State of Tamil Nadu*, AIR 1972 SC 66 : (1971) 2 SCC 641 : 1972 CrLJ 11 : 1972 (1) SCR 450.

[8455] ● ***Statement made to Police Officer—Admissibility.***—The statement made by any person to a police officer in the course of an investigation cannot be used for any purpose except for the purpose of contradicting a witness, as mentioned in the proviso to sub-section (1), or for the purposes mentioned in sub section (2) with which we are not concerned in the present case. The prohibition contained in the section relates to all statements made during the course of an investigation. Letter PEEE which was addressed by Sahi Ram to Station House Officer was in the nature of narration of what, according to Sahi Ram, he had been told by the accused. Such a letter, in our opinion, would constitute statement for the purpose of Section 162 of the Code of Criminal Procedure. The prohibition relating to the use of a statement made to a police officer during the course of an investigation cannot be set at naught by the police officer not himself recording the statement of a person but having it in the form of a communication addressed by the person concerned to the police officer. If a statement made by a person to a police officer in the course of an investigation is inadmissible, except for the purposes mentioned in Section 162, the same would be true of a letter containing narration of facts addressed by a person to police officer during the course of an investigation. It is not permissible to circumvent the prohibition contained in Section 162 by the investigating officer obtaining a written statement of a person instead of the investigating officer himself recording that statement. *Kali Ram* v. *State of Himachal Pradesh*, AIR 1973 SC 2773 : (1973) 2 SCC 808 : 1974 CrLJ 1 : 1974 (1) SCR 722.

[8456] ● ***Statement recorded by custom officer—Inculpatory part could be accepted.***— Inculpatory part of the statement could be accepted even though the exculpatory part of the statement of the accused was rejected. We find that the inculpatory part of statement Ex. A of the accused is distinct and severable from the exculpatory part. The present is not a case wherein the two parts of the statement are inextricably linked together and it is not possible to accept one part without accepting the other part. In case, the Court finds the exculpatory part of the statement of the accused to be inherently improbable, there is no reason why the other part of the statement which implicates the accused to be inherently improbable, there is no reason why the other part of the statement which implicates the accused and which the Court sees no reason to disbelieve, should not be accepted. *Jethamal Pithaji* v. *Assistant Collector of Customs, Bombay and another*, AIR 1974 SC 699 : (1974) 3 SCC 393 : 1974 CrLJ 621 : 1974 (1) SCR 645.

[8457] ● ***Statement not confession within meaning of Section 24—Evidence Act.***—To attract the prohibition enacted in Section 24, Evidence Act, these facts must be established:

(i) that the statement in question is a confession;

(ii) that such confession has been made by an accused person;

(iii) that it has been made to a person in authority;

(iv) that the confession has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;

(v) such inducement, threat or promise, must have reference to the charge against the accused person;

(vi) the inducement, threat or promise must in the opinion of the Court be sufficient to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. *Veera Ibrahim* v. *State of Maharashtra*, AIR 1976 SC 1167 : (1976) 2 SCC 302 : 1976 SCC (Cri) 278 : 1976 CrLJ 860 : 1976 CrLR (SC) 165 : 1976 (3) SCR 672.

[8458] ● ***Confessional statement—Permissible to believe one part and to disbelieve another.***—It is permissible to believe one part of a confessional statement, and to disbelieve another, and that it is enough if the whole of the confession is tendered in evidence so that it may be open to the Court to reject the exculpatory part and to take inculpatory part into consideration if there is other evidence to prove its correctness. *Bhagwan Singh Rana* v. *State of Haryana*, AIR 1976 SC 1797 : (1976) 3 SCC 101 : 1976 SCC (Cri) 373 : 1976 CrLJ 1379 : 1976 CrLR (SC) 257.

[8459] ● ***Judicial confession—Voluntary.***—Mr. Krishan Pal Singh appearing for the appellant submitted that judicial confession is inadmissible as the Magistrate who recorded the same, has not been examined to prove the confession, or the voluntary nature of the same. It appears that the Magistrate was not examined before the trial Court but both the Courts have relied on the confession and have held that it was voluntary. Even if we exclude the judicial confession from consideration there is sufficient circumstantial evidence to connect the appellant with the crime. *Pyare Lal* v. *State of Madhya Pradesh*, AIR 1977 SC 1765 : (1977) 1 SCC 731 : 1977 SCC (Cri)

162 (163) : 1977 CrLJ 1157 : 1977 CrLR (SC) 430.

[8460] ● ***Extra-judicial confession.***—In deciding whether a particular confession attracts the frown of the S. 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind. . . . Mr. Kapur having stated to the accused on 19.7.1970 that "now that the case has been registered they should state the truth", it is difficult to hold that by this statement he would not generate in the minds of the accused some hope and assurance that if they told the "truth" they would receive his "support" which he had earlier conveyed to them through D.S.P. Honda. *Satbir Singh* v. *State of Punjab,* AIR 1977 SC 1294 : (1977) 2 SCC 263 : 1977 SCC (Cri) 333 (342) : 1977 CrLJ 985 : 1977 CrLR (SC) 211 : 1977 Cr App R (SC) 147 : (1977) 3 SCR 195.

[8461] ● ***Confession—Recording of.***—How much time for reflection should be allowed to an accused person before recording his confession, is a question which depends on the circumstances of each case. The object of giving such time for reflection to the accused, is to ensure that he is completely free from Police influence. If immediately before the recording of the confession, the accused was in judicial custody beyond the reach of the investigating police for some days, then such custody from its very nature, may itself be a factor dispelling fear or influence of the police from the mind of the accused. In such a case, it may not be necessary to send back the accused person for any prolonged period to Jail or Judicial Lock-up. *Shankaria* v. *State of Rajasthan*, AIR 1978 SC 1248 : (1978) 3 SCC 435 : 1978 SCC (Cri) 439 : 1978 CrLJ 1251 : 1978 CrLR (SC) 245.

[8462] ● ***Confession or admission where separable.***—Where a confession or an admission is separable there can be no objection to taking one part into consideration which appears to be true and reject the other part which is false. *Keshoram Bora* v. *The State of Assam*, AIR 1978 SC 1096 : (1978) 2 SCC 407 : 1978 SCC (Cri) 219 : 1978 CrLJ 1089 : 1978 CrLR (SC) 109.

[8463] ● ***Confessional statement to be voluntary.***—Before a confessional statement made under Section 164 of the Code of Criminal Procedure can be acted upon, it must be shown to be voluntary and free from police influence and that the confessional statement made by the appellant in the instant case cannot be taken into account, as it suffers from serious infirmities in that (1) there is no contemporaneous record to show that the appellant was actually kept in jail as ordered on Sept. 6, 1974 by Shri R.P. Singh, Judicial Magistrate, Gorakhpur, (2) Shri R.P. Singh who recorded the so-called confessional statement of the appellant did not question him as to why he was making the confession and (3) there is also nothing in the statement of the said Magistrate to show that he told the appellant that he would not be remanded to the police lock up even if he did not confess his guilt. It cannot also be gainsaid that the circumstantial evidence relied upon by the prosecution must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. *Davendra Prasad Tiwari* v. *State of Uttar Pradesh*, AIR 1978 SC 1544 : (1978) 4 SCC 474 : 1979 SCC (Cri) 95 : 1978 CrLJ 1614 : 1978 CrLR (SC) 519.

[8464] ● ***Extra-judicial confession.***—There is no evidence of PWs-5, 6 and 11 to show that when they visited the deceased in the Hospital three or four days after he was sent there, the deceased regained consciousness for some time and narrated the entire incident to these witnesses. These witnesses further prove that apart from the oral statement given by the deceased to them even the accused Jaspal Singh has also told him that he had driven the cart and a wheel was passed over the body of Bhunpinder Singh and that he had committed a mistake and would bear all the expenses of the treatment of the deceased. There is no reason to disbelieve them. *Jaspal Singh* v. *State of Punjab*, AIR 1979 SC 1708 (1709) : (1980) 1 SCC 487 : 1979 SCC (Cri) 920 : 1979 CrLJ 1386 : 1979 CrLR (SC) 487.

[8465] ● ***Extra-judicial confession.***—An extra-judicial confession by one of the accused charged with conspiracy to widow of another conspirator, who was assisting her husband in making spears and other weapons, is not acceptable. *Kanan* v. *State of Kerala*, AIR 1979 SC 1127 (1128) : (1979) 3 SCC 319 : 1979 CrLJ 919 : 1979 CrLR (SC) 601.

[8466] ● ***Admission of guilt.***—When the appellant was called upon to make his plea before the commencement of the prosecution evidence, he pleaded not guilty in respect of the offence charged against him and it was only after the prosecution evidence was closed and his examination under S. 313 of the CrPC was completed that he admitted guilt presumably as a result of plea bargaining. The learned Judicial Magistrate was in the circumstances not entitled to take into account the admission of guilt made by the appellant in reaching his decision in regard to the conviction of the appellant. The learned Judicial Magistrate, it is true, did not pass his order of conviction solely on the admission of guilt made by the appellant, but it is clear from his judgment that his conclusion was not unaffected by the admission of guilt on the part of the appellant. There can be no doubt that when there is admission of guilt made by the accused as a result of plea bargaining or otherwise, the evaluation of the evidence by the Court is likely to become a little superficial and perfunctory and the Court may be disposed to refer to the evidence not critically with a view to assessing its credibility but mechanically as a matter of formality in support of the admission of guilt. The entire approach of the Court to the assessment of the evidence would be likely to be different when there is an admission of guilt by the accused. Here it is obvious that the approach of the learned Judicial Magistrate was affected by the admission of guilt made by the appellant and in the circumstances, it would not be right to sustain the conviction of the appellant. *Ganeshmal Jashraj* v. *Government of Gujarat*, AIR 1980 SC 264 : (1980) 1 SCC 363 : 1980 SCC (Cri) 239 (241) : 1980 CrLJ 208 : 1980 CrLR (SC) 80.

[8467] ● ***Confessional statement recovered by Inspector of RPF.***—An officer of RPF conducting an inquiry under Section 8(1) of the Railway Property (Unlawful Possession) Act, 1966 has not been invested with all the powers of an officer-incharge of a Police Station making an investigation under Chapter XIV of the Code. Particularly, he has no power to initiate prosecution by filing a charge-sheet before the Magistrate under Section 173 of the Code, which has been held to be the clinching attribute of an investigating "police officer". Thus judged by the test laid down in *Badka Joti Savant* v. *State of Mysore*, AIR 1966 SC 1746 : 1966 CrLJ 1353. Inspector of RPF could not be deemed to be a "police officer" within the meaning of Section 25 of the Evidence Act and, therefore, any confessional or incriminating statement recorded by him in the course of an inquiry under Section 8(1) of the above-said Act of 1966, cannot be excluded from evidence under the said section. *Balkishan A. Devidayal* v. *State of Maharashtra*, AIR 1981 SC 379 : (1980) 4 SCC 600 : 1981 SCC (Cri) 62 : 1980 CrLJ 1424 : 1980 CrLR (SC) 588.

[8468] ● ***Voluntary confession.***—The learned Magistrate has put to the accused all the necessary questions to satisfy himself that the confession was voluntary. He has also appended the necessary certificate. We do not accept Shri Jain's submission that the learned magistrate should have been examined as a witness. Section 80 of the Evidence Act makes the examination of Magistrate unnecessary. It authorises the Court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly taken in accordance with law. The Magistrate has appended a certificate that he was satisfied that the confession was voluntary. No circumstance has been brought out in the evidence justifying the calling of the Magistrate as a witness. We do not think that the circumstances of the justify and comment on the alleged failure of the prosecution to examine the Magistrate as a witness. *Madi Ganga* v. *State of Orissa*, AIR 1981 SC 1165 : (1981) 2 SCC 224 : 1981 SCC (Cri) 411 : 1981 CrLJ 628 : 1981 CrLR (SC) 337.

[8469] ● ***Confessional statement.***—The circumstances in which the appellant was apprehended and his confessional statement is alleged to have been made also is rather interesting. In Bihar, the appellant was apprehended for having committed theft and that he was produced before the Mukhiya of the village. PW-7 and the Mukhiya wanted him to handed over to the Police. That it is alleged that the appellant said that "I am wanted in connection with a murder case and I am hiding from the police" and therefore requested not to be handed over to the Police and in this background, it is alleged that he made a statement that he has killed one "B.M." To prove such an extra-judicial confession two witnesses were produced. One of these witnesses has gone back on that statement and this statement is alleged to have been made after a long lapse of time. It is a piece of evidence on which no reliance could be placed. *Kans Behera* v. *State of Orissa*, AIR 1987 SC 1507 : (1987) 3 SCC 480 : 1987 SCC (Cri) 601 (605) : 1987 CrLJ 1857 : 1987 CrLR (SC) 389 : JT 1987 (2) SC 193.

[8470] ● ***Confession—Credibility.***—The confessional statement recorded by the 1st Class Magistrate has been rightly held to be correct in as much as in accordance with the statement the dead body was recovered from a room of the deceased's house after removing the earth on the pointing out of place by the appellant where the corpse was buried by the appellant herself. This dead body was recovered in the presence of PW 6, who is the Tehsildar. Secondly, the dead body was in a highly decomposed state as it was recovered after 10 days from the date of dumping the dead body under earth and as such the injuries on the dead body were not clearly visible and it is not possible for the doctor, PW 5 who held the post mortem examination to see all the injuries on the person of the deceased. The evidence of the doctor was not very relevant in this connection.

Manguli Dei v. *State of Orissa*, AIR 1989 SC 483 : 1989 Supp (1) SCC 161 : 1989 SCC (Cri) 322 : 1989 CrLJ 823 : 1989 CrLR (SC) 106 : 1988 (3) Crimes 773.

[8471] ● ***Confession—Evidence of.***—"The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It can not be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept." *Subamiya Deshmohmed* v. *State of Gujarat*, (1992) 1 SCC 473 : 1992 SCC (Cri) 157 : 1992 CrLJ 2757 : 1992 CrLR (SC) 235 : 1992 (1) Crimes 232.

[8472] ● ***Recording of confession.***—The Executive Magistrates while exercising their judicial or *quasi*-judicial functions thought in a limited way within the frame of the Code of Criminal Procedure, which judicial functions are normally performed by Judicial Magistrate can be held to be holding the judicial office. Therefore, the contention of the learned counsel that the conferment of judicial functions on the Executive Magistrate and Special Executive Magistrate is opposed to the fundamental principle of government contained in Article 50 of the Constitution cannot be countenanced. Resultantly, we hold that sub-section (3) of Section 20 of the TADA does not offend either Article 14 or 21 and hence this sub-section does not suffer from any constitutional invalidity.

Though we are holding that this section is constitutionally valid, we, in order to remove the apprehension expressed by the learned counsel that the Executive Magistrates and the Special Executive Magistrate who are under the control of the State may not be having judicial integrity and independence as possessed by the Judicial Magistrate and the recording of confessions and statements by those Executive Magistrates may not be free from any possible oblique motive, are of the opinion that it would be always desirable and appreciable that a confession or statement of a person is recorded by the Judicial Magistrate whenever the Magistrate is available in preference to the Executive Magistrates unless there is compelling and justifiable reason to get the confession or statement, recorded by the Executive or Special Executive Magistrates.

Sub-sections (3) and 4(a) of Section do not suffer from any infirmity on account of the inclusion of the Executive Magistrate and Special Executive Magistrate within the purview of Sections 164 and 167 of the Code of criminal Procedure in respect of their application in relation to a case involving an offence punishable under the TADA Act or any rule made thereunder. Likewise, clause (a) of Section 15 of the Special Courts Act, 1984 does not suffer from any infirmity. *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899 : 1994 CrLJ 3139 : (1994) 1 Crimes 1031.

[8473] ● ***Confession on phone.***—It can be seen that the evidence of PWs-10 and 11 amply establishes that it was the accused who shot the deceased dead. Then we have the evidence of PW-12, Subedar in the security department. He deposed about allocating the duties to the deceased and that he instructed PW-10 to take Markanda Rao and the deceased and drop them at their respective places of duty. He further deposed at about 12 midnight he received a phone call from Ammunition Store which was from the accused who told him on phone in Tamil that he had shot the deceased and that he should send the ambulance immediately. PW-12 made an entry in Ex. P. 12, the daily occurrence diary. Just then PWs-10 and 11 returned in the bus and he was also informed by them that the deceased was shot dead by the accused. PW-12 immediately passed on the information to PW-16, the assistant Security Officer, who immediately along with PW-13 and PW-18 came in a car. All of them went to the Ammunition Store and parked the car at about 50 feet. They kept the head-lights on and in that light they saw the body of the deceased lying on the ground at a distance of 10 feet from the Ammunition Store and found the accused near the gate of the Ammunition Store holding a rifle in his hands. PW-16 asked the accused to keep the rifle on the ground and accordingly he kept it on the ground and raised his hands. He was caught hold of by PW-16 and PW-18 went and brought the rifle and on being asked the accused told that he had kept the ammunition near the telephone and the pouch containing four live and one used cartridges was secured. All of them along with the accused came in the car to the Airport Police Station and PW-13 gave the report and the accused was handed over to the police along with the rifle and the cartridges. PWs-13, 16 and 18 also deposed about these details as to how on information they went to the Ammunition Store and took the accused into custody and also secured the musket and the ammunition. We do not find anything important which in any manner affects their veracity. Further as stated above, the evidence of PW-19 establishes that the accused took charge from PW-19 and that at the time of relieving, PW-19 handed over the musket and the live cartridges to him. This evidence coupled with the evidence of the above mentioned witnesses would establish that the accused was on duty at the relevant time and that he was responsible for causing the death of the deceased. Thus there is overwhelming evidence given by the above mentioned independent witnesses which fully establishes the guilt of the accused. As noted above, the plea of the accused has been of total denial and he simply stated that he was in the house wherefrom he was taken to the police station, which is totally false. When once it is accepted that the accused inspite of overwhelming evidence mentioned above, the High Court for no valid reason rejected the same. One of the infirmities pointed out by the High Court is that there is no mention about the alleged confession of the accused to PW-12 on phone in the complaint and, therefore, according to the High Court, all this story has been built up subsequently. We see absolutely no logic in this reasoning. The appreciation of evidence by the High Court is highly unsound and absolutely no valid reasons are given for disagreeing with the finding of the trial Court. We are satisfied that under the facts and circumstances of the case and on the basis of the overwhelming evidence, the only reasonable view is the one taken by the trial Court. For all the above reasons, we set aside the judgment of the High Court and restore the judgment of the trial Court convicting the accused under Section 302, IPC. *State of Karnataka by H.A.L. Airport Police, Bangalore* v. *Thangaraj*, AIR 1995 SC 2124 (1227) : 1995 CrLJ 3659 : (1995) 3 Crimes 236.

[8474] ● ***Confessional statement recorded by Police.***—The provisions contained in R. 15 of the Terrorist and Disruptive Activities (Prevention) Rules relating to the procedure to be followed for sending the confessional statement to the Chief Judicial Magistrate or the Chief Metropolitan Magistrate for being transmitted to the Designated Court concerned is not mandatory but directory. What is mandatory is that the report must be sent to the Designated Court. Accordingly, merely for not sending the said confessional statement to the Chief Judicial Magistrate for onward transmission to the Designated Court, the said confessional statement need not be scrapped on the score of incurable illegality for not following the mandatory provisions of R. 15 of the said Rules. In the instant case, such confessional statement had in fact been directly sent to the Designated Court immediately after recording the same. In the aforesaid facts, no prejudice has been caused to the accused for not sending the same to the Chief Judicial Magistrate for onward transmission to the Designated Court. The lapse committed in not sending the said confessional statements to the Designated Court through the Chief Judicial Magistrate is only a procedural irregularity which has not vitiated the trial. *Wariyam Singh* v. *State of Uttar Pradesh*, AIR 1996 SC 305 : (1995) 6 SCC 458 : 1995 SCC (Cri) 1124 (1127, 1128) : JT 1995 (7) SC 117 : (1995) 4 Crimes 200.

[8475] ● ***Confessional statement.***—In this case the High Court disbelieved the manner of extra-judicial confession because the same had been allegedly made even to the father of the deceased and that too in the presence of two co-villager it is not acceptable that the respondent would make a confession of such a heinous crime in presence of so many persons. The statement recorded by the learned Magistrate which has been characterised as judicial confession is really not so because a perusal of the same shows that the appellant had not admitted his guilt in terms inasmuch as the statement as recorded states about assault on the deceased by mistake. It may, however, be that the statement is not true. Now, if a statement is not true, that cannot be used even if the same were to be confessional in nature because the settled law is that for a confession to be used against the maker in a criminal trial the same has to be both true and voluntary. *State of Haryana* v. *Rajender Singh*, AIR 1996 SC 2978 : (1996) 8 SCC 77 : 1996 SCC (Cri) 534 (535, 536) : 1996 CrLJ 1875 : JT 1996 (3) SC 396.

[8476] ● ***Confession—Definition of.***—A "Confessions" must either be an express acknowledgment of guilt of the offence charged, certain and complete in itself, or it must admit substantially all the facts which constitute the offence. Section 24 provides, though in the negative form, that "Confession" can be treated as relevant against the person making the confession unless it appears to the Court that it is rendered irrelevant on account of any of the factors, namely, threat, inducement, promises etc. mentioned therein. Whether the "Confession" attracts the frown of Section 24 has to be considered from the point of view of the confession accused as to how the inducement, threat or promise from a person in authority would operate in his mind. Section 25 which provides that a "Confession" made to a Police Officer shall not be proved against the person accused of an offence, places complete ban on the making of such confession by that person whether he is in custody or not. Section 26 lays down that confession made by a person while he is in the custody of a Police Officer shall not be proved against him unless it is made in the immediate presence of a Magistrate. Section 27 provides that when any fact is discovered in consequence of information received from a person accused of any offence who is in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, may be proved. Section 27 is thus in the form of a proviso to Sections 24, 25 and 26. Sections 164, 281 and 463 of the Code of Criminal Procedure are the other provisions dealing with "Confession" and the manner in which it is to be recorded. Section 15 of the TADA Act, however, makes a special provision as to the admissibility of confession and signals a departure from the normal rule contained in Sections 25 and 26 of the Evidence Act. It provides that a confession made by an accused to a Police Officer of a particular rank or higher would be admissible in evidence and can be proved against that person subject to the fulfillment of other requirements indicated in that section. *Sahib Singh* v. *State of Haryana*, AIR 1997 SC 3247 : (1997) 7 SCC 231 : 1997 SCC (Cri) 1049 : 1997 CrLJ 3956 : 1997 CrLR (SC) 548 : (1997) 3 Crimes 114.

[8477] ● ***Statement made to doctor—Admissibility.***—Statement made by accused to the doctor who examined him about the cause of injury is admissible. *Ammini* v. *State of Kerala*, AIR 1998 SC 260 : (1998) 2 SCC 301 : 1998 SCC (Cri) 618 : 1998 CrLJ 481 : 1998 CrLR (SC) 61 : (1997) 4 Crimes 131.

[8478] ● ***Confession before—Magistrate.***—Except the bare allegation there was no material on record to indicate that police had pressurised A-4 or had forced him to make the confession. The trial Court was not justified in considering the length of the confession as a suspicious circumstance. The confession was a complete record of the steps taken by the Magistrate, the questions put to the accused and the answers given by him. The High Court has also pointed out how other reasons given by the trial Court are also improper. While agreeing with the trial Court that the Judicial Magistrate had failed to inquire from A-4 as to whether he was promised that he would be made an approver if he made the confession, the High Court held that this omission was of no significance as A-4 was clearly warned that if he made a confession it was likely to be used against him. The High Court was also right in holding that the trial Court in relying extensively on the case diary had committed an illegality. The omission found by the trial Court as a result of that illegal effort were minor and did not justify the conclusion that the confession was not voluntarily made. In the absence of any requirement that separate reasons were required to be recorded for believing that the confession was made voluntarily it was not proper for the trial Court to doubt its genuineness on the ground that the reasons were not recorded separately though the satisfaction was recorded in the memorandum. The High Court was therefore right in placing reliance upon the confession. *Ammini* v. *State of Kerala*, AIR 1998 SC 260 : (1998) 2 SCC 301 : 1998 SCC (Cri) 618 : 1998 CrLJ 481 : 1998 CrLR (SC) 61 : (1997) 4 Crimes 131.

[8479] ● ***Confessional statement recorded under Section 15 of TADA.***—A confessional statement recorded in accordance with requirements contained in Section 15(1), TADA of the ban contained in Section 25 of the Evidence Act or Section 162 of the Code of Criminal Procedure. The requirements stipulated in Section 15(1) of the TADA for admissibility of a confession made to a police officer are (1) The confession should have been made to a police officer not lower in rank than a Superintendent of Police (2) it should have been recorded by said police officer (3) the trial should be against the maker of the confession, (4) such trial must be for an offence under TADA or the Rules thereunder. If the above requirements are satisfied the confession becomes admissible in evidence and it is immaterial whether the confession was recorded in one particular case or in a different case.

When there is no statutory inhibition for using such confession on the premise that it was not recorded during the investigation of the particular offence which is under trial there is no need or reason for the Court to introduce a further fetter against the admissibility of the confessional statement. It often happens that a confessor would disclose very many acts and events including different facets of his involvement in the preparation, attempt and commission of crimes includeing the acts of his co-participators therein. But to expel every other incriminating disclosures than those under investigation of a particular crime from the ambit of admissibility is not mandated by any provision of law. We have, therefore, absolutely no doubt that a confession, if usable under Section 15 of the TADA, would not become unusable merely because the case is different or the crime is different. If the confession covers that different crime it would be a relevant item of evidence in the case in which that crime is under trial and it would then become admissible in the case. *State of Gujarat* v. *Mahammed Atik*, AIR 1998 SC 1686 : (1998) 4 SCC 351 : 1998 SCC (Cri) 936 : 1998 CrLJ 2251 : (1998) 2 Crimes 92.

[8480] ● ***Confessions—Recording of—Omission to obtain signature of accused at end of confession.***—Thiagarajan (the S.P.I.) has submitted that his not getting signature of Nalini (A-1) at the end of confession is an omission. There is no cross-examination of V. Thiagarajan (PW-52) as to why the omission occurred. It has not been suggested that the omission was deliberate. Statement of v. Thiagarajan (PW-52) is forthright. There could certainly be a human error but that would not mean that Section 463 of the Code becomes inapplicable. Mr. Natarajan is correct in his submission that when the requirement of law is that confession should be signed by the person making it, it would mean his signatures at the end of the confession. What Section 463 requires is that evidence could be led of police officer recording the confession as to why provisions of Rule 15(3) could not be complied while recording the confession. It has not been suggested or brought on record as to how not getting signatures of Nalini (A-1) on the last pages of the confession has injured her in her defence on the merits of the case. The confession has been corroborated in material particulars by means of independent evidence even if the confessions of the co-accused are set apart. Confession of Nalini (A-1) was recorded on 7-8-1991 and was sent to the Court of the Chief Judicial Magistrate on the following day and on 9-8-1991 and was sent to the Designated Court. We find that the confession was duly made, which was recorded by V. Thiagarajan (PW-52). We are, therefore, inclined to admit the confession. (D.P. WADHWA J.) *State of T.N.* v. *Nalini*, AIR 1999 SC 2640 : (1999) 5 SCC 253 : 1999 SCC (Cri) 691 : 1999 CrLJ 3124 : 1999 CrLR (SC) 424.

[8481] ● ***Magistrate not explained how he knew accused desiring to confess.***—It is a worthless exercise to ponder over how or from which source the Investigating Officer would have come to know that the accused was desiring to confess. Investigating Officer can have different sources to know that fact and he is not obliged to state in Court the same, particularly in view of the ban contained in S. 162 of the Code of Criminal Procedure. *State of Maharashtra* v. *Daman Gopinath Shinde*, AIR 2000 SC 1691 : (2000) 6 SCC 269 : 2000 CrLJ 2301.

[8482] ● ***Confession—Possibility of exerting control by Police over detenu.***—The geographical distance between the two buildings—sub-jail and the police station—should not have been a consideration to decide the possibility of police exerting control over a detenu. To keep a detenu in the police fear it is not necessary that the location of the police station should be proximal to the edifice in which the prisoner is detained in judicial custody. In many places judicial Courts are situated very near to police station houses, or the offices of higher police officers would be housed in the same complex. It is not a contention to be countenanced that such nearness would vitiate the independence of judicial function in any manner. *State of Maharashtra* v. *Daman Gopinath Shinde*, AIR 2000 SC 1691 : (2000) 6 SCC 269 : 2000 CrLJ 2301.

[8483] ● ***Confession—Voluntariness.***—Newasa is a taluk located within the territorial limits of the district of Ahmednagar. The Chief Judicial Magistrate, Ahmednagar was approached for nominating a Magistrate within his jurisdiction for recording the confession. There could have been a variety of reasons for the Chief Judicial Magistrate for choosing a particular Magistrate to do the work. When not even a question was put to PW-19 or PW-44 (the Investigating Officer) as to why the CJM, Ahmednagar did not assign the work to a Magistrate at Newasa, it is not proper for the High Court to have used that as a ground for holding that voluntariness of the confession was vitiated. *State of Maharashtra* v. *Daman Gopinath Shinde*, AIR 2000 SC 1691 : (2000) 6 SCC 269 : 2000 CrLJ 2301.

[8484] ● ***Statement recorded under Section 108(3)—Customs Act—Admissibility.***—Section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said Section is intended to be exercised by a Gazetted Officer of the Customs department. Sub-s. (3) enjoins on the person summoned by the officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the Gazetted Officer to elicit the truth from the person interrogated. There is no involvement of the magistrate at that stage. The entire idea behind the provision is that the Gazetted Officer questioning the person must gather all the truth concerning the episode. If the statement so extracted is untrue, its utility for the officer gets lost. A confession made to a police officer can be recorded by him without any of the constraints incorporated under Section 164, CrPC. But the safety of the confessor who makes such statement to the Police Officer is that the same is forbidden from use in evidence. The ban contained in Section 25, Evidence Act is an absolute ban. But there is no bar in regard to the confession made to any person other than a police officer except when such confession was made while he is in police custody. The inculpatory statement made by any person under S. 108 is to non-Police personnel and, hence, it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in Police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the Court in the same manner as confession made by an accused person to any non-Police personnel. The Court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted Officer must also pass the tests prescribed in S. 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in S. 24 that statement becomes useless in any criminal proceeding. A statement recorded by Customs Officers under S. 108 of the Customs Act is admissible in evidence. The Court has to test whether the inculpating portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in S. 24 of the Evidence Act. *Assistant Collector of Central Excise* v. *Duncan Agro Industries Ltd.*, AIR 2000 SC 2901 (2903, 2904) : (2000) 7 SCC 53 : 2000 CrLJ 4035 : 2000 SCC (Cri) 1275 : 2000 CrLR (SC) 640.

[8485] ● ***Confessional statement and retraction both constitute composite relevant fact.***—There can be no doubt, it was not necessary, while considering the case of the petitioner detenue, to place all or any of the document which is relevant relied in the proceedings of a co-accused, but where the sponsoring authority opts out of his own volition to place any document of the other co-detenue, not merely as a narration of fact but reiterating in details the confession made by him, then it cannot be said it would not prejudice the case of the detenue. If this has been done, it was incumbent for the sponsoring authority to have placed their retraction also. As held in *Rajappa Neela Kantan Case*, (2000(2) Scale 642). The placement of a document of other co-accused may prejudice the case of the petitioner. In the first place the same should not have been placed, but, if placed, the confessional statement and the retraction, both constituting a composite relevant fact both should have been placed. If any one of the two documents alone is placed without the other, it would affect the subjective satisfaction of the detaining authority. But once the sponsoring authority having chosen to place the confessional statement, then it was incumbent on it to place the retraction also. All documents, which are relevant which have bearing on the issue, which are likely to affect the mind of the detaining authority should be placed before him. Of course, a document which has no link with the issue cannot be construed as relevant. *A. Sonkath Ali* v. *Union of India*, AIR 2000 SC 2662 (2669) : (2000) 7 SCC 148 : 2000 SCC (Cri) 1304 : 2000 CrLJ 3691 : 2000 CrLR (SC) 568.

[8486] ● ***Statement before Magistrate admission not confession.***—A statement of 1st accused, Meena Gupta, was recorded by the Sub-Divisional Judicial Magistrate. It was marked in the case and proved through the said Magistrate, as though it was a judicial confession. The High Court did not find any inculpative statement therein and, hence, declined to act on it as a confession. We cannot but agree with the conclusion of the High Court that the said statement does not have even one limb of inculpative admission so far as the matter of the statement is concerned. If it is not inculpative then the same cannot be used against a co-accused because S. 30 of the Evidence Act permits only a confession made by one accused to be taken into consideration against the co-accused also subject to the conditions laid down in the section. As far 1st accused is concerned; the statement made by her to the Magistrate can be treated as an admission by her though not as confession. *Bishwa Nath Aggarwal* v. *Meena Gupta*, (2000) 9 SCC 149 : 2000 SCC (Cri) 1182 (1183) : (2001) 1 Crimes 17.

[8487] ● ***Judicial confession.***—We are unable to understand how a judicial confession would become bad by reason of the fact that articles belonging to the victims were recovered prior to the making of the confession. That aspect instead of vitiating the confession, could be a factor in favour of the voluntariness of the confession. When the culprit finds that the articles concealed by him are all disinterred, it is possible that he might feel that there is no use in concealing the facts any more. Then he may desire to make a clean breast of everything to any person or authority. *State of Tamil Nadu* v. *Kutty*, AIR 2001 SC 2778 : (2001) 6 SCC 550 : 2001 SCC (Cri) 1177 (1181) : 2001 CrLJ 4168.

[8488] ● ***Confession before Magistrate.***—The learned counsel for A-2 contended that A-2 in his confession did not own that he also stabbed at least one of the two deceased. A reading of the confession as a whole leaves no doubt that A-2 has admitted the full length role played by him in association with the other two assailants for murdering the two ladies. Hence, the very fact that he did not say in so many words that he also inflicted one stab injury on the deceased is of no consequence. In a way, this aspect is a further assurance to us that his confession was not what the Police wanted him to say to the Magistrate. *State of Tamil Nadu* v. *Kutty*, AIR 2001 SC 2778 : (2001) 6 SCC 550 : 2001 SCC (Cri) 1177 (1182) : 2001 CrLJ 4168.

[8489] ● ***Confessions in criminal law either judicial or extra-judicial.***—Confessions in criminal law have been categorised to be either judicial or extra-judicial. The prosecution is obliged to refer and rely on the alleged confession of the accused in any one of the aforesaid categories. An extra-judicial confession cannot be treated as judicial confession, similarly an alleged judicial confession proved to have not been legally recorded cannot be used as extra-judicial confession otherwise also such an approach would result in dragging the judicial officers into uncalled for and unnecessary controversies. *Dhanajaya Reddy* v. *State of Karnataka*, AIR 2001 SC 1512 : (2001) 4 SCC 9 : 2001 SCC (Cri) 652 (662) : 2001 CrLJ 1712 : 2001 CrLR (SC) 315 : JT 2001 (3) SC 395 : (2001) 2 Crimes 15.

[8490] ● ***Confessional statement recording of under Section 15 of TADA.***—In view of the settled legal position, it is not possible to accept the contention of learned senior counsel that as the accused were in police custody, the confessional statements are either inadmissible in evidence or are not reliable. Custodial interrogation in such cases is permissible under the law to meet grave situation arising out of terrorism unleashed by terrorist activities. In the present case, confessional statements were recorded prior to the date of decision in the case of *Kartar Singh* case 1994 CrLJ 3139, *i.e.,* before 11th March, 1994. Further, despite the suggestion made by this Court in *Kartar Singh*'s case, the said guidelines are neither incorporated in the Act nor in the rules by the Parliament. Therefore, it would be difficult to accept the contention raised by learned Counsel for the accused that as the said guidelines are not followed, confessional statements, even if admissible in evidence, should not be relied upon for convicting the accused. Further, this Court has not held in *Kartar Singh*'s case that if suggested guidelines are not followed then confessional statement would be inadmissible in evidence. Similar contention was negatived by this Court is *S.N. Dube* v. *N.B. Bhoir*, AIR 2000 SC 776 : 2000 CrLJ 830, by holding that a Police Officer recording the confession under S. 15 is really not bound to follow any other procedure and the rules or the guidelines framed by the Bombay High Court for recording the confession by a Magistrate under S. 164, CrPC; the said guidelines do not by themselves apply to recording of a confession under S. 15 of the TADA Act and it is for the Court to appreciate the confessional statement as the substantive piece of evidence and find out whether it is voluntary and truthful. *Lal Singh* v. *State of Gujarat*, AIR 2001 SC 746 : (2001) 3 SCC 221 : 2001 SCC (Cri) 472 (488) : 2001 CrLJ 978 : JT 2001 (1) SC 410.

[8491] ● ***When confessional statement is there Prosecution need not establish each and every link.***—To say that prosecution has to prove the case with a hundred per cent certainty is a myth. Since last many years the nation is facing great stress and strain because of misguided militants and co-operation to the militancy, which has affected the social security, peace and stability. It is common knowledge that such terrorist activities are carried out with utmost secrecy. Many facts pertaining to such activities remain in personal knowledge of the person concerned. Hence, in case of conspiracy and particularly such activities, better evidence than acts and statements including that of co-conspirators in pursuance of the conspiracy is hardly available. In such cases, when there is confessional statement, it is not necessary for the prosecution to establish each and every link as confessional statement gets corroboration from the link which is proved by the prosecution. In any case, the law requires establishment of such a degree of probability that a prudent man may on its basis, believe in the existence of the facts in issue. *Lal Singh* v. *State of Gujarat*, AIR 2001 SC 746 : (2001) 3 SCC 221 : 2001 SCC (Cri) 472 (518) : 2001 CrLJ 978 : JT 2001 (1) SC 410.

[8492] ● ***Confession of co-accused.***—"Learned Senior Counsel submitted that the High Court has given benefit of doubt to A-2 with regard to conspiracy for commission of murders and, therefore, as he is acquitted for the main offence, his confessional statement is not admissible in evidence. This submission in our view is without any substance. Firstly, the confessional statement of A-2 recorded under S. 164, CrPC by the Magistrate would be admissible in evidence as accused Nos. 1 and 2 were jointly tried. The said statement is proved by examining the Magistrate who recorded the same. Only question would be—to what extent it can be used against A-1. In the present case, conviction of A-1 for the offence for which he is charged is based on circumstantial evidence. Conviction of A-2 for the offence punishable under S. 201, IPC is also based on circumstantial evidence and after taking into consideration confessional statement. The circumstantial evidence which gets corroboration from the confessional statement of A-2 for connecting A-1 with the crime could be relied upon. *Prakash Dhawai Khairnar (Pahil)* v. *State of Maharashtra*, AIR 2002 SC 340 (347-48) : (2002) 2 SCC 35 : 2002 CrLJ 928 : (2002) 1 Crimes 18.

[8493] ● ***Confessional statement before Police Officer.***—Confessional statements before the Police officer under Section 15 of the TADA is substantive evidence and it can be relied upon on the trial of such person or co-accused, abettor or conspirator for an offence punishable under the Act or the rules. The Police officer before recording the confession has to observe the requirement of sub-section (2) of Section 15, TADA. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the Legislature in its wisdom has provided that such confessional statement can be used as evidence, it would not be just, reasonable or prudent to water down the scheme of the Act (TADA) on the assumption that the said statement was recorded under duress or was not recorded truly by the concerned officer in whom faith is reposed. *Jayawant Dattatraya Suryarao* v. *State of Maharashtra*, AIR 2002 SC 143 (168) : (2001) 10 SCC 109 : 2002 CrLJ 226.

[8494] ● ***Confessional statements made voluntarily.***—The ground for rejecting the confessional statement, as noticed by the Designated Judge, is alleged interpolations in confessional statements. It may be noticed that the confessional statements were recorded in Marathi language in Devnagri script. The statements were typed wherein some names and dates have been shown in bold letters. The use of bold letters does not make the confession doubtful justifying the conclusion that there had been interpolations. The bold letters are intended to high light the importance of the names and words. . . . In view of specific denial and there being no evidence to the contrary, the Trial Court committed a mistake of law in not relying upon the confessional statements of A-5 and A-6 which were otherwise held by him to be voluntarily made. *State of Maharashtra* v. *Bharat Chaganlal Raghani*, AIR 2002 SC 409 (424) : (2001) 9 SCC 1 : 2002 CrLJ 944.

[8495] ● ***Confessions divided into two classes judicial and extra-judicial.***—Confessions may be divided into two classes, *i.e.*, judicial and extra-judicial. Judicial confessions are those, which are made before a Magistrate or a Court in the course of judicial proceedings. Extra-judicial confessions are those, which are made by the party elsewhere than before a Magistrate or Court. Extra-judicial confessions are generally those that are made by a party to or before a private individual, which includes even a Judicial Officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the CrPC or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. *State of Rajasthan* v. *Raja Ram*, AIR 2003 SC 3601 : (2003) 8 SCC 180 : 2003 SCC (Cri) 1965 : 2003 CrLJ 3901.

[8496] ● ***Extra-judicial confession—Meaning and reliability of.***—As to extra-judicial confessions, two questions arise : (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the Court to have been caused by any inducement; threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. If follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person; or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24.

If the evidence relating to extra-judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration as rightly submitted by the counsel is a matter of prudence and not an invariable rule of law. It is improbable as rightly held by the High Court that the accused would repose confidence in a person who is inimically disposed towards him, and confess his guilt. *State* *of Rajasthan* v. *Raja Ram*, AIR 2003 SC 3601 : (2003) 8 SCC 180 : 2003 SCC (Cri) 1965 : 2003 CrLJ 3901.

[8497] ● ***Confession—Relationship with admission.***—Under the general law of the land as reflected in the Evidence Act, no confession made to a police officer can be proved against an accused. "Confessions" which is a terminology used in criminal law is a species of "admissions" as defined in Section 17 of the Evidence Act. An admission is a statement, oral or documentary which enables the Court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1773) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8498] ● ***Confession—Meaning.***—Confession is a statement made by an accused which must either admit in terms of the offence, or at any rate substantially all the facts which constitute the offence. *Ajay Singh* v. *State of Maharashtra,* AIR 2007 SC 2188 : (2007) 12 SCC 341 : 2007 (3) Crimes 1 (SC) : 2007 (7) SCR 983.

[8499] ● ***Admissibility of confession.***—In a murder trial, only that part of the confession which leads to the recovery of dead body or crime articles of the deceased would be admissible in evidence. *Aloke Nath Dutta* v. *State of West Bengal,* (2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2007) 1 Crimes 321.

[8500] ● ***Judicial Confession—Value.***—Judicial confession would be looked into to buttress other evidence and not *vice versa. Aloke Nath Dutta* v. *State of West Bengal,* (2008) 12 SCC 230 : 2008 (2) SCC (Cri) 264 : (2007) 1 Crimes 321.

[8501] ● ***Corroboration.***—Judicial or extra-judicial confessions need corroboration in general. It is not necessary that corroboration should be in material particulars. Each and every piece of information mentioned in confession need not be corroborated by independent evidence. *Vilayuda Pulavar* v. *State,* (2009) 14 SCC 436 : 2009 (6) SCR 383 : JT 2009 (11) SC 266.

[8502] ● ***Expression "Confession"—Meaning and Scope.***—The expression 'confession' is not defined in the Evidence Act, 'Confession' is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement' is "act of stating; that which is stated; a formal account, declaration of facts *etc.*" The word 'statement' includes both oral and written statement. Communication to another is not however an essential component to constitute a 'statement'. An accused might have been overheard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid nevertheless constitute a statement. If such statement is an admission of guilt, it would amount to a confession whether it is communicated to another or not. This very question came up for consideration before this Court in *Sahoo* v. *State of Uttar Pradesh,* AIR 1966 SC 40 : 1966 Crl. U 68. After referring to some passages written by well known authors on the "Law of Evidence" SUBBA RAO, J. (as he then was) held that "communication is not a necessary ingredient to constitute confession". *Shiva Karam Payaswami Tewari* v. *State of Maharashtra,* 2009 AIR SC 1692 : 2009 (11) SCC 262 : 2009 (1) SCR 442 : 2009 (1) Supreme 461.

2. MEANING OF THE EXPRESSION 'ACCUSED PERSON' AS USED IN SECTIONS 24 TO 27 OF THE ACT

[8503] ● ***Meaning of the expression 'accused person' as used in Sections 24 to 27 of the Act.***—The words 'accused person' and 'person accused of an offence' as used in Sections 24 to 27 of the Evidence Act have the same meaning. They are only descriptive of the person put up before a criminal Court on a charge of having committed an offence against whom a previous confession or statement made by him is sought to be produced in evidence. These words do not predicate that a formal accusation against the person concerned must have already been made at the time when the confession or statement was made.

The bar against the use of a confession made by any person under Sections 24 to 26 operates whether or not he has already been accused of an offence at the time when he made the confession, and whether or not he is in police custody at that time. Similarly, if a fact is discovered in consequence of information given by an accused, it can be proved whether or not a formal accusation of an offence had already been made against him at the time when he gave that information.

In other words, the word 'accused' in these sections is adjectival and describes the person to whom they are meant to apply, and it is not a condition of the applicability of these sections that an accusation of an offence must necessarily be in existence at the very time when that person made the confession or statement sought to be proved. *State of Uttar Pradesh* v. *Deoman Upadhaya*, AIR 1960 SC 1125 : 1960 CrLJ 1504 : 1961 (1) SCR 14.

3. THE PROPER METHOD OF USE OF A CONFESSION WHICH IS PARTLY INCULPATORY AND PARTLY EXCULPATORY

[8504] ● ***The Proper Method of Use of a Confession which is partly Inculpatory and partly Exculpatory.***—*Note.*—The question as to the correct method of use of a confessional statement made by the accused when it is partly inculpatory and partly exculpatory or explanatory, has been considered by the Court in a number of cases. The rules relating to this question which have evolved from these decisions may be summarised as under:

1. When the whole of a statement made by the accused relates to the same matter, and contains portions which are inculpatory and also portions which are exculpatory or explanatory, the Court must accept that statement as a whole, or if there are reasons for rejecting it, must reject it as a whole. It is not open to the Court to split up the statement and accept only its inculpatory part after rejecting the exculpation or explanation contained in the statement as being inherently improbable or incredible.
2. However, even when the statement wholly relates to the same matter, the Court would be justified in splitting the statement and accepting only its inculpatory portion, if there is clear affirmative evidence on the record to show that the explanatory portion of it is definitely false.
3. When the same statement covers two distinct and separate matters, Rule No. 1 above does not apply, and it is open to the Court to accept it as to one matter only. In such a case, the Court would be justified in rejecting the statement as to the other matter purely on the ground of its inherent improbability, even though it has not been shown to be false by any positive evidence.

These principles apply equally, whether the statement under consideration is a previous confessional statement or is one made in Court during examination under section 342, CrPC; for this reason, all the cases relating to this question are collected here under one head.

It is settled law that an admission made by a person, whether amounting to a confession or not cannot be split up. If the Court proposes to make use of an admission made in a statement recorded under Section 342 of the Code of the purpose of corroborating thereby some piece of prosecution evidence, the Court must use the whole statement, including that portion of it which offers an explanation.

An admission must be used either as a whole, or not at all, and it is not open to the Court to use only a part of it and reject the rest.

In the present case, the question was whether a particular letter had been typed on the typewriter in the office of the accused or had been typed by him at his house on his private machine. When questioned, the accused said that it had been typed 'on one of the typewriters which were brought in the office for trial'. The lower Courts rejected this explanation and further held his omission to state that the letter had been typed on the office machine could be taken as an admission that it had not been so typed.

Held : Such a use of the statement of the accused was wholly unwarranted. The Court was bound to look at his statement as a whole and it could not be split up so as to exclude from consideration the explanation he had offered. *Hanumant Govind Nargundkar* v. *State of Madhya Pradesh*, AIR 1952 SC 343 : 1953 CrLJ 129 : 1952 SCR 1091 : 1952 SCJ 509.

[8505] ● ***Confession partly inculpatory and partly exculpatory.***—It is not open to the Court to accept only the inculpatory part of the statement of an accused and at the same time to reject the exculpatory or explanatory part as inherently false and incredible.

For instance, if an accused gives an account of how he killed a woman and then gives his reasons for doing so, the Court may, if the said account commends belief, accept it, but in that case the Court must also accept the explanation given by the accused, even though it finds the explanation inherently incredible, unless there is clear affirmative evidence showing that the exculpatory portion was false.

In the present case, the accused was charged with the murder of her husband by administering him potassium cyanide. The case rested on circumstantial evidence as to disposal of the dead body and her confession in which she had stated that she had not given him any poison, that his medicine bottle and another bottle containing a liquid for washing photos lay side by side, that he had taken the liquid from the wrong bottle by mistake and had died some time later, and that-having got panicky she had disposed of the body with the assistance of an accomplice by taking it in a jeep to a lonely well and had thrown it there.

The High Court, on appeal, accepted that part of her confession which related to her conduct in connection with the disposal of the body, and on the strength of it rejected the earlier part of it in which she had explained the circumstances in which her husband had died, as being inherently improbable.

This approach to the question of the use of a confession which is partly inculpatory and partly exculpatory is quite incorrect. It is not open to a Court, in such a case, to split up the confession and accept only inculpatory part, as the High Court had done. In the absence of any affirmative evidence to show that her description of the circumstances in which her husband had died was definitely false, if the confession is to be accepted, it has to be accepted as a whole, including her explanation of his death, or otherwise the whole of the confession has to be rejected as being unbelievable.

After considering the confession as a whole, and the circumstantial evidence in the case, it is not sufficient to establish the guilt of the accused, and acquit her. *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 351 : 1953 CrLJ 154 : 1952 SCR 94 : 1952 SCJ 545.

[8506] ● *Accused when makes statement partly inculpatory and partly exculpatory regarding any fact.*—When the accused makes any statement regarding any fact which is partly inculpatory and partly exculpatory, the Court is bound to consider the statement as a whole. It cannot break up that statement so as to accept the part which is inculpatory and reject the explanation.

However, when the statement of the accused covers two *different* and *independent* facts, it is open to the Court to accept the statement so far as it relates to one fact and to reject it as to another fact which is proved beyond doubt by the prosecution evidence.

In the present case the accused was charged under Section 66(*b*) read with Section 81 of the Bombay Prohibition act, for possessing in his godown rectified spirit without permit. The accused did not challenge the prosecution case that he was in charge of the godown and admitted that fact in his statement. He, however, denied that the spirit was found from the godown and asserted that it was found from outside the godown.

The trial Magistrate accepted the statement of the accused insofar as it admitted that the godown was in his possession; but in view of the fact that it had been clearly established that the spirit had been recovered from that godown, he rejected that part of the statement in which he denied that it had been so recovered. He held that it had been proved that the accused had in his possession rectified spirit without a permit, and convicted the accused as charged. On appeal, the High Court confirmed the conviction.

The use of the statement of the accused made by the lower Courts is correct and according to law. The order of conviction is maintained. *Vijendrajit Ayodhya Prasad Goel* v. *State of Bombay*, AIR 1953 SC 247 : 1953 CrLJ 1097 : 1953 SCJ 328.

[8507] ● *Statement when consists of distinct and separate matters.*—When an accused makes a statement under Section 342, CrPC, and the Court proposes to take it into consideration, it must be taken as a whole and it is not proper to accept the incriminatory portion only, while at the same time the Court rejects the exculpatory portion thereof.

This proposition as to the use which can be made of the statement of an accused was laid down in *Hanumant G. Nargundkar* v. *State of Madhya Pradesh,* and is a perfectly correct principle of law on this matter.

But it applies to what the accused has stated as to any one matter only, and not when the statement consists of distinct and separate matters. When a statement covers matters which are distinct and separate, it is perfectly open to the Court to accept an admission as to one matter and rely upon it by way of corroboration of the prosecution evidence on record, and convict the accused on the strength of such corroboration, even though the Court rejects another portion of the same statement relating to quite another matter because of its inherent improbability.

In the present case an accused charged along with others with murder at night time, was arrested soon after the crime and was found to have received gunshot injuries. When questioned he admitted his presence at the scene of occurrence, but explained his injuries as having been received when he went to the reuse of the deceased and was grappling with unknown assailants. In the circumstances of the case, his explanation was rejected as being utterly improbable, because the deceased was proved to have been his deadly enemy and there was no evidence at all that any person other than the accused and his companions were concerned in the attack.

The use of the statement of the accused made by the trial Court cannot be objected to as being not in accordance with the principles laid down in *Hanumant Nargundkar*'s case, because that part of the statement of the accused which has been rejected relates to a matter distinct and separate from the mater contained in the first part which has been accepted, whereas the whole statement in *Hanumant*'s case relates only to one matter. *Karnail Singh* v. *State of Punjab,* AIR 1954 SC 202 : 1954 CrLJ 580 : 1954 SC 904.

[8508] ● ***Confession of accused to be taken as a whole.***—It is settled law that the confession of the accused has to be taken as a whole and the exculpatory part cannot be thrown aside. as said before, the case of the prosecution lies solely on the two dying declarations of the deceased. The appellant instead of projecting a plain denial has on the other hand strengthened those dying declarations by his statement in admitting that he was responsible for the death of the deceased. Yet, his owning the commission of the crime does not lead to the conclusion that he was guilty of offence punishable under S. 302, IPC. *Devku Bhikha* v. *State of Gujarat*, AIR 1955 SC 2171 (2172) : 1955 CrLJ 3975.

[8509] ● ***Confession—What is.***—Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in Sections 24 to 30 of the Evidence Act and Sections 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in Sections 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provisions of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides : "No confession made to a police officer shall be proved as against a person accused of an offence." The terms of Section 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by Section 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by Section 25 on a confession made to a police officer. Section 27 is in the form of a proviso and partially lifts the ban imposed by Sections 24, 25 and 26. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119 : 1966 CrLJ 100.

[8510] ● ***Confession by accused to Police Officer protected under Section 25 of Evidence Act.***—Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-section (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of Section 27 of the Evidence Act. The words of Section 162 are wide enough, to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under Section 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by Section 27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under Section 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by Section 162 of the Code of Criminal Procedure and a confession to any other person made by him while in the custody of a police officer is protected by Section 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them. *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119 : 1966 CrLJ 100.

[8511] ● ***Confession—Admission of offence.***—A confession may be defined as an admission of the offence by a person charged with the offence.

A statement which contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. If an admission of an accused is to be used against him, the whole of it should be tendered in evidence and if part of the admission is exculpatory and part inculpatory the prosecution is not at liberty to use in evidence the inculpatory part only. *Vide Hanumant Govind v. State of Madhya Pradesh*, 1952 SCR 1091 at page 1111 : AIR 1952 SC 343 at page 350 and 1953 SCR 94 : AIR 1952 SC 354. The accused is entitled to insist that the entire admission including the exculpatory part must be tendered in evidence. But this principle is of no assistance to the accused where no part of his statement is self-exculpatory, and the prosecution intends to use the whole of the statement against the accused. *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119 : 1966 CrLJ 100.

[8512] ● ***Confession consists of several parts.***—A confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact *i.e.* some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also, every other admission of an incriminating fact contained in the statement is part of the confession. *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119 : 1966 CrLJ 100.

[8513] ● ***Proof of confession if excluded by any provision of law.***—If proof of the confession is excluded by any provision of law such as Sections 24 25, and 26 of the Evidence Act, the entire confessional statement in all its parts including the admission of minor incriminating facts must also be excluded, unless proof of it is permitted by some other sections such as Section 27 of the Evidence Act. Little substance and content would be left in Sections 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted. *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119 : 1966 CrLJ 100.

[8514] ● ***Confession to Police Officer.***—On a plain construction of Section 24 it can be said that proof of all the admissions of incriminating facts contained in a confessional statement is excluded by the section. Similarly, Sections 25 and 26 bar not only proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also admissions contained in the confessional statement of all incriminating facts related to the offence. *Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119 : 1966 CrLJ 100.

4. COMBINED EFFECT OF SECTIONS 24 TO 27 OF THE EVIDENCE ACT—RESTRICTIONS ON THE USE OF A CONFESSION

[8515-16] ● ***Combined effect of Sections 24 to 27 of the Evidence Act—Restrictions on the use of a confession.***—When an accused person, that is, any person who is charged in a criminal proceeding with the commission of an offence, has made a statement which is relevant to the charge against him to any person at any time previous to the commencement of the proceeding against him, then, subject to the conditions set out in Sections 24 to 26 of the Act, such a statement may be proved against the accused, whether it amounts to a confession or not, and whether at the time when he made it he was already an accused person or not. The restrictions imposed by law on the use by the prosecution of a statement or confession made by the accused are as under :

1. A confession cannot be proved if it has been procured by any inducement, threat or promise which proceeded from a person in authority and which has led the accused to suppose that he would gain some advantage in reference to a proceeding against him. This bar applies with the same force whether the accused is or is not already an accused person charged of an offence, or is in custody or not, at the time when he made the confession (Section 24).
2. A confession cannot be proved if it has been made to or in the presence of a police officer. This bar is absolute and it applies equally whether the accused was or was not in custody at the time he made the confession (Section 25).
3. After the accused has been arrested and taken into custody, a confession made

by him while he is in the custody of a police officer cannot be proved unless it is made before a Magistrate, and has been duly recorded after satisfying all the requirements of law as regards the recording of a confession, and after putting to the accused all necessary questions for the purpose of ensuring that the confession is entirely voluntary (Section 26, and Section 164, CrPC).

4. Even when statement made by an accused person to a police officer does not amount to a confession and therefore does not fall under the ban of Section 25 if that statement is made in the course of investigation into any offence, it cannot be used against the accused for any purpose in any inquiry or trial in respect of that offence, except when that statement falls under Section 27, in which case it can be used against him only to the extent permitted under that section [Section 162(1) and (2), CrPC].
5. Notwithstanding anything said in Rules 1 to 3 above, if any person who is accused of an offence gives any information and in consequence thereof a relevant fact is deposed to as having been discovered, so much of that information as distinctly relates to the fact discovered thereby, and no more, may be proved, whether that information is contained in a confession proof of which is barred under Section 24 to 26 of the Evidence Act, or whether it is contained in a statement made to a police officer in the course of an investigation use of which is barred under Section 162 of the Code. *State of Uttar Pradesh* v. *Deoman Upadhyaya,* AIR 1960 SC 1125 : 1960 CrLJ 1504.

[8517] ● ***Confession recorded by Inspector of Excise.***—The words "police officer" in Section 25 of the Evidence Act are not to be construed in a narrow way, but have to be construed in a wide and popular sense. However, they are not to be construed so widely as to include persons on whom only some of the powers exercised by the police are conferred. The test for determining whether an officer in some other department of the Government who does not belong to the police force or the police establishment is or is not a "Police officer" within the meaning of Section 25 is whether such officer is primarily concerned with the detection and investigation of crime. The confessional statement recorded in the present case, which had been admitted in evidence by the trial Court and had been relied upon by both the Courts below for the purpose of conviction of an offence under Section 47(a) of the Excise Act, had been recorded by an Excise Inspector. From the provisions of Section 77 and 78(3) of the Bihar and Orissa Excise Act, 1915, and Notification No. 470-F dated 15 January 1919 issued under the Act it was clear that an Excise Inspector or Sub-Inspector in the State of Bihar was vested with all the powers of an officer in charge of a police station under chapter XIV of the Code of Criminal Procedure as regards investigation of offences under the Excise Act, arrest of accused persons, grant of bail, sending up an accused person for trial, filing of charge-sheet, search for and seizure of article connected with such offences, and so on. It followed that a confession recorded by him during an investigation into an excise offence is in no way different from a confession to a police officer. *Raja Ram Jaiswal* v. *State of Bihar,* AIR 1964 SC 828 : 1964 (1) CrLJ 705.

[8518] ● ***Confession—Position of Excise Inspector or Sub-Inspector distinguishable from that of Custom Officer.***—The position of an Excise Inspector or Sub-Inspector is thus distinguishable from that of a Customs Officer functioning under the Customs Acts whose power and duties are not identical with those of police officer, and are not derived from or by reference to the Code, though some of his powers are analogous to those of a police officer. The basic difference is that the Customs Officer has no power to investigate into an offence and no power to submit a report of the offence to a Magistrate, while an Excise Officer is expressly conferred with such powers under the Excise Act. *Raja Ram Jaiswal* v. *State of Bihar,* AIR 1964 SC 828 : 1964 (1) CrLJ 705.

[8519] ● ***Confession recorded by Excise Inspector empowered to investigate offence—Inadmissible.***—What is pertinent for the purpose of determining as to who can be regarded a police officer for the purpose of Section 25 of the Evidence Act is not the totality of the powers which an officer enjoys, but the kind of powers which the law enables him to exercise. The test for determining this question is whether the powers which are conferred on the officer are exercisable by him are such as would tend to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. The powers conferred on Customs Officers are contained in Chapter XVII of the Sea Customs Act. (1) The power of search given under Section 169 is subject to the right given under Section 170 to the person concerned to demand that before the search he must be taken before a Magistrate or the Customs Collector. There is no such restriction upon a police officer. (2) Section 173 of the Act gives the power to arrest, but no power is given to release on bail at his discretion, as is given to a police officer. Further, if the person arrested so demands, he is bound to give him a statement in writing disclosing the reasons for the arrest, while no such duty is cast upon a police officer. It will thus be seen that the power conferred on a Customs Officer in connection with offences under the Sea Customs Act are powers of a limited character though they are analogous to the powers of a police officer in some respects.

The most significant difference is that the powers of investigation which a police officer enjoys are not conferred under the Sea Customers Act upon a Customs officer, but they are conferred upon Inspectors and Sub-Inspectors of Excise under the Excise Act. It is the possession of these powers which enables the officer to exercise a kind of authority over the person arrested which facilitates the obtaining of statements, which are in the nature of confessions. The law allows the police officer to obtain such statements with a view to facilitate the investigation of the offences, but it renders them inadmissible in evidence for the obvious reason that a suspension about voluntariness would attach to them. It is the power of investigation which establishes a direct relationship with the prohibition enacted in Section 25. Therefore, where such a power is conferred upon an officer under any Act, the mere fact that he possesses some other powers under another law would not make him any the less a police officer for the purposes of Section 25. *Raja Ram Jaiswal* v. *State of Bihar,* AIR 1964 SC 828 : 1964 (1) CrLJ 705.

[8520] ● ***Confession recorded by Police Officer and confession recorded by Excise Officer—Distinction.***—Section 25 was enacted to eliminate from consideration confessions made to an officer who by virtue of his position could extort a confession by force, torture or inducement. An Excise Officer functioning under the Excise Act is in the same position as a police officer in the matter of investigation. He would likewise have the same opportunity of extorting a confession from a suspect. It is therefore not possible to draw any rational distinction between a confession recorded by a police officer—strictly so called and a confession recorded by an Excise Officer who is deemed to be a police officer. *Raja Ram Jaiswal* v. *State of Bihar,* AIR 1964 SC 828 : 1964 (1) CrLJ 705.

[8521] ● ***Confession to Excise Officer to be excluded under Section 162, CrPC.***—There is another reason also why the confession made to an Excise Officer must be excluded. Under the Excise Act, he is conferred with the powers of police officer in charge of a police station. Therefore, the confession is a statement made during the course of investigation to a police officer within the meaning of Section 162 of the Code of Criminal Procedure. Such a statement is excluded under Section 162 from evidence for all purposes except that of contradiction. *Raja Ram Jaiswal* v. *State of Bihar,* AIR 1964 SC 828 : 1964 (1) CrLJ 705.

[8522] ● ***Confession by person accused of offence under Excise Law to Excise Inspector—Admissibility.***—A confession made by a person accused of an offence under the Excise Act to an Excise Inspector or Sub-Inspector is hit by the provisions of Section 25 of the Evidence Act and is inadmissible in evidence and cannot be proved against the person accused of any such offence. *Raja Ram Jaiswal* v. *State of Bihar,* AIR 1964 SC 828 : 1964 (1) CrLJ 705.

[8523] ● ***Statement made by accused to custom officers—Admissibility.***—Section 25 of the Indian Evidence Act, has no application to the facts of the instant case. In similar circumstances, it was held by this Court in the case of *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276, that custom officers are not police officers and statements made to them were not inadmissible under Section 25. Section 24 would however apply, for custom authorities must be taken to be persons in authority and the statements would be inadmissible in a criminal trial if it is proved that they were caused by inducement, threat or promise. But the findings of all the Courts in the instant case were that the statements were not made on account of any inducement, threat or promise as required by Section 24 of the Indian Evidence Act. In the face of these findings it cannot be said that the statements were inadmissible under Section 24 of the Indian Evidence Act. *Soni Vallabhadas Liladhar* v. *The Asstt. Collector of Customs, Jamnagar,* AIR 1965 SC 481 : 1965 (1) CrLJ 490 : 1965 (3) SCR 854.

[8524] ● ***Confession contained in letter—Admissibility.***—The finding of each of the two Courts below, that the relations between the appellant and his wife were strained because the appellant not merely suspected the fidelity of his wife but also charged her with unchastity, being one of fact cannot be lightly permitted to be questioned in an appeal by special leave. No ground has been made out by the learned counsel which would justify our looking into the evidence. The learned Counsel for the appellant challenged the admissibility of the letter *found near the body of the deceased,* on the ground that it amounts to a confession to a police officer and that therefore S. 25 of the Evidence Act renders it inadmissible in evidence. We do not think that the objection is well founded. No doubt the letter contains a confession and is also addressed to a police officer. That cannot make it a confession to a police officer which is within the bar created by S. 25 of the Evidence Act. The Police Officer was not nearby when the letter was written or did not know that it was being written. In such circumstances quite obviously the letter would not have been a confession to the Police Officer if the words "Sub-Inspector" had not been written on it. Nor do we think it can become a confession in similar circumstances only because the words "Sub-Inspector" had been written there. It would still have not been a confession made from any point of view. We agree with the High Court, therefore, that the confession contained in, Ex. ka-9 is admissible and that it is an additional circumstance which can be pressed in aid and in support of the charge against the appellant. However, as already stated, even without this confessional statement there was sufficient material before the Courts below on the basis of which the appellant's conviction could be sustained. The appeal is without any merit and is accordingly dismissed. *Sita Ram* v. *State of Uttar Pradesh,* AIR 1966 SC 1906 : 1966 (2) CrLJ 1519. (MUDHOKAR, J)

[8525] ● ***Letter—Confession to Police officer—Not admissible.***—In my opinion, the letter Ex. Ka-9, is a confession made to a Police Officer, and is not admissible in evidence against the appellant. The letter contained a confession, and was addressed to the Sub-Inspector. I do not see why a confession cannot be made to a Police Officer unless he is present in the immediate vicinity of the accused. A confession can be made to a Police Officer by an oral message to him over the telephone or the radio as also by a written message communicated to him through post, a messenger or otherwise. In its widest and most popular signification, the phrase, "confession made to a Police Officer" includes a confession made to a Police Officer in a letter written to him and subsequently received by him. We should not cut down the wholesome protection of S. 25 by refined arguments. I am, therefore, of the opinion that the Courts below were in error in admitting Ex. Ka-9 against the appellant. I, however, agree that, apart from Ex. Ka-9, there are sufficient materials on the record establishing the guilt of the appellant. The appeal must, therefore, fail. In the result, appeal is dismissed. *Sita Ram* v. *State of Uttar Pradesh,* AIR 1966 SC 1906 : 1966 (2) CrLJ 1519. (BACHAWAT, J.)

5. A CONFESSION CAN BE ACCEPTED ONLY IF IT IS VOLUNTARY AS WELL AS TRUE

[8526] ● ***A confession can be accepted only if it is voluntary as well as true.***—In the present case, when the accused was brought before a Magistrate for getting his confession recorded, he complained to the Magistrate that shortly before he had been sent up, the police had ill-treated him and had told him that he would be lightly let off only if he made a confession. Thereupon, the Magistrate ordered that he be kept in a magisterial lock-up for a few days, and recorded his confession thereafter. At the trial, the accused retracted the confession and alleged that while he was in the magisterial custody, the police frequently came to him and threatened him and ill-treated him. It was established that the lock-up was in the same compound as the police-station, and that at night time there was no magisterial guard and the police could have had easy access to the accused. In spite of these facts, the confession was accepted as being voluntary, and the accused was convicted. Under these circumstances, conviction based upon the confession of the accused cannot be sustained, and has to be set aside. The possibility remained that the accused was not free from police influence at the time when the confession was recorded, and it cannot be definitely said that it was a voluntary confession. Conviction is set aside. *Tulsiram Kanu* v. *State*, AIR 1954 SC 1 : 1954 CrLJ 225.

[8527] ● ***Confession made under inducement and threat.***—In the present case, a confession made by the accused was later retracted by him, and it was suggested that it was made under inducement and threat by the investigating police officers. This principle is well settled, but it does not mean that a mere bald assertion by the accused that he was threatened or tutored, or that an inducement was offered to him, can be accepted as true without anything more. The suggestion must be rejected when there is no material whatsoever to hold that the prisoner was threatened or beaten, and the story of tutoring is, on the face of it, incredible. The circumstances which were taken into consideration for arriving at this conclusion were as under :

1. that for two days before the day on which the confession was recorded, the

accused was in jail custody, and was not in police custody or otherwise amenable to police influence, and thus had full time to made up his mind whether to make a confession or not;

2. that over a month had elapsed before he took steps to resile from his confession;
3. that the Magistrate who recorded the confession had made a memorandum as required by Section 164, CrPC which showed that all the requirements of law in recording a confession had been duly complied with, and all necessary questions required to be put to the accused had been duly put and recorded;
4. that the confession was a long one covering 21 pages, and contained precise details which the police could not possibly have known, and hence ruled out the suggestion that it was a tutored confession;
5. that the confession had been retracted only after the accused had taken legal advice.

When an accused has been kept in jail custody for a period which can be considered sufficient for removing any possible impression caused by police threats or inducement, the conduct of the police before he was lodged in jail cannot affect the voluntary character of the confession, because even if the circumstances connected with that conduct be not above suspicion, it has to be held that the confession was made after the impression caused by any possible inducement, threat or promise coming from the police had been clearly removed. The appropriate place for recording a confession is the Court-house, and if it is found to have been recorded in jail it is certainly an irregularity. But in the absence of anything to show that there was some ulterior motive in deciding to record it in jail, it cannot be contended merely on the strength of such irregularity that the confession was not voluntary. *Hem Raj* v. *State of Ajmer,* AIR 1954 SC 462 : 1954 CrLJ 1313 : 1954 SCJ 449.

[8528] ● ***Accused when retracts confession.***—Even when the accused retracts the confession, when questioned about it under Section 42 of the Criminal Procedure Code, and makes various statements as to the circumstances in which he made it, such as, that he was given liquor, or that he was promised to be made an approver, and these suggestions are rejected by the Court as being false, that, in itself, does not relieve the prosecution of the burden which lies upon it to prove positively that the confession was voluntary, and if it fails in discharging that onus, the confession has to be rejected from consideration. In an accused is found to have been kept in police custody for a prolonged period immediately before his confession was recorded, that circumstance is sufficient in itself to stamp the confession as being not voluntary, unless the reason for his being kept in such custody is satisfactorily explained. In the present case, the accused who had been kept in jail custody was taken out of the jail, and had been kept in police custody for a fortnight before being sent up for making his confession. The prosecution had failed to give any satisfactory explanation as to why it had become necessary to do so.

The confession has to be rejected as the prosecution has failed to establish that the confession is voluntary. *Nathu* v. *State of Uttar Pradesh,* AIR 1956 SC 56 : 1956 CrLJ 152.

[8529] ● ***Confession when not voluntary.***—There are two important principles of criminal jurisprudence. The accused is entitled to the benefit of every reasonable doubt, and secondly, when he offers a reasonable explanation of his conduct, then, even though he cannot prove his assertions they should ordinarily be accepted, unless the circumstances of the case clearly indicate that his explanation is false.

If the Court is satisfied that there was ample opportunity for coercion and threats by the police while the accused was kept in a judicial lock-up, and if the accused asserts that this opportunity was fully utilised by the police by giving him threats at night-time several times, and there is nothing on record to show definitely that the assertion is false, and if the confession is retracted at the earliest opportunity, it must be held that there was a reasonable probability that what the accused asserted may be true. In such a case, it must be held that the prosecution has failed to establish that the confession was voluntary, and the confession must be rejected in considering the case against the accused. In the present case the accused was arrested for murder and was sent the next day to a Magistrate for recording a confession. The Magistrate decided to give him time "to cool down" and kept him in a judicial lock-up for 10 days before the confession was recorded. The admitted facts about this lock-up were that it was in charge of a police guard who was under the direct orders and supervision of the very Sub-Inspector who conducted the investigation in the case. The police lock-up also was within the jail compound. The police could talk to and see the accused through the bars of the judicial lock-up, and at night-time neither the peon who acted as a warder nor the Clerk-Jailor remained present at the judicial lock-up. Before the committing Magistrate the accused retracted the confession, and stated that it was made under repeated police threats given at night-time, that they frightened him, and that before these threats were given he was actually beaten after his arrest. This retraction was repeated in the Sessions Court on the same grounds. The assertion of the accused as to the circumstances in which he made the confession may or may not be true. But the important thing is that what he said is possible, and there is nothing on record to show that it is false. Such things *can* happen, and *may* have happened in the present case. Under these circumstances it has to be held that the prosecution has failed to establish that the confession was voluntary, and it has to be rejected. *Aher Raja Khima* v. *State of Saurashtra,* AIR 1956 SC 217 : 1956 CrLJ 426 : 1956 SCJ 243.

[8530] ● ***Confession once rejected as being not voluntary.***—Once a confession is rejected as being not voluntary, the question whether it is true or whether it is sufficient for conviction does not at all have to be considered.

If a confession is rejected as being not voluntary, the question whether it is true, or whether it is corroborated by other evidence, or whether the confession of a co-accused lends it assurance, does not at all arise. In such a case, the Court has to kept the confession entirely out of consideration, and see whether the other evidence is sufficient by itself for conviction, and if it is not, the accused must be acquitted. *Nathu* v. *State of Uttar Pradesh,* AIR 1956 SC 56 : 1956 CrLJ 152.

[8531] ● ***Case resting on retracted confession.***—In the present case : the three accused *A, B* and *C* were charged under Section 302, IPC. The prosecution case was that *A* had strangled a boy with the assistance of *B* and *C.* The case against *A* rested entirely on his retracted confession, the confession of *B* and *C*, and evidence that the dead body was found from a well.

The confession of *A* having been rejected as being not voluntary, the question of corroboration or assurance to it cannot at all arise, and the confession of *B* and *C* cannot be of any use in considering the case against *A.* The discovery of the dead body is not evidence of murder, and that evidence by itself, or even together with the confessions of the co-accused, cannot be held to be sufficient to establish the charge. Accused acquitted. *Nathu* v. *State of Uttar Pradesh*, AIR 1956 SC 56 : 1956 CrLJ 152.

[8532] ● ***Conviction of accused vesting on confession.***—Once a confession is rejected as being not voluntary, the question whether it is true or false does not have to be considered at all. The question as to the truthfulness and reliability of a confession has to be gone into only after the Court is absolutely satisfied as to the voluntary character of the confession, and not till then. Similarly, the question whether the other evidence is or is not sufficient for the purpose of corroboration to a confession can arise only when it has been accepted as being involuntary and true, and not till then. Once a confession has been rejected, that only purpose for which the other evidence on record can be examined is not to see whether it is sufficient to lend corroboration to the confession, but only to see whether it is sufficient by itself for basing a conviction upon it. In such a case, if the other evidence is not found to be so sufficient, the accused must be acquitted, even though it may be of such a character that if the confession had been accepted it could have been considered sufficient for the purpose of corroborative support. In the present case, the conviction of the accused rested upon his confession and circumstantial evidence. The Court found that the confession was not voluntary and rejected it (See under the sub-head *V* above.) It then examined the other evidence and came to the conclusion that it was not sufficient by itself for the purpose of conviction. Conviction was set aside and the accused was acquitted. *Aher Raja Khima* v. *State of Saurashtra,* AIR 1956 SC 217 : 1956 CrLJ 426 : 1956 SCJ 243.

[8533] ● ***Prosecution when relies upon confession made by accused proper method of approach.***—When the prosecution relies for its case upon a confession made by the accused, the proper method of approach is as under : If the confession is retracted by the accused and he claims that it was not voluntary, the Court must first determine whether it had been voluntarily made; then, if the Court does not reject it as being not voluntary, the next question is whether it is true and reliable; it is only when the Court is satisfied that it is both voluntary and true, that it must then proceed to examine its sufficiency for the purpose of conviction and the sufficiency of the other evidence on record for the purpose of corroboration. The three questions are independent of each other, and each must be decided on its own merits, before proceeding to examine the next in order. It is only when the Court comes to a clear conclusion that the confession is both voluntary and true that it should proceed to go into the question of its sufficiency, and not till then. *Balbir Singh* v. *State of Punjab*, AIR 1957 SC 216 : 1957 CrLJ 481.

[8534] ● *Confession Voluntary and True.*—The Court must first consider whether a confession is "voluntary". If on a consideration of all the facts bearing upon the question, the Court finds that there are circumstances which throw a grave doubt upon its voluntary character, the matter is at an end, and the confession must be rejected. In such a case, there is no question of consideration of the further question whether it is "true". On the other hand, if after having carefully considered the question, the Court finds the confession to be voluntary, the matter does not end there, and the Court has the duty to consider further; whether the confession is "true". The Court would be in error if it assumed without enquiry the truth of the confession as arising from the very fact that it was voluntary. Thus before a confession can be accepted as the basis of a conviction, the Court must consider all the circumstances and factors in the case bearing upon the question not only as to whether it was voluntary but also as to whether it was true. The question as to whether there is any independent corroboration arises only when the Court has, after due consideration of all such circumstances and factors, arrived at the conclusion that the confession was both voluntary and true, and not till then. If the Court finds that the confession is both voluntary and true, the Court should, as a rule of prudence, further consider whether it is supported by such corroboration as the Court considers sufficient for lending it assurance. *Sarwan Singh Rattan Singh* v. *State of Punjab,* AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 CrLJ 699.

[8535] ● *Accused—When retracts his confession.*—When an accused retracts his confession in Court, the first thing which the Court has to determine is whether it was voluntary. The burden of proof as to the voluntary character of a confession no doubt rests upon the prosecution, but in the absence of any circumstances to throw a doubt upon its voluntary character, the confession must be held to be voluntary, if the memorandum at its foot made by the recording Magistrate conforms to the requirements of law in this connection, and clearly shows that before recording it the accused was given sufficient time to think over the matter, that he was cautioned that he was not bound to make it, that he was informed that if he made the confession it would be used in evidence against him, and that he volunteered to make it after all these formalities were duly satisfied. If the certificate of the Magistrate as a witness, for the purpose of satisfying itself that all the necessary questions had been put to the accused and that the confession had been made voluntarily. If there are no circumstances in the case which themselves throw a doubt on the voluntary nature of the confession, and if the Court is satisfied that the requirements of law as regards the recording of the confession were duly fulfilled, it must be held that the prosecution has discharged the burden which lies upon it to show that a confession was made voluntarily. In such a case, if the accused asserts that the confession was not voluntary and was made as a result of any maltreatment or inducement or threat, the burden lies upon him to substantiate his assertions by affirmatively proving the existence of some circumstance which shows that his assertion might be true. In such a case, a bare assertion by the accused that the confession was not voluntary would not be enough for rejecting the confession, and in spite of its retraction by the accused, it would be open to the Court to take the confession into consideration. *Balbir Singh* v. *State of Punjab,* AIR 1957 SC 216 : 1957 CrLJ 481.

[8536] ● *Confession voluntary—Proper Safeguards for.*—The requirements of Section 164, CrPC are not mere formalities. They are important safeguards for ensuring that the confession is entirely voluntary, and their careful observance is a solemn judicial function. *Ram Chandra* v. *State of Uttar Pradesh,* AIR 1957 SC 381 : 1957 CrLJ 559.

[8537] ● *Confession—Precautions to be observed by Magistrate.*—Precautions which must be observed by a Magistrate before he proceeds to record a confession, in order to assure himself that what the accused is going to state is absolutely 'voluntary'. *Sarwan Singh Rattan Singh* v. *State of Punjab,* AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCJ 699.

[8538] ● *Accused under Police influence—Confession—When made.*—It was contended in the present case that though after the accused was first produced before a Magistrate for recording a confession he was kept in a Magisterial sub-jail for two days before the confession was recorded, the accused was brought from there on both occasions by a police constable, and that there was a gateway between police-station and the jail which always remind open, and that therefore the mind of the accused was not free from police influence at the time when the confession was made. *Held* : In the absence of anything further to show that he continued to be under the influence of the police during the period of the two days when he was in Magisterial custody, these facts, by themselves are not sufficient to support the suggestion that the accused was still under police influence when his confession was recorded. *Subramania Goun-*

dan v. *State of Madras,* AIR 1958 SC 66 : 1958 CrLJ 238 : 1958 SCJ 321.

[8539] ● *"Appears" means "seems"—Degree of proof.*—In the present case, the accused who was an officer in the office of the Chief Engineer was convicted of the offence of theft under Section 379, Penal Code, arising from temporary removal by him of an official file from the office for the purpose of enabling a private contractor to remove and substitute some documents in the file. The prosecution case was that when a departmental enquiry was held by a Secretary to the Government, the accused had made a confession to him wherein he had in clear terms admitted the commission of the offence. The conviction was based mainly upon this confession. Under Section 24 of the Evidence Act, a confession made by an accused person is irrelevant in a criminal proceedings, if it appears to the Court,

1. that the making of the confession was caused by any inducement, threat or promise, 2. that the said threat, inducement or promise had reference to the charge against the accused person, 3. that it proceeded from a person in authority, and 4. that it was sufficient to give the accused person grounds which would appear to him reasonable for supposing that he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

The crucial word is "appears" and the proper meaning of the word is "seems". The word imports a lesser degree of probability than proof. The test of proof under Section 3 of the Act is that there is such a high degree of probability that a prudent man ought to act on the assumption that the thing is true. But under Section 24 of the Act the stringent rule as to proof is waived or relaxed and a lesser degree of assurance is laid down as the criterion. Even so, Section 24 does not warrant a Court in basing its opinion on pure surmise, and it must base its opinion on evidence and circumstances. The result is that it is open to the Court to base its conclusion that making of the confession was caused by some threat, inducement or promise on the evidence and the circumstances in a particular case, even though the said fact is not strictly proved. It is not possible or advisable to lay down an inflexible standard for the guidance of Courts which would apply in every case, and in the ultimate analysis it is for the Court before which the question arises to decide on the circumstance of the particular case whether the confession relied upon by the prosecution was or was not voluntarily made. *Pyare Lal Bhargava* v. *State of Rajasthan,* AIR 1963 SC 1094 : 1963 (2) CrLJ 178.

[8540] ● *Confession—Threat etc. must proceed from person in authority.*—It is a question of fact in each case whether the person from whom the threat, inducement or promise proceeded is a person in authority or not, and what is more important, whether it is sufficient to cause a reasonable belief in the mind of the accused that by making the confession he would gain an advantage or avoid any evil in reference to the proceeding against him. While the opinion to be formed is that of the Court, the criterion laid down is the reasonable belief in the mind of the accused, and thus the section makes it clear that it is the duty of the Court to place itself in the position of the accused and to form an opinion as to the state of his mind in the circumstances of the case. *Pyare Lal Bhargava* v. *State of Rajasthan,* AIR 1963 SC 1094 : 1963 (2) CrLJ 178.

[8541] ● *Lower Courts holding statement not caused by threat.*—In the present case, there was no doubt that the Secretary to whom the accused made the confession was a person in authority within the meaning of Section 24. However, that alleged threat was that if the appellant did not disclose the truth, the matter would be placed in the hands of the police. This was only a general statement which any person who has lost his property and is not able to find out the culprit would make. It may be that such a statement in different circumstances may amount to a threat, or it may also be that another Court may take a different view even in the same circumstances. But the question whether a statement appears to the Court to be a threat or not is a question of fact and in this case the three lower Courts, the trial Court, the Sessions Judge in appeal and the High Court in revision, had concurrently held that in the circumstances of the case, the statement made by the Secretary did not appear to be a threat within the meaning of Section 24. That being so, the Supreme Court would not, in the exercise of its powers under Article 136, be prepared to differ from the concurrent finding given by the three Courts that the statement did not constitute a threat, in the absence of any permissible ground for disturbing that finding. *Pyare Lal Bhargava* v. *State of Rajasthan,* AIR 1963 SC 1094 : 1963 (2) CrLJ 178.

[8542] ● *Unambiguous confession, if admissible in evidence.*—One stage of the investigation suspected of complicity in this murder and, therefore, he should be treated no better than an accomplice. In our opinion, this criticism is not justified An unambiguous confession, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possesses a high probative force because it emanates directly from the person committing the offence. But in the process of proof of an alleged confession the Court has to be satisfied that, it is voluntary, it does not appear to be the result of inducement, threat or promise as contemplated by Section 24, Indian Evidence Act and the surrounding circumstances do not indicate that it is inspired by some improper or collateral consideration suggesting that it may not be true. For this purpose, the Court must scrutinise all the relevant factors, such as, the person to whom the confession is made, the time and place of making it, the circumstances in which it is made and finally the actual words used. *Thimma* v. *State of Mysore,* AIR 1971 SC 1871 : (1970) 2 SCC 105 : 1971 CrLJ 1314 : 1971 (1) SCR 215.

[8543] ● ***Confession made to Police Officer.***— Sections 24 to 26 form a trio containing safeguards against accused persons being coerced or induced to confess guilt. Towards that end Section 24 makes a confession irrelevant in a criminal proceeding if it is made as a result of inducement, threat or promise from a person in authority, and is sufficient to give an accused person grounds to suppose that by making it he would gain any advantage or avoid any evil in reference to the proceedings against him. Under Section 25, a confession made to a Police Officer under any circumstances is not admissible in the evidence against him. Section 26 provides next that no confession made by a prisoner in custody even to a person other than a Police Officer is admissible unless made in the immediate presence of a Magistrate. *Kanda Padayachi* v. *State of Tamil Nadu,* AIR 1972 SC 66 : (1971) 2 SCC 641 : 1972 CrLJ 11 : 1972 (1) SCR 450 : 1971 CAR 453 : 1972 Andh WR 70 : 1972 All CrR 140.

[8544] ● ***Expression "believe"—Meaning of—Distinction between "believe" and "hope".***— There is a marked difference in what is connoted by "hope" and "believe", "to hope" means "to want and expect", "to look forward with expectation and desire". "Hope" is a wishful feeling floating on nebulous foams projected into the unknown further. Deep hidden in "hope" dwells a lingering doubt, a speck of suspicions, that what is desired and expected may not turn out true. Not unoften, if the mind of the person hoping, there lurks subconscious fear that the "hope" may turn out a "dupe". In contrast with it, the term "believe" in the sense in which it is used in S. 164, CrPC has logical confidence or "rational conviction" as its essential element. It imports as very high degree of expectation brought by reason, a satisfaction fast-rooted *in terra firma*, free from doubt as to the truth of the fact perceived and believed. In the light of the above discussion we are of the opinion that the Magistrate advisedly chose to use the word "hope" instead of "believe" in the memorandum Ex P-28, because he was not fully convinced that the confession, Ex, P-27, had been voluntarily made, the Magistrate's mind being troubled by suspicion and doubt as to the voluntariness of the confession. The retracted confession, Ex P-27, therefore, must be excluded from consideration. *Chandran* v. *State of Madras,* AIR 1978 SC 1574 : (1978) 4 SCC 90 : 1978 SCC (Cri) 528 (540) : 1978 CrLR (SC) 455 : 1978 UJ (SC) 671 : (1979) 1 SCR 176.

[8545] ● ***Requirement of Section 164, CrPC—Non compliance confession—Not admissible.***— To say that the accused was "in a position" or mood to give a voluntary statement, falls far short of vouching that upon questioning the accused, he (Magistrate) had "reason to believe that the confession is being voluntarily made", which under Section 164 is a *sine qua non* for the exercise of jurisdiction to record the confession. But that section does not make it obligatory for the Magistrate to append at the end of the record of the preliminary questioning, a certificate as to the anticipated voluntariness of the confession about to be recorded. But the law does peremptorily require that after recording the confession of the accused, the Magistrate must append at the foot of the record a memorandum certifying that he believes that the confession was voluntarily made. The reason for requiring compliance with this mandatory requirement at the close of the recording of the confession, appears to be that it is only after hearing the confession and observing the demeanour of the person making it, that the Magistrate is in the best position to append the requisite memorandum certifying the voluntariness of the confession made before him. If, the Magistrate recording a confession of an accused person produced before him in the course of police investigation, does not, on the face of the record, certify in clear, categorical terms his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor testifies orally, as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial. It is not possible to hold that the Magistrate was ignorant of the different in the meaning of the words "hope" and "believe" and that he unwittingly chose the former, while in reality, he intended to express what was meant by the latter. There is every probability that the use of the word "hope" instead of "believe" in the memorandum. *Chandran* v. *State of Madras,* AIR 1978 SC 1574 :

(1978) 4 SCC 90 : 1978 SCC (Cri) 1574 : 1978 CrLJ 1693 : 1978 CrLR (SC) 455.

[8546] ● ***Confession—Reliability—Tests.***—The twin tests to be applied to evaluate a confession : (1) whether the confession was perfectly voluntary, and (2) if so, whether it is true and trustworthy. The learned Judge pointed out that if the first test is not satisfied the question of applying the second test does not arise. Then the Court indicated one broad method by which a confession can be evaluated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test. *Shankaria* v. *State of Rajasthan*, AIR 1978 SC 1248 : (1978) 3 SCC 435 : 1978 SCC (Cri) 439 : 1978 CrLJ 1251.

[8547] ● ***Confession made to Customs Officer under coercion.***—We would consider it extremely unsafe to regard the confession exhibit Z-383 signed by the appellant as having been made by him voluntarily and therefore trustworthy. The appellant, in our opinion, has shown the existence of circumstances which make it appear to the Court that the confession may well have been obtained in a manner which would bring it within the ambit of Section 24 of the Evidence Act, it being undisputed that the concerned officers of the Department of Customs were 'persons in authority' within the meaning of that expression as used in the section. *Sevantilal Karsondas Modi* v. *State of Maharashtra,* AIR 1979 SC 705 : (1979) 2 SCC 58 : 1979 SCC (Cri) 360 : 1979 CrLJ 645 : 1979 CrLR (SC) 558.

[8548] ● ***Confessional statement voluntary.***—A perusal of these confessional statements, Exs. 6 and 7 shows that they are more or less exculpatory of the maker, for Henry had attributed everything to Sunil and stated that he had done everything at the instance of Sunil while Sunil had attributed the important role in the crime to Henry. This would not normally be the position if the confessions were the result of tutoring by the police. The confessional statement of Henry is quite long while that of Sunil is much longer. As remarked by the learned Sessions Judge these confessions are full of facts and minute details which would not be there normally if the confessions are the result of tutoring or of compulsion. The circumstantial evidence relied upon by the trial Court and the High Court lend assurance to the genuineness and voluntary nature of these confessions. They have no doubt been retracted, but in view of the fact that they are generally corroborated by the circumstantial evidence in ample measure, there is no satisfactory reason for the confessions not being accepted and acted upon. In these circumstances, we agree with the learned Sessions Judge that the confessional statements of Henry and Sunil Exs. 6 and 7, are voluntary and can be acted upon, together with the circumstantial evidence, for basing a conviction. *Henry Westmuller Roberts* v. *State of Assam,* AIR 1985 SC 823 : (1985) 3 SCC 291 : 1985 SCC (Cri) 364 : 1985 CrLJ 1079 : 1985 CrLR (SC) 205 : 1985 (1) Crimes 877.

[8549] ● ***Confession—Free from all infirmities.***—A perusal of the Statement of Ram Sagar made under S. 164 of the Code will go to show that he himself made an application before the Magistrate requesting him to record his confessional statement and according to Ram Sagar it was at his instance and request that his confessional statement, was recorded by the Magistrate, PW-76, in which he had confessed the guilt. Ram Sagar, PW-3, stated that the Magistrate had told him that it was his own choice and volition to make or not to make the confessional statement and that he made the statement on his free will. He denied the suggestion that while making the statement under S. 164, CrPC any Police Officer was present there and deposed that he was not given any assurance by the CBI officials that if he would become approver he would be set at liberty or discharged from the case. He, however, stated that he himself thought that if he made correct statement before the Magistrate he may be set at liberty. He asserted that he made a true disclosure of the circumstances relating to the offence before the Magistrate in his statement under S. 164, CrPC irrespective of the fact whether he would be released or not. Ram Sagar was subjected to a very lengthy and searching cross-examination in this regard but nothing could be elicited from him to suggest that he did not make true disclosure of the facts of the case or that he made the confession under threat or pressure or on any assurances from the prosecuting agency or from any official in authority. The statement that he made gives an impression that it was made on his own volition which fact is further fortified from the statement of the Judicial Magistrate who recorded his statement. PW-76 deposed that before recording the statement of Ram Sagar under S. 164, CrPC he had given the necessary warning to him as required by law and this fact is borne out from the certificate Ex "A" appended to that effect in the confessional statement before he proceeded to record the confession. This is indicative of the fact that he did caution Ram Sagar and sounded a note of warning that he is not bound to make the confessional statement and if he chooses to make any the same may be used against him and it was thereafter that he made the confession voluntary on his own volition. He deposed that Ram Sagar did not tell him that he made his confessional statement under any threat or fear or on any promise. In view of this positive evidence on record it is difficult to accept that the confessional statement made by the approver Ram Sagar under S. 164, CrPC was not voluntary or under any fear or promise or assurance. On the contrary, the confession in free from all infirmities and confirms to the requirement of Section 164, CrPC. *Suresh Chandra Bahri* v. *State of Bihar,* AIR 1994 SC 2420 (2436) : 1995 Supp (1) SCC 80 : 1994 CrLJ 3271 : 1994 CrLR (SC) 725 : JT 1994 (4) SC 309 : (1994) 2 Crimes 1027.

[8550] ● ***Confession—Finding by Designated Court.***—So far as the confessional statements were concerned, the learned Designated Court reached the following conclusions :

> "(i) That they appear to have been pre-recorded and got typed by some person other than the District Supdt. of Police Sri Ganganagar (PW-6).
>
> (ii) That Supdt. of Police (PW-6) has simply made the endorsement (outlined above) and put his signatures and office seal in a mechanical manner without complying with the mandatory provisions of Section 15 of the Act read with Rule 15 of the 1987 Rules framed under the said Act.
>
> (iii) That the facts and circumstances surrounding the recording and making of confession cast great doubts on their veracity and voluntariness and no reliance can be placed on them.
>
> (iv) That these statements cannot be extended to show that the matter of any of these deposits in fact admitted any offence or in any manner substantially admitted all facts constituting any of the offences charges against them individually or collectively.
>
> (v) That none of the aforesaid statements Exp. 12 to Exp. 19 can be made basis for holding any of these accused persons guilty even as accomplices; there being no corroboration in material respect of any of the offence charged against them by any independent evidence.
>
> (vi) These alleged confessions Exp. 12 to Exp. 19 being devoid of voluntariness and truthfulness cannot be made basis of convicting any of the accused.

That any of the accused committed any terrorist act punishable under Section 3(2)(ii) of the Act 1987 or in any way conspired, attempted to commit; abetted advised or incite or knowing facilitated the commission of a terrorist act or did any act preparatory to a terrorist act.

We see no ground to interfere with the impugned judgment of acquittal rendered by the Designated Court. *State of Rajasthan* v. *Mahendra Singh,* AIR 1995 SC 2326 : 1995 CrLJ 3640 and 3981.

[8551] ● ***Judicial confession—Recording of validity.***—From the confessional statement (Exhibit P. 11) we find that the Magistrate (P.W. 8) first disclose his identity and told him that he was not bound to make any confession and if he did so, it might be used as evidence against him. After administering the above caution the Magistrate recorded the confession and then made the memorandum required under sub-section (4) of Section 164, CrPC In our considered view, the confession so recorded is in utter disregard of the statutory provisions of sub-section (2) of Section 164, CrPC Under the above sub-section the Magistrate is first required to explain to the accused that he was not bound to make a confession and that if he did so, it might be used against him. Though this requirement has been complied with in the instant case, the other requirement which obligates the Magistrate to put questions to the accused to satisfy himself that the confession was voluntary so as to enable him to give the requisite certificate under sub-section (4), has not been fulfilled for, the learned Magistrate did not ask any question whatsoever to ascertain whether the appellant was making the confession voluntarily. In view of such flagrant omission to comply with the mandatory requirement of Section 164(2), CrPC we must hold that the High Court was not at all justified in entertaining the confession as a piece of evidence, much less, a reliable one. Once the confession is left out of consideration—as it has got to be—the only other piece of evidence to connect the appellant with the alleged offences are the recoveries allegedly made pursuant to his statement. Even if we proceed on the assumption that the evidence led by the prosecution in this behalf is reliable, still, considering its nature, we are unable to hold that it can be made the sole basis for conviction even for the offence under Section 404, IPC. *Preetam* v. *State of Madhya Pradesh,* AIR 1997 SC 445 : (1996) 10 SCC 432 : 1996 SCC (Cri) 1343 : 1996 CrLJ 4458.

[8552] ● *Confession made in custody.*—It was submitted on behalf of appellant that the confession was made while he was in custody and it was given by him under threat and pressure PW-1 had taken the appellant to her office and the confessional statement came to be recorded at about 8 p.m., no doubt, while the appellant was in custody of PW-1. But that by itself cannot be regarded as sufficient to hold that the confessional statement was made by the appellant under pressure or compulsion. No complaint was made by the appellant when he was produced before the Magistrate on the next day nor had he made any complaint thereafter till his statement came to be recorded under S. 313, CrPC It was only during the trial that a suggestion was made to PW-1 and subsequently when the appellant gave a statement under S. 313, CrPC, he stated that the confessional statement was given by him under threat and pressure. Even while giving his statement under S. 313, CrPC, the appellant had not stated what was the nature of the threat given to him or in what manner pressure was brought upon him. It was a vague statement. If in such circumstances the Trial Court held that the confessional statement was voluntarily made and thought it safe to rely upon the same it cannot be said that it committed any error in doing so. We are also of the view that the said confessional statement was made by the appellant voluntarily and, therefore, it can be used against him. *Pon Adithan* v. *Deputy Director, Narcotic Control Bureau, Madras,* AIR 1999 SC 2353 : (1999) 6 SCC 1 : 1999 SCC (Cri) 1051 (1055) : 1999 CrLJ 3663 : 1999 CrLR (SC) 443 : JT 1999 (4) SC 540 : (1999) 3 Crimes 133.

[8553] ● *Confession recorded under 'TADA' before Police Officer.*—While a confession recorded under the TADA Act before a police officer not below the rank of Superintendent of Police even under police custody is admissible but not under other criminal trials. Keeping an accused under police custody in what manner with what precautions is a matter for the police administration to decide. It is for them to decide what essential measures is to be taken in a given case for the purpose of security. What security, in which manner are all in the realm of administrative exigencies and would depend on the class of accused, his antecedents and other in formation *etc.* The security is also necessary for the police personnel keeping him in custody or other personnel of the police administration including the public at large. Thus what measure has to be taken is for the police administration to decide and if they feel greater security is required in a case of trial under the TADA Act, it is for them to decide accordingly. The preamble of the TADA Act itself reveals that this Act makes special provisions for the prevention of and forthwith keeping with terrorists and disruptive activities. In fact earlier TADA Act of 1985 was repealed to bring in the present Act to strengthen the prosecution to bring to the books those involved under it without their filtering out, by bringing in more stringent measures under it. In this background, we do not find the handcuffing of the appellant or another policeman being present in the room with the chain of his handcuff or armed guards present outside the room to be such to constitute that the appellant confessional statement was not made voluntary. It has to be kept in mind that Section 15 and Rule 15 of the TADA Act and the Rules have taken full precaution to see that confessional statement is only recorded when he makes it voluntarily. First, confession could only be recorded by a police officer to the rank of Superintendent of Police or above. Such police officer has to record in his own handwriting, he has to clearly tell such accused person that such confession made by him shall be used against him and if such police officer after questioning comes to the conclusion that it is not going to be voluntarily he shall not record the same. Keeping this in the background which is complied in the present case and keeping the administrative exigencies under which an accused is kept under handcuff with armed guards *etc.* which may be for the antecedents activities of the appellant as terrorist, for the purpose of security, then this could in no way be constituted to be a threat or coercion to the accused for making his confessional statement. The policeman holding his chain of his handcuff was only a constable and the person recording his confession was of the rank of Superintendent of Police. The Superintendent of Police conveyed confidence to the appellant and made it clear to the appellant as aforesaid. After all this, if the appellant was still ready and made his confessional statement, then merely presence of a constable a subordinate of Superintendent of Police, who was holding chain cannot be constituted to be such to be a threat which could induce him not to make any voluntary statement. Hence, we have no hesitation to hold that the presence of a constable in a room could in fact or law to be constituted to be such to hold that such confessional statement was not made voluntarily. Mere handcuffing and presence of a policeman we fail to understand in what way could it be said to be a threat to the accused appellant. It is not the case that before making confessional statement any inducement, threat or promise by any other word or deed was made to him by any person which resulted into his making the said confessional statement. Firstly, we find total absence of inducement, threat or promise in the present case as against the appellant and as we have said handcuffing, presence of a policeman holding chain of handcuff or even keeping armed guard outside the room which being parts of the security measure by itself cannot penetrate into the realm as to make a confessional statement not to be voluntarily made. *Gurdeep Singh alias Deep* v. *State (Delhi Admn.),* AIR 1999 SC 3646 : (2000) 1 SCC 498 : 1999 CrLJ 4573 : 1999 CrLR (SC) 702 : 1999 (3) Crimes 243.

[8554] ● ***Confessional statement—When obtained by force.***—In his examination under S. 313, Cr.P. Code he had stated that the statement was obtained by force and that he was beaten by the officers of Narcotic Control Bureau. He had not stated at that time that he did not know Apart from the officers of Narcotic Department there is evidence of an employee of the Hotel where the appellant has stayed, who has proved some of the entries made in English by the appellant himself in the English in the register. The said statement of the appellant was recorded in 1990. He retracted it in 1994. Till then he had not complained against any officer as regards the alleged beating or use of force nor he had stated that he did not know English. Therefore, this contention cannot be accepted. *Kalema Tumba* v. *State of Maharashtra*, AIR 2000 SC 402 (403) : (1999) 8 SCC 257 : 2000 CrLJ 507 : 2000 CrLR (SC) 38.

[8555] ● ***Confessional statement—No complaint about recording of under coercion.***—In the present case undisputedly when the accused were produced before the Magistrate they did not make a complaint that the confessional statements were recorded under coercion Further, R. 15 of TADA Rules is complied with and each accused making the confession was explained that he was not bound to make it and in case he makes it, it could be used against him as evidence. Further, the officer had also verified that accused was making the confessional statement voluntarily and certificate to that effect is also attached to the said confessional statement. *Lal Singh* v. *State of Gujarat,* AIR 2001 SC 746 : (2001) 3 SCC 221 : 2001 SCC (Cri) 472 (489) : 2001 CrLJ 978 : JT 2001 (1) SC 410.

[8556] ● ***Confessional statement recording of under Section 15 of TADA.***—"Sub-r. (5) of R. 15 of the TADA Rules provides that the confession recorded under S. 15 of the TADA shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the record of confession so received to the Designated Court which may take cognizance of the offence. R. 15 does not oblige such Magistrate either to open the envelop containing the confessional statement recorded by the Police Officer or to satisfy himself regarding, the voluntary nature of the confession. The Magistrate, at the most, can record the statement of the accused if made regarding alleged harassment, torture or the like. If the Magistrate, referred to in sub-r. (5) of R. 15 has to ascertain the voluntary nature of the confessional statement, the purpose of S. 15 authorising a Police Officer to record the confessional statement shall stand frustrated. It was, therefore, not correct on the part of the Designated Judge to hold, "it was obligatory on the part of the Magistrate to question the accused as to whether they had made the said statements voluntarily or otherwise and that ought to have been formed as a part of the record of the confessional statements which were sent to her". Therefore, in view of the provisions as contained in S. 15 of the TADA Act, R. 15, of the TADA Rules and law laid down by this Court in *Kartar Singh case,* 1994 CrLJ 3139 the Designated Judge committed a mistake of law in not relying upon the confession on the ground that PW-44 had not given a separate certificate and had not herself inquired about the voluntary nature of the confessional statement" *State of Maharashtra* v. *Bharat Chaganlal Raghani,* AIR 2002 SC 409 (421, 423) : (2001) 9 SCC 1 : 2002 CrLJ 944.

[8557] ● ***Confession—Test for deciding acceptability of.***—The Court is to apply double test for deciding the acceptability of a confession *i.e.* (i) whether the confession was perfectly voluntary and (ii) is so, whether it is true and trustworthy. Satisfaction of the first test is a *sine qua non* for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise, such as mentioned in Section 24 of the Evidence Act, it must be excluded and rejected brevi manu. If the first test is satisfied, the Court must before acting upon the confession reach the finding that what is stated therein is true and reliable. *Mohd. Khalid* v. *State of W.B.*, (2002) 7 SCC 334 : 2002 SCC (Cri) 1734 : (2002) 4 Crimes 160 (SC).

[8558] ● ***Confessional statement—Recording of.***—The prosecution relied on a confession attributed to the appellant as recorded by a Deputy Commissioner of Police (PW-4). That confession is sought to be admitted under S. 15 of TADA. If the contents of the documents styled as confession can be acted on as voluntary and genuine, it would provide evidence for the disruptive activities said to have been perpetrated by the appellant Learned Senior Counsel, focused on the reliability of the said confession. The first point raised against the confession is that when appellant was produced before PW-4, he did not administer a caution to him that he was not bound to make any such confession. PW-4 asked him the question whether he was aware that he was not bound to make a confession to which the appellant answered in the affirmative, then only he proceeded further and recorded the confession, Thus, it is clear that what was required by law for compliance with as precautionary measures have been complied with by PW-4. Of course, the witness PW-4 has deposed in Court that he explained to the confessor that he was not bound to make such a confession. There is no requirement that the confessor should be administered with such caution on every day the officer meets him. It is enough that the caution is administered before the accused made the confessional statement. *Nazir Ahmad Bhatt* v. *State of Delhi,* AIR 2002 SC 30 (32) : (2002) 1 SCC 474 : 2002 CrLJ 213 : (2002) 1 Crimes 126.

[8559] ● ***Confession caused by any inducement threat or promise irrelevant in criminal proceeding.***—If it *appears* to the Court that the making of the confession was caused by any inducement, threat or promise proceeding from a person authority, the confession is liable to be excluded from evidence. The expression "appears" connotes that the Court need not go to the extent of holding that the threat, *etc.* has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the Court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than a police officer. Confessions leading to discovery of a fact which is dealt with under Section 27 is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer. Consideration of a proved confession affecting the person making it as well as the co-accused is provided for by Section 30. Briefly and broadly, this is the scheme of the law of evidence *vis-à-vis* confessions. The allied provision which needs to be noticed at this juncture is Section 162, CrPC. It prohibits the use of any statement made by any person to a police officer in the course of investigation for any purpose at any enquiry or trial in respect of any offence under investigation. However, it can be used to a limited extent to contradict a witness as provided for by Section 145 of the Evidence Act. Sub-section (2) of Section 162 makes it explicit that the embargo laid down in the section shall not be deemed to apply to any statement falling within clause (1) of Section 32 or to affect the provisions of Section 27 of the Evidence Act. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1773) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8560] ● ***Full Compliance of Section 164 CrPC.—Confession Voluntary.***—On 24th August 2001, upon receipt of an application moved by Superintendent of Police for recording dying declaration of A-1 by a Magistrate, DSP Man Singh, who partly investigated the case, approached the Chief Judicial Magistrate, Hisar, who, in turn, marked the said application to Pardeep Kumar, PW. 62. After reaching the hospital and before recording the statement, PW. 62 first sought opinion of Dr. Anant Ram (PW 32) as to the fitness of A-1 to make the statement. As in the opinion of PW. 32, A-1 was fit to make the statement, PW. 62 proceeded to record it, which is in question and answer form. It appears from Ext. 187 as well as from the questions and answers which were put to A-1 that PW. 62 warned A-1 that she was not bound to make any confessional statement and in case she did so, it might be used against her as evidence. In spite of this warning, A-1 volunteered to make the statement and only thereafter the statement was recorded by PW. 62. In the certificate that was appended to the said confessional statement PW. 62 has very categorically stated that he had explained to A-1 that she was not bound to make a confession and that if she did so, any confession she would make might be used as evidence against her and that he believed that the confession was voluntarily made. He further stated that he read over the statement to the person making it and admitted by her to be correct and that it contained a full and true account of the statement made by her. It has been further stated by PW. 62 in his evidence that at the time of recording of the confession it was he and PW 32, who were present in the room and there was neither any police officer nor anybody else within the hearing or sight when the statement was recorded. It also appears from the evidence of PW 62 that it took about 2½ hours for him to record the statement of A-1, which runs into 5 pages, which he started at 10.53 p.m. and ended at 1.28 a.m. which goes to show that A-1 took her time before replying to the questions put. PW 62 has also stated that she had given the statement after taking due time after understanding each aspect. It also appears that he was satisfied that she was not under any pressure from any corner. Therefore, it is evident from the certificate appended to the confessional statement by PW 62 that the confessional statement was made by the accused voluntarily. Of course, he failed to record the question that was put by him to the accused whether there was any pressure on her to give a statement, but PW 62 having stated in his evidence before the court that he had asked the accused orally whether she was under any pressure threat or fear and he was satisfied that A-1 was not under any pressure from any corner, that in the room in which the said confessional statement was recorded it was only he and PW 32 who were present and none else and that no police officer was available even within the precincts of the hospital, the said defect, is cured by S. 463 as the mandatory requirement provide under S. 164(2), namely, explaining to the accused that he was not bound to make a statement and if a statement is made the same might be used against him has been complied with and the same is established from the certificate appended to the statement and from the evidence of PW 62. Therefore, there is no hesitation in holding that the judicial confession having been recorded according to the procedure set out in Section 164 read with Section 281 and the defect made while recording the same being curable by Section 463, it is admissible in evidence. *Ram Singh* v. *Sonia,* AIR 2007 SC 1218 : (2007) 3 SCC 1 : 2007 CrLJ 1642 (1649, 1650).

[8561] ● ***Voluntary confession is admissible in evidence.***.—A confessional statement, as is well known, is admissible in evidence. It is relevant fact. The Court may rely thereupon if it is voluntarily given. It may also form the basis of the conviction, wherefor the Court may only have to satisfy itself in regard voluntariness and truthfulness thereof and in given cases, some corroboration thereof. A confession which is not retracted even at a later stage of the trial and even accepted by the accused in his examination under Section 313 of the Code, can be fully relied upon. In this case the confession was not retracted, the appellant no. 1 in his examination under Section 313, CrPC accepted the same. The confession was relied upon the conviction of the accused under Section 302 IPC & 376 IPC was upheld. *Bishnu Prasad Sinha* v. *State of Assam,* AIR 2007 (SC) 848 : (2007) 11 SCC 467 : 2007 CrLJ 1145 (1157) (SC) : 2007 (1) Crimes 147 (SC).

[8562] ● ***Confession to be Voluntary***.—Confession to be acceptable must be voluntary and free from suspicion. *Mohtesham Mohd. Ismail* v. *Special Director Enforcement Directorate.* (2007) 8 SCC 254 : 2007 3 SCC (Cri) 531.

[8563] ● ***Voluntary Confession—Value***.—Judicial Confession if voluntary can solely form the basis of confession. *Alok Nath Dutta* v. *State of West Bengal,* (2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2007) 1 Crimes 321.

[8564] ● ***Voluntary Confession can be accepted.***—If the confessional statement is found to be voluntary and free from pressure, it can be accepted. This is no doubt true, but it all depends on the facts and circumstances of each case and no hard and fast rule can be laid down in this connection whether a particular alleged confessional statement should be accepted. *Francis Stanly* v. *Intelligence officer, NCB Tiravanthapuram,* AIR 2007 SC 794 : (2006) 13 SCC 210 : (2007) 2 SCC (Cri) 618 : 2007 CrLJ 1157 (1159).

[8565] ● ***Voluntary nature of confession—Burden of proof***. Burden lies on the prosecution that establish that the confession is voluntary and is not a result of threat etc. *Vinod Solanki* v. *Union of India,* (2008) 16 SCC 537 : 2008 (17) SCR 1070 : JT 2009 (1) SC 1.

[8566] ● ***Involuntary confession.***—An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or if a threat and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution, if it is not. A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. *Kusuma Ankama Rao* v. *State of Andhra Pradesh,* AIR 2008 SC 2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502 : 2008 (10) SCR 89.

[8567] ● ***Voluntariness of confession—Doubtful.***—A confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at the stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession even if its is admissible in evidence. *Kusuma Ankama Rao* v. *State of Andhra Pradesh,* AIR 2008 SC

2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502 : 2008 (10) SCR 89.

[8568] ● ***Confession—When voluntary.***—A confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person; or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. *Kusuma Ankama Rao* v. *State of Andhra Pradesh*, AIR 2008 (SC) 2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502 : 2008 (10) SCR 89 : JT 2008 (7) 360.

[8569] ● ***Confession as a result of inducement, threat or promise etc.***—Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. *Kusuma Ankama Rao* v. *State of Andhra Pradesh*, AIR 2008 SC 2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502 : 2008 (10) SCR 89 : JT 2008 (7) SC 360.

[8570] ● ***Confession caused by inducement, threat, promise etc.***—A confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the Court to have been caused by any inducement threat or promise (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. *Kusuma Ankama Rao* v. *State of Andhra Pradesh*, AIR 2008 SC 2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502 : 2008 (10) SCR 89 : JT 2008 (7) 360.

[8571] ● ***Involuntary confession—Scope.***—An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See : *Woodroff's Evidence*, 9th Edn. P. 284) A promise is always attached to the confession alternative while a threat is always attached to the silence alternative, thus is one case the prisoner is measuring the net advantage of the promise minus the general undesirability of a false confession, as against the present unsatisfactory situation, while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. *Kusuma Ankama Rao* v. *State of Andhra Pradesh*, AIR 2008 SC 2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502 : 2008 (10) SCR 89 : JT 2008 (11) 360 : 2008 (9) Scale 652 : 2008 (6) SLT 169 : 2008 (7) SRJ 164.

[8572] ● ***Confession—Use.***—A confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of, a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. *Kusuma Ankama Rao* v. *State of Andhra Pradesh*, AIR 2008 (SC) 2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502 : 2008 (10) SCR 89 : 2008 (7) JT 360 : 2008 (9) Scale 652 : 2008 (6) SLT 169 : 2008 (7) SRJ 164.

[8573] ● ***Confession—Voluntariness.***—Whether or not the confession was voluntary would depend on the facts and circumstances of each case, judged in the light of Section 24 of the Evidence Act. *State of Punjab* v. *Harjagdev Singh,* AIR 2009 SC 2693 (2695) : (2009) 16 SCC 91 : 2009 (8) SCR 54.

[8574] ● ***Confession as a result of harassment and continuous interrogation.***—Where the statement is made as a result of harassment and continuous interrogation for several hours, after the person is treated as an offender and accused, such statement must be regarded as involuntary. *State of Punjab* v. *Harjagdev Singh,* AIR 2009 SC 2693 (2695) : (2009) 16 SCC 91 : 2009 (8) SCR 54.

[8575] ● ***Refusal of Court to act on confession.***—If the facts and circumstances surrounding making of confession appear to cast a doubt on veracity or voluntariness of confession, the Court may refuse to act on confession even it is admissible in evidence. *State of Punjab* v. *Ha-*

rjagdev Singh, AIR 2009 SC 2693 (2695) : (2009) 16 SCC 91 : 2009 (8) SCR 54.

[8576] ● *Inducement, threat, promise.*—"A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm.

Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. *State of Punjab* v. *Harjagdev Singh,* AIR 2009 (SC) 2693 : (2009) 16 SCC 91 : 2009 (8) SCR 54 : JT 2009 (7) SC 538.

[8577] ● *Confession alleged to be made under police pressure.*—Where the accused, who was released on bail on 18-1-2003 sent his confession in writing on 23-1-2003 while in judicial custody in jail, it could not be held that the confession was under any police pressure. *Sansar Chand* v. *State of Rajasthan*, (2010) 10 SCC 604.

6. CONVICTION BASED ON CONFESSION—PROPRIETY

[8578] ● *Magistrate followed legal formalities in recording confession.*—The recorded confession showed that the Magistrate followed the legal formalities in recording the confession. The Magistrate told the appellant that he was not bound to give any confession and if given, it would be used against him. The Magistrate also told the appellant as to whether anybody had used any force or pressure or coercion to make the confession statement. The appellant answered in the negative. The various answers given by the appellant to the queries made by the magistrate clearly showed that the confession was voluntary in nature. It was true that the appellant had made a statement that he was beaten up by the police for three days and that was recorded by the Magistrate that the appellant had showed his back and fingers, but there were no injuries or marks either on the back or on the fingers.

The appellant had time for reflection and the appellant was during this period in judicial custody. The appellant had given detailed recording as to how the incident happened. Description of the injuries found on the dead body of deceased in the post-mortem report was in conformity with the overt act described in the confession statement. Recovery had been affected at the instance of the accused-appellant and the "dhariya" and turban allegedly worn by the appellant at the time of incident were blood stained and they were recovered from the house of the appellant. *Held*, there was satisfactory evidence to prove the case against the appellant and the Sessions Judge as well as the High Court had rightly convicted the appellant for the offence, punishable under Section 302, IPC. *Devi Singh* v. *State of Rajasthan*, (2005) 10 SCC 453 : 2005 SCC (Cri) 1580 (1582).

7. MANNERS OF EXTRACTING CONFESSION—COMPULSION

[8579] ● *Manners of extracting confession—Compulsion.*—Compulsion may take many forms : A person accused of an offence may be subject to physical or mental torture. He may be starved or beaten and a confession may be extorted from him. By deceitful means he may be induced to believe that his son is being tortured in adjoining room and by such inducement he may be compelled to make an incriminating statement. *Yusufalli Esmial Nagree* v. *State of Maharashtra,* AIR 1968 SC 147 : 1968 CrLJ 103 : (1967) 3 SCR 720.

8. CONFESSION MADE TO POLICE OFFICER

[8580] ● *Confession made to Police Officer.*—The Law Commission of India in its 185th report on review of the Evidence Act has expressed strong views disfavouring the admission of confessions made to police officers. The commission commented that the basis for introducing Sections 25 and 26 in the Indian Evidence Act in 1872 helds good even today. The commission observed "we are compelled to say that confessions made easy, cannot replace the need for scientific and professional investigation."

In England, even though the confessions to the police can be received in evidence, the voluntariness of the confessions are tested by adopting stringent standards. Section 76 of the Police and Criminal Evidence Act, 1984 deals with confession in England. The prosecution has to prove beyond reasonable doubt that the confession was made voluntarily and was reliable. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1787) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8581] ● ***Confession—Admissibility Test as to voluntariness.***—The Court of Appeal decision in *R.* v. *Middleton*, 1975 QB 191 : (1974) 2 All ER 1190 shows that whenever the admissibility of a confession is challenged "a trial within a trial" is conducted to test the voluntariness of such confession at the earliest. In England, in the light of the Human Rights Act of 1988, a fresh look is being taken into the existing provisions of the Police and Criminal Evidence Act and other allied laws including the Law of Confessions.

In the United States, according to the decisions of the Supreme Court *viz. Miranda* v. *Arizona*, 348 US 436; *Escobedo* v. *Illinois*, 378 US 478 the prosecution cannot make use of the statements stemming from custodial interrogation unless it demonstrates the use of procedural safeguards to secure the right against self-incrimination and these safeguards include a right to counsel during such interrogation and warnings to the suspect/accused of his right to counsel and to remain silent. In *Miranda case*, (decided in 1966), it was held that the right to have counsel present at the interrogation was indispensable to the protection of the Vth Amendment privilege against self-incrimination and to ensure that the right to choose between silence and speech remains unfettered throughout the interrogation process. However, this rule is subject to the conscious waiver of right after the individual was warned of his right. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1787) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

9. CONFESSION IN POLICE CUSTODY

[8582] ● ***Admissibility of confession in police custody.***—The High Court after holding that the order granting Police Custody is *ex facie* illegal, has further held that the so-called confession and alleged recovery has no evidentiary value. The question arises whether the High Court was right in making the aforesaid observations, even if it is assumed that the order granting Police Custody was illegal.

The admissibility or otherwise of a piece of evidence has to be Judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that any other law in India does not exclude relevant evidence on the ground that it was obtained under an illegal search and seizure. *State* v. *N.M.T. Joy Immaculate,* AIR 2004 SC 2282 : (2004) 5 SCC 729 : 2004 CrLJ 2515 : 2004 (3) Crimes 136.

[8583] ● ***Confessional statement made to police officer.***—A confessional statement made to a police officer/IO. cannot be proved as evidence. *Vasanthi* v. *State of Andhra Pradesh,* AIR 2005 SC 2643 : (2005) 5 SCC 132 : 2005 CrLJ 3075 (3076) : 2005 (2) Crimes 210.

[8584] ● ***Confession under A.P. Control of Organised Crime Act, 2001.***—The A.P. Control of Organized Crime Act (42 of 2001), Act contains a special provision making the confessional statement admissible notwithstanding anything contained in the CrPC or the Indian Evidence Act provided the confession is made before a Police Officer not below the rank of the Superintendent of Police. The confessional statements which were sought to be relied upon in the charge-sheet were not those recorded in accordance with Section 18(1) of the Act by the authorized officer. As far as the recovery of car was concerned, the same was seized while it was at her residence. Whether under Section 27, any part of her statement would be admissible was also not free from doubt. *Vasanthi* v. *State of Andhra Pradesh,* AIR 2005 SC 2643 : (2005) 5 SCC 132 : 2005 CrLJ 3075 (3076) : (2005) 2 Crimes 210.

[8585] ● ***Confession of accused in police custody—Confession—Admissibility.***—Confession of the accused in the custody of police. Only that point which leads to discovery of facts would be admissible in evidence. *Swamy Shraddananda* v. *State of Kerala,* AIR 2007 SC 2531 : (2007) 12 SCC 288 : (2008) 2 SCC (Cri) 264.

10. RETRACTED CONFESSION

[8586-87] ● ***Retracted confession.***—[Note:—Effect of the Retraction of a confession on the question whether it is voluntary and true. When a confession is retracted, the fact of such retraction has a bearing on the question whether it is voluntary and true. In such a case, for the purpose of deciding whether the retracted confession was voluntary and true, the Court must keep the fact of such retraction in mind and consider all attendant factors which throw a light on the nature of the confession, such as, (*a*) the reason given by the accused for making the confession, (*b*) the circumstances alleged by the accused which throw a doubt on the voluntary character of the confession, such as inducement, threat pressure or promise from the police authorities, (*c*) the material discrepancies, if any, between the testimony of eye-witnesses and the contents of the confession, and (*d*) the facts and circumstances surrounding the making of the confession. If after scrutinising and weighing all such factors, the Court is satisfied that the confession was voluntary and true and that it was the outcome of penitence and remorse and was born of a desire to make a clean breast of the whole affair, then the confession is the best evidence against the maker. On the other hand, if the Court concludes that the attendant circumstances are such as to throw a doubt upon the true and voluntary character of a confession, the fact of its retraction lends weight to that doubt.

A Confession must be found to be True, before the Court can go into the question of its sufficiency.]

In a case in which two accused are charged with the joint commission of an offence, and the case rests mainly upon confessions made by both the accused, even if both retract their confessions, once the Court comes to the conclusion that the confessions are voluntary, it can use both the confessions against the accused in deciding whether the prosecution has proved its case, provided that it finds the confessions to be true. In such a case, it is not open to the accused to urge that the two confessions must be read together, and that both must be condemned as being not true if differences in details in describing the manner in which the offence was committed are found to exist, and each accused throws the main blame on the other. Such differences can arise out of the natural desire of each accused to exonerate himself as much as possible, and merely because of the existence of such differences it could not be said that the confessions are not true. In such a case, if the Court finds that there is sufficient independent corroboration to justify it in accepting and relying upon the confessions as being true and voluntary, it is open to it to accept them in spite of such differences and convict the accused. *Balbir Singh* v. *State of Punjab*, AIR 1957 SC 216 : 1957 CrLJ 481.

[8588] ● ***Confession—When accepted as true.***—When the manner of causing death or the circumstances in which the death was caused as described in a confession is improbable or unnatural, such improbability or unnaturalness is a factor which the Court must bear in mind when considering the question whether the confession can be accepted as true and reliable. In such a case, before accepting the confession as true the Court must always look for other evidence which supports the description given in the confession, and if there is no such evidence in the case, prudence demands that conviction should not be based on such a confession, even when the Court is satisfied that it is made voluntarily.

On the other hand, if the corroborative evidence on record clearly supports the description given in the confession, the unusual or unnatural character of the circumstances described in the confession loses its significance, and the confession has to be accepted as true, in the absence of anything else which shows it to be false. *Ram Chandra* v. *State of Uttar Pradesh,* AIR 1957 SC 381 : 1957 CrLJ 559.

[8589] ● ***Prosecution failing to prove beyond doubt that confession was true.***—For the purpose of deciding whether a confession could be relied upon as being 'true', the Court must carefully examine its contents, and must then compare them with the other prosecution evidence and apply to them the test of probability. It the Court finds that the material statements in the confession are inconsistent with the evidence of eye-witnesses or the medical evidence so that injuries to the deceased which are confessed to are not borne out by the other evidence on record, or that there are material discrepancies between the other evidence and the description given in the confession so that both could not be true, it must be held that the prosecution has failed to prove beyond doubt that the confession is 'true', and it must be put aside when considering the case against the accused. *Sarwan Singh Rattan Singh* v. *State of Punjab,* AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCJ 699.

[8590] ● ***Confession—Whether true—One of tests for determining.***—One of the tests for determining whether a confession is true or not is to compare it with the evidence of eye-witnesses and to weigh it in the light of the probabilities of the case. But that does not mean that if a confession does not contain elaborate details and lacks the extensive particulars found in the evidence of eye-witnesses, it is to be branded as untrue, even though there is nothing in the oral evidence which can be said to be contradictory in any material particular to the contents of the confession. Omission in a confession to state the exact number of stabs given, or the names of the persons who were present at the time of the assault, or the fact that a weapon or other article had been discovered at his instance is not a good ground for holding that the confession has not been proved to be true and for rejecting it when considering the case against the accused. *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66 : 1958 CrLJ 238 : 1958 SCJ 321.

[8591] ● ***Retracted confession when to form basis of conviction.***—"A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances can such a conviction be made without corroboration, for a Court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the Court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars." *Pyare Lal Bhargava* v. *State of Rajasthan*, AIR 1963 SC 1094 : 1963 (2) CrLJ 178 : 1963 Supp (1) SCR 689.

[8592] ● ***Retracted confession of co-accused.***—Bello made a confession implicating Mukherjee. At the trial he retracted the confession. Under Section 30 of the Evidence Act, the Court can take into consideration this retracted confession against Mukherjee. But this confession can be used only in support of other evidence and cannot be made the foundation of a conviction. It cannot be used to support the evidence of the other accomplice. *Mohd. Hussain Umar Kochra* v. *K.S. Dalip Singhji,* AIR 1970 SC 45 : (1969) 3 SCC 429 : 1970 SCC (Cri) 99 (112) : 1970 CrLJ 9 : 1969 UJ (SC) 356 : (1970) 1 SCR 130.

[8593] ● ***True confession made voluntarily be acted upon.***—A Court may take into consideration the retracted confession but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the Court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the Court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the Courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true. *Bharat* v. *State of U.P.*, 1972 SCC (Cri) 198 : (1971) 3 SCC 950.

[8594] ● ***Retracted confession corroboration necessary.***—In the present case the main evidence against the appellant consists of the retracted confession made by the accused before the Magistrate where he admitted to have assaulted the deceased with a lathi as a result of some altercation with the deceased. This confession has been held to be voluntary both by the High Court and Sessions Court and nevertheless as the confession was retracted, corroboration was necessary. *Kora Ghasi* v. *State of Orissa,* AIR 1983 SC 360 : (1983) 2 SCC 251 : 1983 SCC (Cri) 387 (387) : 1983 CrLJ 692 (2) : 1983 CrLR (SC) 188 : (1983) 1 Crimes 984.

[8595] ● ***Retracted judicial confession—Reliance on.***—The retracted judicial confession of accused 5 could not be relied upon against accused 6 in this case in view of the fact that accused 6 who had been tried alongwith accused 5 had been acquitted by the High Court of the charge of conspiracy under S. 302 read with S. 120-B, IPCode and accused 5 was not charged for the offence of murder of Malan for which only accused 1, 6 and 7 were tried. *Vinayak* v. *State of Maharashtra,* AIR 1984 SC 1793 (1796) : (1984) 4 SCC 441 : 1984 SCC (Cri) 605 : 1984 CrLR (SC) 424 : (1985) 1 SCR 779 : 1985 Cr App R (SC) 9.

[8596] ● ***Confession—When retracted.***—When confession has been retracted and there is no independent corroboration and the presence of the eye witnesses at the scene of crime is doubtful accused cannot be convicted on the basis of confession. *Palanisamy* v. *State of Tamil Nadu,* AIR 1986 SC 593 : (1986) 1 SCC 693 : 1986 SCC (Cri) 97 : 1986 CrLJ 551 : 1986 CrLR (SC) 99 : 1986 (1) Crimes 599.

[8597] ● ***Confession before customs authorities when retraced.***—The confessional statement it is alleged was extracted from him while the detenue was in the custody of the custom authorities. The detenue however as soon as he was produced before the Magistrate retracted from the statement. The non-placement of the retraction of the confessional statement by the detenue before the detaining authority and non-consideration of the same while arriving at his subjective satisfaction in making the order of detention goes to the root of the order of detention and makes the order of detention invalid. *K. Satyanarayan Subudhi* v. *Union of India,* AIR 1991 SC 1375 : 1991 Supp (2) SCC 153 : 1991 SCC (Cri) 1013 : 1991 CrLJ 1536 : 1991 CrLR (SC) 859.

[8598] ● ***Retracted confession—Value of.***—The confession as such is of no value, particularly because it is retracted, except as a reassurance when reliable evidence has already been adduced on behalf of the prosecution. *Union of India* v. *J.S. Brar,* AIR 1993 SC 773 : (1993) 1 SCC 176 : 1993 SCC (Cri) 318 (321) : 1993 CrLJ 426 : (1993) 2 SCR 794 : JT 1992 (3) SC 222.

[8599] ● ***Retracted extra-judicial confessions.***—The case of the prosecution rests on retracted extra judicial confession. It is well settled that the retracted extra judicial confession is a very weak type of evidence and strong corroborating circumstances should be there. Before we proceed further, it is necessary to examine whether the death was a homicidal one. Unfortunately, for the prosecution, the body was recovered 20 days later and it was in a highly decomposed state. The doctor (S.B. Raha) who conducted the post-mortem found only fracture of the third Cervical Vertibra of the spine and no other injuries. He noted that the same could not be as certained whether it was the ante-mortem or post-mortem injury. No doubt, in his further deposition he has answered to a question that the injury was sufficient in the ordinary course of a nature to cause death. The answer given does not in any manner improve the prosecution case, in view of the fact that the doctor could not categorically say whether the fracture was ante-mortem or post-mortem. That apart, according to PW 11, the accused is alleged to have confessed that he hit the deceased on the head and other parts of the body. But the doctor did not find, as noted above, any fracture of the skull or any other internal injuries. Therefore, the version as per the extra judicial confession is inconsistent with the medical evidence. The extra judicial confession should be taken as a whole and should not suffer from any infirmity even if it is to be acted upon. But in this case we find that the belated confession itself becomes doubtful in the light of the medical evidence apart from being the same retracted. We think it is highly unsafe to sustain the conviction. *Chhittar* v. *State of Rajasthan,* AIR 1994 SC 214 : 1995 Supp (4) SCC 519 : 1995 SCC (Cri) 248 : 1994 CrLJ 245.

[8600] ● ***Retraction of confession—When after thought.***—The detenu was apprehended on 26-8-92 and was questioned and his statement along with the statements of others was recorded. On 18-9-92 the detention order was passed. By then there was no retraction. However, the detenu claimed that he retracted on the same day and the fact remains that it was not before the detention order was passed. There is no such request for the presence of a lawyer which would have a bearing on the voluntary nature of the confession and the subsequent retraction. Therefore the retraction is clearly an afterthought and if the same is not placed before the declaring authority that will not vitiate his subjective satisfaction. *Noor Salman Makani* v. *Union of Indian,* AIR 1994 SC 575 : (1994) 1 SCC 381 : 1994 SCC (Cri) 521 : 1994 CrLJ 602 : 1993 (3) Crimes 1108.

[8601] ● ***Exculpatory confessional statement by one of accused—When not reliable.***—Accused confessed about a conspiracy to commit the murder of the deceased, but did not at all confess that he was a party to the murder. Confession can not be relied. *Shabad Pulla Reddy* v. *State of Andhra Pradesh,* AIR 1997 SC 3087 : 1997 (8) SCC 495 : 1997 CrLJ 3753 : 1997 CrLR (SC) 602 : 1997 (3) Crimes 240.

[8602] ● ***Retraction of confession not ground to throw confession overboard.***—It is not the law that once a confession is retracted the Court should presume that the confession is tainted. As a matter of practical knowledge we can say that a non-retracted confession is a rarity in criminal cases.

To retract from confession is the right of the confessor and all the accused against whom confessions were produced by the prosecution have invariably adopted that right. It would be injudicious to jettison a judicial confession on the mere premise that its maker has retracted from it. The Court has a duty to evaluate the evidence concerning the confession by looking at all aspects. The twin test of a confession is to ascertain whether it was voluntary and true. Once those tests are found to be positive, the next endeavour is to see whether there is any other reason which stands in the way of acting on it. Even for that, retraction of the confession is not the ground to throw the confession overboard. *State of Tamil Nadu* v. *Kutty,* AIR 2001 SC 2778 : (2001) 6 SCC 550 : 2001 SCC (Cri) 1177 (1181) : 2001 CrLJ 4168.

[8603] ● ***Confession voluntary.***—In the present case, the learned senior counsel for the appellant made an endeavour to show that PW-4 had only copied the statement prepared by the investigating officer under Section 161, CrPC and secured the signature of the appellant thereon. We do not have any material to think that PW-4 did so as contended by the learned counsel. We have to bear in mind the answer given by the appellant to a question put by the trial Judge during examination under Section 313 of the CrPC after bringing his attention to Ext. PW 4/B. That document is dated 18.4.1995 and it shows that appellant gave his consent to make a confessional statement before the senior officer. Appellant owned Ext 4/B though he explained that he signed it at the instance of the investigating officer. This means appellant was told in advance about the possibility of recording his confession. He never had any complaint that he was physically or even mentally tortured by the Police at any time. He thought of retracting from the confession only during trial of the case and not at any previous stage. That confession was voluntarily made by him. From the above we are inclined to believe that confession was voluntarily made by him. *Nazir Ahmad Bhatt* v. *State of Delhi,* AIR 2002 SC 30 (33) : (2002) 1 SCC 674 : 2002 CrLJ 213.

[8604] ● ***Retracted Confession—Corroboration.***—A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a confession without corroboration. The expression "corroboration of material particulars" does not imply that there should be meticulous examination of the entire material particulars. It is enough that there is broad corroboration in conformity with the general trend of the confession, as pointed out in Subramania Goundan's case. *Parmananda Pegu* v. *State of Assam,* AIR 2004 SC 4197 : (2004) 7 SCC 779 : 2004 CrLJ 4197 (4203) : (2004) 3 Crimes 337.

[8605] ● ***Retracted confession—Extent of corroboration.***—As too the extent of corroboration required, it was observed in *Subramania Goundan case*, AIR 1958 SC 66 : 1958 CrLJ 238 : 1958 SCR 428 that each and every circumstance mentioned in the retracted confession regarding the complicity of the maker need not be separately and independently corroborated. The learned Judges observed : (SCR pp. 440-41).

> "It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession." *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1775) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8606] ● ***Retracted confession—Admissibility and use of—Against co-accused.***—*Use of retracted confession.*—The use of retracted confession *against the co-accused* however stands on a different footing from the use of such confession against the maker. To come to grips with the law on the subject, we do no more than quoting the apt observations of VIVIAN BOSE J., speaking for a three-Judge Bench in *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159 : 1952 CrLJ 839 : 1952 SCR 526. Before clarifying the law, the learned Judge noted with approval the observations of Sir Lawrence Jenkins that a confession can only be used to "lend assurance to other evidence against a co-accused". The legal position was then stated thus : (SCR p. 530).

> "Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, *if it is believed,* a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, *if believed,* it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept." *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1776-1777) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8607] ● ***Confession retracted.***—Where there is no evidence except the confessional statement of the accused which too has been retracted subsequently, the accused would be acquitted by giving benefit of doubt. *Ravindra* v. *Supdt of Customs,* AIR 2007 SC 2040 : (2007) 6 SCC 410 : 2007 (3) SCC (Cri) 189 : 2007 CrLJ 3414 : (2007) 3 Crimes 105.

[8608] ● ***Confession retracted in TADA Case.***—In a TADA Act case, it was held that merely because confession of the accused before Deputy Commissioner was subsequently retracted, cannot bee held to be unreliable. *Abdulvahab Abdul Majid Shaikh* v. *State of Gujarat,* (2007) 4 SCC 257 : 2007 (2) SCC (Cri) 276 : 2007 CrLJ 3405.

[8609] ● ***Retracted Confession—Voluntariness.***—Where a confession has been recorded by a person duly empowered by law to record confession after following all the formalities, the mere fact that the confession is retracted subsequently is no ground to hold that the confession was not voluntary. *Abdul Vahab Abdul Majid Shaikh* v. *State of Gujarat,* AIR 2007 SC 2492 : (2007) 9 SCC 293 : 2007 (3) SCC (Cri) 126 : 2007 CrLJ 3529 (3532).

[8610] ● ***Retraction of Confession—Relevancy.***—Mere retraction of confession may not be sufficient to make the confession irrelevant, for the purpose of proceeding in a criminal or quasi-criminal case to determine the relevancy or otherwise, the court has to take into consideration the pros and cons of both the confession and the retraction subsequently made by the accused.

To arrive at a finding on retracted confession, court must consider attending circumstances, such as the time of retraction, and nature and manner thereof. *Vinod Solanki* v. *Union of India,* (2008) 16 SCC 537 : 2008 (17) SCR 1070 : JT 2009 (1) (SC) 1.

11. EXTRA-JUDICIAL CONFESSION—PRINCIPLES RELATING TO THEIR ACCEPTANCE AND USE

[8611] ● ***Extra-judicial confession—Principles relating to their acceptance and use.***—An extra-judicial confession by an accused can be accepted as evidence only when the Court is satisfied that it is both voluntary and true. For that purpose the Court must first inquire whether there are any circumstances on record which tend to throw a doubt on the voluntary character of the confession, that is, whether the making of the confession appears to have been caused by any inducement, threat or promise proceeding from any person in authority. The mere fact that the accused repudiates the confession or denies having made it, or that there was a possibility of there having been some inducement is not sufficient to attract Section 24 of the Evidence Act. Before a confession can be rejected there must be on record some circumstances from which the Court can legitimately arrive at the conclusion that the confession appears to have been made as a result of some inducement held out by a person in authority.

In *R.* v. *Thomson*, (1893) 2 QB 12 it was proved that a person in authority had told the brother of the accused "it will be the right thing for your brother to make a statement". In *Re, Chinna Papiah,* AIR 1940 Mad 136 the accused was put to close questioning by a police officer for six hours before he made a confession. In *Hashmat Khan* v. *Emp.,* ILR 15 Lah 856, the accused was told before he made the confession "It will be better for you if you told the truth". In all these cases the confession was rightly rejected because there was a proved circumstance on record which threw a doubt on the voluntary character of the confession. *Ratan Gond* v. *State of Bihar,* AIR 1959 SC 18 : 1959 CrLJ 102 : 1959 SCJ 198.

[8612] ● ***Extra-judicial confession—Voluntary character of.***—In the present case, the only circumstance urged against the voluntary character of the confession was that after the accused was arrested and brought back to the village, he was taken to the village authorities, and that a period of three hours elapsed from the time when he was brought to the house of the Mukhia upto the time when he made the confessional statement. This circumstance in itself is not such as to cast a doubt on the voluntary character of the extra-judicial confession made thereafter by the accused, as there is nothing to show that any inducement was offered to the accused which might have persuaded him to make the confession. *Ratan Gond* v. *State of Bihar,* AIR 1959 SC 18 : 1959 CrLJ 102 : 1959 SCJ 198.

[8613] ● ***Confession—Voluntary and True.***—In the present case, the evidence was that the accused had confessed that he had killed a child in a lonely place in a jungle by severing her head because of greed for money, as a contractor who was building a bridge near the village had offered Rs. 80 for a human head as a sacrifice. On behalf of the accused it was urged that in the absence of any evidence to support these facts there was no guarantee that this confession was true. The accused is an aboriginal belonging to a class of people who were steeped in superstition, and there is no reason to hold that he would not believe that the contractor was offering a sum of money for a human head as a sacrifice. In the very nature of things it cannot be expected that any witness can be produced to prove that a sum of money has in fact been offered for such a purpose, or that someone has informed the accused about it. The absence of any such evidence is no reason for doubting that the confession is true. The Courts below are right in accepting the confession as being voluntary and true though it had been retracted at a later stage, and in convicting the accused of murder, though there is no evidence corroborating his statement that such an offer had been made or that he had been told of such an offer. Conviction was maintained. *Ratan Gond* v. *State of Bihar,* AIR 1959 SC 18 : 1959 CrLJ 102 : 1959 SCJ 198.

[8614] ● ***Extra-judicial confession voluntary.***—If, on the evidence on record, the Court accepts an extra-judicial confession to be voluntary and true, it can be relied upon along with other evidence for convicting the accused. Like any other fact the confession has to be proved, and the question whether it has been proved depends like all other questions of fact upon the veracity of the witnesses who speak to such a confession having been made to them.

There is no inflexible rule that the Court should always insist upon the exact words used by the accused when making the confession, or that the Court should not accept the evidence as to an extra-judicial confession if the actual words spoken are not mentioned and only a substance of it is given by the witness. No doubt, as far as possible, the Court will require the witness to recollect the very words in which the confession was made, but if there were an invariable rule that evidence as to such a confession has to be excluded unless the exact words spoken by the accused are repeated by the witness, more often than not, reliable and important evidence will get excluded, because except in the case of persons of unusual memory, a witness cannot repeat the exact words he has heard, though he may be able to give the substance of what he has heard and may be quite reliable and truthful. It is, therefore, for the Court in each case to decide whether to accept or reject evidence of an extra-judicial confession when the witness gives evidence as to it in his own words without being able to reproduce the very words of the accused which he had heard. In arriving at its decision the Court will have regard to such factors as the credibility of the witness, his capacity to follow the language in which the confession was made, the nature of the confession made (such as its length, mass of detail or complicated facts), and the existence or non-existence of any conflict between the versions of different witnesses. If after considering all these factors the Court sees no reason to reject the evidence, there is no rule of law which compels the Court to reject it merely because the witnesses have been unable to reproduce the very words used by the accused. *Mulk Raj* v. *State of Uttar Pradesh,* AIR 1959 SC 902 : 1959 CrLJ 1219.

[8615] ● ***Admission by accused.***—In the instant case, the appellant appeared before the Collector of Central Excise, who made an inquiry, and admitted before him that certain items Nos. 6 to 10 were smuggled goods from Pakistan. The finding of custom authorities that the appellant purchased the said items, which were smuggled goods, was based on the said admission. In this connection, it was observed that it would have been better if the custom authorities had taken that admission in writing from the appellant for that would prevent the retraction of the confession on second thought. That apart, it is more satisfactory if a body entrusted with functions such as the custom authorities are entrusted with, takes that precaution when its decision mainly depends upon such admission. *Amba Lal* v. *Union of India,* AIR 1961 SC 264 : 1961 (1) CrLJ 326 : 1962 (2) SCJ 549.

[8616] ● ***Extra-judicial confession value of.***—Extra-judicial confessions are not usually considered with favour but that does not mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in circumstances which tend to support his statement, should not be believed. There is no enmity between Ujagar Singh and the appellant and, therefore, no good reason existed for Ujagar Singh to state falsely. The evidence of the appellant's having enmity with Sheo Sahai, the appellant's conduct in purchasing a sword and delivering it stained with human blood to the Police and the appellant's confession to Ujagar Singh, fully establish that the appellant did commit the murder of Sheo Sahai. We are therefore of opinion that he has been rightly convicted of the offence under Section 302, IPC, and has been awarded the proper sentence. *Ram Singh* v. *State of Uttar Pradesh,* AIR 1967 SC 152 : 1962 Supp (2) SCR 203 : 1967 CrLJ 9.

[8617] ● ***Extra-judicial conviction—Basing of conviction on.***—The learned Judge is right in observing that it was not safe to base a conviction on an extra-judicial confession. The conviction in this case was not based merely on the extra-judicial confession. There was the evidence of the complainant against the respondent. The extra-judicial confession strongly corroborated that statement. The document too, therefore, was admissible in evidence and had been wrongly ignored by the learned Judge. *State of Gujarat* v. *Vinaya Chandra Chhota Lal Pathi,* AIR 1967 SC 778 : 1967 CrLJ 668 : 1967 (1) SCR 249.

[8618] ● ***Confession to witnesses.***—The evidence in this regard is so artificial that it is not safe to place any reliance on the same. According to PW 3 when several weeks after the incident and when rumours were afloat in the village. PW-7 came and informed her about the information given by her son PW-2 that the appellant has killed his father-in-law and buried him in the field. On this PW-3 is stated to have asked the appellant whether the rumour is true and the appellant confessed that he murdered his father-in-law and his body was buried in the field. Similarly PW 5 states that a long after the incident, she found the appellant one day in a very distressed mood and when she asked him the reason, the appellant stated to her that he had killed her father. The evidence regarding this confession stated to have been made to PW 3 and 5 is very artificial and cannot be acted upon. Their evidence does not appear to be true. The High Court was not justified in acting on the basis that the appellant had made any confession to PW 3 and 5. Their evidence appears to be somewhat unusual and mechanical. They did not evince any anxiety about the whereabouts of the deceased after he failed to return to the house within a reasonable time. In view of the above circumstances, it is not safe to place reliance on their evidence. *Duvvur Dasaradharamareddy* v. *State of Andhra Pradesh,* AIR 1971 SC 1461 : 1971 (3) SCC 247 : 1971 SCC (Cri) 472 : 1971 CrLJ 1139.

[8619] ● ***Extra-judicial confession to be considered with caution.***—Before the Court will act on extra judicial confession the circumstances under which the confession is made, the manner in which it is made, the persons to whom it is made will be considered along with two rules of caution. First, whether the evidence of confession is reliable and secondly whether it finds corroboration. *Wakil Nayak* v. *State of Bihar,* 1972 CrLJ 566 : (1971) 3 SCC 778.

[8620] ● ***Extra-judicial confession.***—Radhabai lives very close to the place of occurrence, while the other two witnesses work in the factory which is located in one of the rooms of the Chawl wherein the occurrence took place. According to these witnesses, the accused with a knife in his hand came and enquired regarding the whereabouts of Ganpat. The accused also told them that he had murdered that woman. There is nothing unnatural or improbable in the above statement of the accused which was made immediately after the murder of the deceased. The three witnesses had no particular animus against the accused and after having been taken through their evidence, we find a ring of truth in it. In addition to the evidence of the abovementioned three witnesses, we have the statement of Ganpat PW that the accused came armed with a knife to the witness. The witness on seeing the accused in a threatening mood ran away. The fact that the accused after arming himself with a knife ran after Ganpat is also admitted by the accused. This circumstance lends further assurance to the testimony of Radhabai, Pandurang and Shankar.

We find that the clothes of the accused, who was arrested by the police soon after the occurrence, were found to be stained with blood. The accused was also soon after the occurrence seen sitting in front of the room is which the dead body of the deceased was lying with a blood-stained knife in his hand. These facts, which are not disputed by the accused, furnish additional corroboration to the evidence relating to the extra-judicial confession made by the accused. The explanation furnished by the accused regarding the blood-stains on his clohes and the blood-stained knife in his hand is not at all convincing and has been rightly rejected by the High Court. *Kashinath Krishna Jadhav* v. *State of Maharashtra,* AIR 1973 SC 1219 : (1973) 3 SCC 95 : 1973 CrLJ 989.

[8621] ● ***Extra-judicial confession.***—The accused was also, soon after the occurrence, seen sitting in front of the room in which the dead body of the deceased was lying with a blood-stained knife in his hand. These facts, which are not disputed by the accused, furnish additional corroboration to the evidence relating to the extra-judicial confession made by the accused. *Kashinath Krishna Jadhav* v. *State of Maharashtra,* AIR 1973 SC 1219 : (1973) 3 SCC 95 : 1973 SCC (Cri) 157 : 1973 CrLJ 989.

[8622] ● ***Confession by accused to witness.***—There was no history of previous association between the witness and the two accused as may justify the inference that the accused could repose confidence in him. In the circumstances, it seems highly improbable that the two accused would go to the witness and blurt out a confession. *Rahim Beg* v. *State of Uttar Pradesh,* AIR 1973 SC 343 : (1972) 3 SCC 759 : 1972 SCC (Cri) 827 : 1972 CrLJ 1260.

[8623] ● ***Extra-judicial wealth piece of evidence.***—Extra-judicial Confession in a weak piece of evidence. Introduction of false prosecution story would further affect the credibility of extra- judicial confession. *Jagta* v. *State of Haryana,* AIR 1974 SC 1545 : 1974 (4) SCC 747 : 1974 CrLJ 1010 : (1975) 1 SCR 165.

[8624] ● ***Extra-judicial confession, weak piece of evidence.***—Extra judicial confession is a weak piece of evidence. Reliance cannot be placed unless it is plausible and inspires confidence. *State of Punjab* v. *Bhajan Singh,* AIR 1975 SC 258 : (1975) 4 SCC 472 : 1975 CrLJ 282 : 1975 (1) SCR 747.

[8625] ● ***Extra-judicial confession to witnesses.***—The evidence furnished by the extra-judicial confession made by the accused to witnesses cannot be termed to be a tainted evidence and if corroboration is required it is only by way of abundant caution. If the Court believes the witnesses before whom the confession is made and it is satisfied that the confession was voluntary, then in such a case conviction can be founded on such evidence alone. *Maghar Singh* v. *State of Punjab,* AIR 1975 SC 1320 : (1975) 4 SCC 234 : 1975 CrLJ 1102.

[8626] ● ***Confession of accused to uncle and cousin of his wife.***—Where the accused confessed murder of wife to the uncle and cousin of his wife who were not person in authority, confession does not suffer from an illegal infirmity. *Darshan Lal* v. *State of J&K,* AIR 1975 SC 898 : (1975) 4 SCC 33 : 1975 CrLJ 774.

[8627] ● ***Extra-judicial—Confession when corroborated.***—Law does not require that the evidence of an extra judicial confession should in all cases be corroborated. In the instant case, the extra judicial confession was proved by an independent witness who was a responsible officer and who bore no *animus* against the appellants. There was hardly any justification for the Sessions Judge to disbelieve the evidence of Balbir Singh particularly when the extra judicial confession was corroborated by the recovery of an empty from the place of occurrence. *Piara Singh* v. *State of Punjab,* AIR 1977 SC 2274 : (1977) 4 SCC 452 : 1977 SCC (Cri) 614 (621) : 1977 CrLJ 1941 : 1977 CrLR (SC) 466 : (1978) 1 SCR 597 : 1977 UJ (SC) 753.

[8628] ● ***Extra-judicial confession not free from taint of infirmity.***—In deciding whether a particular confession attracts the frown of Section 24 of the Evidence Act the question has to be considered from the point of view of the confessing accused as to how the inducement threat or promise proceeding from a person in authority would operate in his mind. On July 17, 1970 the Police gave a go by to the encounter story and the present case was registered against the accused. Two days after on July 19, 1970. Mr. Kapur having already failed to get any confessional statement from the accused through other agency took upon himself to question accused persons separately and this time he succeeded in securing confessional statements. When the two accused were questioned separately after several abortive attempts to secure confessions, can it be said that there was no inducement, threat or promise of some kind proceeding from Mr. Kapur to have made any impact on their minds resulting in the confession? Mr. Kapur having stated to the accused that "now that the case has been registered they should state the truth," it is difficult to hold that by this statement he would not generate in the minds of the accused some hope and assurance that if they told the "truth" they would receive his "support" which he had earlier conveyed to them through D.S.P. Handa. It is true that in the course of cross-examination Mr. Kapur stated that he had told the accused that if they had done anything wrong they would go to jail. But having regard to the effect of the totality of the evidence of this witness, we are unable to hold that the confessions made by the accused before Mr. Kapur were free from the taint of infirmity within the mischief of Section 24, Evidence Act. *Satbir Singh* v. *State of Punjab,* AIR 1977 SC 1294 : (1977) 2 SCC 263 : 1977 SCC (Cri) 333 (341, 342) : 1977 CrLJ 985 : 1977 CrLR (SC) 211.

[8629] ● ***Extra-judicial confession—Unsafe to accept evidence of.***—In the instant case, a prosecution witness admitted that he saw the appellant running and on being questioned the appellant told him that he had committed a mistake and had killed his brother due to quarrel. In cross-examination the witness admitted that he did not narrate this story of the murder to anybody. The witness met a number of persons on that day but he did not mention the factum of the confession to any one of them. Secondly the evidence shows that he was not known to the appellant and therefore, it is difficult to believe that the appellant would make a confession to a person who was not known to him at all. For these reasons it is wholly unsafe to accept the evidence of the extra-judicial confession of the appellant. *Lakhanpal* v. *State of Madhya Pradesh*, AIR 1979 SC 1620 (1621) : (1979) 3 SCC 256 : 1979 SCC (Cri) 644 : 1979 CrLJ 1217.

[8630] ● ***Confession of all persons to witness.***— It is not at all understandable as to why the appellant should suddenly decide to make a confession of all persons to Hari Singh. The witness admits in cross-examination that he did not know the neighbour of Mukhtiar Kaur nor had he ever been to the house of Mukhtiar Kaur. He further observed that never before Mukhtiar Kaur had come to him.

In these circumstances we find it difficult to believe that the appellant will go suddenly to make a confession of all persons to this witness. *Mukhtiar Kaur* v. *State of Punjab,* AIR 1981 SC 1871 (2) : (1980) 2 SCC 369 : 1980 SCC (Cri) 456 (457) : 1980 CrLJ 1420 : 1980 UJ (SC) 640.

[8631] ● ***Confession to under trial in Jail.***— The three accused made extra-judicial confession to an undertrial in jail charged with the offence of dacoity. The three accused were possibly with him in jail, when this dubious extra-judicial confession is alleged to have been made to him. The extra-judicial confession is vague and ambiguous because it in not clear whether each one spoke separately and what were the words used by each of the accused. Witness speaks of an extra-judicial confession by three accused person having simultaneously made and when reproduced in his language, it makes no sense. It is dangerous to rely upon such extra-judicial confession even if the witness's credentials are not in question. The question that agitates is what language was used by each accused, in what words confession was made and whether each used the same language? Evidence of the witness does not reproduce the words used by each accused. We are at a loss to understand how the High Court accepted the evidence on this extra-judicial confession without examining the credentials of PW-2, without ascertaining the words used; without referring to the decision of this Court wherein it is succinctly stated that extra-judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed. *Heramba Brahma* v. *State of Assam,* AIR 1982 SC 1595 (1597, 1598) : (1982) 3 SCC 351 : 1983 CrLJ 149.

[8632] ● ***Extra-judicial confession—Credibility of.***—It is succinctly stated by this Court that extra-judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed. *Heramba Brahma* v. *State of Assam,* AIR 1982 SC 1595 : (1982) 3 SCC 351 : 1983 SCC (Cri) 40 (45, 46) : 1983 CrLJ 149 : 1982 CrLR (SC) 502 : 1983 UJ (SC) 10 : (1983) 1 Crimes 150.

[8633] ● ***Extra-judicial confession to witnesses.***—In this case the extra-judicial confession is stated to have been made by the appellant to PW-3 and PW-5. The extra-judicial confession is said have been made after their return from the Police Station. The Police did not appear to have examined PW-5 after the alleged extra-judicial confession was made.

The extra-judicial confession stated to have been made by the appellant in the circumstances of this case was rightly rejected by the Trial Judge.

The appellant had accompanied the informant PW-3 and PW-5 to the Police Station. It was discarded. Appeal was allowed. *Sonia Bahera* v. *State of Orissa,* AIR 1983 SC 491 : (1983) 2 SCC 327 : 1983 SCC (Cri) 444 (447) : 1983 CrLJ 829 : 1983 CrLR (SC) 262 : 1983 UJ (SC) 536.

[8634] ● ***Extra-judicial confessions—Weak type of evidence.***—The learned Sessions Judge has brushed aside their evidence by presuming that their statements constituting an extra-judicial confession is a very weak type of evidence. This is a wrong view of the law. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. *Narayan Singh* v. *State of Madhya Pradesh,* AIR 1985 SC 1678 : 1985 SCC (Cri) 460 : 1985 CrLJ 1862 : 1985 CrLR (SC) 404 : 1985 (2) Crimes 604.

[8635] ● ***Extra-judicial confession to witnesses self-inculpatory.***—The appellant, Smt. Basanti made an extra-judicial confession to PWs 16, 17, 18, 22, 28 which was self inculpatory she admitted that she alongwith the co-accused Assoo alias Aso Ram had conspired to kill the deceased and had committed the murder and that she alongwith the co-accused had carried the decapitated body of her deceased husband alongwith the severed head to the maize field behind the cattle shed of the house of the deceased from where the dead body was ultimately recovered when it started emanating foul smell. Extra judicial confession of co-accused cannot be used against an accused. *Basanti* v. *State of Himachal Pradesh,* AIR 1987 SC 1572 : (1987) 3 SCC 227 : 1987 SCC (Cri) 473 (476) : 1987 CrLJ 1869 : 1987 CrLR (SC) 302 : JT 1987 (2) SC 281. **TO THE SAME EFFECT :** *State of Himachal Pradesh* v. *Assoo alias Aso Ram,* AIR 1987 SC 1572 : (1987) 3 SCC 227 : 1987 SCC (Cri) 473 (476) : 1987 CrLJ 1869 : 1987 CrLR (SC) 302 : JT 1987 (2) SC 281.

[8636] ● ***Extra-judicial confession following assault and beating.***—The accused Yadav made extra-judicial confession following assault and beating. Obviously, when Yadav was beaten up, he must have been anxious to ensure that the assault stopped. His plea in such a situation would neither be voluntary nor natural. It would not be proper to rely upon the same for any purpose. *Param Hans Yadav and Sadanand Tripathi* v. *State of Bihar,* AIR 1987 SC 955 : (1987) 2 SCC 197 : 1987 SCC (Cri) 322 (326) : 1987 CrLJ 789 : 1987 CrLR (SC) 346 : JT 1987 (1) SC 595 : (1987) 1 Crimes 894.

[8637] ● ***Extra-judicial confession—Weak piece of evidence.***—On August 10, 1985 FIR was lodged by Nihal Singh (PW-2) and on August 13, 1985 the appellant went to Amrik Singh (PW-3) to make an extra-judicial confession. Amrik Singh says that the appellant told him that as the Police was after him he had come and confessed the fact so that he might not be unnecessarily harassed. There is nothing to indicate that this Amrik Singh was a person having some influence with the Police or a person of some status to protect the appellant from harassment. In his cross-examination, he admits that he is neither the Lumbardar or Sarpanch nor a person who is frequently visiting the Police Station. He further admits that when he produced the appellant there was a crowd of 10 and 12 persons. There is no other corroborative evidence about the extra-judicial confession. As rightly conceded by the counsel of the State that Extra-judicial confession is a very weak piece of evidence and is hardly of any consequence......." *Makhan Singh* v. *State of Punjab,* AIR 1988 SC 1705 : 1988 Supp SCC 526 : 1988 SCC (Cri) 916 (917) : 1988 CrLR (SC) 501 : JT 1988 (3) SC 126 : (1988) 2 Crimes 942.

[8638] ● ***Confessional statements made while in police custody.***—Admittedly PW-10 and the appellant do not belong to the same Village. From the narrative of the prosecution story it is clear that PW-27 and PW-10 came together and apprehended the appellant from his village and was taken to Jassur for identification. After he was identified by PW-7 and PW-8 it was stated that he was brought back to Gaggle village of PW-10 and was kept in his company and PW-27 left for further investigation. S. 25 of the Evidence Act provides that no confession made to a Police Officer shall be proved as against a person accused of any offence. S. 26 provides that no confession made by any person while he is under custody of the Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Therefore, the confession made by an accused person to a Police Officer is irrelevant by operation of S. 25 and it shall be proved against the appellant likewise the confession made by the appellant while he is in the custody of the Police shall not be proved against the appellant unless it is made in the immediate presence of the Magistrate, by operation of S. 26 thereof. Admittedly the appellant did not make any confession in the presence of the Magistrate. The question, therefore, is whether the appellant made the extra-judicial confession while he was in the Police-custody. It is incredible to believe that the Police Officer, PW-27, after having got identified the appellant by PW-7 and PW-8 as the one last seen the deceased in the company of the accused would have left the appellant without taking him into custody. It is obvious that with a view to avoid the rigour of Ss. 25 and 26, PW-27 created an artificial scenario of his leaving for further investigation and kept the appellant in the custody of PW-10, the Pradhan, to make an extra-judicial confession. Nothing prevented PW-27, to take the appellant to a Judicial Magistrate and have his confession recorded as provided under S. 164 of the CrPC which possesses great probative value and affords an unerring assurance to the Court. It is too incredulous to believe that for mere asking to tell the truth the appellant made voluntarily confession to PW-10 and that too sitting in a Hotel. The other person in whose presence it was stated to have been made was not examined to provide any corroboration to the testimony of PW-10. Therefore, it would be legitimate to conclude that the appellant was taken into the Police custody, and while the accused was in the custody the extra-judicial confession was obtained through PW-10 who accommodated the prosecution. Thereby an irresistible conclusion can be safely reached that the alleged extra-judicial confession statement was made while the appellant was in the Police custody. It is well settled law that Ss. 25 and 26 shall be construed strictly. Therefore, by operation of S. 26 of the Evidence Act, the confession made by the appellant to PW-10 while he was in the custody of the Police Officer (PW-27) shall not be proved against the appellant. In this view it is unnecessary to go into the voluntary nature of the confession, *etc. Kishore Chand* v. *State of Himachal Pradesh,* AIR 1990 SC 2140 : (1991) 1 SCC 286 : 1991 SCC (Cri) 172 (181, 182) : 1990 CrLJ 2289 : 1990 CrLR (SC) 608 : JT 1990 (3) SC 662 : (1990) 3 Crimes 341.

[8639] ● ***Extra-judicial confession—If voluntary.***—The Court has to look into the surrounding circumstances and to find whether the extra judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. For this purpose the Court must scrutinise all the relevant facts such as the person to whom the confession is made, the time and place of making it the circumstances in which it was made and finally the actual words used by the accused. Extra-judicial confession if found to be voluntary, can be relied upon by the Court alongwith other evidence on record. Therefore, even the extra-judicial confession will also have to be proved like any other fact. The value of the evidence as to the confession depends upon the veracity of the witness to whom it is made and the circumstances in which it came to be made and the actual words used by the accused. Sometimes it may not be possible to the witness to reproduce the actual words in which the confession was made. For that reason the law insists on recording the statement by a judicial Magistrate after administering all necessary warnings to the accused that it would be used as evidence against him. Admittedly the appellant did not make any confession in the presence of the magistrate. The question, therefore, is whether the appellant made the extra judicial confession while he was in the police custody. It is incredible to believe that the police officer, PW 27, after having got identified the appellant by PW 7 and PW 8 as the one last seen the deceased in his company would have left the appellant without taking him into custody. It is obvious, that with a view to avoid the rigour of Sections 25 and 26, PW-27 created an artificial scenario of his leaving for further investigation and kept the appellant in the custody of PW-10, the Pradhan to make an extra judicial confession. Nothing prevented PW-27 to take the appellant to a Judicial Magistrate and had his confession recorded as provided under Section 164 of the CrPC which possesses great probative value and affords an unerring assurance to the Court. It is too incredulous to believe that for mere asking to tell the truth the appellant made voluntarily confession to PW-10 and that too sitting in a hotel. *Kishore Chand* v. *State of Himachal Pradesh,* AIR 1990 SC 2140 : (1991) 1 SCC 286 : 1991 SCC (Cri) 172 : 1990 CrLJ 2289 : 1990 CrLR (SC) 608 : 1990 (3) Crimes 341.

[8640] ● ***Unambiguous extra-judicial confession.***—An unambiguous extra-judicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of its falsity. But in the process of the proof of the alleged confession the Court has to be satisfied that it is a voluntary one and does not appear to be the result of inducement threat or promise envisaged under S. 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Ss. 25 and 26 of the Evidence Act. Therefore, the Court has to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. For this purpose the Court must scrutinise all the relevant facts such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made and finally the actual words used by the accused. Extra-judicial confession if found to be voluntary, can be relied upon by the Court alongwith other evidence on record. Therefore, even the extra-judicial confession will also have to be proved like any other fact. The value of the evidence as to the confession depends upon the veracity of the witness to whom it is made and the circumstances in which it came to be made and the actual words used by the accused. Some times it may not be possible to the witness to reproduce the actual words in which the confession was made. For that reason the law insists on recording the statement by a judicial Magistrate after administering all necessary warnings to the accused that it would be used as evidence against him. *Kishore Chand* v. *State of Himachal Pradesh,* AIR 1990 SC 2140 : (1991) 1 SCC 286 : 1991 SCC (Cri) 172 (180, 181) : 1990 CrLJ 2289 : 1990 CrLR SC 608 : JT 1990 (3) SC 662 : (1990) 3 Crimes 341.

[8641] ● ***Extra-judicial confession—If voluntary.***—An extra-judicial confession, if voluntary, can be relied upon by the Court alone with other evidence in convicting the accused. The value of the evidence as to the confession depends upon the veracity of the witnesses to whom it is made. It is true that the Court requires the witness to give the actual words used by the accused as nearly as possible but it is not an invariable rule that the Court should not accept the evidence, if not the actual words but the substance were given. It is for the Court having regard to the credibility of the witness to accept the evidence or not. When the Court believes the witness before whom the confession is made and it is satisfied that the confession was voluntary, conviction can be founded on such evidence. *Baldev Raj* v. *State of Haryana,* AIR 1991 SC 37 : 1991 Supp (1) SCC 14 : 1991 SCC (Cri) 659 : 1990 CrLJ 2643 : 1990 CrLR (SC) 664.

[8642] ● ***Extra-judicial confession—If voluntary.***—An extra-judicial confession, if voluntary, can be relied upon by the Court alongwith other evidence in convicting the accused. The value of the evidence as to the confession depends upon the veracity of the witness to whom it is made. It is true that the Court requires the witness to give the actual words used by the accused as nearly as possible, but it is not an invariable rule that the Court should not accept the evidence, if not the actual words but the substance were given. It is for the Court having regard to the credibility of the witness to accept the evidence or not. When the Court believes the witness before whom the confession is made and it is satisfied that the confession was voluntary. Convection can be founded on such evidence. *Baldev Raj* v. *State of Haryana,* AIR 1991 SC 37 : 1991 Supp (1) SCC 14 : 1991 SCC (Cri) 659 (663) : 1990 CrLJ 2643 : 1990 CrLR (SC) 664 : JT 1990 (4) SC 524.

[8643] ● ***Extra-judicial confession not obtained by coercion.***—The Extra-judicial confession, which is not shown to have been obtained by coercion, promise of favour or false hope, *etc*. and is plenary in character and voluntary in its nature acknowledging his guilty is the gravely incriminating fact in its nature acknowledging his guilt in precise and explicit words. This confession has been made in presence of a body of persons on two occasions inclusive of the family members of the respondent as well as other witnesses. This confession can be acted upon *Madan Gopal Kakkad* v. *Naval Dubey,* (1992) 3 SCC 204 : 1992 SCC (Cri) 598 (611) : JT 1992 (3) SC 270 : (1992) 2 SCR 921 : (1992) 2 Crimes 168.

[8644] ● ***Retracted extra-judicial confession.***—There are many suspicious features in the evidence of PW-11. It becomes highly doubtful as to why the accused should cover such a long distance and go all the way to PW-11 to confess his crime and then immediately leave his house. This is a retracted extra-judicial confession which is the sole basis on which both the Courts have relied and bases the conviction. We are not satisfied with the evidence of PW- 11 and his conduct also throws any amount of doubt about the truthfulness and the version given by him. If PW-11's evidence becomes unreliable, then there is no other circumstance to connect the accused with the crime. In the result, the appellant is given benefit of doubt and the conviction and sentence awarded against him are set aside. *Sakharam Shankar Bansode* v. *State of Maharashtra,* AIR 1994 SC 1594 : 1994 SCC (Cri) 505 : 1994 CrLJ 2189.

[8645] ● ***Extra-judicial confession as one of circumstance.***—"PW-10 speaks about the extra-judicial confession. He belongs to village Gugauli Khurd within the limits of the same Police Station. The village of the accused is situated at about one mile from there. He deposed that 18 to 20 days after the murder the accused came to him at about 5.30 p.m. and he was looking depressed and sad and he stated that he had committed a blunder that he had murdered the deceased and after that he had gone to his brother in Punjab and that PW-10 is a man of influence in the area and that should save him. On that very night the Investigating Officer came to him and enquired and he informed him what has happened. This is all the evidence about the so called extra-judicial confession.

In the cross-examination PW-10 admitted that a case under S. 307 was instituted against him in the same Police Station and 8 or 10 months back the case was thrown out because it was a false case and final report in that case was also filed by the Police. We have carefully gone through the evidence of PW-10. We find that the same does not inspire confidence...... The suggestion made by the defence that PW-10 was deposing at the instance of Police is not without force." *Kailash* v. *State of Uttar Pradesh,* AIR 1994 SC 470 (471) : 1994 CrLJ 142.

[8646] ● ***Retracted extra-judicial confession.***—It is well settled now that retracted extra-judicial confession, though a piece of evidence on which reliance can be placed, but the same has to be corroborated by independent evidence. That apart, the Court must be satisfied that the confession alleged to have been made to PW-11 was true and voluntary one and in judging the same, the conduct of PW-11 and the circumstances which impelled the accused to make such a statement to PW-11 should be above suspicion PW-11 deposed that he and the accused studied together some years ago and thereafter they left the school and PW-11 was working as a labourer. PW-11 further admitted that 7 or 8 years back, the accused and the father left the village and two years prior to this occurrence he met him and during the period, the accused did not even visit his house. PW-11 further admitted that he did not inform anybody and he did not even think of informing the Police even after coming to know that the accused committed the murder. Though he has stated that he informed his mother but no statement of the mother has been recorded as such. PW-11 further deposed that on May, 8 1977 the accused was living in the village on which date he was arrested. But he has not stated so before the Police. This conduct of PW-11 throws any amount of suspicion on his veracity. Unless we are satisfied that the extra-judicial confession itself is true, voluntary and reliable, we cannot proceed further to examine whether there is any other independent corroboration evidence. There are many suspicious features in the evidence of PW-11. It becomes highly doubtful as to why the accused should cover such a long distance and go all the way to PW-11 to confess his crime and then immediately leave his house. This is a retracted extra-judicial confession which is the sole basis on which both the Courts have relied and based the conviction. We are not satisfied with the evidence of PW-11 and his conduct throws any amount of doubt about the truthfulness and the version given by law. *Sakharam Shankar Bansode* v. *State of Maharashtra,* AIR 1994 SC 1594 : 1994 SCC (Cri) 505 : 1994 CrLJ 1884.

[8647] ● ***Extra-judicial confession recorded through tape-recorder.***—"The prosecution also came out with a story that on 11th October, 1976 the respondent-accused went to PW-31, Dr. Raj Kumar and gave an extra-judicial confession which was recorded through a tape recorder. According to the story that these two boys were chewing sugarcane on the ridge of the field a few days earlier to the incident. 'The accused reprimanded them whereupon they ran away. Later on the fateful day they were again found in a sugarcane field which led to the belief on the part of the accused that these two boys were responsible for stealing sugarcane and because of this motive he murdered the boys...........First and foremost PW-31, Dr. Raj Kumar, had not seen the accused earlier nor did the accused know PW-21 earlier. Therefore, it sounds strange that the accused could have made an extra-judicial confession that too in the presence of PW-31, Lal Chand, when both of them were strangers to the accused. It is equally surprising that Doctor kept ready a tape recorder anticipating' his confession. It is clear this is an evidence brought out by influence; may be perhaps when the accused was in Police custody. The medical evidence also does not support the extra-judicial confession when, the Doctors and post mortem examination could not fix the cause for death." *State of Haryana* v. *Ved Prakash*, AIR 1994 SC 468 (469, 470) : 1994 CrLJ 140.

[8648] ● ***Evidence of daughter of deceased proved by extra-judicial confession of prosecution witnesses and corroborated by other witnesses.***—Learned Senior counsel appearing for the appellants has, however, contended that the evidence of the daughter of the deceased (PW-13) should not be accepted because she did not make any statement when the police recorded her statement when the dead body was discovered. But she deposed only after two and a half years in the Court. It may be indicated here that PW-13 was under the custody of the mother and from her evidence it transpires that she had to suffer great trauma on account of a licentious and misguided mother and despite all imploration, she could not persuade her mother to lead dignified life. She had to live with her mother and accused 1 and it is not at all unlikely that at the initial stage she did not dare making any statement about the said murder but when she was cited as a witness, she wanted to make clean breast of the relevant facts and stated the truth. Her evidence gets corroboration from the depositions of other witnesses and also from the extra-judicial confession proved by PWs 1, 2, 3, and 4. We, therefore, do not find any reason to discard the evidence of PW13. *Pathan Fathima* v. *State of Andhra Pradesh,* AIR 1995 SC 1958 : 1995 CrLJ 3613.

[8649] ● ***Extra-judicial confession made to prosecution witness.***—We have carefully seen the evidence of PW-13 to whom the appellant is alleged to have made extra-judicial confession. He admitted that the appellant had for the first time taken him on a scooter. He did not know the names of the father and the relation of the appellant and had gone with the appellant to the Tankbund, where the appellant is claimed to have made extra-judicial confession. The evidence does not inspire confidence as, according to PW-13, though he had gone near the dead body and found some person there, he did not disclose the alleged confession to anyone at that time. Police too was seen near the dead body, but he did not tell them about it, nor about the availability of the appellant at that time. No ostensible reason was given to take PW-13 into confidence to confess the crime. Judicial confession under Section 164, CrPC was not recorded. *Kailash Potlia* v. *State of Andhra Pradesh,* AIR 1996 SC 66 : 1995 SCC (Cri) 985 : 1995 CrLJ 4183 : 1995 (3) Crimes 54.

[8650] ● ***Extra-judicial confession made to PW-7.***—In the present case extra-judicial confession is alleged to have been made by accused 1, to (PW-7). It has come on the record that this witness had no special friendship with either of the accused. (PW-7) in his evidence had vaguely stated that after about one and half months of the incident, accused 1 contacted him and in the presence of accused 2 confessed the crime. After going through the evidence of this witness, it may be stated that his evidence cannot be accepted as trustworthy. *Balbir Singh* v. *State of Punjab,* 1996 SCC (Cri) 1158 (1160) : JT 1996 (7) SC 342 : (1996) 3 Crimes 80.

[8651] ● ***Extra-judicial confession of accused to Sarpanch.***—The Trial Court disbelieved the Sarpanch stating that the same did not inspire confidence because of the reason that the offence having been committed in absolute secrecy, the perpetrator would have been too hesitant to make a confession; more so, when practically all the residents of the village were strongly condemning the rapist/ killer of a young girl of the same village. The trial Court absolutely missed. The point that the Sarpanch was approached by the accused to seek protection as the police was putting pressure on the members of his family. A Sarpanch being a man of authority it was nothing unnatural in approaching him. *Dharma* v. *Nirmal Singh alias Bittu,* AIR 1996 SC 1136 : (1996) 7 SCC 471 : 1996 SCC (Cri) 444 (449) : 1996 CrLJ 1631 : JT 1996 (4) SC 608.

[8652] ● ***Extra-judicial confession made by accused to witness.***—Coupled with the evidence of motive if the evidence of extra-judicial confessions of accused No. 1 and 2 stood the test of scrutiny then there would have been a cast iron case against accused Nos. 1 and 2. It is the case of prosecution that Accused 1 and 2 approached PW-10 and PW-13, an employee of father of deceased and stated before them that they had committed a mistake and that they had killed the girl in anger and they should get matter amicably settled. Then again after 15 days he met PW-10 and stated that they are prepared to compensate. The witness also did not inform any one about the so-called confessional statements of the accused. His further statement was recorded by the Police on 20. 1. 1978 in connection with this alleged extra-judicial confession of the accused. If there was any such confession made by the accused before him in November or December there is no reason why he should not have gone to the Police immediately and reported about the same when investigation was in progress and even a criminal complaint was filed by the father of the deceased in the Magistrate's Court and summons were issued to the accused. Consequently no reliance could be placed on the extra-judicial confessions said to have been made by the accused before him. The witness was also not known to any of the parties and hence it was unlikely that accused would confide in him and confess their guilt before him. The learned Trial Judge was, therefore, justified in not placing reliance on extra-judicial confessions of accused No. 1 and 2, said to have been made before this witness. *Mulak Raj* v. *State of Haryana,* AIR 1996 SC 2868 : (1996) 7 SCC 308 : 1996 SCC (Cri) 398 : 1996 CrLJ 1358 : JT 1996 (1) SC 401 : 1996 (1) Crimes 24 (SC).

[8653] ● *Extra-judicial confession to employee of father of deceased.*—PW-13 was an employee of father of deceased PW-23. If the accused had told him as alleged by him confessing their crime of having killed deceased in anger the witness in the normal course of conduct would have rushed to his employer Krishna Kumari's father and told him about the same. But curiously enough he informed no one about the so-called extra-judicial confessions and only on 20.1.1978 his further statement was recorded by the Police wherein he stated about this so-called confession about the death of Krishna Kumari. PW-13, was present on the scene of offence after the incident and his statement was earlier recorded by the Police. Under the circumstances nothing prevented him from immediately approaching the investigating agency in November/ December, 1977 and in informing them about the so-called confession of the accused. Still he kept mum and did not do so. Consequently the version of this witness regarding the extra-judicial confessions was rightly not believed by the learned Trial Judge. That evidence of extra-judicial confessions apart from being inherently weak is not at all established on record of this case and no reliance can be placed on this evidence. Once that conclusion is reached the most important connecting link between the accused or at least accused 1 and 2 on the one hand and the homicidal death of deceased on the other gets snapped and eliminated. *Mulak Raj* v. *State of Haryana,* AIR 1996 SC 2868 : (1996) 7 SCC 308 : 1996 CrLJ 1358 : JT 1996 (1) SC 401.

[8654] ● *Extra-judicial confession weak type of evidence.*—An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with great deal of care and caution; where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. The Courts generally look for independent reliable corroboration before placing any reliance upon an extra-judicial confession. *Balwinder Singh* v. *State of Punjab,* AIR 1996 SC 607 : 1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59 (65) : 1996 CrLJ 883 : JT 1995 (8) SC 81.

[8655] ● *Extra-judicial confession surrounded by suspicious circumstances.*—PW-3 claims to be the Pardhan of Mohalla Preet Nagar and states that she is a social worker. According to her deposition, the appellant had made an extra-judicial confession to her when she visited his house on 20-3-1984 on learning from the neighbours that the appellant had killed his two daughters. PW-3, however, lodged the complaint with the Police only on 23-3-1984 when not only had she learnt from the neighbours about the murder of the two girls by the appellant but the appellant had himself made an extra-judicial confession to her 20-3-1984 itself. PW-3 admitted in her cross-examination that she was with the Police in connection with the case of Darshana from 21-3-84 to 23- 3-84 but could offer no explanation as to why she did not lodge the complaint with the Police till 23-3-1984. In view of the hostility which the appellant had with PW-3 for leading his life astray, the story of confession is not acceptable The manner in which the extra-judicial confession is alleged to have been made and the silence of PW-3 for three days in disclosing the same to the Police, even though she had admittedly been with the Police between 21st March and 23rd March, 1984 renders it unsafe to rely upon her statement. The unexplained long delay in lodging the FIR detracts materially from the reliability of the prosecution case on general and the testimony of PW-3 in particular. The alleged extra-judicial confession is surrounded by suspicious circumstances and the prosecution has not been able to establish that the appellant had made any extra-judicial confession to PW-3. *Balwinder Singh* v. *State of Punjab,* AIR 1996 SC 607 : 1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59 : 1996 CrLJ 883 : JT 1995 (8) SC 81.

[8656] ● *Confession to reserve police officer—Admissibility of.*—A senior reserve Police Officer appointed under the State Reserve Police Force Act, though is a Police Officer under the Bombay Police Act and an officer-in-charge of a police station, he is in charge only for the purpose of maintaining law and order and tranquillity in the society and the powers of investigation envisaged in Chap. XII of the CrPC have not been invested with him. Hence, S. 25 of the Evidence Act would not get attracted. *State of Gujarat* v. *Anirudh Singh,* AIR 1997 SC 2780 (2785) : (1997) 6 SCC 514 : 1997 SCC (Cri) 946 : 1997 CrLJ 3397 : JT 1997 (6) SC 236 : (1997) 2 Crimes 82.

[8657] ● ***Confession made to Police Officer.***—It is true that any confession made to a police office is inadmissible under Section 25 of the Evidence Act and that ban is further stretched through Section 26 to the confession made to any other person also if the confessor was then in police custody. Such custody need not be necessarily be post arrest custody. The word "custody" used in Section 26 is to be understood in a pragmatic sense. If any accused is within the ken of surveillance for the purpose of the section. If he makes any confession during that period to any person be he not a police officer such confession would also be hedged within the banned contours outlined in Section 26 of the Evidence Act. But the confession made by the respondent to PW-6 and PW-7 was not made while he was anywhere near the precincts of the police station or during the surveillance of police. Though Ex P-7 would have been recorded inside the police station its contents were disclosed long before they were reduced to writing. We are only concerned with the inculpatory statement which the respondent had made to PW-6 and PW-7 before they took him to the police station. So the mere fact that the confession spoken to those witnesses was later put in black and white is no reason to cover it with the wrapper of inadmissibility. *State of A.P.* v. *Gangula Satya Murthy,* AIR 1997 SC 1588 : (1997) 1 SCC 272 : 1997 SCC (Cri) 325 (330, 331) : 1997 CrLJ 774 : 1997 CrLR (SC) 127.

[8658] ● ***Extra-judicial confession to Sarpanch of another village.***—The third contention that it is highly improbable that A 1 would have gone to the witness alongwith his co-accused to confess the guilt is formidable. PW-7 has not given any reason as to why and how A. 1 and co-accused reposed such confidence in him and confessed their guilt. *Jaspal Singh alias Pali* v. *State of Punjab,* AIR 1997 SC 332 : (1997) 1 SCC 510 : 1997 SCC (Cri) 358 (362) : 1997 CrLJ 370. **TO THE SAME EFFECT :** *Darshan Singh* v. *State of Punjab,* AIR 1997 SC 332 : (1997) 1 SCC 510 : 1997 SCC (Cri) 358 (362) : 1997 CrLJ 370.

[8659] ● ***Extra-judicial confession fall of material omissions.***—Coming to the next circumstance, namely the extra-judicial confession alleged to have been made by the appellants to Bharpur Singh, the prosecution had not chosen to examine him as a witness at the trial. One Bagicha Singh (PW-7) was examined who in his evidence has stated that he had gone to the house of Bharpur Singh for some work and at that time both the appellants had come to his house; they were nervous and when he (Bharpur Singh) inquired from them the reason, (A-1) told that they had committed the murder of Surinder Kaur. During the cross-examination, several material omissions were brought on record. He had not stated before the Police that he was on visiting terms with Bharpur Singh or A-1 and A-2. The evidence of this witness is full of material omissions. If this witness was not close to the appellants, it is extremely doubtful whether they would confess the guilt in his presence. The Courts below have overlooked this aspect and erroneously held that the prosecution has proved the extra-judicial confession alleged to have been made by the appellants. It is not safe to accept this evidence on the absence of corroboration *Prem Singh* v. *State of Punjab*, AIR 1997 SC 221 : 1997 SCC (Cri) 255 (260) : 1997 CrLJ 69 : JT 1996 (9) SC 504. **TO THE SAME EFFECT :** *Amarjit Singh* v. *State of Punjab and State of Punjab* v. *Bimal Kaur*, AIR 1997 SC 221 : 1997 SCC (Cri) 255 (260) : 1997 CrLJ 69 : JT 1996 (9) SC 504.

[8660] ● ***Extra-judicial confession before Mukhia.***—We see no reason to doubt the evidence of Mukhia PW-13 and other witnesses regarding A-1 making the extra-judicial confession before him. Ex. 5 was received by the investigating officer at about 10 p.m. and he made an endorsement on it to that effect. We have, therefore, no doubt whatsoever regarding the prosecution evidence that A-1 had made the extra-judicial confession before the Mukhia at 8 p.m. The trial Court was fully justified in relying upon the said confession. *State of Bihar* v. *Anirudh Thakur,* AIR 1998 SC 921 (924) : (1998) 9 SCC 616 : 1998 CrLJ 1201 : JT 1998 (1) SC 505.

[8661] ● ***Extra-judicial confession weak piece of evidence.***—There is no doubt that convictions can be based on extra-judicial confession but it is well-settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the witness to whom it is made. It may not be necessary that the actual words used by the accused must be given by the witness but it is for the Court to decide on the acceptability of the evidence having regard to the credibility of the witnesses. *Kavita* v. *State of Tamil Nadu,* AIR 1998 SC 2473, 2474 : (1998) 6 SCC 108 : 1998 SCC (Cri) 421 : 1998 CrLJ 3624 : 1998 CrLR (SC) 461 : JT 1998 (5) SC 149 : (1998) 3 Crimes 67.

[8662] ● ***Extra-judicial confession to senior officers.***—In the present case of murder extra-judicial confession was made by accused who was a sepoy in army to his senior officers. At the time when the appellant made the confession, neither he nor the military authorities had any knowledge of the recovery of the headless trunk of the appellant's wife. The military authorities were in no way biased or inimical to the appellant. Nothing is brought out in the evidence in respect of the military officers which may indicate that they had a motive for attributing an untruthful statement to the appellant. The statement has been proved by one of the officers to whom it was made. The said officer has been examined as PW-32. A perusal of the evidence shows that the vague plea raised by the appellant that the statement was obtained from him on inducement and promise is not true. In such circumstances, it is open to the Court to rest its conclusion on the basis of such statement and no corroboration is necessary. *Vinayak Shivajirao Pol* v. *State of Maharashtra,* AIR 1998 SC 1096 (1098) : (1998) 2 SCC 233 : 1998 SCC (Cri) 610 : 1998 CrLJ 1558 : 1998 CrLR (SC) 83 : JT 1998 (1) SC 184.

[8663] ● ***Extra-judicial confession made justly by all accused.***—Evidence of PW-6, who only testified about it, is improbable and lacking in credence. It does not stand to reason—rather it seems odd—that all the four accused persons should be seized at the same time by a mood to approach PW-6 to make a joint confession. It is significant to note that they had no particular relationship or connection with PW-6, so as to confide in him and take his assistance for surrendering before the police. If really, they wanted to surrender—as is the evidence of PW-6—we fail to understand why instead of going to the Police they would approach him and blurt out a confession before him. *Surinder Kumar* v. *State of Punjab,* AIR 1999 SC 215 : 1999 (SCC) (Cri) 33 : 1999 CrLJ 267 : 1998(4) Crimes 101.

[8664] ● ***Extra-judicial confession made before witness—Close relative of accused.***—It was also submitted that it was not probable that the appellant would have gone to Ram Kishan and made such a confessional statements. Ram Kishan's son being his brother-in-law, it is quite probable that the appellant thought that he would get shelter in his house. It was also submitted that the explanation that this witness was not available for recording his statement for 20 days cannot be believed. The Investigating Officer has explained that he had summoned this witness but as he was not found, his statement could not be recorded before 19.10.1978. There is no material to infer that he had not gone to the Police Station even though he was informed. Evidence of PW-5, suffers from no infirmity and we see no reason to interfere with the findings recorded by the Courts below that his evidence is reliable and truthful. His evidence is sufficient to establish the guilt of the appellant. *Ram Khillari* v. *State of Rajasthan,* AIR 1999 SC 1002 : (1999) 9 SCC 89 : 1999 SCC (Cri) 376 (377) : 1999 CrLJ 1450 : 1999 CrLR (SC) 123 : JT 1999 (1) SC 453.

[8665] ● ***Extra-judicial confession made before relative.***—In the instant case where extra-judicial confession was made before a close relative, delay in recording the statement of witness was duly explained by the investigating officer and the evidence of witness proving extra-judicial confession was found to be reliable and truthful, conviction was rightly based on the testimony of such witness. *Ram Khillari* v. *State of Rajasthan,* AIR 1999 SC 1002 : (1999) 9 SCC 89 : 1999 SCC (Cri) 376 : 1999 CrLJ 1450 : 1999 CrLR (SC) 123.

[8666] ● ***Extra-judicial confession improbable.***—In the instant case the evidence of PW-6 who only testified about the extra-judicial confession is improbable and lucking on credence. It does not stand to reason—rather it seems odd—that all the four accused persons should be seized at the same time by a mood to approach PW-6 to make a joint confession. It is significant to note that they had no particular relationship or connection with PW-6 so as to confide in him and take his assistance for surrendering before the Police. If really, they wanted to surrender—as is the evidence of PW-6—we fail to understand why instead of going to the Police they would approach him and blurt out a confession before him. Another compelling reason which makes the evidence of PW-6 in this regard suspect is that even though he was admittedly, close to the family of the deceased, he did not disclose the names of the accused persons to PW-2 the wife of the deceased, who lived at a distance of one furlong from his house and was not aware as to who killed her husband. *Surinder Kumar* v. *State of Punjab,* AIR 1999 SC 215 : 1999 SCC (Cri) 33 (34, 35) : 1999 CrLJ 267 : 1998 CrLR (SC) 776 : JT 1998 (8) SC 43.

[8667] ● ***Confession made to avoid harassment.***—The confession in the normal course of events are made to avoid harassment by the police and to a person who could otherwise protect the accused against such a harassment. The records in the present appeal do not reflect any one of these aspects. As such it is difficult to point to the accused with the crime on the basis of the evidence available in this case. The incident did take place on 18.11.1989 and the body was recovered on 19.11.1989. The extra-judicial confession of the accused as regards his involvement in the crime is said to have been effected to PW-7 on 7.12.89. Thus a delay of more than 20 days without any explanation whatsoever. The delay in recording an extra-judicial confession before a person wholly unconnected with the police is always a matter of great suspect. The High Court was right in rejecting the confessional statement. *State of Punjab* v. *Gurdeep Singh,* AIR 1999 SC 3724 : (1999) 7 SCC 714 : 1999 SCC (Cri) 1368 (1377) : 1999 CrLJ 4597 : JT 1999 (6) SC 514.

[8668] ● ***Confession—Meaning.***—Confession in common acceptation means and implies acknowledgment of guilt—its evidentiary value and its acceptability however shall have to be assessed by the Court having due regard to the credibility of the witnesses. In the event, however, the Court is otherwise in a position having due regard to the attending circumstances to believe the witness before when the confession is made and is otherwise satisfied that the confession is in fact voluntary and without there being any doubt in regard thereto, an order of conviction can be founded on such evidence. *State of Punjab* v. *Gurdeep Singh,* AIR 1999 SC 3724 : (1999) 7 SCC 714 : 1999 SCC (Cri) 1368 (1371) : 1999 CrLJ 4597 : JT 1999 (6) SC 514.

[8669] ● ***Extra-judicial confession not relied as exact words not reproduced.***—The extra-judicial confession as deposed by PW-15 has not been relied upon by the learned Sessions Judge and the High Court also came to the conclusion that it is difficult to rely upon the same, as the exact words or even the words as nearly as possible have not been reproduced by PW-15. Even the statement of PW-15 indicates that Raveendran and he went to an arrack shop and consumed liquor, whereafter Ranveendran disclosed the entire incident and, therefore, such statement cannot be said to be a voluntary and truthful one and on the other hand it is the outcome of the consumption of liquor, both by the witness as well as the accused, if at all he can be said to have made the statement. In this view of the matter the so-called extra-judicial confession has to be excluded from the purview of consideration. *C.K. Raveendran* v. *State of Kerala,* AIR 2000 SC 369 : (2000) 1 SCC 225 : 2000 SCC (Cri) 108 (112) : 2000 CrLJ 497.

[8670] ● ***Extra-judicial confession if found reliable.***—The law is that an extra-judicial confession, if found reliable can be made the sole basis of conviction. Nonetheless as a proposition of practice and prudence, it is advisable that Court may search for assuring circumstances, so that, there can be no room for doubt regarding the reliability of the extra-judicial confession. *State of A.P.* v. *Shaik Mazhar,* AIR 2001 SC 2427 : 2001 CrLJ 3287 : JT 2000 (4) SC 391 : 2001 Cr App R (SC) 311.

[8671] ● ***Extra-judicial confession made before friend.***—PW-5 stated that the appellant-Sanjay who was his friend came to his shop in the evening of 20th June, 1990 at about 5-6 p.m. He was in worried mood. Upon enquiry he told the witness that being in need of money he alongwith his three friends went to the house of his aunt with a view to commit theft. He further told that while he and one of his friends stood outside the house of his aunt, the other went inside the house to commit theft. Those who went inside after coming back out of the house told Sanjay-apellant that they had committed the murder of his aunt. After knowing about the death of his aunt the aforesaid accused got scared and worried. He came to the witness for seeking his help. The witness told him that he should go to the Police and make his genuine statement there. We have critically analysed the statement of the aforesaid a witness and do not find that the story of the accused is false, as submitted by counsel on behalf of Sanjay appellant. The witness, PW-5 has categorically stated "I developed friendship with accused-Sanjay in the last one and half years of this incident". The common friend of the witness and the accused was one Dharmender Dhingra. In his statement, recorded under S. 313, CrPC, the appellant-Sanjay has not specifically denied his friendship with PW-5. No suggestion was made to the aforesaid witness for allegedly making wrong statement and thereby roping in the said accused with the commission of the crime. Admittedly, PW-5 is a shopkeeper and has no axe to grind with the appellant-Sanjay. Why did he go to the witness to make clean his breast, is a fact only known to the accused for which he has not given any explanation. We have no hesitation to believe the statement of PW-5 that the accused-Sanjay `had in fact come to him on 20th June, 1990 about 5-6 p.m. and confided with respect to the offence of robbery and murder committed by him and others on that day. *Sanjay @ Kaka* v. *State (NCCT of Delhi),* AIR 2001 SC 979 : (2001) 3 SCC 190 : 2001 SCC (Cri) 449 (455) : 2001 CrLJ 1231 : 2001 CrLR (SC) 181 : JT 2001 (2) SC 461 : 2001 Cr App R (SC) 169 : (2001) 1 Crimes 268.

[8672] ● ***Extra-judicial confession made before independent witness.***—There is no reason, in the instant case to discard the extra-judicial confession made by the accused before PW-3, an independent witness who was known to the accused and his father. PW-3 is also resident of the same locality and was working on a lathe machine. After making confession, accused sought his help to save him. It has come on record that father of the accused was plying rickshaw and PW-3 was sending his goods in his rickshaw and that the accused was coming to his work-shop quite often. The witness has also stated that the father of the accused was meeting him on number of occasions. *Raju* v. *State of Haryana,* AIR 2001 SC 2043 (2045) : (2000) 9 SCC 50 : 2001 CrLJ 2580 : 2001 CrLR (SC) 448 : JT 2001 (5) SC 203.

[8673] ● ***Extra-judicial confession made voluntary before witnesses.***—In the instant case the extra-judicial confession made by the appellant has been sought to be proved by the testimony of PWs-2, 5, 6, and 7. All the aforesaid witnesses are closely related to the appellant in whom, under the normal circumstances, he would have confided hoping help, protection and being safeguarded. The confession has been made instantaneously immediately after the occurrence and is not alleged to have been procured under any undue influence, coercion or pressure. Though the appellant expected a favour from the witnesses, yet none of them is stated to have promised to favour him in case he made a truthful statement regarding the occurrence. Except the alleged usurption of property of the deceased by PWs-6 and 7, there is no other suggestion which could tend to show that their evidence is tainted and that the extra-judicial confession was not voluntarily made by the appellant....It is true that PW-5 has been declared hostile and no reliance can be placed upon his testimony for the purposes of deciding as to whether the appellant had made the extra-judicial confession or not. Similarly, the statement of PW-7, Joginder Singh, to the extent it refers to the appellant having made extra-judicial confession is inadmissible in evidence as admittedly by the time this witness reached the place of occurrence, the appellant had been arrested by the Police and any confession made by him thereafter is inadmissible in evidence. It is in evidence that the appellant was admittedly arrested before the arrival of PW-7 in the village. However, there is reliable evidence (PW-6) which has been believed by both the Courts below and we have not been persuaded to disagree with the aforesaid findings. We are also not impressed by the argument that PW-6 had made the statement allegedly for depriving the appellant from succession to the estate of Bhajan Singh, deceased. The time, the manner and the attending circumstances clearly prove that the appellant had made a voluntary extra-judicial confession before this witness without any fear, favour or coercion *Gura Singh* v. *State of Rajasthan,* AIR 2001 SC 330 : (2001) 2 SCC 205 : 2001 SCC (Cri) 323 (330) : 2001 CrLJ 487.

[8674] ● ***Confession—Exact words uttered necessary for proving.***—Further, the learned counsel is right in submitting that there was no necessity for Sandeep and other accused to go at the residence of Laxmi Narain, moreso when Laxmi Narain was not closely acquainted with the accused nor was having any status in the society so that he could be helpful to them. On this aspect, prosecution has not brought anything on record to point out the reason as to why Sandeep and others had gone at the house of PW-9. In cross-examination, witness stated that he was a member of Lions Club and that Vikram had visited his house 2-3 times and last time 2 months prior to the date of occurrence. He has also stated that he was knowing Sandeep prior to his visit at his residence. It is his say that he met him in a restaurant and both of them took snacks and he made payment. Considering the entire evidence of this witness the prosecution has not brought on record any reason for the accused to go at the residence of Laxmi Narain to confess their crime. Therefore, the said confessional statements cannot be relied upon. *Sandeep* v. *State of Haryana,* AIR 2001 SC 1103 : (2001) 9 SCC 41 : 2001 CrLJ 1456 : 2001 CrLR (SC) 296 : JT 2001 (3) SC 136.

[8675] ● ***Extra-judicial confession not obtained by coercion be made basis of conviction.***—It is settled position of law that extra-judicial confession, if true and voluntary it can be relied upon by the Court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. *In Maghar Singh* v. *State of Punjab,* AIR 1975 SC 1320, this Court held that the evidence in the form of extra-judicial confession made by the accused to witnesses cannot always be termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the Court believes the witness before whom the confession is made and is satisfied that the confession was true and voluntarily made, then the conviction can be founded on such evidence alone *In Narayan Singh* v. *State* *of M.P.,* AIR 1985 SC 1678 the Court cautioned that it is not open to the Court trying the criminal case to start with presumption that extra-judicial confession is always a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. The retraction of extra-judicial confession which is a usual phenomenon in criminal cases would by itself not weaken the case of the prosecution based upon such a confession. In *Kishore Chand* v. *State of H.P.,* AIR 1990 SC 2140. This Court held that an unambiguous extra-judicial confession possesses high probative value as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of any falsity However, before relying on the alleged confession, the Court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise envisaged under S. 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Ss. 25 and 26. The Court is required to look into the surrounding circumstances to find out as to whether such confession is not inspired by any improper or collateral consideration or circumvention of law suggesting that it may not be true. All relevant circumstances such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made, have to be scrutinized. To the same effect is the judgment in *Baldev Raj* v. *State of Haryana,* AIR 1991 SC 37. In *Madan Gopal Karrad*, v. *Naval Dubey,* JT 1992 (3) SC 270. This Court held that the extra-judicial confession which is not obtained by coercion, promise of favour of false hope and is plenary in character and voluntary in nature can be made the basis for conviction even without corroboration. *Gura Singh* v. *State of Rajasthan,* AIR 2001 SC 330 : (2001) 2 SCC 205 : 2001 SCC (Cri) 323 (329, 330) : 2001 CrLJ 487 : 2001 CrLR (SC) 22.

[8676] ● ***Confessional statement to PW-9.***—Alleged confessional statement narrated by the witness PW-9 is limited to the extent that Sandeep, Vikram and Aman came to his house and Sandeep told him that they committed the murder of Vishal Goel and his body was thrown in Gurgaon canal. They also informed him that they were afraid of the Police and requested him to produce them before the Police. It is his say that when he was going alongwith the accused to inform the Police, Police met him *en route* and accused were handed over to the Police. From aforesaid version of the witness, it is apparent that neither Vikram nor Aman made any confessional statement. Hence, it is difficult to arrive at the conclusion that Vikram and Aman made any confessional statement. Only Sandeep told the witness that they have committed the murder of Vishal Goel. Further, the learned counsel is right in submitting that there was no necessity for Sandeep and other accused to go at the residence of Laxmi Narain, moreso when Laxmi Narain was not closely acquainted with the accused nor was having any status in the society so that he could be helpful to them. On this aspect, prosecution has not brought anything on record to point out the reason as to why Sandeep and others had gone at the house of PW-9. In cross-examination, witness stated that he was a member of Lions Club and that Vikram had visited his house 2-3 times and last time 2 months prior to the date of occurrence. He has also stated that he was knowing Sandeep prior to his visit at his residence. It is his say that he met him in a restaurant and both of them took snacks and he made payment. Considering the entire evidence of this witness the prosecution has not brought on record any reason for the accused to go at the residence of Laxmi Narain to confess their crime. Therefore, the said confessional statements cannot be relied upon. *Sandeep* v. *State of Haryana,* AIR 2001 SC 1103 (1106, 1107) : (2001) 3 SCC 136 : (2001) 9 SCC 41 : 2001 CrLR (SC) 296 : JT 2001 CrLJ 1456.

[8677] ● ***Extra-judicial confession made before stranger.***—The testimony of PW-2 as regards the confession made by the accused at the earliest point of time is such as to inspire confidence in the mind of the Court. PW-2 may be a stranger to the accused but it should also be noted that there is absolutely no reason why he should unnecessarily implicate the accused without any loss of time he brought to the notice of PW-3 and the police of the factum of confession made by the accused soon after the crime. His version in this regard is supported by PW-3 who, being the father of the proprietor of the lodge, came to the lodge immediately after receiving the phone call from PW-2. The conduct of the accused in committing the murder and immediately revealing this fact to a stranger like PW-2 may not be consistent with the ordinary human conduct. It may be difficult to speculate as to what prompted the accused to confess the commission of crime before PW-2 and to remain in the lodge after the incident. But, on that account, there need not be astute reluctance on the part of the Court to accept the extra judicial confession. The unnatural conduct on the part of the accused will not necessarily shake the veracity of PW-2's testimony but it will put the Court on guard to get the assurance of truth in the prosecution case by corroborative evidence including circumstantial factors. We have before us the evidence of PW-3 who corroborates the version of PW-2 and both these witnesses have no reason to falsely implicate the accused. That apart, the circumstances referred to by the trial Court are almost clinching and lend assurance to the correctness of the version of PW-2. *State of Karnataka* v. *M.N. Ramdas*, AIR 2002 SC 3109 : (2002) 7 SCC 639 : (2002) 4 Crimes 193 (SC).

[8678] ● ***Extra-judicial confession not voluntary.***—It is on record that the accused Jagbir was being taken to various places and at different points of time he was being pressurized to make a statement. Though the accused was claimed to have made the statement in the present of a large number of persons, a combined reading of the evidence shows that nobody else speaks about the so-called extra-judicial confession, not even those who have been examined as PWs. Though PW-10 said that there were many persons who had heard it, no other person has stated about it. The statements of PWs-7 and 10 go to show that the accused was being interrogated by PWs and other villagers as well as his father and other relatives. Interrogation continued for about 3 days when allegedly Jagbir confessed his guilt. Though the first information report was lodged by PW-7 after knowing about the extra-judicial confession, there is no mention about this vital fact. In a given circumstance, omission to mention about the particular aspect may not render the prosecution version suspicious. But when circumstances in the present case are taken in their entirety the alleged extra-judicial confession is not believable. In order to make an extra-judicial confession a reliable evidence it has to be shown that the same was voluntary. The factual scenario as presented by the prosecution goes to show that the alleged extra-judicial confession cannot be termed to be voluntary even if it was said to have been made, as claimed. The High Court was right in discarding the alleged extra-judicial confession. *State of Haryana* v. *Jagbir Singh*, AIR 2003 SC 4377 : (2003) 11 SCC 261 : 2003 CrLJ 5054 : 2004 SCC (Cri) 126 (134).

[8679] ● ***Confessions made to TV and press reporters.***—The talk which Afzal had with the TV and press reporters admittedly in the immediate presence of the police and while he was in police custody, should not be relied upon irrespective of the fact whether the statement was made to a police officer within the meaning of Section 162, CrPC or not. We are not prepared to attach any weight or credibility to the statements made in the course of such interview prearranged by the police. The police officials in their overzealousness arranged for a media interview which has evoked serious comments from the counsel about the manner in which publicity was sought to be given thereby. Incidentally, we may mention that PW-60 the DCP, who was supervising the investigation, surprisingly expressed his ignorance about the media interview. We think that the wrong step taken by the police should not enure to the benefit or detriment of either the prosecution or the accused. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1834) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8680] ● ***Extra-judicial confession made by co-accused.***—Value another incriminating circumstance sought to be proved against the accused is the extra-judicial confession alleged to have been made by the ninth accused PM wherein he named A-1, A-2, A-5 and A-6. It is alleged that he made the confession to PW-105 SN and A-9 is alleged to have disclosed to PW-105 that these accused persons had given him money and he murdered SGN for the sake of money. Under Section 30 of Evidence Act, the extra-judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. In the absence of any substantive evidence against these accused persons, the extra-judicial confession allegedly made by the ninth accused loses its significance and there cannot be any conviction based on such extra-judicial confession. The High Court has given cogent and satisfying reasons for the acquittal of the accused of A-1 to A-8. *State of Madhya Pradesh* v. *Paltan Mallah,* AIR 2005 SC 733 : (2005) 3 SCC 169 : 2005 CrLJ 918 (921, 922) : 2005 (1) Crimes 220.

[8681] ● ***Extra-judicial confession before Pradhan.***—An extra-judicial confession by one of the accused to the widow of another accused, whom she had been helping in making spears and other weapon cannot be relied upon. *State of Uttar Pradesh* v. *Chatur Singh,* AIR 2006 SC 745 : (2005) 13 SCC 360 : 2006 CrLJ 545 (546) : 2005 (4) Crimes 277.

[8682] ● ***Extra-judicial confession before village Administrative officer.***—There does not exist any embargo for an accused person to make an extra-judicial confession before a village Administrative officer. There is no reason as to why such an extra-judicial confession could not be made before a village Administrative officer with a view to exclude the admissibility of the confession made before a person, he must be a police officer. A village Administrative officer does not answer the description. While carrying out his duty to inform the police or the Magistrate in terms of Section 40 of the Code, the village headman does not act as a public servant removable only by or with the sanction of the local Government nor he acts in his capacity as Magistrate. The extra-judicial confession by the appellant before the village Administrative officer was not admissible and, thus, could not be relied upon. *Sivakumar* v. *State by Inspector of Police,* AIR 2006 SC 653 : (2006) 1 SCC 714 : 2006 CrLJ 536 (542) : (2006) 1 Crimes 158.

[8683] ● ***Extra-judicial confession before advocate.***—Extra-judicial confession before an advocate was found reliable. *Gagan Kanojia* v. *State of Punjab,* (2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109 : (2007) 2 Crimes 81.

[8684] ● ***Extra-judicial confession before village Administrative Officer—Corroborated by Statement of PW—Conviction held proper.***—Where the accused had killed his wife as the latter had refused to have illicit relations with another person, the extra-judicial confession made by the accused before the Administrative officer of the village was corroborated by the statement of PW 2 from whose house the dead body of the deceased blood-stained clothes and weapon of offence was recovered, the conviction of the accused for offence under Section 302, IPC was held proper. *Namale Subba Rao* v. *State of Andhra Pradesh,* AIR 2007 SC 9 : (2006) 10 SCC 557 : 2007 (1) SCC (Cri) 155 : 2007 CrLJ 47 (48).

[8685] ● ***Extra-judicial confession made to stranger.***—The Counsel appearing on behalf of the accused has submitted that PW 48 being a stranger to A-2 and Brahm Singh, who was not examined by the prosecution on the pretext of having been won over, having been remotely connected to PW 48 no reliance should be placed on the confession made by A-2 before A 48. The Supreme Court rejected the submission for the reason that in his testimony PW 48 has stated that he had attended the betrothal ceremony and marriage of A-2. Therefore, question of his being stranger to A-2 does not arise. However, it is well settled by a catena decisions rendered by the Supreme Court than extra judicial confession made even to a stranger cannot be eschewed from consideration if it is found to have been truthful and voluntarily made before a person who has no reason to state falsely.

Examined in the light of the enunciation of law as above, the Supreme Court was of the view that the testimony of PW 48 as regards the confession made by A-2 was such as to inspire confidence in the mind of the Court. Indisputably, extra-judicial confession was made by A-2 to PW 48 prior of his arrest by the police and, therefore, question of it being made under any inducement, threat or promise does not arise. Moreover, there was absolutely no reason for PW 48 to unnecessarily implicate the accused, as he had no animus against him.

The Court found no reason to disbelieve the evidence of PW 48 and hold that A-2 made extra-judicial confession which was voluntary and truthful. *Ram Singh* v. *Sonia,* AIR 2007 SC 1218 : (2007) 3 SCC 1 : 2007 (2) SCC (Cri) 1 : 2007 CrLJ 1642 (1656, 1657) : 2007 (2) Crimes 1 (SC).

[8686] ● ***Extra-judicial confession before persons in whom accused had no reason to confide.***—Where the accused making extra-judicial confession had no reason to confide in the persons before whom the extra-judicial confession was made, the rejection of the extra-judicial confession alleged to be made by the accused, by the High Court was found proper. *State of Rajasthan* v. *Kashi Ram,* AIR 2007 SC 144 : (2006) 12 SCC 254 : (2007) 1 SCC (Cri) 688 : (2007) 1 Crimes 262.

[8687] ● ***Extra-judicial confession made by co-accused.***—In the present case, the extra-judicial confession made by the co-accused Babu clearly indicates that Asha was followed by Akhlaq (appellant) who in turn was followed by the other co-accused. The said extra-judicial confession indicates the entry of all accused including Akhlaq (appellant) into the flied of Kanchi. They were seen by Jairam Singh (PW 11). The evidence of PW 11 stood corroborated by the evidence of PW 4 to that extent. The extra-judicial confession shows that Asha was raped forcibly and then strangulated. The injuries on the different parts of her body indicates that she was raped forcibly. This is clear form the testimony of Dr. Surendra Pal Singh (PW 14). The location of the body in the scattered flied also shows that she was forcibly raped. The strangulation by Dhoti is also one more circumstance showing how she was murdered. Therefore, each and every statement made in the extra-judicial confession corroborates the evidence of PW 1, PW 11, PW 4 and PW 14. Moreover, Akhlaq (appellant) remained silent when confession was made by co-accused Babu to Mahesh Chandra (PW 6). In the said confession, Babu implicated himself. This conduct of Akhlaq (appellant) has been noticed by the trial Court. The trial Court has correctly invoked S. 8 of the Evidence Act while evaluating the extra-judicial confession. *Held*, the conviction of the accused on the charge of murder under Sections 302/34 was proper. *Akhlaq* v. *State of Uttar*

Pradesh, 2007 CrLJ 2277 (2281, 2282) : (2007) 2 Crimes 377 (SC).

[8688] ● *Extra-judicial confession before prosecution witnesses.*—The extra-judicial confession alleged to be made before two PWs was found not reliable looking to the other evidence in the case. Conviction of the accused on charge of murder under Section 302 IPC was not maintained. *Roop Singh* v. *State of Punjab,* (2008) 11 SCC 79 : 2008 CrLJ 3184 (3187) (SC) : 2008 (3) Crimes 52.

[8689] ● *Extra-judicial confession—To be made before private persons.*—Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164, CrPC, or a Magistrate so empowered but receiving the confession at a stage when Section 164 of the code does not apply. *Kusuma Ankama Rao* v. *State of Andhra Pradesh,* AIR 2008 SC 2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502 (3507).

[8690] ● *Extra-judicial confession—Validity.*—It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be ruled upon and conviction can be based thereon if the evidence about the confession comes from the month of witnesses who appear to be unbiased, nor even remotely inimical to the accused and is respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributely an untruthful statement to the accused, the word speaker to, by the witness are clear and unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. *Kusuma Ankama* v. *State of Andhra Pradesh*, AIR 2008 SC 2819 : (2008) 13 SCC 257 : 2008 CrLJ 3502.

[8691] ● *Extra-judicial confession—Value.*—Extra-judicial confession is evidence of weak nature. However, when there is any recovery pursuant thereto, it may be taken as truthful. *Ponnusamy* v. *State of Tamil Nadu*, AIR 2008 SC 2110 : (2008) 5 SCC 587 : 2008 (2) SCC (Cri) 656 : 2008 CrLJ 2563.

[8692] ● *Extra-judicial confession—Exact words need not be produced.*—Exact words of extra-judicial confession need not be produced. *Aloke Nath Dutta* v. *State of West Bengal,* (2007) 12 SCC 230 : 2008 SCC (Cri) 264 : (2007) 1 Crimes 321.

[8693] ● *Extra-judicial confession made before large number of persons in form of natural response.*—Extra-judicial confession made before large number of persons in the form of natural response to a stressful stimulus on the spur of moment was found voluntary and reliable. *Aloke Nath Dutta* v. *State of West Bengal,* (2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2007) 1 Crimes 321.

[8694] ● *Court not to start with presumption that extra-judicial confession is weak type of evidence.*—It is not open to any Court to start with the presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and credibility of the witnesses who speak to such a confession. *Kusuma Ankama Rao* v. *State of Andhra Pradesh,* AIR 2008 SC 2819 : (2008) 13 SCC 257 : 2008 AIR SCW 4649 : 2008 CrLJ 3502 (3508).

[8695] ● *Extra-judicial confession by accused, a free man.*—The, Court would rely on extra-judicial confession if the accused at the time of making the confession was a free man. *Kusuma Ankama Rao* v. *State of Andhra Pradesh,* AIR 2008 SC 2819 : (2008) 13 SCC 257 : 2008 AIR SCW 4669 : 2008 CrLJ 3502 (3507).

[8696] ● *Extra-judicial confession—Voluntariness.*—As to extra-judicial confessions, two questions arise : (1) were they mad voluntarily? and (ii) are the true? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise. (1) having reference to the charge against the accused person. (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of the temporal nature in reference to the proceedings against him. *Mohd. Azad* v. *State of West Bengal*, AIR 2009 SC 1307 : (2008) 15 SCC 449 : JT 2008 (11) 658 : 2008 (4) Crimes 449.

[8697] ● *Extra-judicial confession—Inducement, threat or promise.*—The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution. If it is not. (See Woodroffe's Evidence 9th Edn., p. 284) A promise is always attached to the confession alternative while a threat is always attached to the confession alternative while a threat is always attached to the silence alternative: thus, in one case the prisoner is measuring the net advantage of the promise minus the general undesirability of a false confession as against the present unsatisfactory situation, while in the other case he is measuring the net advantage of the present satisfactory situation, minus the general undesirability of the concession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of an inducement promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil. It is enough to exclude the confession. The words "appear to him" in the last part of the section refer to the mentality of the accused. *Chattar Singh* v. *State of Haryana*, JT 2008 (10) SC 223.

[8698] ● ***Extra-judicial confession—Elements of inducement, threat etc.***—Every inducement, threat or promise does not vitiate a confession. If the inducement, promise, threat is sufficient in the opinion of the Court to give the accused persons grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession, the word "appear to him" in the last part of the section refer to the mentality of the accused. *State of Punjab* v. *Harjadev Singh,* AIR 2009 SC 2693 (2695; 2696) : (2009) 16 SCC 91 : 2009 (8) SCR 54.

[8699] ● ***Extra-judicial confession—Evidentiary value.***—Extra-judicial confession is a weak piece of evidence. However, in a given situation the Court may rely upon it. *State of Andhra Pradesh* v. *S. Swarnalatha,* (2009) 8 SCC 383 : 2009 (12) SCR 289 : 2009 (3) Crimes 385 (SC).

[8700] ● ***Extra-judicial confession—Evidentiary value.***—Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra-judicial confession, Court has to satisfy itself that the same was voluntary and without any coercion and undue influence. Extra-judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra-judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may he many who are possessed of normal memory and do so. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied that confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous. *Shiva Kumar Payaswami Tewari* v. *State of Maharashtra,* AIR 2009 (SC) 1692 : 2009 (11) SCC 262 : 2009 (1) SCR 442 : 2009 (1) Supreme 461.

[8701] ● ***Evidentiary value of extra-judicial confession.***—Evidentiary value of extra-judicial confession depends upon trustworthiness of the witness before whom confession is made. Law does contemplate that the evidence of an extra-judicial confession should in all cases be corroborated. It is not an inflexible rule that in no case conviction can be based solely or extra-judicial confession. It is basically in the realm of appreciation of evidence and a question of fact to be decided in the facts and circumstances of each case. *Podyami Sukada* v. *State of M.P.*, AIR 2010 SC 2977 : 2010 CrLJ 4273 (4275).

[8702] ● ***Extra-judicial confession—Value.***—An extra-judicial confession is a weak piece of evidence. Though it can be made the basis of conviction, due care and caution must be exercised by the Courts to ascertain the truthfulness of the confession. Rules of caution must be applied before accepting an extra-judicial confession. Before the Court proceeds to act on the basis of an extra-judicial confession, the circumstances under which it is made, the manner in which it is made and the persons to whom it is made must be considered along with the two rules of caution. First, whether the evidence of confession is reliable and second whether it finds corroboration. *Arul Raja* v. *State of Tamil Nadu*, (2010) 8 SCC 233 : 2010 (3) Crimes 320 (SC).

[8703] ● ***Extra-judicial confession—Evidentiary value.***—Only the admissible part of extra-judicial confessional statement can be exhibited. The statement as a whole, if exhibited and relied upon by the prosecution, leads to the possibility of the Court getting prejudiced against the accused. Thus it has to be avoided. In the instant case, the confessional statement of A-4 had been exhibited in the Court in its full text. It was neither required or warranted nor was permissible. However, in view of the fact that there had been other sufficient material on record to show his involvement in the crime, the full exhibition of the statement had not prejudiced the case against him. *C. Muniappan* v. *State of Tamil Nadu*, AIR 2010 SC 3718 : (2010) 9 SCC 567.

[8704] ● ***Extra-judicial confession—Requirements.***—There is no absolute rule that an extra-judicial confession can never be the basis of conviction, what is required ordinarily is that the extra-ordinary confession should be corroborated. *Sansar Chand* v. *State of Rajasthan*, (2010) 10 SCC 604.

[8705] ● ***Evidence relating to reliability of extra-judicial confession—Reliability.***—The evidence relating to extra-judicial confession can be acted upon if the evidence about extra-judicial confession comes from the mouth of witness who appears to be unbiased and in respect of whom even remotely nothing is brought out which may tend to indicate that he may intend to indicate that he may have a motive for attributing an untruthful statement to the accused. *Aftar Ahmed Ansari* v. *State of Uttranchal*, AIR 2010 SC 773 : (2010) 2 SCC 583 : 2010 (1) Crimes 97 (SC).

[8706] ● ***Evidence relating to extra-judicial confession—Reliability.***—In the instant case, it is proved by the prosecution that PW-5 was not an inimical terms with the appellant at all. After subjecting this evidence to a rigorous-test on the touch-stone of credibility, this Court finds that the extra-judicial confession referred to by PW 5 is reliable and is rightly accepted by the trial Court. The contention that when the appellant was being brought to the Court he was in custody and, therefore, the extra-judicial confession referred to PW 5 would be hit by the provisions of Section 26 of the Evidence Act and could not have been received in evidence cannot be accepted. The record shows that the appellant and another were produced before the Court for extension of judicial remand. The appellant could not probablise his defence that he was in custody of offence officer while he had made extra-judicial confession before PW 5. The evidence relating to extra-judicial confession inspires confidence. *Aftab Ahmad Ansari* v. *State of Uttranchal*, AIR 2010 SC 733 (785, 786) : (2010) 2 SCC 583 : 2010 (1) Crimes 97 (SC).

[8707] ● ***No conviction based merely evidence on extra-judicial confession.***—In the instant case, the prosecution witnesses No. 2 and 4 neither in the examination nor in the cross-examination had stated anything about the extra-judicial confession said to have been made by the accused. PW-1 and PW-3 in the examination-in-chief did not support the case of the prosecution and after being declared hostile and cross-examined by the prosecution did say about the extra-judicial confession by the accused, but again in cross-examination by the defence they admitted that no again in cross-examination by the defence they admitted that no such confession was made. Thus the evidence of both the prosecution witnesses was slippery. It was held that the witnesses of extra-judicial confession did not inspire confidence and merely on the ground of recovery of weapon of crime at the instance of the accused, it would be unsafe to sustain the conviction of the accused. *Podyami Sukada* v. *State of M.P.*, AIR 2010 SC 2977 : 2010 CrLJ 4273 (4275).

[8708] ● ***Extra-judicial confession—Corroboration***—Extra-judicial confession must be used only in limited circumstances and should be corroborated by way of abundant caution. *S. Arul Raja* v. *State of Tamil Nadu*, (2010) 8 SCC 233 : 2010 (3) Crimes 320 (SC).

12. SECTION 164 CRPC 1973 : RECORDING OF A CONFESSION—RULES TO BE OBSERVED

[8709] ● ***Section 164 CrPC 1973 : recording of a confession—rules to be observed.***—Once an investigation into an offence has commenced, evidence of a statement or a confession made by an accused person is admissible only if, (*a*) it consists of a written record thereof made by a Magistrate authorised under Section 64, CrPC in that behalf, and (*b*) the record is made in due compliance with the conditions laid down in that section. Even when all the requirements of Section 164 are satisfied, if it is shown that a police officer was present at the time when the confession was recorded, the statement or confession made by the accused becomes inadmissible because it is hit by the provisions of Section 25 Evidence Act, and Section 162, CrPC. *Rao Shiv Bahadur Singh* v. *State of V.P.*, AIR 1954 SC 322 : 1954 CrLJ 910 : 1954 SCJ 362.

[8710] ● *Statement or confession.*—Section 164 of the Code applies to every form of statement made by any person after investigation into an offence of which he is accused has commenced, whatever be the nature of that statement, and whether it is confessional or entirely non-confessional. It follows that if any statement is made by an accused to a Magistrate, whatever be its nature, if a written record thereof has not been made by the Magistrate, oral evidence thereof cannot at all be given by any one (see Section 91, Evidence Act, and Section 164, CrPC), and even the Magistrate himself is not competent to give evidence of such a statement or confession. *Rao Shiv Bahadur Singh* v. *State of V.P.*, AIR 1954 SC 322 : 1954 CrLJ 910.

[8711] ● *Statement or confession made to private person.*—Finally, even when it is shown that an accused had made a statement or confession to a private person and that no police officer or Magistrate was present at the time when it was made, if the Court is satisfied, after looking into all the facts and circumstances of the case, that the accused was induced to make such a statement or confession to a third party merely as a colourable pretence for the purpose of avoiding the letter of the provisions of law, such a statement or confession must be held to have been made 'in the course of an investigation' within the meaning of Sections 162 and 164 of the Code, and it must be rejected, because in its spirit it is in violation of the provisions of those sections. However, the question whether a statement or confession made by an accused before independent witnesses after an investigation has commenced falls under the bar of Section 162 and 164 is a question of fact which has to be determined in each case having regard to all the surrounding facts and circumstances, and it is required to be excluded from consideration only when the Court is satisfied beyond any doubt that the employment of such witnesses was only a colourable device and pretence which was used by the authorities for tricking the accused into making a statement which he would otherwise not have made. In the absence of any such circumstance indicating the hand of the police in obtaining an incriminating admission from the accused, a statement made by him before independent witnesses must be admitted in evidence and could be used against him even though such witnesses may have been called by the police. *Rao Shiv Bahadur Singh* v. *State of V.P.*, AIR 1954 SC 322 : 1954 CrLJ 910.

[8712] ● *Statement to person assisting Police or Magistrate.*—In the present case, the accused who was a public servant, was charged under Section 161, Penal Code. The case against him was that he had demanded a bribe from a contractor, and thereupon a police trap had been set, in which a Magistrate had accompanied the raiding party. The complainant went into the house of the accused and gave Rs. 25,000 as previously demanded. The accused took the money and put it in a drawer of a table. Then at a signal from the complainant, the raiding party rushed in, and on the money being demanded of him, the accused produced it from the drawer where it had been kept by him. Then, on being questioned by the Magistrate, he said that it was his own money. Then two highly placed and respectable persons *G* and *P*, were called, and when they questioned him, the accused repeated that the money was his own, but upon being asked to explain how the numbers of the currency notes recovered from him tallied with the numbers which had already been noted down in the panchnama made before the raid took place, the accused became confused and was unable to give them any explanation of that fact. On this evidence the accused was convicted in the trial Court, and on appeal, the High Court confirmed the conviction. In the appeal before the Supreme Court, it was contended on behalf of the accused that this evidence was hit by Sections 162 and 164 of the Code and was therefore inadmissible, though it was admitted that the police officers and the Magistrate were not present when the accused made his statement to the witnesses. The evidence of the police officers and the Magistrate as to what the accused said when questioned by the Magistrate is barred by Section 25 of the Evidence Act and Sections 162 and 164 of the Code, and it has to be put aside. However, on the facts of the case, it cannot be said that the questioning of the accused by the two independent witnesses *G* and *P* which is made in the absence of the police and the Magistrate is only a device employed for the purpose of avoiding the prohibition of Sections 162 and 164, and the Courts below are right in accepting their evidence. This evidence, together with the other evidence as to the demand of a bribe by the accused and the recovery of the marked currency notes from his possession, is sufficient to establish the charge under Section 161 of the Penal Code. The order of conviction is maintained. *Rao Shiv Bahadur Singh* v. *State of V. P.*, AIR 1954 SC 322 : 1954 CrLJ 910.

[8713] ● ***Confession—Place of recording.***—Ordinarily the confession must be recorded in open Court and during Court hours, unless it is not feasible to do so, in which case the reasons must be recorded. Before recording the confession the Magistrate must put questions to the accused to ascertain how long he has been in police-custody, what was the treatment meted out to him when in police-custody, how long he was in jail custody and who were the persons who interviewed him there. Then the accused must be told in clear terms which he can understand that he is not bound to make a confession, and that if he makes it, it would be used in evidence against him. Further, he must be put questions to ascertain why he was making the confession even after knowing that it would be used against him. All these are not mere formalities, but important safeguards for the purpose of making it certain that the confession is entirely voluntary and is not made under pressure or persuasion coming from a person in authority. The recording of a confession is the exercise of a solemn judicial function, and in serious cases the task must be entrusted only to experienced Magistrates who would take care to observe all the necessary precautions enjoined by law. If the record suffers from serious defects by reason of the non-observance of these precautions, a grave doubt arises as to the voluntary character of the confession, and that doubt does not get removed merely because the confession carries a certificate at its foot in the language of Section 164(3) of the Code. Under such circumstances it must be held that the prosecution has failed to establish that the confession is voluntary, and it must be rejected from consideration when judging the case against the accused. *Ram Chandra* v *State of Uttar Pradesh,* AIR 1957 SC 381 : 1957 CrLJ 559.

[8714] ● ***Confession must be voluntary and true.***—The act of recording a confession is a very solemn act, and the whole object of the provisions regarding precautions which must be observed before a confession is recorded is to obtain assurance that the confession is not caused by any inducement, threat or promise having reference to the charge against the accused. Therefore, in discharging his duties under Section 164, Criminal Procedure Code, the Magistrate must, before proceeding to record the statement of the accused, keep in mind the following rules which are all for the purpose of the assurance that the accused has become completely free from any possible influence of the police and that the statement which he is going to make is entirely "voluntary".

1. Once an accused person evinces a desire to the police officer in whose custody he is, to make a confession, he should be forwarded immediately to a Magistrate for the purpose of having his statement recorded. If, on an accused being forwarded to him, the Magistrate finds that he was kept for several days in police-custody after he expressed a desire to make a statement, the Magistrate should inquire of the officer concerned as to his reasons for not forwarding the accused to him immediately, and should set down the reasons given on the record.
2. When an accused is produced before a Magistrate for having his confession recorded, the Magistrate should not, unless there are strong reasons for doing so, proceed to record his statement immediately, and should give him adequate time to consider whether he should make a confession at all. There is no hard and fast rule as to the time which should be allowed for this purpose, but it is reasonable to give him at least twenty-four hours to come to a final decision, and in a case where there is reason to suspect that the accused has been persuaded or coerced to make a confession, even a longer period may be given.
3. If, on being produced before him, the accused insists upon making a statement straightaway, his keenness to do so must put the Magistrate on guard against the possibility of such insistence being inspired by police pressure or inducement, and the Magistrate should refuse to yield to the demand and should not, merely because the accused so desires, record his statement straightaway.
4. After giving the accused time to consider whether or not to make his confession, the Magistrate must order that the accused be kept in jail custody, or in such magisterial custody as excludes the possibility of contact with the police, until he is produced again before the Magistrate.
5. Before recording the confession, the requirements of Section 164(3) of the Code should be carefully observed. The Magistrate must clearly explain to the accused that he is not bound to make a confession and that if he does so, it will be used a evidence against him, and must put

questions to the accused to satisfy himself that the confession is being made voluntarily. For that purpose the Magistrate should carefully keep in mind the circulars issued by the High Courts in this behalf. Further, in the observance of this solemn act, the Magistrate should not allow any element of casualness to creep in, and should be fully satisfied that the confession which the accused desires to make is in fact and substance absolutely voluntary.

6. If the person of the accused shows any marks of injury, the Magistrate must inquire of him how he came to be injured, and must keep his answers on the record.

7. When the statement is being recorded, no police officer should be allowed to be present inside the office where it is being recorded, or even outside it, say on the veranda, even though the doors of the office may have been closed. *Sarwan Singh Rattan Singh* v. *State of Punjab,* AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCJ 699.

[8715] ● ***Confession to police officer.***—In the present case, the accused were charged with murder. A panchnama of the scene of offence had been prepared by the investigating officer after putting questions to the accused themselves. Not only did the document contain a reference to the various spots pointed out by the accused, but it also contained a complete record in the nature of a confession of the whole crime from the beginning to the end by all the accused. Finally, the panchanama carried the signatures not only of the panchas, but also of all the accused. At the trial, the prosecution produced the panchnama, and it was admitted on the record, though it was objected to on behalf of the accused. The panchnama is altogether inadmissible, and should never have been admitted on the record. The procedure adopted in preparing it is highly irregular and contravenes the provisions of Sections 162 and 164 of the Code and Section 25 of the Evidence Act. *Narayan Rao* v. *State of A.P.*, AIR 1957 SC 737 : 1958 CrLJ 1320 : 1957 SCJ 727.

[8716] ● ***Confession grant of time for reflection.***—There is no hard-and-fast rule regarding grant of time for reflection and the rules and guidelines applicable to a confession under Section 164, CrPC do not govern but in the present case, the time of 5 or 10 minutes is, by all standards, utterly inadequate. Granting reasonable time for reflection before recording a confession is one way of ensuring that the person concerned gets the opportunity to deliberate and introspect once again when he is brought before the prescribed authority for recording the confession. That it is one of the relevant considerations in assessing the voluntariness of the confession is laid down in *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCR 953. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1838) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8717] ● ***Confession recording of by—Magistrate.***—In the present case, before recording the confession the Magistrate put to the accused two questions, "why do you want to give a statement "and" for what purpose are you making the statement". It was contended that the accused had made a false confession in order to save his father from implication in the charge or murder which the police were threatening. The manner in which these questions were put was criticized as being such as to directly induce the accused who was emotional young man to save his father from the meshes of the police by sacrificing himself. The questions put by the Magistrate are perfectly in order, obligatory, and innocent, and there is nothing in them to suggest they were put with any ulterior motive to extract a false confession. *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66 : 1958 CrLJ 238 : 1958 SCJ 321.

[8718] ● ***Confession—Recording of—Circumstances established in connection with.***—The trial Court convicted both the accused under Sections 302 and 201, relying mainly upon their retracted confessions, and on appeal, the conviction was confirmed by the High Court. Both the Courts held that the confessions were duly recorded and were voluntary and true, and that the discoveries of the various articles as a result of the statements made by both the accused afforded sufficient corroboration to their confessions. The following circumstances had been established in connection with the recording of the confessions,—

(*a*) The confessions had in fact not been recorded by the Magistrate himself and had been written by his readers, and he could not even say which reader had written which confession; or which confession was recorded first and which thereafter.

(*b*) The Magistrate had not made a separate memorandum of each statement as required by Section 364(3).

(*c*) The Magistrate could not remember whether at the time of recording the statement of each accused, the other accused was kept present in the same room or had been kept outside.

(*d*) The Magistrate who recorded the confessional statements of the two accused was the same magistrate who had actively assisted the investigation of the case by attesting the disclosure statement of *L* which led to the discovery of the dead body, and also the disclosure statements of both *S* and *L* which led to the discovery of the various articles.

(*e*) Though it was brought out that the Magistrate himself had not recorded the confessions, the readers who had actually recorded the said confessions were not examined as witnesses in the case by the prosecution. What actually happened was that the reader who had recorded the confession of *L* was examined as a defence witness. He actually gave the name of the other reader who recorded the confession of *S*, but even so, that reader was not examined.

(*f*) The magistrate had not made any endorsement showing when the accused were brought before him and how much time he gave them to consider whether they should make any confession or not.

It is important that before proceeding to record a confession, the Magistrate who records the confession must give to the accused person sufficient time to consider whether he should make any confession or not, and this is particularly so where the accused has remained in police custody for a long time right up to the time when he is brought before the Magistrate for recording the confession. It is the duty of the Magistrate to satisfy himself before proceeding to record the confession that the mind of the accused person has been freed from the fear of the police or other complexes developed during police custody. Generally 24 hours at least should be allowed to elapse before a confession is recorded. The record did not show that this requirement was observed by the Magistrate in the present case. Having regard to the fact that the accused were kept in police custody for a long period, the time of only one hour given to the accused to consider whether to make a confession or not was wholly insufficient and unsatisfactory. *Babu Singh* v. *State of Punjab,* 1964 (1) CrLJ 566 : (1963) 2 SCJ 209 : (1963) 3 SCR 749.

[8719] ● *Accused when brought before Magistrate for recording voluntary confession must feel that Magistrate independent of Police.*—It is true that technically there is no prohibition against such a procedure, but what one has to consider is not the technicality of the matter but its propriety. It is of primary importance that the accused who is brought before a magistrate for recording a voluntary confession must feel that the Magistrate is independent of the police, and when the Magistrate has taken active part in the police investigation, the claim made by the Magistrate that he is independent of the police would appear to the accused as rather difficult to accept. *Babu Singh* v. *State of Punjab,* 1964 (1) CrLJ 566 : (1963) 2 SCJ 209 : (1963) 3 SCR 749.

[8720] ● *Confession recorded by Magistrate not empowered.*—If a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him. *State of Uttar Pradesh* v. *Singhara Singh,* AIR 1964 (SC) 358 : 1964 (1) CrLJ 263 (2) : (1964) 4 SCR 485.

[8721] ● *Confessional statement—Failure to comply with Section 164(3), CrPC or High Court Circular—Effect.*—The failure to comply with S. 164(3), CrPC or with the High Court Circulars will not render the confessions inadmissible in evidence. Relevancy and admissibility of evidence have to be determined in accordance with the provisions of the Evidence Act. S. 29 of that Act lays down that if a confession is otherwise relevant, it does not become irrelevant merely because, *inter alia*, the accused was not warned that he was not bound to make it and the evidence of it might be given against him. If therefore, a confession does not violate any one of the conditions operative under Ss. 24 to 28 of the Evidence Act, it will be admissible in evidence. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession even if it is admissible in evidence. A strict and faithful compliance with S. 164 of the Code and with the instructions issued by the High Court affords in a large measure the guarantee that the confession is voluntary. The failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statements. Considering the circumstances leading to the processional recording of the eight confessions and the abject disregard, by the Magistrate, of the provisions contained in S. 164 of the Code and of the instructions issued by the High Court, no reliance can be placed on any of the confessions. *Dagdu* v. *State of Maharashtra,* AIR 1977 SC 1579 : (1977) 3 SCC 681 : 1977 SCC (Cri) 421 (436) : 1977 CrLJ 1206 : 1977 CrLR (SC) 261 : (1977) 3 SCR 636 : 1977 Cr App R (SC) 241.

[8722] ● ***Confession—Recording of—Procedure.***—It is true that the interval between preliminary examination of the appellant and the recording of his confessional statement was about 15 minutes. But there is no statutory provision in S. 164, CrPC or elsewhere, or even an executive direction issued by the High Court, that there should be an interval of 24 hours of more between the preliminary questioning of the accused and the recording of his confession. Although the interval between the preliminary questioning of the appellant and his confession was about 15 minutes, the appellant had no less than 38 hours at his disposal, whilst he was in judicial custody free from fear or influence of the Police, to think and decide whether or not to make a confession. *Shankaria* v. *State of Rajasthan,* AIR 1978 SC 1248 : (1978) 3 SCC 435 : 1978 SCC (Cri) 439 (452) : 1978 CrLJ 1251 : 1978 CrLR (SC) 245 : (1978) 3 SCR 736.

[8723] ● ***Confession recorded by specially empowered Taluka Magistrate.***—In the instant case it was argued that as a judicial Magistrate was available the investigating officer should have requisitioned his services neither than of the Taluka Magistrate. It is no doubt true that it would have been better for the Police to get the confession recorded by a Judicial Magistrate but that by itself is not sufficient to enable us sole testimony of the Taluka Magistrate that he was appointed as Magistrate in 1952 and had been specially empowered to record the confession. The Magistrate was a Magistrate of sufficient experience and we are satisfied that he was fully satisfied that the confession was voluntary and was given without duress or coercion. *Abdul Rehman* v. *State of Karnataka,* AIR 1979 SC 1924 : (1979) 3 SCC 426 : 1979 SCC (Cri) 518 (518) : 1979 CrLJ 1296 : 1979 CrLR (SC) 325 : 1979 UJ (SC) 424.

[8724] ● ***Confession recording of in front of questions and answers.***—The confession recorded by the Magistrate was recorded in the form of questions and answers. The record shows that he was virtually cross examined and whatever he said was in answer to leading questions put by the learned Magistrate. In view of the above the confession was rightly excluded by the High Court. *State of Madhya Pradesh* v. *Dayaram Hemraj,* AIR 1981 SC 2007 : 1981 Supp SCC 14 : 1981 SCC (Cri) 601 (601) : 1981 CrLJ 1688 : 1981 CrLR (SC) 512(2).

[8725] ● ***Confessional statement not to be rejected because only three hours given for reflection.***—The Judicial Magistrate, P.W.-3 would have been well advised if he had given more time for reflection to the accused than he had done. But it is not possible to reject the confessional statements merely because only three hours' time had been given for reflection, if they are otherwise acceptable. *Henry Westmuller Roberts* v. *State of Assam,* AIR 1985 SC 823 : (1985) 3 SCC 291 : 1985 SCC (Cri) 364 : 1985 CrLR (SC) 205 : 1985 CrLJ 1079 : 1985 (1) Crimes 877.

[8726] ● ***Confession not recorded in question answer form.***—The compliance of sub-section (2) of Section 164, CrPC is mandatory and imperative and non-compliance of it renders the confession inadmissible in evidence. Section 463, CrPC, 1973 provides that where the questions and answers regarding the confession have not been recorded evidence can be adduced to prove that in fact the requirement of Section 164(2) read with Section 281 have in fact been complied with. If the Court comes to a finding that such a compliance had in fact been made the mere omission to record the same in the proper form will not render it inadmissible evidence and the defect in cured under Section 463, CrPC 1973, but when there is non-compliance of the mandatory requirement of Section 164(2), CrPC and it comes out in evidence that no such explanation as envisaged in the aforesaid sub-section has been given to the accused by the Magistrate, this substantial defect cannot be cured under Section 463, CrPC, 1973. *Kehar Singh* v. *State (Delhi Administration),* AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 (781, 782) : 1988 CrLJ 1 : 1988 CrLR (SC) 536 : JT 1988 (3) SC 191.

[8727] ● ***Confession—Guidelines.***—The following guidelines are given :

We would like to lay down following guidelines so as to ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice but is in strict conformity of the well recognised and accepted aesthetic principles and fundamental fairness :

(1) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;

(2) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay;

(3) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any. made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon;

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a Police Officer of equivalent rank, should investigate any offence punishable under this Act of 1987.

This is necessary in view of the drastic provisions of this Act. More so when the Prevention of Corruption Act, 1988 under Section 17 and the Immoral Traffic Prevention Act, 1956 under Section 13, authorise only a police officer of a specified rank to investigate the offences under those specified Acts.

(5) The Police Officer if he is seeking the custody of any person for preindictment or pre-trial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody;

(6) In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts respect his right of assertion without making any compulsion to give a statement of disclosure.

Though it is entirely for the Court trying the offence to decide the question of admissibility or reliability of a confession in its judicial wisdom strictly adhering to the law it must, while to deciding the question should satisfy itself that there was no trap, no track and no importune seeking of evidence during the custodial interrogation and all the conditions required are fulfilled. *Kartar Singh* v. *State of Punjab,* (1994) 4 SCC 569 : 1994 SCC (Cri) 899 : 1994 CrLJ 3139 : 1994 (1) Crimes 1031 : 1994 (1) Rec CrR 168.

[8728] ● ***Confession if made voluntary and truthfully.***—The only piece of evidence relied upon against the appellant is the confessional statement recorded by PW-17 on 22-7-1986. A confession, if voluntary and truthfully made is an "efficacious proof of guilt. " It is an important piece of evidence and therefore it would be necessary to examine whether or not the confession made by the appellant was voluntary, true and trustworthy. The statutory provisions dealing with the recording of confessions and statements by the Metropolitan Magistrate and Judicial Magistrates are contained in Section 164, CrPC and the Rules framed by the High Court containing guidelines for recording of confessions. Unless the Court is satisfied that the confession is voluntary in nature, it cannot be acted upon and no further enquiry as to whether it is true and trustworthy need be made. *Shivappa* v. *State of Karnataka,* AIR 1995 SC 980 : (1995) 2 SCC 76 : (1995) 1 Crimes 138.

[8729] ● ***Enquiry by Magistrate to ascertain voluntary nature of confession.***—From the plain language of Section 164, Cr.P.C. and the Rules, and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164, Cr.P.C., is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164, Cr.P.C. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of S. 164. Cr.P.C. and the Rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrates jurisdiction to record the confession and renders the confession unworthy of credence. *Shivappa* v. *State of Karnataka,* AIR 1995 SC 980 : (1995) 2 SCC 76 : (1995) 1 Crimes 138.

[8730] ● ***Sufficient time for reflection to be given to accused before recording confession.***—Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he made one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody. *Shivappa* v. *State of Karnataka,* AIR 1995 SC 980 : (1995) 2 SCC 76 : (1995) 1 Crimes 138.

[8731] ● ***Magistrate—When entrusted with duty of recording confession.***—The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the provisions of Section 164, CrPC and the Rules framed by the High Court for the guidance of the subordinate Courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the Court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with. *Shivappa* v. *State of Karnataka,* AIR 1995 SC 980 : (1995) 2 SCC 76 : (1995) 1 Crimes 138.

[8732] ● ***Confessional statement recorded under Section 164, CrPC—No attempt on part of Magistrate to ascertain voluntary character of confessional statement.***—From a perusal of the evidence of PW-17, Shri Shitappa, Addl. Munsif-Magistrate, we find that though he had administered the caution to the appellant that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence but PW-17 did not disclose to the appellant that he was a Magistrate and that the confession was being recorded by him in that capacity nor made any enquiry to find out whether he had been influenced by any one to make the confession. PW-17 stated during his deposition in Court "I have not stated to the accused that I am a Magistrate" and further admitted "I have not asked the accused as to whether the police have induced them (Chithavani) to give the statement." The Magistrate, PW-17 also admitted that "at the time of recording the statement of the accused no police or police official were in the open Court. I cannot tell as to whether the police or police official were present in the vicinity of the Court." From the memorandum prepared by the Munsif-Magistrate, PW-17 as also from his deposition recorded in Court it is further revealed that the Magistrate did not lend any assurance to the appellant that he would not be sent back to the police custody in case he did not make the confessional statement. Circle Police Inspector, Shivappa Shanwar. PW-25 admitted that the sub-jail, the office of the Circle Police Inspector and the Police Station are situated in the same premises. No contemporaneous record has been placed on the record to show that the appellant had actually been kept in the sub-jail, as ordered by the Magistrate on 21-7-1986 and that he was out of the zone of influence by the police keeping in view the location of the sub-jail and the police station. The prosecution did not lead any evidence to show that any jail authority actually produced the appellant on 22-7-1986 before the Magistrate. That apart, neither on 21-7-1986 nor on 22-7-1986 did the Munsif-Magistrate, PW-17 question the appellant as to why he wanted to make the confession or as to what had prompted him to make the confession. It appears to us quite obvious that the Munsif-Magistrate, PW-17 did not make any serious attempt to ascertain the voluntary character of the confessional statement. The failure of the Magistrate to make a real endeavour to ascertain the voluntary character of the confession, impels us to hold that the evidence on the record does not establish that the confessional statement of the appellant recorded under Section 164, CrPC was voluntary. The cryptic manner of holding the enquiry to ascertain the voluntary nature of the confession has left much to be desired and has detracted materially from the evidentiary value of the confessional statement. It would, thus, neither be prudent nor safe to act upon the confessional statement of the appellant. Under these circumstances, the confessional statement was required to be ruled out of consideration to determine the guilt of the appellant. Both the trial Court and the High Court, which convicted the appellant only on the basis of the so called confessional statement of the appellant, fell in complete error in placing reliance upon the statement and convicting the appellant on the basis thereof. Since, the confessional statement of the appellant is the only piece of evidence relied upon by the prosecution to connect the appellant with the crime, his conviction cannot be sustained. *Shivappa* v. *State of Karnataka,* AIR 1995 SC 980 : (1995) 2 SCC 76 : (1995) 1 Crimes 138.

[8733] ● ***Confessional statements recorded in Hindi.***—It was argued that the confessional statements were recorded in Hindi but the accused did not know Hindi. Hence they could not understand what was recorded as their alleged confessional statements. It may be indicated that none of the accused raised any objection against recording of confessional statements in Hindi by contending that they could not follow what had been recorded as their confessional statements. It is only, almost after 1-1/2 years after recording confessional statements that only one of the accused, made such application before the Designated Court and the same was rejected by the Designated Court by holding that the accused could follow Hindi. As a matter of fact, various lengthy questions were put to the accused under S. 313, CrPC and such questions were answered by them and none of the accused expressed any difficulty in understanding the questions and answering them. Hence the argument cannot be accepted. *Wariyam Singh* v. *State of Uttar Pradesh,* AIR 1996 SC 305 : (1995) 6 SCC 458 : 1995 SCC (Cri) 1124 (1128, 1129) : JT 1995 (7) SC 117 : (1995) 4 Crimes 200.

[8734] ● ***Recording of confession by Magistrate Failure to put questions to ascertain voluntary nature of confession.***—In the instant case the confession so recorded is in utter disregard of the statutory provisions of sub-s. (2) of S. 164, CrPC. Under the above sub-section the Magistrate is first required to explain to the accused that he was not bound to make a confession and that if he did so, it might be used against him. Though this requirement has been complied with in the instant case, the other requirement which obligates the Magistrate to put questions to the accused to satisfy himself that the confession was voluntary so as to enable him to give the requisite certificate under sub-s. (4) has not been fulfilled for, the learned Magistrate did not ask any question whatsoever to ascertain whether the appellant was making the confession voluntarily. In view of such *flagrant omission* to comply with the mandatory requirement of S. 164 (2), CrPC We must hold that the High Court was not at all justified in entertaining the confession as a piece of evidence, much less a reliable one. *Preetam* v. *State of Madhya Pradesh,* AIR 1997 SC 445 : (1996) 10 SCC 432 : 1996 SCC (Cri) 1343 (1344) : 1996 CrLJ 4458.

[8735] ● ***Confession—Recording of—Merely because it was recorded a day or so before Police remand to expire not make it involuntary.***—We think sufficient time was given to the accused in the circumstances of the case for them to reflect if they wanted to make confession. Merely because confession was recorded a day or so before the police remand was to expire would not make the confession involuntary. No complaint was made before the trial Court that confession was the result of any coercion, threat or use of any third degree methods or even playing upon psychology of the accused. *State of Tamil Nadu* v. *Nalini,* AIR 1999 SC 2640 : (1999) 5 SCC 253 : 1999 SCC (Cri) 691 : 1999 CrLJ 3124 : 1999 CrLR (SC) 424. (Per D.P. WADHWA)

[8736] ● ***Confession—Omission to obtain signature of accused.***—Confession was recorded in as many as 18 pages. All the first 16 pages contain the signatures of A1 (Nalini) but the last two pages don't have the signatures. The requirement that confession statement shall be signed by the maker has been substantially complied with despite the slip in obtaining the signature in the last two pages. According to PW-52—the Superintendent of Police who recorded it, the said slip was an inadvertent omission. But that omission does not mean that a confession was not signed by her at all. The certificate which is required by Rule 15(3) has also been made at the foot of Ext. P-77, but that happened to be made on one of the two pages where the signature of A-1 is absent. On the facts we are not persuaded to uphold the contention that Rule 15(3) TADA has not been complied with. That apart, even if there was such an omission the question is whether it would have injured the accused in her defence. Section 463 of the Code permits such an approach to be made in regard to the omissions in recording the confession under Section 164 of the Code. That approach can be adopted in respect of the confession recorded under Section 15 of the TADA as well. The resultant position is that the said omission need not be countenanced since it was not shown that the omission has caused any harm to the accused. (Per THOMAS, J.) *State of Tamil Nadu* v. *Nalini,* AIR 1999 SC 2640 : (1999) 5 SCC 253 : (1999) SCC (Cri) 691 : 1999 CrLJ 3124 : 1999 CrLR (SC) 424.

[8737] ● ***Confessional statement recording of under Section 15 of TADA.***—An analysis of sub-section (1) of Section 15 TADA shows that it has two limbs. The first limb bars application of provisions of the Code of Criminal Procedure and the Indian Evidence Act to a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by him in any of the modes noted in the section. The second limb makes such a confession admissible, *de hors* the provisions of the Evidence Act in the trial of such person or co-accused, abettor or conspirator for an offence under the TADA Act or rules made thereunder provided the co-accused, abettor or conspirator is charged and tried in the same case together with the accused. The import of Section 15(1) is that insofar as the provisions of the CrPC and the Evidence Act come in conflict with either recording of a confession of a person by a police officer of the rank mentioned therein, in any of the modes specified in the section, or its admissibility at the trial, they will have to yield to the provisions of Section 15(1) of the TADA Act as it is given overriding effect. Thus, Sections 162, 164, 281 and 463 of the Code of Criminal Procedure which have a bearing on the question of recording of statement/confession of a person and Sections 24 to 30 of the Evidence Act which deal with various aspects of confession of an accused stand excluded *vis-a-vis* Section 15(1) of the TADA Act and cannot be called in aid to invalidate recording of confession of an accused by a police officer of the specified rank and/or its admissibility in the trial of the co-accused, abettor or conspirator charged and tried in the same case together with the accused for an offence under the TADA Act or rule, made thereunder. It must be made clear that the non-obstante clause in Section 15(1) of the TADA Act does not exclude the application of all the provisions of the CrPC and the Indian Evidence Act in the trial of offences under TADA Act. *State of Tamil Nadu* v. *Nalini,* AIR 1999 SC 2640 : (1999) 5 SCC 253 : 1999 SCC (Cri) 691 : 1999 CrLJ 3124 : 1999 CrLR (SC) 424. (SS. M. QUADRI, J.)

[8738] ● ***Power of Judicial Magistrate to record confession.***—S. 164 of the Cr.P. Code deals with "recording of confession and statements". The provision empowers a Judicial Magistrate to record any confession or statements made to him during the course of an investigation "under this Chapter or under any other law for the title being in force or at any time afterwards before the commencement of the inquiry or trial." It must be pointed out that the power conferred by the said provision could be exercised only by a Judicial Magistrate. Even a Police Officer on whom power of a Magistrate has been conferred is forbidden from recording a confession. Sub-ss. (2) and (4) deal with procedure which such Magistrate has to follow while recording inculpatory statements made by persons. *Assistant Collector of Central Excise* v. *Duncan Agro Industries, Ltd.*, AIR 2000 SC 2901 (2993) : (2000) 7 SCC 253 : 2000 SCC (Cri) 1275 : 2000 CrLJ 4035 : 2000 CrLR (SC) 640.

[8739] ● ***Confessional statement—Requirement of obtaining signature mandatory.***—The function of the Magistrate in recording confession under S. 164 of the Cr.P.Code is a very solemn act which he is obliged to perform by taking due care to ensure that all the requirements of S. 164 are fully satisfied. The Magistrate recording such a statement should not adopt a casual approach as appears to have been shown by (PW-50) in this case. Besides ensuring that the confessional statement being made before him is voluntary and without pressure, the Magistrate must record the confession in the manner laid down by the section. Omission to comply with the mandatory provisions, one of such being as incorporated in sub-s. (4) of S. 164, is likely to render the confessional statement inadmissible. The words, "shall be signed by the person making the confession", are mandatory in nature and the Magistrate recording the confession has no option. Mere failure to get the signature of the person making the confession may not be very material if the making of such statement is not disputed by the accused but in cases where the making of the statement itself is in controversy, the omission to get the signature is fatal. *Dhanajaya Reddy* v. *State of Karnataka,* AIR 2001 SC 512 : (2001) 4 SCC 9 : 2001 SCC (Cri) 652 (661) : 2001 CrLJ 1712 : 2001 CrLR (SC) 315 : JT 2001 (3) SC 395 : (2001) 2 Crimes 15.

[8740] ● ***Recording of confessional statement—Time to think over after administering statutory warning to accused.***—In case the recording officer of the confessional statement on administering the statutory warning to the accused forms a belief that the accused should be granted some time to think over the matter, it becomes obligatory on him to grant reasonable time for the purpose of the accused. In other words, the cooling time that is granted has to be reasonable. What time should be granted would of course depend upon the facts and circumstances of each case. At the same time, however, when the time to think over is granted that cannot be a mere farce for the sake of granting time. In a given case, depending on facts, the recording officer without granting any time may straightway proceed to record the confessional statement but if the thinks it appropriate to grant time, it cannot be a mechanical exercise for completing a formality. *Ranjit Singh* v. *State of Punjab*, AIR 2002 SC 3247 : (2002) 8 SCC 73 : 2002 CrLJ 4694 : (2002) 4 Crimes 275 (SC).

[8741] ● ***Confessional statement—Admissibility of.***—Writing the certificate and making the memorandum under Rule 15(3)(b) is mandatory.

The language of the certificate and the memorandum is not mandatory.

In case the certificate and memorandum is not prepared but the contemporaneous record shows substantial compliance of what is required to be contained therein, the discrepancy can be cured if there is oral evidence of recording officer based on such contemporaneous record.

In absence of contemporaneous recorded, discrepancy cannot be curded by oral evidence based on memory of the recording officer.

In the present case, admittedly Rule 15(3)(b) has not been complied. No memorandum as required was made. There is also no contemporaneous record, to show the satisfaction of the recording officer after writing of confession that the confession has been voluntarily made. The confession of accused No. 7 does not even state that it was read over to him. Thus, confessional statements are inadmissible and cannot be made basis of upholding the conviction. Once confessional statements are excluded the conviction cannot be sustained. *Bharatbhai* v. *State of Gujarat*, AIR 2002 SC 3620 : (2002) 8 SCC 447 : 2003 CrLJ 28 : (2002) 4 Crimes 386 (SC).

[8742] ● ***Recording of confession—Oath not to be administered.***—Where recording confession of an accused oath should be administered. Taking of a statement of an accused or oath is prohibited. *Babubhai Uedesinh Parmar* v. *State of Gujarat,* AIR 2007 SC 420 : 2007 (1) SCC (Cri) 702 : 2007 CrLJ 786 (788) : 2007 (1) Crimes 194.

[8743] ● ***Recording of confession.***—Where the accused was charged for serious offences of rape and murder, two judicial confessions one after the another were recorded by the Magistrate, no legal aid was given to the accused, the first confession was recorded in fifteen minutes, the accused was produced from police custody for recording confession, and the accused had been in police custody for 16 days, there was no other evidence against the accused, the conviction of the accused for offences under Sections 376, and 302 based on such two judicial confessions was found not sustainable. *Babubhai Udesinh Parmar* v. *State of Gujarat,* AIR 2007 SC 420 : 2007 (1) SCC (Cri) 702 : 2007 CrLJ 786 (788, 791) : 2007 (1) Crimes 194.

[8744] ● ***Recording of confession—Safeguards for accused.***—Section 164, CrPC provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with. But, it does not envisage compliance of the statutory provisions in a routine or mechanical manner. *Babubhai Udesinh Parmar* v. *State of Gujarat,* AIR 2007 SC 420 : 2007 (1) SCC (Cri) 702 : 2007 CrLJ 786 (789) : 2007 (1) Crimes 194.

[8745] ● ***Statement—of accused recorded under Section 67, NDPS Act.***—Statement of accused recorded under Section 67, NDPS Act is not akin to Section 161, CrPC. Statement can be used as confession. *Kanhaiyalal* v. *Union of India,* 2008 AIR SCW 627 (637).

[8746] ● ***Recording of confession—Necessary for Magistrate to put questions as intended to be asked under Section 164(3).***—Recording of confession under Section 164, CrPC, is a very solemn act and, in discharging his duties in the said section, The Magistrate is required to take care to see that the requirements of sub-Section (3) of Section 164 of the Code are fully satisfied. It is necessary in every case to put questions as intended to be asked under Section 164(3), CrPC. *State of Punjab* v. *Harjagdev Singh,* AIR 2009 SC 2693 (2696) : 2009 (8) SCR 54.

[8747] ● ***Compliance with Section 164(2).***—All necessary precautions required under Section 164(2) have been taken by the Magistrate as before recording the confession, she has given time to the accused to reflect. Secondly, she has also warned the accused about anything said by him in the evidence could be later on used against him and that he was not bound to give evidence. The submission of the defence that the word used by the Magistrate was "evidence" instead of "confession" and therefore there was non-compliance of Section 164(2) is hyper-technical.

The Magistrate has recorded in the statement that she has given the statutory warning and the statutory advice that he was not bound to make the statement. Section 463 has rightly been applied in the case. *M.A. Antony* v. *State of Kerala,* AIR 2009 SC 2549 (2557) : (2009) 6 SCC 220.

[8748] ● *Recording of confession—Doctor stating about absence of police officials.*—PW-60-Dr. Anila Kumari has supported the case of extra judicial confession (Ext. P-48) which records the history of injury and also records the said confession. The statement made by the independent witness Dr. Anila Kumari has been accepted by both the Court below. In her examination-in-chief, she has stated that, "I had examined Antony as per the request of Dy. S.P. of Aluva. There is no material to show that the said Dy. S.P. (PW-59) was present at the time when the statement was recorded. Dy. S.P. (PW 59) does not state that he had accompanied the accused to Doctor's house. Secondly, there is no material on record nor is there any suggestion made to PW-60 that when she had recorded the said confessional statement, any police person was present with the accused-appellant. Thus, the criticism of the defence that the said statement is not fit to be accepted as it has been recorded in the presence of the police officials is without any material on record. *M.A. Antony* v. *State of Kerala,* AIR 2009 SC 3549 : 2009 (6) SCC 220 : 2009 (6) SCR 829 : 2009 (7) JT 372.

13. RULES AS TO SUFFICIENCY AND CORROBORATION IN RELATION TO A CONFESSION

[8749] ● *Rules as to sufficiency and corroboration in relation to a confession.*—Except in rare cases, a conviction of an accused cannot be sustained if it rests solely upon his confession which he has retracted. If the confession is not supported by any corroborative evidence, it must be held that the guilt of the accused has not been proved beyond doubt and the accused must be acquitted. In the present case, the charge against the two accused *A* and *B* rested on the evidence of eye-witnesses and a confession made by *A,* and both the accused were convicted. On appeal, the High Court disbelieved the direct evidence and acquitted *B*, but it upheld the conviction of A after agreeing with the finding of the trial Court that the confession made by him was voluntary as well as true, though he has retracted it during the trial when questioned about it by the Court. The High Court having rejected the direct evidence as unbelievable, the case against *A* has rested entirely upon his retracted confession, and it has erred in holding that it is sufficient by itself to sustain his conviction. Conviction is set aside. *Arjunlal Misra* v. *State,* AIR 1953 SC 411 : 1953 CrLJ 1633.

[8750] ● *Retracted confession conviction not to be based upon.*—It is a settled rule of prudence that a conviction should not be based upon a retracted confession unless it is corroborated in material particulars by independent evidence. If the evidence produced by the prosecution by way of corroboration is not worthy of belief, or if the facts stated in the confession could easily have been corroborated by other evidence and yet such evidence has not been produced, it has to be held that the charge has remained unproved. In such a case conviction cannot be sustained merely on the confession by itself, even though it has been admitted as being true and voluntary. *Puran Shree Ram* v. *State of Punjab,* AIR 1953 SC 459 : 1953 CrLJ 1925.

[8751] ● *Retracted confession when accepted as being voluntary.*—The general rule of prudence is that even when a retracted confession has been accepted as being voluntary and true, conviction should not be based upon it alone if it is not corroborated by independent evidence. But apart from this, if the circumstances of a particular case are such as to cast a suspicion upon the genuineness of a confession which has been retracted, it would be clearly wrong to base a conviction upon it without such independent corroboration as justifies the Court in relying upon it as being true. Mere wealth of detail in a confession cannot be urged as a ground for holding that it is necessarily genuine, because an agile mind can easily invent false details. But even when a confession contains intrinsic material which strongly indicates its genuineness, it cannot be contended that merely because of that the Court should dispense with the need for independent corroboration. Even when the confession contains a detailed description of the circumstances in which the crime was committed, the Court has no other means of testing the veracity of the accused except through other evidence which lends support to his word, and hence, even when the confession is detailed and contains a full description of an incident, prudence demands that the Court must always look for independent corroboration from other evidence, and in its absence, it should be considered unsafe to rely only upon the confession for the purpose of conviction. In other words, wealth of detail in a confession cannot be regarded as a substitute for corroboration. *Muthuswami* v. *State of Madras,* AIR 1954 SC 4 : 1954 CrLJ 236.

[8752] ● *Confession—Corroboration.*—There is no rule of law that a confession can be corroborated only by evidence discovered by the police after the time when it was recorded, or that evidence already known to the authorities before the time of its recording cannot be treated as independent corroboration. *Hem Raj* v. *State of Ajmer,* AIR 1954 SC 462 : 1954 CrLJ 1313 : 1954 SCJ 449.

[8753] ● *Confession if corroborated by evidence.*—When an offender states in his confession something which adds to the knowledge already possessed by the investigating officer, and facts are discovered in consequence of the statements made in the confession, such discovery is a strong reason for relying upon the confession as being true and adds to its value. But that is not to say that only facts discovered as a result of what the accused stated in his confession can be used in support of it. It is perfectly open to the prosecution to use by way of corroboration any material which was already with the police at the time when the confession was made, and even in the absence of any material subsequently discovered, it is open to the Court to rely upon the confession and convict the accused if it is corroborated in material particulars by evidence as to facts previously known to the police. *Matadin* v. *Emp.,* AIR 1931 Oudh 166, does not lay down any proposition to the contrary as was contended on behalf of the accused. *Hem Raj* v. *State of Ajmer,* AIR 1954 SC 462 : 1954 CrLJ 1313 : 1954 SCJ 449.

[8754] ● *Confession—Article discovered afford ample corroboration to.*—In the present case, two accused *H* and *K* were charged under Sections 302/34 of the Penal Code. The prosecution case was that one night when one *M* was sitting in his shop with his munim *G* the accused who were wearing masks entered his shop and *H* fired at *M* from a pistol and shot him dead. The case rested on the following items of evidence : (*a*) the evidence of *G* who said that two persons, of whom one was dressed in blue shirt and shorts had entered the shop and that the man in blue clothes had fired the shot from a pistol in his hand, (*b*) recovery of a blue shirt, a mask and a mauser pistol from the house of *H*, (*c*) delivery by *H* to the police after his arrest of a blue pair of shorts, a torch, a revolver and cart ridges, and (*d*) a subsequent confession by *H* that he had committed the murder because *M* had not complied with a demand for money made by him in a letter sent by him to *M*. *H* retracted his confession in the committal Court. At the trial, the Court accepted the confession as being voluntary and true, and relying upon it and the other evidence convicted both the accused. On appeal, the High Court acquitted *K* giving him the benefit of doubt as to his identity (for which see under sub-head XIII below), but confirmed *H*'s conviction. In the appeal before this Court it was contended that the recovery of all the incriminating articles from *H* had preceded the confession, and that evidence as to such recovery could not be considered to be independent evidence which corroborated the confession since the police knew about it already before the confession was made. The contention has no force and has to be rejected. A confession can be made at any time, and even if it is made at the late stage when the trial has already commenced, it is open to the Court to use the material already in the possession of the police for the purpose of corroboration, provided the Court finds the confession to be voluntary and true. The evidence in the present case as to the articles recovered from the accused afforded ample corroboration to this confession, and there was no reason to interfere with the finding of the High Court that the charge of murder had been established against the accused beyond any reasonable doubt. Conviction is upheld. *Hem Raj* v. *State of Ajmer,* AIR 1954 SC 462 : 1954 CrLJ 1313 : 1954 SCJ 449.

[8755] ● *Retracted confession when accepted as being voluntary and true.*—If a confession made by an accused has been subsequently retracted by him, corroboration of the confession by independent evidence is always necessary before conviction can be sustained. Even when the retracted confession has been accepted as being voluntary and true, the rule of prudence is that in the absence of any corroborative evidence it should not be made the sole basis of conviction. *Pangambam Kalanjoy* v. *State of Manipur,* AIR 1956 SC 9 : 1956 CrLJ 126.

[8756] ● *Confession of accused found to be true and voluntary substantive evidence against him.*—No doubt, the confession of an accused which is found to be voluntary and true is substantive evidence against him which is of the highest value, even though he may have subsequently retracted it, and if there is other independent evidence in the case which corroborates it and makes it safe to rely upon it, it would be proper to rest the conviction of the accused upon his confession, even though it has been retracted. In such a case, if there is also a confession made by a co-accused implicating himself as well as the first accused, it lends assurance to the Court in relying upon the confession of the first accused. However, if a confession is not clearly established to be voluntary and true, the question of corroboration by other evidence or of assurance by the confession of a co-accused does not at all arise, and the accused has to be acquitted unless the other evidence in the case is sufficient by itself to sustain his conviction. On the same principle, even though a retracted confession has been accepted as being true and voluntary, if there is no corroboration by other evidence of an independent character which makes it safe to rely upon the same, it must be held that the guilt of the accused has not been established beyond doubt, and the accused must be acquitted. *Nathu* v. *State of Uttar Pradesh,* AIR 1956 SC 56 : 1956 CrLJ 152.

[8757] ● ***Confession if rejected as being either not voluntary or not true.***—The question whether there is sufficient evidence on record to lend corroboration to a confession made by the accused can arise only when the confession has been found to be both voluntary and true, and not till then. If the confession has been rejected as being either not voluntary or not true, it is not open to the Court to look into the other evidence except for the purpose of seeing whether it is sufficient in itself to establish the guilt of the accused. In such a case, if the Court finds that the other evidence is not sufficient in itself to sustain conviction, the accused must be given the benefit of doubt and must be acquitted, even though that evidence might be of such a character that in case the confession had been accepted it might have been considered sufficient to lend support to it by way of corroboration. *Aher Raja Khima* v. *State of Rajasthan,* AIR 1956 SC 217 : 1956 CrLJ 426 : 1956 SCJ 243.

[8758] ● ***Corroboration required for retracted confession—Conditions to be fulfilled.***—The corroboration required for a retracted confession must fulfil two conditions.

1. there must be corroboration as to the commission of the crime in the manner set out in the confession, and
2. there must further be corroboration with regard to the participation of the accused in that crime.

But the rule of prudence as to independent corroboration is not to be understood as requiring that each and every circumstance mentioned in the confession with regard to the participation by the confessor in that crime must be separately and independently corroborated. If that were the rule, the proposition would be meaningless, because in that case the independent evidence would itself be a sufficient basis by itself for the conviction, and it would be altogether unnecessary to call the confession in aid.

Further, it is not essential that corroboration must come only from facts and circumstances discovered *after* the confession was made. Evidence even as to facts previously known to the prosecution would be sufficient for the purpose of corroboration. *Balbir Singh* v. *State of Punjab,* AIR 1957 SC 216 : 1957 CrLJ 481.

[8759] ● ***Retracted confession not to be made sole basis of conviction.***—Corroboration by independent evidence is necessary to sustain a conviction, even when the Court accepts a confession which has been retracted as being voluntary and true. It is a rule of prudence, if not of law, that a retracted confession cannot be made the sole basis of a conviction, because it is always unsafe to rely for that purpose only on his retracted word when there is no support to it from any other evidence; and this is particularly so when the charge is of a grave crime like murder. *Ram Chandra* v. *State of Uttar Pradesh,* AIR 1957 SC 381 : 1957 CrLJ 559.

[8760] ● ***Confession—When accepted voluntary and true.***—When a confession is accepted as voluntary and true, even though it may not be sufficient to sustain a conviction on a particular charge for want of corroborative evidence as to the facts essential to the proof of that charge, the Court may rely upon that very confession and convict the accused of another charge, if there is sufficient, independent corroborative evidence on record as regards that other charge. In the present case, the confession admitted commission of murder as well as extortion. The Court held that the conviction for murder could not be based upon that confession because there was no other evidence in support of that charge, but relied upon it and convicted the accused on the charge of extortion because the same marked currency notes which were left in a lonely place as demanded by the accused were found from his house. *Ram Chandra* v. *State of Uttar Pradesh,* AIR 1957 SC 381 : 1957 CrLJ 559.

[8761] ● ***Conviction of accused on his own confession even though retracted.***—In law it is open to a Court to convict an accused relying solely on his own confession even though he may have retracted it, provided the Court finds the confession to be true and voluntary.

However, it is a rule of prudence which the Courts have usually adopted that there should be sufficient corroborative support to a confessional statement which has been retracted, before the accused can be convicted by relying upon such confession. *Sarwan Singh Rattan Singh* v. *State of Punjab,* AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCJ 699.

[8762] ● *Conviction basing of on retracted confession.*—What amounts to sufficient corroboration for the purpose of basing a conviction on a retracted confession, is always a question of fact which is to be determined in the light of the circumstances of each case. *Sarwan Singh Rattan Singh* v. *State of Punjab,* AIR 1957 SC 637 : 1957 CrLJ 1014 : 1954 CrLJ 699.

[8763] ● *Retracted confession not to be made sole basis of conviction when.*—There is no absolute rule of law that even when a retracted confession is accepted by the Court to be entirely voluntary and true, it cannot be made the basis of a conviction unless it is materially corroborated. But the view taken by the Supreme Court in several decisions is that as a matter of prudence and caution a retracted confession cannot be made the sole basis of a conviction, and this rule of prudence has now sanctified itself into a rule of law. *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66 : 1958 CrLJ 238 : 1957 SCJ 321.

[8764] ● *Retracted confession—Corroboration required.*—In the case of an accomplice, he is on his own showing a person who is depraved and debased who has taken part in the crime and now tries to exculpate himself and wants to fasten the liability on another. Therefore, in the case of an accomplice it is absolutely necessary that what he deposes to is corroborated in every material particular.

In contrast with this, a person who makes a confession stands on a different footing, and all that is necessary to find is whether the confession made by him was voluntary and true and was the result of remorse and repentance or was the result of any inducement, threat or promise coming from a person in authority. It is only with the object of arriving at a conclusion on this point that corroboration is sought for.

Therefore a retracted confession is not to be equated with the evidence of an accomplice, and the standard and degree of corroboration required is quite different, and it is *not* necessary that the confession be corroborated in every *material particular. Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66 : 1958 CrLJ 238 : 1958 SCJ 321.

[8765] ● *Confession general corroboration required.*—All that is required, therefore, in the case of a confession is that there is a *general* corroboration, and it is sufficient if the general trend of the confession is substantiated by some evidence which tallies with what is contained in the confession. In contrast with the corroboration required for the evidence of an accomplice, it is *not* necessary that every material circumstance mentioned in the confession regarding the complicity of the accused should be separately and independently corroborated. Further it is not necessary that the corroboration which is on record must come from facts and circumstances discovered *after* the confession was made. That is, the fact that these facts and circumstance had already come to light and were known to the authorities before the confession was made does not detract from their corroborative value. *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66 : 1958 CrLJ 238 : 1958 SCJ 321.

[8766] ● *Confession—Rightly accepted by High Court as voluntary and true.*—In the present case the accused was charged with murder of two persons belonging to his village as a result of factional animosity. The evidence against him consisted of : (*a*) direct evidence of eye-witnesses, (*b*) a confession made by the accused which he subsequently retracted at the trial, but which contained a detailed statement as to the circumstances in which he committed the murders. (*c*) evidence as to the recovery of a banian and a drawer from the person of the accused when he was arrested, and evidence as to the discovery of a bed-sheet at the instance of the accused from a rafter in the garden shed of the accused, regarding all these articles the medical evidence was that they were stained with human blood.

The confession is rightly accepted by the High Court as voluntary and true, and in view of the fact that the accused has not been able to give any satisfactory explanation of the blood-stained articles recovered from his person and at his instance, the circumstantial evidence as to their recovery is sufficient corroboration for the purpose of basing a conviction upon the confession. Conviction is upheld. *Subramania Goundan* v. *State of Madras,* AIR 1958 SC 66 : 1958 CrLJ 66 : 1958 CrLJ 238 : 1958 SCJ 321.

[8767] ● *Extra-judicial confession if accepted to be voluntary and true.*—If an extra-judicial confession is accepted to be voluntary and true, then alone will the Court go into the question of corroboration. Usually and as a matter of caution the Court must require some material corroboration to an extra-judicial confession, that is, corroboration which connects the accused with the crime committed. *Ratan Gond* v. *State of Bihar,* AIR 1959 SC 18 : 1959 CrLJ 108.

[8768] ● *Extra-judicial confession—Corroboration.*—In the present case, the prosecution case was that the accused who was an aboriginal had murdered a young girl and had severed her head out of greed because he believed that a contractor who was building a bridge nearby his village had offered a sum of money for a human head as sacrifice. In corroboration of the extra-judicial confession there were on record the following items of circumstantial evidence :

(*a*) recovery of blood-stained balua from the room of the accused,

(*b*) recovery of blood-stained strands of hair from a place pointed out by the accused,

(*c*) disappearance of the accused from the village immediately after the murder,

(*d*) total denial by the accused of the aforesaid recoveries at his instance, when questioned in Court.

By themselves these circumstances may not be sufficient to prove the guilt of the accused, but when there is a confession made by an accused which the Court accepts as voluntary and true, all that is required of the corroborative circumstantial evidence produced in its support is that it must be sufficient only to lend assurance to the confessional statement of such a kind as connects the accused with the crime in question. The circumstances proved in the present case affords sufficient corroboration to the confession made by him, and the only reasonable inference which can be drawn from the confession taken together with the circumstantial evidence is that it is the accused who committed the murder. Conviction under Section 302, Penal Code, and the sentence of death are maintained. *Ratan Gond* v. *State of Bihar,* AIR 1959 SC 18 : 1959 CrLJ 108.

[8769] ● *Retracted confession—Conviction not to be based on without corroboration.*—A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it is a rule of prudence that a Court shall not base a conviction on a retracted confession without corroboration. *Pyare Lal Bhargava* v. *State of Rajasthan,* AIR 1963 SC 1094 : 1963 (2) CrLJ 178.

[8770] ● *Retracted confession corroboration necessity of.*—It is not a rule of law, and it cannot be laid down as an inflexible rule of prudence or practice that under no circumstances can a conviction be made without corroboration; for a Court may, in a particular case, be convinced of the absolute truth of a confession and be prepared to act upon it without corroboration. But it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the Court is satisfied that the confession is true and voluntarily made and has been corroborated in material particulars. Where, having regard to this general rule of practice, the High Court has looked for corroboration and found it in the evidence of a witness with whose help the offence was committed, and a piece of documentary evidence, and has accepted the confession in view of the said piece of corroboration, the finding is one of fact and the Supreme Court will not disturb it unless there is some permissible ground for doing so. *Pyare Lal Bhargava* v. *State of Rajasthan,* AIR 1963 SC 1094 : 1963 (2) CrLJ 178.

[8771] ● *Confession—Voluntary nature of.*—There is nothing in the record on the basis of which it can reasonably be said that the confessions are not voluntary. It is pointed out that there was a delay of about a week in sending up the accused to the Magistrate for recording the confessions, but no inference against the prosecution can be drawn merely on that account, particularly when no question was put to the investigating officer on this point. It is also pointed out that the Circle Inspector had visited the judicial lock-up on the day previous to the date of the confessions, but no significance could be attached to that fact as, though the prosecution offered to examine him, the defence did not avail itself of that offer, and in fact had objected to it when the Judge was prepared to examine him as a Court witness. Finally, it is pointed out that the accused were kept in solitary cells, but no conclusion about the confessions not being voluntary can be drawn from that fact. There is nothing to show that the three confessions are not voluntary, and so they have been rightly admitted into evidence. *Nand Kumar* v. *State of Rajasthan,* 1963 (2) CrLJ 702 : 1963 (2) SCJ 422 : (1963) 2 SCR 890.

[8772] ● *Retracted confession—Evidentiary value.*—Ordinarily, even when the confession of an accused person is held to be voluntary, the Courts consider it unsafe to convict him on the basis of his retracted confession unless there is corroboration in material particulars by independent evidence. What is sufficient corroboration for the purpose has to be decided in each case on its own facts and circumstances. However, it may generally be stated that the Court must hold that there is sufficient corroboration when, by production of evidence which is reliable and independent and which is not tainted evidence like that of an accomplice or a co-accused, the truth of several parts of the account given in the confession is established and these parts are so integrally connected with the other parts of the confession that a prudent Judge of facts would think it reasonable to believe that what the accused has stated in the confession as a whole is true. More than this is not needed, and less than this is ordinarily insufficient for the purpose of corroboration. Applying this test to the three confessions in this case, it must be held that the confessions had been so well corroborated by independent evidence in material particulars that what each accused had said in his confession as regards his own participation in the crime had been proved to be true. These facts and circumstances established by independent evidence provided sufficient corroboration to the confession made by each accused. It must therefore the held that the confessions made by *N, K* and *M* are voluntary and there is sufficient corroboration to establish the truth of each of these confessions. In the circumstances, all three of them have been rightly convicted under Section 302, Penal Code. *Nand Kumar* v. *State of Rajasthan*, 1963 (2) CrLJ 702 : 1963 (2) SCJ 422 : (1963) 2 SCR 890.

[8773] ● ***Nothing to show that confessions not voluntary.***—The facts in the present case were as under. Four accused persons, *N, K, L,* and *M,* were convicted under Section 302 on the charge of murder, and on appeal, the High Court confirmed the conviction. The prosecution case was briefly stated as follows. Eight small boys had gone for a picnic to a temple on a hill near their city on four bicycles. The four accused joined them there and took them into the forest and after robbing them of their belongings such as a camera, wrist watches, rings and gold buttons, killed all the eight boys with a knife. The booty was then distributed between the accused. The next day investigation was started and on a witness saying that he had seen the boys with the accused, all the accused were arrested. On a statement made by *N* to the police officer, *N* was taken to the forest and there he led the police to the top of a small hill and pointed out the bicycles lying at one spot and the dead bodies of the eight boys lying at different places in the jungle, seven of them being naked. The hands of each were tied from behind and their mouths were gagged. *N* also took out a knife from a bush. Thereafter different items of the belongings of the victims and their blood-stained clothes were recovered from the houses of each of the accused. Three of the accused *N, K,* and *M,* made confessions before a Magistrate a week later. At the trial, these confessions were retracted. The trial Court as well as the High Court held that the confessions were voluntary and true and that there was sufficient corroboration in the discovery of various articles and blood-stained clothes to establish the truth of the confessions. There is nothing in the record on the basis of which it can reasonably be said that the confessions are not voluntary. It is pointed out that there was a delay of about a week in sending up the accused to the Magistrate for recording the confessions, but no inference against the prosecution can be drawn merely on that account, particularly when no question was put to the investigating officer on this point. It is also pointed out that the Circle Inspector had visited the judicial lock-up on the day previous to the date of the confessions, but no significance could be attached to that fact as, though the prosecution offered to examine him, the defence did not avail itself of that offer, and in fact had objected to it when the Judge was prepared to examine him as a Court witness. Finally, it is pointed out that the accused were kept in solitary cells, but no conclusion about the confessions not being voluntary can be drawn from that fact. There is nothing to show that the three confessions are not voluntary, and so they have been rightly admitted into evidence. *Nand Kumar* v. *State of Rajasthan,* 1963 (2) CrLJ 702 : 1963 (2) SCJ 422 : (1963) 2 SCR 890.

[8774] ● ***Confessions corroborated by independent evidence.***—Applying this test to the three confessions in this case, it must be held that the confessions had been so well corroborated by independent evidence in material particulars that what each accused had said in his confession as regards his own participation in the crime had been proved to be true. These facts and circumstances established by independent evidence provided sufficient corroboration to the confession made by each accused. It must therefore the held that the confessions made by *N, K* and *M* are voluntary and there is sufficient corroboration to establish the truth of each of these confessions. In the circumstances, all three of them have been rightly convicted under Section 302, Penal Code. *Nand Kumar* v. *State of Rajasthan,* (1963) (2) CrLJ 702 : 1963 (2) SCJ 422 : (1963) 2 SCR 890.

[8775] ● ***Confession form of admission.***—The confession is a form of admission consisting of direct acknowledgement on guilt in a criminal charge. It must be in express words by the accused in a criminal case of the truth of the guilt fact charged or some essential part of it and a statement that contains a self-exculpatory matter cannot amount to a confession. The confession should be a voluntary one, that means not caused by inducement, threat or promise. Whether a confession is voluntary or not is essentially a question of fact. The judicial confessions are those which are made before a Magistrate or in Court in due course of legal proceedings and when such a confession is retracted, the Courts have held that apart from the statement being voluntary it should be true and should receive sufficient corroboration in material particulars by independent evidence. The rule of prudence namely requiring corroboration does not mean that each and every circumstance mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated. It is sufficient if there is general corroboration of the important incidents, just like in the case of an approver's evidence and it is not necessary that the corroborative evidence itself should be sufficient for conviction. It may not be necessary to refer to remaining aspects governing the use of retracted confession for the purposes of this case. Suffice it to say that it is also laid down that it is not illegal to base a conviction on an uncorroborated confession of an accused person but as a rule of prudence which has sanctified itself to the rule of law, the Courts do look for corroboration before acting upon and accepting the retracted confession and what amount of corroboration would be necessary in a case would be a question of fact to be determined in the light of the circumstances of the case. *Shankar alias Gauri Shankar* v. *State of Tamil Nadu,* (1994) 4 SCC 478 : 1994 SCC (Cri) 1252 (1275-76) : 1994 CrLJ 3071 : 1994 (2) Crimes 1.

[8776] ● ***Confessional statement—Admissibility.***—Ordinarily, even when the confession of an accused person is held to be voluntary, the Courts consider it unsafe to convict him on the basis of his retracted confession unless there is corroboration in material particulars by independent evidence. What is sufficient corroboration for the purpose has to be decided in each case on its own facts and circumstances. However, it may generally be stated that the Court must hold that there is sufficient corroboration when, by production of evidence which is reliable and independent and which is not tainted evidence like that of an accomplice or a co-accused, the truth of several parts of the account given in the confession is established and these parts are so integrally connected with the other parts of the confession that a prudent Judge of facts would think it reasonable to believe that what the accused has stated in the confession as a whole is true. More than this is not needed, and less than this is ordinarily insufficient for the purpose of corroboration. Corroboration of the confessional statement is not a rule of law but a rule of prudence. Whether in a given case corroboration is sufficient, would depend upon the facts and circumstances of that case. In order to sustain a conviction on the basis of a confessional statement, it is sufficient that there is its general corroboration. *State of Maharashtra* v. *Bharat Chaganlal Raghani,* AIR 2002 SC 409 (429) : (2001) 9 SCC 1 : 2002 CrLJ 944.

[8777] ● ***Confession of co-accused—Corroboration.***—A-3 in his statement under Section 313, CrPC stated that he helped the appellant in throwing the body in the pond. This statement being in the nature of a confession involving co-accused it is not safe to place reliance on the same in the absence of any corroboration whatsoever. *Kajja Sreenu* v. *State of A.P.,* 2005 SCC (Cri) 853 (856).

14. SECTION 25, EVIDENCE ACT— A CUSTOM OFFICER IS NOT A POLICE OFFICER

[8778] ● ***Section 25, Evidence Act—A custom officer is not a Police Officer.***—The duties and powers of a police officer are laid down in the Police Act, 1861. Section 20 of the Act deals with the authority which police officers can exercise, and Sections 23 and 25 lay down their duties. These provisions show that their main function is the promotion and detection of crime, and that the powers which they enjoy are powers for the effective prevention and detection of crime in order to maintain law and order. The powers conferred under the Act, relating to Land Customs and Sea Customs on the Customs Officers are different in character from those of police officers. The powers conferred on customs officers are merely for the purpose of checking the smuggling of goods and the due realisation of customs duty, and it is with respect to the detecting and preventing of smuggling of goods and preventing loss of revenue to the State, that they have been given limited power to search for smuggled goods and detain them, and limited power to summon persons to give evidence in any inquiry with respect to the smuggling of goods.

Practically all the provisions of the Sea Customs Act are enacted to achieve the object of a proper levy of customs duties, and for that purpose the Customs Officer is given the power to confiscate, to fix the duty, and to impose penalties. The customs officer is not primarily concerned with the detection and punishment of crime committed by a person, but is mainly concerned with the detection and prevention of smuggling of goods and safeguarding of the public revenue. In other words, he is more concerned with the goods and customs duty than with the offender. *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276 : 1962 (1) CrLJ 217.

[8779] ● ***Duty of customs officers different from those of police officers.***—Most of the offences mentioned in Section 167 are of the type in which the Customs Officer has nothing or little to investigate and the limited power of detection which they are given is only for the purpose of detecting the smuggling of goods and the person responsible for it. It will thus be seen that the duties of the Customs Officers are very much different from those of police officers, and their possessing certain powers which may have a similarity with those of police officers would not make them 'police officers.' *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276 : 1962 (1) CrLJ 217 : 1962 (3) SCR 338.

[8780] ● ***Expression—Police Officer in Section 25 of Evidence Act not restricted to Police officers of Police force.***—The expression "police officers" in Section 25 of the Evidence Act is not restricted only to the police officers of the police force enrolled under the Police Act of 1861. It has to be construed in a wide sense so as to include officers of any department of the State who exercise the functions of the police and on whom the powers of a police officer in detection and investigation of crime have been conferred under any Special Act. But the mere fact that an officer who by no stretch of imagination is a police officer, exercises certain powers similar to the powers of a police officer, cannot make such officer a police officer. *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276 : 1962 (1) CrLJ 217 : 1962 (3) SCR 338.

[8781] ● ***Expression—Police officer in Section 25 of Evidence Act—Meaning.***—The expression "police officer" in Section 25 of the Evidence Act does not have such a wide meaning as to include all officers on whom powers analogous to those of police officers have been conferred under Special Acts. There are various reasons for this view. The object of enacting Section 25 was to exclude from evidence confessions made to the regular police officers. The police force had a very bad record for the methods it employed in investigation of crime specially in forcibly extracting confessions for the purpose of securing convictions. It is too much to suppose that the legislature did intend that all officers who may have to investigate or arrest persons or seize articles under any and every law should be considered to be similarly unreliable. If such were the intention, the legislature would have used in place of the words "police officers" some such expression as "any officer whose duty to detect and prevent the commission of offences." *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276 : 1962 (1) CrLJ 217 : 1962 (3) SCR 338.

[8782] ● ***Customs officer not police officer within meaning of Section 25 of Evidence Act.***—Merely because powers similar to those of police officers in regard to detection of infractions of Customs laws have been conferred under the Sea Customs and Land Customs Acts on officers of the Customs Department, that is not a sufficient ground for holding them to be 'police officers' within the meaning of Section 25 of the Evidence Act. *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276 : 1962 (1) CrLJ 217.

[8783] ● ***Customs officer not treated as police officer when he records confessional statement.***—It is well settled that the act of imposition of confiscation and penalties by Customs Officers is a judicial act. Section 171-A of the Sea Customs Act confers upon a Customs Officer the power to hold an inquiry, summon witnesses, take evidence and record statements. The section itself provides that the inquiry so held is to be deemed to be a judicial proceeding. It is too much to say that if the statement recorded by a Customs Officer in the exercise of his powers under this section be an admission of guilt, the statement is a "confession made to a police officer" within the meaning of Section 25 of the Evidence Act. A police officer never acts judicially, and no proceeding before a police officer is deemed under any provision of law to be a judicial proceeding. It cannot be accepted that the legislature contemplated that a Customs Officer, whose proceedings are judicial for all other purposes, should be treated on the same footing as a police officer only when he records a confessional statement. *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276 : 1962 (1) CrLJ 217 : 1962 (3) SCR 338.

[8784] ● ***Confessional statement recorded by customs officer—Admissibility.***—It is not denied that confessional statement made by the offender recorded by Customs Officers are good material for them to take action and to penalise the offender to any amount of fine when the statements are in respect of offence under Section 167 which can be disposed of by the Customs Officers themselves. If so, it would be highly incongruous that the same kind of confessional statements be held to be inadmissible in evidence as being hit by Section 25 of the Evidence Act, when it has to be used in a regular Court of law at a trial for a criminal offence. *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276 : 1962 (1) CrLJ 217.

[8785] ● ***Custom officer not Police Officer.***—Customs Officers are not "police officers" within the meaning of Section 25 of the Evidence Act, and a confessional statement made by any accused person before a Customs Officer, can be proved against him at his trial, and conviction based upon such confessional statement is legal. *State of Punjab* v. *Barkat Ram,* AIR 1962 SC 276 : 1962 (1) CrLJ 217 : 1962 (3) SCR 338.

15. CONFESSION OF CO-ACCUSED—ITS LIMITED USE AND EVIDENTIARY VALUE

[8786] ● ***Confession of co-accused—Its limited use and evidentiary value.***—The confession of a co-accused is not "evidence" within the meaning of that term as defined in Section 3 of the Evidence Act. It is not required to be recorded on oath and it cannot be tested by cross-examination. It is evidence of a very weak type, and is much weaker even than the evidence of an approver or an accomplice. The only way in which the confession of a co-accused can be used by the prosecution is as under : First, the Court will altogether exclude such confession from consideration, and see whether there is on record other evidence against the accused which, if believed, would be sufficient to sustain a conviction. If in the opinion of the Court the other evidence is not sufficient by itself to sustain a conviction, the matter ends there, and a conviction cannot be upheld even though there is in addition a confession by a co-accused. If on the other hand the Court finds that the other evidence is of such a nature as to be sufficient to sustain a conviction provided it is believed, but the Court entertains a hesitation as to believing it as it stands by itself, the confession of a co-accused comes into its use, and can be called in aid for lending assurance to the belief in that evidence. In other words, a confession of a co-accused comes into use only when the other evidence against an accused is of such a nature as to be sufficient in itself to establish his guilt, and yet the Court hesitates to rely upon it. In such a case, if there is on the record also a confession of a co-accused, it serves to lend assurance to the belief in the other evidence and to fortify the Court's faith in it, so that if some hesitation exists, it gets removed when the confession of the co-accused which the Court has found to be voluntary and true is thrown into the scale. Thus, the only limited use which can be made of a confession of a co-accused is by way of furnishing, an additional reason for believing such other evidence as exists. *Kashmira Singh* v. *State of Madhya Pradesh,* AIR 1952 SC 159 : 1952 CrLJ 839 : 1952 SCR 526.

[8787] ● ***Confession of co-accused not to be of any use by way of concurrence.***—In the present case, two accused, *H* and *K,* were charged under Section 302/34, Penal Code. The case against them was that one night when one *M* and his munim *G* were sitting in their shop, the accused who were wearing masks rushed in, and *H* fired a shot from his pistol at *M* and killed him. The case rested on the following items of evidence, (*a*) a full confession made by *H* which implicated himself as we as *K*, (*b*) the evidence of *G* that the man who fired the shot was wearing blue shirt and shorts, and (*c*) the recovery of several incriminating articles from *H,* such as, a pistol and cartridges, blue shirt and shorts, a mask and a torch. During the proceedings, *H* retracted his confession, but the trial Court accepted it to be true and voluntary, and relying upon it and the other evidence, convicted both the accused. On appeal, the High Court confirmed the conviction of *H,* but acquitted *K,* giving him the benefit of doubt as to his identity. The confession of *H* cannot be used as substantive evidence against *K.* The other evidence is not sufficient to prove beyond doubt that he was the companion of *H* at the time when the murder was committed. The articles recovered from *H* cannot be of any use as evidence against *K,* and nothing was recovered from *K* himself. He had been seen with *H* before the incident. It in itself did not establish that he was the other participant in the murder. Since the other evidence is not sufficient in itself to prove his guilt, confession of the co-accused *H* cannot be of any use by way of concurrence to that evidence. Under these circumstances, it had to be held that charge against him had remained unproved. His acquittal was upheld. *Hem Raj* v. *State of Punjab,* AIR 1954 SC 462 : 1954 CrLJ 1313 : 1954 SCR 1133.

[8788] ● ***Confession of co-accused not substantive evidence.***—Confession of a co-accused is not substantive "evidence" as defined in Section 3 of the Evidence Act, and can only be "taken into consideration" against the other accused. Hence a conviction of an accused person cannot be founded on the confessions of the co-accused only, if there is no substantive evidence on record on which such conviction can be based. In *Kashmira Singh's case* the Court has laid down the principles as to the use to which the confession of a co-accused can be put, and it has been held that the only limited use to which such a confession can be put is to refer to it for the purpose of lending assurance to the belief which could be attached to such other evidence, if the Court entertains a hesitation on that point, and of fortifying that belief.

If there is no sufficient substantive evidence upon which conviction can be based, the confession of a co-accused cannot be of any use at all, and should be left altogether out of consideration, because there can be no question of lending assurance to the belief in any evidence if that evidence in itself is insufficient for being made the basis of a conviction. *Nathu* v. *State of Uttar Pradesh,* AIR 1956 SC 56 : 1956 CrLJ 152.

[8789] ● *Confession—Use of against maker.*— Before a confession can be used against the other accused, it is essential that the confession must implicate the maker himself substantially to the same extent as the others. It is only when the confession fulfils this condition that is can be taken into consideration against the other accused. If reading the confession as a whole it appears that the maker was trying to throw the main blame on his companion, and to make out that he himself was an unwilling spectator of the crime, the confession cannot at all be taken into consideration against the co-accused. *Balbir Singh* v. *State of Punjab,* AIR 1957 SC 216 : 1957 CrLJ 481.

[8790] ● *Confession of co-accused use of.*— Confession of a co-accused is not substantive evidence. It can only be taken into consideration for lending assurance to other evidence, if it exists, and if the other evidence is not sufficient to establish the guilt of the accused, the confession of the co-accused has no use at all so far as the other accused are concerned. *Ram Chandra* v. *State of Uttar Pradesh,* AIR 1957 SC 381 : 1957 CrLJ 559.

[8791-92] ● *Retracted confession of co-accused.*—Section 30 of the Act means that when several persons are being tried jointly for the same offence, a confession made by any one of them affecting himself and the co-accused can be taken into consideration by the Court, not only against maker of the confession, but also against his co-accused. There is nothing to prevent the Court from taking a retracted confession into consideration not only against maker but also against the other accused. Although a retracted confession may be taken into consideration against an accused, its value is extremely weak, and there can be no conviction without the fullest and strongest corroboration on material particulars. The corroboration in full sense implies corroboration not only as to factum of the crime but also to the connection of the co-accused with that crime. The amount of credibility which can be attached to a retracted confession depends upon the facts and circumstances of each case, and as matter of prudence and practice a Court should not ordinarily act upon the retracted confession of a co-accused without the fullest corroboration. On the facts of the case the confession of the co-accused is voluntary and true, that it has been corroborated in material particulars, not only as regards the commission of the crime, but also as regards the participation of the appellant in the crime. Recovery of the ornaments of the deceased at the instance of the appellant shortly after the commission of murder was an incriminating circumstance of the gravest importance, and lent full and strong corroboration to the confession of the co-accused, together with the fact that no person other than the accused had the opportunity to commit the murder.

[*Note :* The effect of this decision is that in a case in which several accused are jointly tried for the commission of an offence, if one of them has made a confession which the Court accepts as voluntary and true, and it receives strong corroboration from the other evidence as regards the part taken in the crime by the other accused, then, even if the confession is subsequently retracted, it could be used as evidence against the other accused, To this extent, this decision appears to be a departure from the principles laid down in the earlier decisions.] *Ram Prakash* v. *State of Punjab,* AIR 1959 SC 1 : 1959 CrLJ 90 : 1959 SCR 1219.

[8793] ● *Retracted confessions of other accused as regards part taken in killing.*—In the present case, four accused persons were prosecuted for the murder of eight boys in a forest. Three of the accused had made confessions which were held to be voluntary and true. Relying upon these confessions and the corroborative evidence which supported them in material particulars, the trial Court had convicted the three accused under Section 302, Penal Code, and the High Court had confirmed the conviction. In the appeal the Court upheld their conviction. The fourth accused, *L,* did not make a confession. He also had been convicted under Section 302 and both the Courts below had relied upon a number of circumstances, namely, his presence with the other three accused at the scene of the offence, and the recovery from his room of part of the booty taken from the murdered boys, and a blood-stained shirt and underwear after he had made a statement that he had kept these things there. Along with these facts the High Court had taken into consideration the retracted confessions of the co-accused and the statements made therein that *L* took actual part in the killing of the eight boys. The circumstances on which the lower Courts had relied had been clearly established by legal evidence. These circumstances were almost sufficient, without anything more, to establish the participation of *L* in the killing of the eight boys in furtherance of the common intention of himself and the other accused to cause their deaths. In the circumstances, it was proper and permissible to take into consideration the statements made in retracted confessions of the other accused as regards the part taken by *L* in the killing. These statements supplied whatever assurance was needed to convince the Court that *L* had taken part in the killing of the eight boys in furtherance of the common intention of himself and others. His conviction under Section 302, Penal Code, was therefore fully justified.

Conviction under Section 302 is upheld and the appeal is dismissed. *Nand Kumar* v. *State of Rajasthan,* 1963 (2) CrLJ 702 : 1963 (2) SCR 890.

[8794] ● ***Confession of co-accused—Its probative value.***—If the Court is inclined to hold that the other evidence may sustain the charge, it then takes the confession into account with a view to assure itself that the conclusion which it is inclined to draw from the other evidence about the guilt of that accused is right. In other words, a confession can only be used to lend assurance to the other evidence against a co-accused. Thus, though a confession may be regarded as evidence in the generic sense that it is an element which may be taken into consideration by the criminal Court, but it is not evidence as defined in Section 3 of the Act. The result is that in dealing with the case against an accused person, the Court cannot start with the confession of a co-accused. It must begin with the other evidence adduced by the prosecution, and it is only after it has formed its opinion with regard to the quality and effect of the said evidence that it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on such other evidence. That, briefly stated, is the effect of the provisions of Section 30.

The confession of a co-accused cannot be treated as substantive evidence. It can be pressed into service only when the Court is inclined to accept the other evidence and feels the necessity of seeking for an assurance in support of its conclusion about the guilt of an accused on the basis of the other evidence. It may be that the confessions made in the present case were voluntary and true and attributed to the two appellants of major part in the commission of the crime. However, the evidence other than the confessions which consisted of the discovery blood stains was entirely insufficient to justify the charge against both the appellants, and therefore it must be held that the conviction of the appellants under Section 396 of the Penal Code could not be sustained. The confessions of the co-accused in such circumstances could only raise a serious suspicion against them but suspicion however grave, must not be allowed to take the place of proof. In criminal trials, there is no scope for convicting the accused on moral conviction of guilt or grave suspicion. Where the other evidence against an accused person is wholly unsatisfactory, there is no scope for conviction on the basis of the confession of a co-accused, and the accused has to be given the benefit of doubt. *Haricharan Kurmi* v. *State of Bihar,* AIR 1964 SC 1184 : 1964 (2) CrLJ 344 : (1964) 2 SCJ 454.

[8795] ● ***Confession of co-accused retracted—General corroboration necessary.***—The High Court is wrong in thinking that a confession cannot be the foundation of a conviction but can only constitute 'a fourth leg to a tripod'. This statement has been repeated again in paragraph 30, where the High Court has observed "the confession alone and by itself cannot prove the guilt of an accused." We are not a little surprised that such a statement should have been made by the High Court. We wish to make it clear and this is only to repeat what is so well established that a retracted confession by an accused may form the basis of a conviction of that accused if it receives some general corroboration form other independent sources. It cannot however be the basis for convicting co-accused though it may be taken into consideration against co-accused also. It is entirely wrong to think that a confession can lead nowhere. *Shrishail Nageshi Pare* v. *State of Maharashtra,* AIR 1985 SC 866 : (1985) 2 SCC 341 : 1985 SCC (Cri) 235 : 1985 CrLJ 1173.

[8796] ● ***Confession of co-accused not substantive evidence against other co-accused.***—It is well-settled that the confession of a co-accused is not substantive evidence against other co-accused persons in the same trial as this Court pointed out in *Kashmira Singh* v. *State of M.P.,* AIR 1952 SC 159. This confession could only be used for lending reassurance if there would be any other substantive evidence to be utilised or acted upon. In *Hari Charan Kurmi* v. *State of Bihar,* AIR 1964 SC 159 the Court observed:

> "In dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person, it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when Court is inclined to accept

> other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence." *Param Hans Yadavo and Sadanand Tripathi* v. *State of Bihar,* AIR 1987 SC 955 : (1987) 2 SCC 197 : 1987 SCC (Cri) 322 (326) : 1987 CrLJ 789 : 1987 CrLR (SC) 346 : JT 1987 (1) SC 595 : 1987 CrAppR (SC) 230 : (1987) 2 SCR 405 : (1987) 1 Crimes 894.

[8797] ● ***Statement in FIR furnished by accused not to be used against other accused.***—A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is as an admission under Section 21 of the Evidence Act against its maker alone unless the admission does not amount to confession. *Bandlamuddi Atchuta Ramaiah* v. *State of Andhra Pradesh,* AIR 1997 SC 496 : (1996) 11 SCC 133 : 1996 CrLJ 4463.

[8798] ● ***Confession made by accused to police—Use of against co-accused.***—It should be remembered that under Sections 25 and 26 of the Evidence Act no confession made by an accused to a police officer, or to any person while he was in police custody could be admitted in evidence, and under Section 162 of the Code no statement made by any person during investigation to a police officer could be used in a trial except for the purpose of contradiction. In view of the aforesaid ban imposed by the legislature Section 15 of the TADA provides an exception to the ban. But it is well to remember that other confessions which are admissible even under the Evidence Act could be used as against a co-accused only upon satisfaction of certain conditions. The first condition is that there should be a confession *i.e.* inculpatory statement. Any exculpatory admission is not usable for any purpose whatsoever as against a co-accused. The second condition is that the maker of the confession and the co-accused should necessarily have been tried jointly for the same offence. In other words, if the co-accused is tried for some other offence, though in the same trial, the confession made by one is not usable against the co-accused. Third condition is that the confession made by one accused should affect himself as well as the co-accused. In other words, if the confessor absolves himself from the offence but only involves the co-accused in the crime, while making the confession, such a confession, cannot be used against the co-accused. Even if no conditions are satisfied the use of a confession as against a co-accused is only for a very limited purpose *i.e.* the same can be taken into consideration as against such other person. It is now well settled that under Section 30 of the Evidence Act the confession made by one accused is not substantive evidence against a co-accused. It has only a corroborative value.

A confession made admissible under Section 15 of the TADA can be used as against a co-accused only in the same manner and subject to the same conditions as stipulated in Section 30 of the Evidence Act. *Kalpnath Rai* v. *State (through CBI)* AIR 1998 SC 201(215) : (1997) 8 SCC 733 : 1998 SCC (Cri) 134 : 1998 CrLJ 369 : 1998 CAR 33 : 1997 (4) Crimes 227.

[8799] ● ***Accused making confessional statement discharged—Not facing trial—Use of statement against co-accused.***—Under Section 30 of the Evidence Act, a confession of an accused is relevant and admissible against a co-accused if both are jointly facing trial for the same offence. Since admittedly, Dr. Bansal has been discharged from the case and would not be facing trial with Kalani his confession cannot be used against Kalani. *Suresh Kalani alias Pappu Kalani* v. *State of Maharashtra,* AIR 1998 SC 3258 (3259-3260) : (1998) 7 SCC 337 : 1998 CrLJ 4592 : 1998 CrLR (SC) 645 : 1998 (3) Bom LR 456.

[8800-01] ● ***Confession of co-accused not to be elevated to status of substantive evidence.***—The crucial expression used in Section 30 is "*the Court may take into consideration* such confession". These words imply that the confession of a co-accused cannot be elevated to the status of substantive evidence which can form the basis of conviction of the co-accused. The import of this expression was succinctly explained by the Privy Council in *Bhuboni Sahu* v. *R.*, AIR 1949 PC 257 : 50 CrLJ 872 in the following words : (AIR p. 260).

> "[T]he Court may take the confession into consideration and thereby, no doubt, makes its evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; *it can be put into the scale and weighed with the other evidence.*" *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1777) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8802] ● ***Confession to police officer by person in police custody.***—The contention of the learned Senior Counsel for the State that even if the confession of the co-accused is not covered by Section 32(1), it can still be taken into account by the Court under Section 30 of the Evidence Act for the limited purpose of corroborating or lending assurance to the other evidence on record, cannot be accepted. There is no difficulty in accepting the contention that Section 30 of the Evidence Act can also play its part in a case of trial under POTA, especially when the other offences under IPC are also the subject-matter of trial. But a confession to the police officer by a person in police custody is not within the realm of Section 30 of the Evidence Act and therefore such a confession cannot be used against the co-accused even under Section 30 of the Evidence Act. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1783) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8803] ● ***Confession of co-accused.***—Confession of co-accused requires corroboration before it can form basis of conviction of accused. *State of Madhya Pradesh* v. *Mukesh,* (2006) 13 SCC 197 : 2007 (2) SCC (Cri) 680. **To the same effect** : *Mohtisham Mohd. Ismail* v. *Special Director, Enforcement Directorate,* (2007) 8 SCC 254 : (2007) 3 SCC (Cri) 531.

[8804] ● ***Confession of co-accused.***—Confession of co-accused by itself is not sufficient to find a co-accused guilty unless there is other supporting evidence to prove that the accused was guilty. *Abdulvahab Abdul Majid Shaikh* v. *State of Gujarat,* AIR 2007 SC 2492 : (2007) 9 SCC 293 : (2007) 3 SCC (Cri) 126 : 2007 CrLJ 3529 (3531).

16. ART. 20 (3), CONSTITUTION HAS NO APPLICATION TO CONFESSIONS

[8805] ● ***Art. 20 (3), Constitution has no application to confessions.***—Under the Evidence Act, a confession is required to be voluntary before it can be accepted against the accused, and if an accused who retracts his confession alleges that is was obtained from him under compulsion or threat, it is open to him to show the circumstances which throw a doubt on it voluntary character. But that is a matter under the ordinary law, and not under Article 203) of the Constitution, which prohibits testimonial compulsion against the accused. This Article only says that an accused person shall not be compelled 'to be a witness against himself' and it has no application whatever to confessions made by accused persons. It cannot possibly be invoked for the purpose of challenging the validity of a confession. *Kalawati* v. *State of Himachal Pradesh,* AIR 1953 SC 131 : 1953 CrLJ 668 : 1953 SCR 546 : 1953 SCJ 144.

17. STATEMENT RECORDED UNDER TADA ACT

[8806] ● ***Statement recorded under TADA Act.***—It would be difficult to hold that the confessional statement recorded by Police Inspector, who went there for apprehending the accused, can be considered to be confessional statement recorded under Section 15 of the TADA Act even though it was recorded in presence of Superintendent of Police. So-called statement was recorded by the police officers in presence of the police party at night time at about 2.30 a.m. between 26th and 27th February, 1992 in the light of the jeep as there was no other light available. Further admittedly, the statement was not sent to the Chief Judicial Magistrate as required under Rule 15 of the TADA Rules. The Statement was produced for the first time before the Designated Court on 21.3.1997 which was allegedly kept in the police diary. Dealing with this contention, the Designated Court held that the procedure prescribed under the Rules was directly. In our view, even though this Court has held the procedure prescribed under Rule 15 as directory, that would not mean that Investigating Officer is not required to follow the said procedure. He has to follow the said procedure. If there is delay in sending the statement, the Court would consider its evidentiary value by weighing other evidence brought on record by the prosecution. It is to be stated that in our country under Constitution, there is separation of judiciary from executive and if lapses on the part of the Investigating Officer are condoned and such statements are used for convicting the accused then the liberty of the citizens would not be safe. It appears that instead of collecting any material or evidence for connecting these accused with the crime, investigating agency has adopted unjustified method. Further, PW-2 Sunil Kumar, Superintendent of Police, in whose presence the statement was recorded, as well as PW-17 Suresh Chander Sharma who recorded the said statement have not identified A-1 Bihari Manjhi before the Court. This would throw a serious doubt with regard to the said confessional statement being recorded by PW-17 and putting of signatures by A-2 Bihari Manjhi on the same. There is no other evidence so far as co-accused appellants are concerned despite the fact that accused are residents of same village where occurrence took place and no other prosecution witnesses have identified them as the persons present at the scene of offence nor there is any recovery alleged to have been made from them or at their instance. *Bihari Manjhi* v. *State of Bihar,* AIR 2002 SC 1832 : (2002) 4 SCC 352 : 2002 SCC (Cri) 803 : 2002 CrLJ 2539 : (2002) 2 Crimes 347 (SC).

[8807] ● ***Conviction based on voluntary and truthful confession recorded under Section 15 of TADA sustainable.***—Conviction based on a voluntary and truthful confession recorded under Section 15 of the TADA Act is sustainable. It requires no corroboration. *Ravinder Singh* v. *State of Maharashtra,* AIR 2002 SC 2241 : (2002) 9 SCC 55 : 2003 SCC (Cri) 1062 : 2002 CrLJ 2957 : JT 2002 4 SC 470.

[8808] ● ***Confession of co-accused when can be pressed into service.***—No doubt, in law the confession of a co-accused cannot be treated as substantive evidence to convict, other than the maker of it, on the evidentiary value of it alone. But it has often been reiterated that if on the basis of the consideration of other evidence on record the Court is inclined to accept the other evidence, but not prepared to act on such evidence alone, the confession of a co-accused can be pressed into service to fortify its belief to act on it also. *Government of NCT of Delhi* v. *Jaspal Singh*, (2003) 10 SCC 586 : 2004 SCC (Cri) 933 (940).

[8809] ● ***Confession under S. 15 of TADA Act.***—Apart from the plain language of Section 15 which excludes the application of Section 30 of the Evidence Act, this Court in many judgments has held that Section 30 of the Evidence Act has no role to play when the Court considers the confession of an accused made under Section 15 of the TADA Act either in regard to himself or in regard to his co-accused. Therefore, the argument that a confessional statement of an accused made under Section 15 of the TADA Act can be used only to corroborate other substantive evidence produced by the prosecution cannot be accepted. *Jameel Ahmed* v. *State of Rajasthan*, AIR 2004 SC 588 : (2003) 9 SCC 673 : 2003 SCC (Cri) 1853 (1862-63).

18. CONFESSION RECORDED UNDER POTA

[8810] ● ***Confessions recorded by police officer under Section 32(1) of POTA.***—As the law now stands, the confession recorded by the police officer under Section 32(1) of POTA is admissible in evidence. The voluntariness and reliability of confession can of course be tested by the Court. The admission of such confession would also be subject to the observance of the other provisions of Section 32 of POTA which are in the nature of procedural safeguards aimed at ensuring that the confessions are made by the accused in an atmosphere free from threat and inducement.

Following the path shown by its predecessor, namely, the TADA Act, POTA marks a notable departure from the general law of evidence in that it makes the confession to a high-ranking police officer admissible in evidence in the trial of such person for the offence under POTA. As regards the confession to the police officer, the TADA regime is continued subject to certain refinements. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1787, 1777) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[8811] ● ***Confession recorded under Section 32 of POTA Evidentiary value.***—The most important safeguard provided in sub-sections (4) and (5) is that the person from whom the confession was recorded is required to be produced before a Chief Metropolitan Magistrate or Chief Judicial Magistrate, within 48 hours, together with the original statement of confession in whatever manner it was recorded. The CMM or the CJM shall then record the statement made by the person so produced. If there is any complaint of torture, the police shall be directed to produce the person for medical examination and thereafter he shall be sent to judicial custody.

If the confessional statement is properly recorded, satisfying the mandatory provisions of Section 15 of the TADA Act and the rules made thereunder, and if the same is found by the Court as having been made voluntarily and truthfully then the said confession is sufficient to base a conviction on the maker of the confession. The mere fact that the expression "admissible only" is used without being followed by the words "in evidence", does not, by any canon of construction, deprive the confession recorded under Section 32 of POTA its evidentiary value; otherwise Section 32(1), more especially the expression "admissible" contained therein will become ineffectual and senseless. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1787) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

19. CONFESSIONAL STATEMENT "RECORDED IN WRITING"

[8812] ● ***Confessional statement "Recorded in Writing".***—When a confessional statement is dictated to a Steno and typed on a typewriter, the same amounts to a confessional statement being in writing. This view is supported by an authority of the this Court in the case of *State of Tamil Nadu* v. *Sivarasan*, (1997) 1 SCC 682. In this case it has been held that the words "recorded in writing" in Section 15 (TADA Act, 1987) includes a type-written confessional statement. It is held that the Police Officer need not record the statement in his own hand-writing, but can take the help of a Steno or use a type-writer. The observations of the Designated Court that the respondents had not been asked whether they wanted to add or subtract anything appear to have been made on a misunderstanding of R. 15(2). Under R. 15(2), the recorded confession has to be (where it is in writing) shown and read back to the person concerned and if he does not understand the language in which it is recorded, it has to be interpreted to him in a language he understands. That person is at liberty to explain or add to his confession. In this case the confessional statements were shown and read back to the respondents. If they wanted, they could have explained or added to these confessional statements. They chose not to do so. Thus, the requirement of R. 15(2) was fully complied with. *Central Bureau of Investigation* v. *Ashiq Hussain Faktoo*, AIR 2003 SC 1441 : (2003) 3 SCC 166 : 2003 SCC (Cri) 588 : 2003 CrLJ 1292.

19. CONFESSION—EVIDENTIARY VALUE

[8813] ● ***Confession of co-accused.***—Confession of co-accused cannot be sole basis of conviction, but it can be used to lend assurance to other independent evidence available against the accused. *Sidharth* v. *State of Bihar*, AIR 2005 SC 4352 : (2005) 12 SCC 545 : (2006) 1 SCC (Cri) 175 : 2005 CrLJ 4499 : 2005 (7) Scale 700 : 2005 (4) Crimes 135.

[8814] ● ***Confession of co-accused.***—Apart from the suspicious conduct of the appellant Rohan Prakahs on the date of the incident, there is no other evidence against him. Therefore, it is difficult to hold that there is other independent evidence to find him guilty of the murder and as there is no independent evidence against Rohan Prakash, the confession made by the co-accused Arnit Das cannot be made as supporting evidence under Section 30 of the Evidence Act. The prosecution has not succeeded fully in proving the guilt of the appellant Rohan Prakash. The independent evidence is not sufficient to prove that he had actively participated in the conspiracy. The conduct exhibited by this appellant would cast serious suspicion on him, but that by itself is not sufficient to find him guilty of the offence under Section 302 read with Sections 34 and 120-B, IPC. *Sidharth* v. *State of Bihar*, AIR 2005 SC 4352 : (2005) 12 SCC 545 : (2006) 1 SCC (Cri) 175 (189) : 2005 CrLJ 4499 : 2005 (4) Crimes 135.

[8815] ● ***Confession implicating accused after common intention was no longer in existence.***—Where the confession implicating the accused has been made after the common intention of the parties was no longer in existence, Section 10, Evidence Act cannot be invoked against the accused. *Sidharth* v. *State of Bihar*, AIR 2005 SC 4352 : (2005) 12 SCC 545 : (2006) 1 SCC (Cri) 175 (187) : 2005 CrLJ 4499 : 2005 (4) Crimes 135.

[8816] ● ***Recording of confession.***—Adequate time is to be given to accused for reflection prior to recording of confession. In the present case the counsel contended that the Supreme Court in *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 CrLJ 1014 had observed that the accused person should at least be given 24 hours time to decide whether or not he should make a confession. It may be noted that in the very some judgment it was stated that it would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case before recording his confession under Section 164, CrPC. *Sidharth* v. *State of Bihar*, AIR 2005 SC 4352 : (2005) 12 SCC 545 : (2006) 1 SCC (Cri) 175 (183) : 2005 CrLJ 4499 : 2005 (4) Crimes 135.

[8817] ● ***Confessional statements—Evidentiary value.***—The Court while weighing the evidentiary value of a confessional statement cannot lose sight of the ground realities. Circumstances attendant to making of such statements, should be taken into consideration. *Union of India* v. *Bal Mukund*, (2009) 12 SCC 161 : 2009 CrLJ 2407 (2413) : 2009 (2) Crimes 171 (SC) : 2009 (5) SCR 205 : JT 2009 (5) SC 45.

CONFIRMATION OF DEATH PENALTY

(Section 366, CrPC)

[8818] ● ***Confirmation of death penalty.***—Time and again this Court has pointed out that on a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provision of Sections 375 and 376, CrPC. Under these sections the High Court must not only see whether the order passed by the Sessions Court is correct but it is under an obligation to examine the entire evidence for itself, apart from and independently of the Sessions Court's appraisal and assessment of that evidence. From the long line of decisions which have taken this view it would be enough to refer to the decisions in *Jumman* v. *State of Punjab*, AIR 1957 SC 469 : 1957 CrLJ 586. **To**

THE SAME EFFECT : (1) *Ram Shanker Singh* v. *State of West Bengal,* AIR 1962 SC 1239 : (1962) 2 CrLJ 296; (2) *Bhupendra Singh* v. *State of Punjab,* AIR 1968 SC 1438 : (1968) 3 SCR 404; (3) *Subash* v. *State of Uttar Pradesh,* AIR 1976 SC 1924 : (1976) 3 SCC 629 : 1976 SCC (Cri) 483 : 1976 CrLJ 1521 : 1976 CrLR (SC) 251.

[8819] ● ***Death sentence—Confirmation of by Supreme Court.***—In the present case, the accused who was charged with the offence of murder, had been convicted by the trial Court and had been sentenced to death. On appeal, the High Court had acquitted the accused and hence the sentence of death had remained unconfirmed. In the appeal by the State of the Supreme Court, the appeal was allowed, the order of acquittal made by the High Court was set aside, and the order passed by the Sessions Court under which the accused had been sentenced to death was restored.

Held : In the exercise of its powers under Article 136, the Supreme Court is competent to pass the same orders which the High Court is, by the Code of Criminal Procedure, competent to pass. The sentence of death passed by the Sessions Court cannot be executed, under the Code, unless it has been confirmed by the High Court. Since the sentence passed in the instant case had not been confirmed by the High Court, the Supreme Court can pass the same order of confirmation of sentence in the exercise of its powers under Article 136. Accordingly, the sentence of death was confirmed. *State of Uttar Pradesh* v. *Deoman Upadhyaya,* AIR 1960 SC 1125 : 1960 CrLJ 1504 : (1960) 2 SCA 371 : 1960 ALJ 733 : 1960 AWR (HC) 568 : (1960) ACrR 361.

[8820] ● ***Confirmation of death sentence—Appeal.***—It may be conceded that if a question of fact or a question of law which plainly arises on the record is relevant and material, and it can be argued without any further evidence being taken, then, if that point was urged before the trial Court and was rejected by it, it may, in a proper case, be permissible to the appellant before the Supreme Court to ask the Court to consider that point in the appeal under Article 136, even though it was not urged before the High Court and so there is no decision on that point in the judgment of the High Court.

In a criminal proceeding of the character where sentences of death are imposed on the appellants, it would not be proper to refuse to consider a relevant and material plea of fact or law only on the ground that it was not urged before the High Court. Even where the appellant is not entitled as a matter of right, to obtain a decision on that point from the Supreme Court because it was not urged before the High Court, there is no hard and fast rule prohibiting the raising of such a plea in appeals under Article 136, and in view of the gravity of the sentence of death, the Court would, in a fit case, allow the appellant to raise such a plea. *Masalti* v. *State of Uttar Pradesh,* AIR 1965 SC 202 : 1965 (1) CrLJ 226 : 1964 SCD 980 : (1965) 1 SCJ 605 : (1964) 8 SCR 133 : 1965 MLJ (Cr) 312 : ILR (1964) 2 A 694 : (1964) 1 ALT 19.

[8821] ● ***Death sentence—Supreme Court confirming in respect of seven and reducing in respect of three.***—It cannot be contended that in a case in which several accused persons are convicted under Section 302/149, sentence of death can be imposed only on such of the accused as had taken active part in the commission of the murder. The question whether the sentence of death should be imposed on persons who are found to be guilty under Section 302 read with Section 149 for murder committed by the hand of some other member of the unlawful assembly is a matter which has to be decided on the facts and circumstances of each case.

In the present case, all the accused had joined together armed with deadly weapons and they shared the common unlawful object to exterminating all the male members of the family of the leader of the opposite faction with whom they were on inimical terms. In prosecution of that common object five persons were killed on the spot by shooting them dead. The High Court imposed the sentence of death on the accused who were armed with fire-arms. On appeal, the Supreme Court confirmed the sentence in respect of seven of the accused and reduced it in respect of three of the accused on the ground of their youth and their being under the pressure and influence of the elder members of their families. *Masalti* v. *State of Uttar Pradesh,* AIR 1965 SC 202 : 1965 (1) CrLJ 226 : 1964 SCD 980 : (1965) 1 SCJ 605 : (1964) 8 SCR 133 : 1965 MLJ (Cr) 312 : ILR (1964) 2 A 694 : (1964) 1 ALT 19.

[8822] ● ***Reference for confirmation of death sentence—Duty of High Court.***—Where apart from appeal by connected accused, reference is made by Sessions Judge for confirmation of the death sentence, a High Court is duty bound to independently consider the matter carefully and examine all relevant and material evidence. *Iftikhar Khan,* AIR 1973 SC 863 : (1973) 1 SCC 512.

[8823] ● ***Confirmation of death sentence—Duty of High Court.***—Whilst confirming a capital sentence a High Court is under an obligation to itself consider what sentence should be imposed and not to content with the trial Court's decision on the point. *N. Sreeramulu,* AIR 1973 SC 2551 : 1973 CrLJ 1775.

[8824] ● ***Reference for confirmation of death sentence—Duty of High Court.***—In a reference for confirmation of the death sentence under Section 374, CrPC, the High Court must examine the entire evidence for itself independently of the Sessions Court. *Balak Ram* v. *State of Uttar Pradesh*, AIR 1974 SC 2165 : (1975) 3 SCC 219 : 1974 SCC (Cri) 837 : 1974 CrLJ 1486 : 1974 CrLR (SC) 530 : (1975) 1 SCR 753.

[8825] ● ***Death sentence—Appeal and also reference for confirmation.***—Where in addition to an appeal field by an accused sentenced to death, the High Court has to dispose of the reference for confirmation of death sentence under Section 374 of the Code of Criminal Procedure, the High Court, while dealing with reference, should consider the proceedings in all their aspects and come to an independent conclusion on the material on record apart from the view expressed by the Sessions Judge. Under the provision of law, it is for the High Court to come to an independent conclusion of its own. *Charan Singh,* AIR 1975 SC 246 (251) : (1975) 3 SCC 39 : 1974 CrLJ 1253.

[8826] ● ***Delay in execution of death sentence.***—Undue long delay in execution of the sentence of death will entitle the condemned person to approach the Supreme Court under Article 32 but that Court will only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the Court while finally maintaining the sentence of death. The Supreme Court, however, may consider the question of inordinate delay in the light of all the circumstances of the case to decide whether the execution of the sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable an to this extent the decision in *Vatheeswaran* case, AIR 1983 SC 361 (2) : 1983 CrLJ 481 : (1983) 2 SCR 348 cannot be said to lay down the correct law and therefore to that extent stands overruled. *Triveniben* v. *State of Gujarat*, AIR 1989 SC 142 : (1988) 4 SCC 574 : 1989 SCC (Cri) 25 : 1989 CrLJ 870 : 1988 Cr AppR (SC) 275 : 1988 ACrC 546 : 1988 Rajdhani LR 628 : (1988) 3 Crimes 771.

[8827] ● ***Confirmation of death sentence—Court to deal with matter carefully.***—In *Masath* v. *State of U.P.*, AIR 1965 SC 202 : 1965 (1) CrLJ 226 it was observed that it is perfectly true that in a murder trial when an accused person stands charged with the commission of an offence punishable under Section 302, he stands the risk of being subjected to the highest penalty prescribed by the Indian Penal Code, and naturally judicial approach, in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals or reference proceedings where the question of confirming a death sentence is involved the Court has to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death. *Arjun Marik* v. *State of Bihar,* 1994 Suppl (2) SCC 372 : 1994 SCC (Cri) 1551 (1557).

[8828] ● ***Reference of death sentence— Rejection of—High Court to give reasons.***—In the present case, the High Court while rejecting the reference under Section 366 of the Code of CrPC did not discuss in detail why it came to the conclusion that the death sentence awarded by the trial Court be not confirmed. It merely stated that the interest of justice would be fully served if the sentence of death is reduced to imprisonment for life. While the trial Court has given some reasons for awarding the death sentence on four of the accused; it would have been more appropriate for the High Court to have given reasons for differing from the view taken by the trial Court rather than mechanically rejecting the reference. *Ramji Rai* v. *State of Bihar,* AIR 1999 SC 3857 : (1999) 8 SCC 389 : 1999 SCC (Cri) 1446 (1451) : 2000 CrLJ 19.

[8829] ● ***Reference of death sentence—Duty of High Court.***—When a reference is made to the High Court under Section 366, CrPC by the learned Sessions Judge on passing a sentence of death, the High Court has to satisfy itself whether a case beyond reasonable doubt has been made out against the accused for infliction of the extreme penalty of death. The proceedings before the High Court in such a case require a reappraisal and re-assessment of the entire facts and law so that it can come to its independent conclusion but while so doing the High Court cannot also totally overlook the conclusion arrived at by the learned Sessions Judge. In performing its duty, the High Court is of necessity bound to consider the merits of the case itself and has to examine the entire evidence on record. The Legislature having provided in the confirmation proceedings a final safeguard of the life and liberty of the subject in cases of capital sentences, the duty of the High Court becomes more onerous to consider independently the matter carefully and examine all relevant material and come to the conclusion one way or the other. It is therefore, the duty of the High Court in a death reference to consider the evidence afresh. In the present case the High Court as a Court of appeal has filed to exercise its power under Section 386 of the Code of Criminal Procedure and instead of discharging its bounden duty to examine the evidence and other materials on record and without appreciating the same, it has, merely on surmises and conjures, come to the conclusion that the accused is entitled to the benefit of doubt. The aforesaid conclusion cannot be sustained. *State of Tamil Nadu* v. *Rajendran,* AIR 1999 SC 3535 : (1999) 8 SCC 679 : 2000 SCC (Cri) 40 (45) : 1999 CrLJ 4552 : JT 1999 (7) SC 348.

CONFISCATION

[8830] ● ***Confiscation.***—Confiscation is not the only mood of disposal under Section 517 of old code of CrPC (Now Section 452) and is singularly inappropriate in a case where the accused is prosecuted for an offence punishable with a maximum sentence of 3 months and a fine of Rs. 100. *Suleman Issa* v. *State of Bombay,* AIR 1954 SC 312 : 1954 SCR 976 (981).

[8831] ● ***Power of Court under Section 452, CrPC extends to confiscation of property in custody of Court.***—The power of Court under Section 517 of the old code of 1898 (Now Section 452, code of 1973) extends to confiscation of property in the custody of the Court but it is not every case in which the Court must necessarily pass on order of confiscation irrespective of the circumstances of the case. *Suleman Issa* v. *State of Bombay,* AIR 1954 SC 312 : 1954 SCR 1976.

[8832] ● ***Confiscation of goods.***—Where the High Court sets aside the conviction and sentence passed upon the accused under Section 7, it has neither the jurisdiction nor the power to confirm the order of confiscation of goods in respect of which the offence had been committed. *Krishna Pillai* v. *State of Madras*, AIR 1954 SC 335 : 1954 CrLJ 1051.

[8833] ● ***Confiscation of vehicle.***—Section 11 of the Opium Act as amended in Madhya Bharat conferred a discretion to Court to confiscate a conveyance. Despite user of the word "shall" this provision is not obligatory. It is well settled that the use of the word "shall" does not always mean that the enactment is obligatory or mandatory; it depends upon the context in which the word "shall" occurs and the other circumstances. The word "shall" occurring in Section 11 of the Madhya Bharat Act means "may" and that it confers discretion on the Court to confiscate the conveyance provided it belongs to the offender. But where it is not so, and the owner of the truck has neither authorized the offender to transport opium, nor is there any reason to believe that the owner knew that his vehicle was likely to be used for transporting contraband opium, the conveyance should not be confiscated because confiscation in such circumstances would be tantamount to punishing one who has not committed any offence under the Opium Act.

Three considerations are relevant is construing Section 11 : First, it is not denied that it would be unjust to confiscate the truck of a person, if he has no knowledge whatsoever that the truck was being used for transporting opium. Suppose a person steals a truck and then uses it for transporting contraband opium, the truck would have to be confiscated. It is well recognized that if a statute leads to absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the sentence. Secondly, it is a penal statute and it should, if possible, be construed in such a way that a person who has not committed or abetted any offence should not be visited with a penalty. Thirdly, if the meaning suggested by Mr. Shroff is given, Section 11(d) of the Madhya Bharat Act may have to be struck down as imposing unreasonable restrictions under Article 19 of the Constitution. Section 11 of the Madhya Bharat Act is not obligatory and it is for the Court to consider in each case whether the vehicle in which the contraband opium is found or is being transported should be confiscated or not, having regard to all the circumstances of the case. *State of Madhya Pradesh* v. *Azad Bharat Finance Co.,* AIR 1967 SC 276 : (1966) 2 SCA 336 : 1966 Supp SCR 473 : 1967 CrLJ 285.

[8834] ● ***Confiscation of bottles containing contraband stuff.***—The short question therefore is whether it can be said that in respect of the 1500 and odd bottles, an offence punishable under the Prohibition Act has been committed. It is no doubt true that the person who was charged with committing an offence was found not guilty, but the question is not whether the accused has been successfully brought to book, but whether the offence in respect of the property has been committed or not. There is distinction between the two. An offence may be demonstrated to be committed although the accused who committed it may not be successfully prosecuted.

In the present case, the two bottles which were sent to the Chemical Examiner were said to contain alcohol although there was some doubt in the mind of the Magistrate as to whether there was no chance of any malpractice. Be that as it may, there are the other bottles intact. There is some evidence to show that they were in the original packing and were a proprietary product. The manufacturer came as a witness and deposed that the liquids were bottled by him as a proprietary manufacture. In these circumstances; it would be fair to assume that all of them were of the same kind as the ones which were sent for chemical examination. However an examination of random samples can be made and if they satisfy the Court that the bottles contain contraband stuff the bottles can be confiscated. *State of Gujarat* v. *Chinubhai Gopaldas,* AIR 1968 SC 1275 : 1968 CrLJ 1478 : 1968 (3) SCR 447.

[8835] ● ***Confiscation of foreign currency.***—An order for the disposal of any property under Section 452(1) of the CrPC is necessary where the property remains to be disposed of by the Court after the inquiry or trial is over. In the present case, it appears that the foreign currency seized from the appellant was not produced before the Magistrate and was not in the custody or control of the Court when the order of confiscation was made. There was, thus, no necessity or occasion for the Court to make an order for disposal of any property; the order of the Magistrate that the goods involved in the case are confiscated "if not already confiscated" clearly shows that he was not aware what had happened to the goods which were in the control of the Custom Authorities. It is true that the foreign currency seized for the appellant's possession was property in respect of which an offence was committed, but this fact alone did not call for an order under Section 452(1), Cr PC in the circumstances of the case, and the order passed, besides being unwarranted, is likely to create complications if in respect of the foreign currency a proceeding under the Customs Act is pending or the Customs authorities have made any order with which the Magistrate's order is inconsistent. *Remo Paul Altoe* v. *Union of India,* AIR 1977 SC 2255 : (1977) 4 SCC 437 : 1977 SCC (Cri) 629 : 1979 CrLJ 1933 : 1977 CrLR (SC) 482 : 1977 UJ (SC) 730.

[8836] ● ***Confiscation of property penal in character.***—Confiscation of property is penal in character. The Sessions Judge examined the penal character of confiscation order and held that in the circumstances of the case it was not just and proper. The Appellate Authority had power and jurisdiction to decide the same. The High Court could not have lightly interfered with the order of the Sessions Judge setting aside the confiscation especially in exercise of the revisional jurisdiction under Section 439, CrPC without making out any of the well recognised grounds for interfering in exercise of its revisional jurisdiction and straight away proceed to interfere with the order which would not be correct exercise of its revisional jurisdiction. *Thakur Das (dead) by LRs.* v. *State of Madhya Pradesh,* AIR 1978 SC 1 : (1978) 1 SCC 27 : 1978 SCC (Cri) 21 : 1978 CrLJ 1 : 1977 CrLR (SC) 484 : (1978) 1 SCR 732 : 1977 Cr App R (SC) 381.

[8837] ● ***Discretion in suitable cases not to order confiscation.***—Section 7(1)(b) and the proviso of the Essential Commodities Act show that Court has a discretion in suitable cases for not imposing confiscation. When a hired truck laden with prohibited cattle fodder is seized—the owner not knowing the goods were prohibited—the truck should not be confiscated Section 7(i)(b) reads that "Any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit including any packages, coverings or receptacles, in which the property is found and any animal, vehicle, vessel or other conveyance used in carrying the property, shall be forfeited to the Government. Provided that if the Court is of opinion that it is not necessary to direct forfeiture in respect of the whole or, as the case may be, any part of the property or any packages, coverings or receptacles or any animal, vehicle, vessel or other conveyance, it may for reasons to be recorded, refrain from doing so." *Sat Pal* v. *State of Haryana,* AIR 1979 SC 1767 : (1979) 3 SCC 322 : 1979 SCC (Cri) 619 : 1979 CrLJ 1341 : 1979 CrLR (SC) 631 : 1979 Cur LJ (Cr) 178 : 1979 SC Cr R 246 : 1979 UJ (SC) 804 : (1979) 3 Mah LR 296.

[8838] ● ***Confiscation of properties subject-matter of charge.***—A special Judge holding the accused guilty for the offence punishable under Section 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act is empowered to order confiscation of properties under Section 452, Criminal Procedure Code which formed the subject-matter of the charge. *Mirza Iqbal Hussain* v. *State of Uttar Pradesh,* AIR 1983 SC 60 : (1982) 3 SCC 516 : 1983 SCC (Cri) 111 : 1983 CrLJ 154 : 1982 CrLR (SC) 515 : 1983 UJ (SC) 41.

[8839] ● ***Confiscation of property forming subject matter of charge.***—Section 161 to 165 Indian Penal Code or cognizable, bailable and non-compoundable according to Schedule II of the Criminal Procedure Code, Section 165 A Indian Penal Code is made cognizable by Section 3 of the Prevention of Corruption Act, 1947. It is also non-bailable and not compoundable.

It is clear from the provision of Section 4(2) Criminal Procedure Code that insofar as the offences under laws other than the Penal Code are concerned, the provisions of the Code of Criminal Procedure apply in their full force subject to any specific or contrary provision made by the law under which the offence is investigated or tried. Section 452 of the Code provides by sub-section (1) that if the trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of property by confiscation. The Prevention of Corruption Act being totally silent on the question of confiscation, the provisions of the Code of Criminal Procedure would apply in their full force, with the result that the Court trying an offence under the Prevention of Corruption Act would have the power to pass an order of confiscation by reason of the provisions contained in Section 452 of the Code. The order of confiscation cannot, therefore, be said to be without jurisdiction.

Further as the accused has been convicted under Section 5(1)(c) precisely for the reason that he was in possession of the two fixed deposit receipts and the cash sum, it cannot be said that the order of confiscation in regard to these amounts has not been properly passed or has been passed without any application of mind. *Mirza Iqbal Hussain* v. *State of Uttar Pradesh,* AIR 1983 SC 60 : (1982) 3 SCC 516 : 1983 SCC (Cri) 111 : 1983 CrLJ 154 : 1982 CrLR (SC) 515 : 1983 UJ (SC) 41.

[8840] ● ***Confiscation of timber or forest produce.***—A close, careful and combined reading of the various sub-sections of Section 44, Section 45 and Section 58-A of the A.P. Forest Act as introduced or amended by Act 17 of 1976 leaves no doubt that the intendment of the Legislature was to provide for two separate proceedings before two different forums and there is no conflict of jurisdiction as Section 45, as amended by the Amendment Act, in terms curtails the power conferred on the Magistrate to direct confiscation of timber or forest produce on conviction of the accused. Conferral of power of confiscation of seized timber or forest produce and the implements, etc. on the Authorised Officer under sub-s. (2-A) of Section 44 of the Act on his being satisfied that a forest offence had been committed in respect thereof, is not dependent upon whether a criminal prosecution for commission of a forest offence has been launched against the offender or not. It is a separate and distinct proceedings from that of a trial before the Court for commission of an offence. Under sub-s. (2-A) of Section 44 of the Act, where a Forest Officer makes a report of seizure of any timber or forest produce and produces the seized timber before the Authorised Officer alongwith a report under Section 44(2), the Authorised Officer can direct confiscation to Government of such timber or forest produce and the implements, etc., if he is satisfied that a forest offence has been committed, irrespective of the fact whether the accused is facing a trial before a Magistrate for the commission of a forest offence under Section 20 or Section 29 of the Act.

Merely because there was an acquittal of the accused in the trial before the Magistrate due to paucity of evidence or otherwise did not necessarily entail in nullifying the order of confiscation of the seized timber of forest produce by the Authorised Officer under sub-section (2-A) of Section 44 of the A.P. Forest Act, 1967 based on his satisfaction that a forest offence had been committed in respect thereof.

The order by the Forest Officer for confiscation had been passed under Section 44 (2-A) of the A.P. Forest Act, 1967. *Divisional Forest Officer* v. *G.V. Sudhakar Rao,* AIR 1986 SC 328 (335) : (1985) 4 SCC 573 : 1986 SCC (Cri) 34 : 1986 CrLJ 357 : 1986 CrLR (SC) 12 : (1986) 1 Crimes 313.

[8841] ● ***Confiscation of illicitly felled Timber—Power of authorised officer to direct.***—It would, therefore, appear that there can be no conflict of jurisdiction between the Authorised Officer acting under sub-section (2A) of Section 44 of the A.P. Forest Act, 1967 Act to direct confiscation of the property seized under sub-section (1) of the AP Forest Act, 1967 on his being satisfied that a forest offence has been committed, and the Magistrate making an order for confiscation of the property so seized on conviction of an accused for a forest offence under Section 45. The power of confiscation conferred on the Authorised Officer under sub-Section (2A) of Section 44 of the Act is separate and distinct from the power of the Magistrate to direct confiscation on conviction of an accused under Section 45.

True it is, where any property is produced by an officer before a criminal Court in an inquiry or trial, the Court may under Section 451 of the CrPC, 1973 make any direction, as it thinks fit, for the proper custody of such property pending the conclusion of the inquiry or trial. At the conclusion of the inquiry or trial, Court may also under Section 452 of the CrPC make an order for the disposal of the property produced before it and make such other directions as it may think necessary. Where the property is not produced before a criminal Court in an inquiry or trial, the Magistrate is empowered under Section 457 of the Code to make such order as he thinks fit, respecting the disposal of the property. The general provision of Section 452 of the CrPC with regard to disposal of property by a criminal Court such as by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof, and that of Section 457, CrPC investing a Magistrate to make an order for disposal of property seized by a Police Officer and not produced before a criminal Court during an inquiry or trial must necessarily yield where a statute makes a special provision with regard to forfeiture of any property and its disposal. In the instant case, admittedly, the illicitly felled teak trees seized by the Forest Range Officer, Adilabad were produced by him before the Division Forest Officer, Hyderabad who is the Authorised Officer under sub-s. (2-A) of Section 44 of the Act, along with a report by him under sub-s. (2) thereof that he had reason to believe that a forest offence had been committed by the respondents. Merely because the Forest Range Officer also later lodged a complaint before the learned Metropolitan Magistrate for trial of the respondents for commission of offences under Section 20(1) (c) (iv) and (x) and Section 20(1) (d) read with Section 29 (4) (a) (ii) of the Act, did not imply that the Authorised Officer was bereft of his power and authority to direct confiscation of the seized timber and the implements, etc. under sub-Section (2-A) of Section 44 of the Act if he was satisfied that a forest offence had been committed. *Divisional Forest Officer* v. *G.V. Sudhakar Rao,* AIR 1986 SC 328 (334, 333) : (1985) 4 SCC 573 : 1986 CrLJ 357 : 1986 SCC (Cri) 34 : 1986 CrLR (SC) 12 : (1986) 1 Crimes 313.

[8842] ● ***Confiscation of vessel.***—It is crystal clear that the Maritime zone of India (Regulation of Fishing by Foreign Vessels) Act 1981 has been with the object of preventing illegal poaching of fishes exclusive economic zone of India by foreign vessels including foreign vessels chartered by the Indian parties by providing deterrent punishment to protect Indian fishermen. Viewed in this context Section 13 mandates that in conviction of the master and character of an offence under Section 12 not only penalty of fine shall be imposed but the vessel used in or in connection with the commission of such offence has to be confiscated.

It is not open to the Court to consider the graveness of the offence and other extenuating circumstances and to make no order for confiscation of the offending vessels concerned. Confiscation of the vessel is the immediate statutory consequence of the finding that an offence either under 00 or S.11 or S.12 of the Act has been proved and its master has been convicted. S.13 is, thus, mandatory and it is not open to the Court as soon as the masters of the vessel is convicted of an offence under S.12 and is awarded penalty to refrain from making an order confiscating the offending vessel. *Chern Taong Shang* v. *Commander S.D. Baijal,* AIR 1988 SC 603 (612) : (1988) 1 SCC 507 : 1988 SCC (Cri) 162 : 1988 CrLJ 855 : 1988 CrLR (SC) 150 : JT 1988 (1) SC 202 : 1988 (1) Crimes 524.

[8843] ● ***Seizure of goods—Notice.***—It must be reiterated whether a notice was given or not within a stipulated time for extension as contemplated under Section 110(2) Customs Act, 1962 is a question of fact. It is also true that the onus that the order was passed without notice, was on the person who asserts it to be so and this is a question of fact. There was an assertion to this effect in the Collector's order, the assertion remained uncontroverted by any specific evidence and also by failure to urge this point. In that view of the matter, the inference drawn by the High Court that such notice was given as contemplated under Section 110(2) was not unwarranted. *Chuhar Mal* v. *Union of India,* AIR 1988 SC 1474 : (1988) 3 SCC 257.

[8844] ● ***Notice in respect of seizure of goods.***—Notice must go to the person from whose possession the goods have been seized, before the expiry of the original period of six months. It is possible that while notice is issued before the expiry of that period, service of such notice may not be effected on the person concerned in sufficient time to enable the Collector to make the order of extension before that period expires. Service of the notice may be postponed or delayed or rendered ineffective by reason of the person sought to be served attempting to avoid service of notice or for any other reason beyond the control of the customs authorities. In that event, it would be open to the Collector if he finds that sufficient cause has been made out before him in that behalf to extend the time beyond the original period of six months, and thereafter after notice has been served on the person concerned, to afford a post-decisional hearing to him in order to determine whether the order of extension should be cancelled or not. Having regard to the seriousness and the magnitude of injury to the public interest in the case of the illicit importation of goods, and having regard to considerations of the damage to economic policy underlying the formulation of import and export planning, it seems necessary to reconcile the need to afford an opportunity to the person effected with the larger considerations of public interest. *I.J. Rao, Asstt. Collector of Customs* v. *Bibhuti Bhushan Bagh*, AIR 1989 SC 1884 : (1989) 3 SCC 202 (210) : (1989) 2 SCJ 619 : JT 1989 (2) SC 531.

[8845] ● *Confiscation of truck used for carrying forest produce.*—The truck of the respondent was ordered to the confiscated by the Assistant Conservator of Forest, as it was found involved in commission of a forest offence. The High Court set aside the order of confirmation on the ground that the authorities had failed to establish that the owner of the truck had any knowledge that his truck was likely to be used for carrying forest produce in contravention of the provision of the Forest Act. The finding was based upon the evidence on the record. Therefore it is not proper to interfere with such finding. *Assistant Forest Conservator* v. *Sharad Ramchandra Kale,* AIR 1998 SC 2927 : (1998) 1 SCC 48 : 1998 SCC (Cri) 260 : 1998 CrLR (SC) 175.

[8846] ● *Confiscation of goods by Customs Authorities—Imposition of redemption fine on release.*—It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent authority. It is an admitted fact that the goods were released to the appellants on an application made by it and on the appellant executing a bond. Under these circumstances, if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the custom authorities to levy redemption fine. *Weston Components Ltd.* v. *Commr of Customs, New Delhi,* AIR 2000 SC 561 : (2000) 1 SCC 565 : JT 2000 (1) SC 525.

[8847] ● *Confiscation of Truck—Proper procedure for.*—In the instant case the appellant challenges an order of confiscation of truck. Notice was issued by this Court on 16.11.1998 calling upon the respondent to show cause why an appropriate order in terms of Section 19 (1) (b) of Madhya Pradesh Van Upaj (Vyapar Vaniyaman) Adhiniyam 1969 should not be passed. Section 19 (1) (b) provides that when any property other than a specified forest produce has been seized as liable to confiscation the State Government may by notification empower a Forest Officer to release the same on payment of the value thereof as estimated by such officer. The forest officer concerned had not focused his attention on the enabling provision of Section 19 (1) (b) of the Act. Forest Officer concerned is, therefore, directed to consider the question of release of the truck already confiscated under Section 19 (1) (b) of the Act and pass appropriate orders on the facts and circumstances of the case. *Dinesh Kumar Katike* v. *State of Madhya Pradesh,* AIR 2000 SC 3633 : (2000) 1 SCC 323 : 2000 SCC (Cri) 190.

[8848] ● *Confiscation of forest produce in proceeding under Section 59-A, Forest Act.*—An order of confiscation of forest produce in a proceeding under Section 59-A of the Forest Act, 1927 would not amount either to penalty or punishment. Such an order, however, can be passed only in the event a valid seizure is made and the authorized officer satisfies himself as regards ownership of the forest produce in the State as also commission of a forest offence. An order of confiscation is not to be passed automatically, and in terms of sub-Section (3) of Section 59-A, a discretionary power has been conferred upon the authorized officer in relation to a vehicle.

The amendments carried out by the State of West Bengal by reason of Sections 59-A to 59-G in the Forest Act, 1927 provide for a complete code. A proceeding for confiscation can be initiated irrespective of the fat as to whether prosecution for commission of a forest offence has been lodged or not. A confiscation proceeding, therefore, is independent of a criminal proceeding.

Once a confiscation proceeding is initiated, the jurisdiction of the Criminal Court in terms of Section 59-G of the Forest Act, 1927 being barred, the High Court also cannot exercise its jurisdiction under Section 482, CrPC for interim release of the property. The High Court can exercise such a power only in exercise of its power of judicial review. *State of West Bengal* v. *Sujit Kumar Rana,* AIR 2004 SC 1851 : (2004) 4 SCC 129 : 2004 SCC (Cri) 984 : 2004 (3) Crimes 195.

[8849] ● *Confiscation of illegally transported forest produce and vehicle by Forest Officer.*—The High Court did not examine the various submissions made, more particularly, with regard to the presumption available to be drawn under Section 69 of the Forest Act, 1927 (as amended in H.P. in (1991) Act. The omission on the part of the appellate Judge under the Act is a serious error at least necessitating the High Court to consider the correctness or otherwise of the stand taken for the department on merits. The trial Court proceeded on the basis that there was no claim that the property belonged to the State. A bare reading of the judgment itself shows that when the articles were seized, the person who accompanied the goods and was travelling in the truck was required to produce permit to show legitimacy of his possession. He could not do it. In that background, the question which was required to be adjudicated was whether the presumption under Section 69 was to be pressed into service. The very action of the Department is on the hypothesis of the property belonging to the Government in view of the statutory presumptions and there is no need for making any separate claim or claims petition separately. This certainly is not a frivolous question and the High Court was required to consider the issue in the proper perspective. The High Court was not justified in its conclusion that no case for examination was made out. *State of Himachal Pradesh* v. *Dhanwant Singh*, AIR 2004 SC 1636 : 2004 CrLJ 1431 : JT 2004 (2) SC 367 : (2004) 2 Crimes 177.

[8850] ● ***Confiscation of goods and vehicles carrying essential commodities***.—Confiscation of goods and the vehicles and vessels carrying the same amounts to deprivation of property. Confiscation of an essential commodity or a truck is permissible only if the provisions of any order made under Section 3 of the Essential Commodities Act, 1955 are violated. When a vehicle is used for carrying an essential commodity, it may be seized and ultimately directed to be confiscated in terms of Clause (c) of sub-Section (1) of Section 6-A of the Act. Violation of an order made under Section 3 of the Act, therefore, is a precondition for passing an order of confiscation. *Kailash Prasad Yadav* v. *State of Jharkhand,* AIR 2007 SC 2626 : (2007) 5 SCC 769 : 2007 (3) SCC (Cri) 14 : 2007 CrLJ 3722 (3723).

[8851] ● ***Confiscation—Authorities must arrive at clear finding regarding violation of Section 3(1) of essential commodities Act***.—The order of confiscation is not passed only because it would be lawful to do so. The authorities must arrive at a clear finding in regard to the violation mode under Section 3 of the Essential commodities Act, 1955 Act. The issues which have been raised before the Supreme Court have not been considered either by the Deputy Commissioner or by the Sessions Judge as also by the High Court. It was not a fit case where an order confiscation could have been passed. *Kailash Prasad Yadav* v. *State of Jharkhand,* AIR 2007 SC 2626 : (2007) 5 SCC 769 : 2007 (3) SCC (Cri) 14 : 2007 CrLJ 3722 (3722) 3724.

[8852] ● ***A valid seizure, as is well known, is a sine qua—non for passing an order of confiscation of property***. *Kailash Prasad Yadav* v. *State of Jharkhand,* AIR 2007 SC 2626 : (2007) 5 SCC 769 : 2007 (3) SCC (Cri) 14 : 2007 CrLJ 3722 (3723).

[8853] ● ***Illegal Transportation of liquor—Confiscation of truck***.—According to the proviso to Section 46 M.P. Excise Act, 1915 the burden is on the owner of the property to establish that he had no reason to believe that such offence was being committed or was likely to be committed. It provides that no animals, carts, vessels, rafts and other conveyance shall be liable to confiscation, if it is proved that they are the property of the offender and if the owner establishes that he has no reason to believe that such offence was being or likely to be committed, the owner has to establish the aforesaid facts. *Kailash Chandra* v. *State of Madhya Pradesh,* (2007) 14 SCC 595 : 2008 CrLJ 1035 (1037).

CONFLICT

[8854] ● ***Conflicting provisions in Contempt of Courts Act, 1971.***—The only two modes of taking cognizance by the High Court mentioned in subsection (2) of Section 15. Contempt of Courts Act, 1971 are (i) on a reference made to it by a subordinate Court; or (ii) on a motion made by the Advocate General, or in relation to a union territory by the notified law officer.

Does the omission in S.15(2) of the Contempt of Courts Act, 1971 of the mode of taking *suo motu* cognizance indicate a legislative intention to debar the High Court from taking cognizance in that mode of any criminal contempt of a subordinate Court? If this question is answered in the affirmative, then, such a construction of sub-s.(2) will be inconsistent with Section 10 which makes the powers of the High Court to punish for contempt of a subordinate Court, co-extensive and congruent with its power to punish for its own contempt, not only in regard to quantum or prerequisites for punishment, but also in the matter of procedure and practice. Such a construction which will bring Section 15(2) in conflict with S.10, has to be avoided, and the other interpretation which will be in harmony with S.10 is to be accepted Harmoniously construed, sub-section (2) of S.15 does not deprive the High Court of the power of taking cognizance of criminal contempt of subordinate Court, on its own motion, also.

If the intention of the Legislature was to take away the power of the High Court to take *suo motu* cognizance of such contempt, there was no difficulty in saying so in unequivocal language or by wording the sub-section in a negative form sub-section (2) of Section 15 properly construed, does not restrict the power of the High Court to take cognizance of and punish contempt of a subordinate Court, on its own motion. *S.K. Sarkar, Member, Board of Revenue, Uttar Pradesh* v. *Vinay Chandra Misra,* AIR 1981 SC 723 : (1981) 1 SCC 436 : 1981 SCC (Cri) 175 (181) : 1981 CrLJ 283 : 1981 CrLR (SC) 72 : (1981) 2 SCR 331.

[8855] ● ***Conflicting dying declarations.***—Examining these two dying declarations, we find out only that they gave two conflicting versions but there is *inter se* discrepancies in the depositions of the witnesses given in support of the other dying declaration dated 6-11-1976. Finally, in the dying declaration before a Magistrate on which possibly more reliance could have been placed, the deceased did not name any of the accused. Thus, we have no hesitation to hold that these two dying declarations do not bring home the guilt of the appellant. On such an evidence the trial Court rightly declined to base a conviction. *Kishan Lal* v. *State of Rajasthan,* AIR 1999 SC 3062 : (2000) 1 SCC 310 : 2000 SCC (Cri) 182 (186, 187) : 1999 CrLJ 4070 : 1999 CrLR (SC) 639 : (1999) 4 Crimes 103 : JT 1999 (6) SC 41.

[8856] ● ***No explanation of prosecution for reconciliation of injuries—Conflict regarding injuries.***—The deceased had received pellet injuries at his chest and jaw and the Investigating Officer PW-5 had also found, at the time of preparing the injury statement, that the deceased had received pellet injuries on his tongue, chest, chin and left shoulder. No explanation, whatsoever, to have been offered by the prosecution for reconciling the recovery of bullet from the chest cavity of the deceased and the presence of pellet injuries as deposed to by the witnesses. Since both the bullet and the gun had been recovered, it was obligatory on the prosecution to have sent the same for expert examination. *State of Madhya Pradesh* v. *Supra,* AIR 2001 SC 2408 : (2002) 9 SCC 447 : JT (2001) 3 SC 309 : 2001 Cr App R (SC) 270.

[8857] ● ***Conflict regarding injuries.***—There are four eye-witnesses in this case who deposed that appellants Majju alias Nasir and Irshad were having Farsi with them and they inflicted cut injuries on Bihari Lal. PW-8, Dr. Vijay Agrawal conducted the post-mortem and described the injuries in a haphazard manner without proper description of the wounds as to whether these were incised injuries or lacerated injuries. But the Doctor who examined the injured immediately after the occurrence of the incident, described the nature of injuries and that is fully in conformity with the oral evidence given by the witnesses. The Sessions Judge as well as the High Court has rightly relied on the evidence of the Doctor who prepared the wound certificate of the deceased. *Majju* v. *State of Madhya Pradesh,* AIR 2001 SC 2939 : (2001) 9 SCC 449 : 2001 CrLJ 4762 : (2001) 4 Crimes 379.

[8858] ● ***Conflict regarding number of knife blows.***—Where in FIR it was stated that only accused R inflicted one knife blow on the deceased but in evidence the witness stated that accused R and P inflicted more than one blow on the deceased, the accused R was given benefit of doubt and acquitted of the charge under Section 302, IPC. *Anil Prakash Shukla* v. *Arvind Shukla,* (2007) 9 SCC 513 (516) : (2007) 3 Crimes 221.

[8859] ● ***Inconsistency in evidence.***—Where the sole eye witness was inimical to the accused, his evidence was inconsistent with the version disclosed in FIR. the accused R was given benefit of doubt and acquitted of the charge under Section 302, IPC. *Anil Prakash Shukla* v. *Arvind Shukla,* (2007) 9 SCC 513 (516) : (2007) 3 Crimes 221.

CONFRONTATION
§ (See "CONTRADICTION")

CONSECUTIVE SENTENCE

[8860] ● ***Consecutive sentence.***—The appellant was given the maximum sentences of seven years in the previous case under the Gold (Control) Act. The conviction was based on the plea of guilty. The latter sentence under the Customs Act was also on the plea of guilty. Generally, it is both proper and customary for Courts to give credit to an accused for pleading guilty to the charge. But no credit need be given if the plea of guilty in the circumstances is inevitable or the accused has no alternative but to plead guilty. The accused being caught red handed is one such instance. The first case under the Gold (Control) Act against the appellant falls into the latter category. The plea of. guilty in that case was inevitable. The Court was therefore justified in awarding the maximum sentence. But the second case under the Customs Act is not of that type. The prosecution has to prove many things in it. There are 18 other accused facing trial in that case. The appellant, however, pleaded guilty, perhaps on legal advice. The enormity of the crime is relevant for measuring the sentence. But the maximum sentence awarded in one case against the same accused is not irrelevant for consideration while giving the consecutive sentence in the second case although it is grave. The Court has to consider the totality of the sentences which the accused has to undergo if the sentences are to he consecutive. The totality principle has been accepted as a correct principle for guidance. The trial Magistrate in this case has properly considered all aspects including the plea of guilty and given good reasons for awarding four years R.I. That means in all the appellant has to undergo 11 years of imprisonment which by itself is quite long enough in a man's life. The High Court took a narrow view of the whole matter with the enormity of the crime on the forefront. It enhanced the sentence to the maximum of 7 years prescribed under Section 135 of the Act. The result is that the appellant has to serve in all 14 years. The broad expanse of discretion left by legislation to sentencing Courts should not be narrowed only to the seriousness of the offences. No single consideration can definitively determine the proper sentence. The Court must recognise, learn to control and exclude' many diverse data. In consecutive sentences, in particular, the Court cannot afford to be blind to imprisonment which the accused is already undergoing. The appeal was allowed restoring the judgment of the trial Court. *Mohd Akhtar Hussain* v. *Asstt. Collector, Customs (Prevention) Ahmedabad,* AIR 1988 SC 2143 : (1988) 4 SCC 183 : 1989 CrLJ 253 : 1988 (3) Crimes 291.

[8861] ● ***Several Sentences—Execution of—Sentences to run concurrently.***—Appellants in this case are two. 1st appellant Ammavasai was convicted in 4 different cases, the occurrence in all of which took place between 27-3-1990 and 7-5-1990. The offence found against him in all the cases was under Section 395 of the IPC and in each case he was sentenced to undergo rigorous imprisonment for 7 years. If he is not given the benefit in exercise of the discretion conferred under Section 427 of the Cr PC, he may have to undergo a very long period of 28 years in jail.

The second appellant Dewaraj was convicted in 5 different cases the occurrence in all of which took place between 21-10-1989 and 7.5.1990. He was also found guilty under Section 395, IPC and was sentenced to undergo rigorous imprisonment for a period of 7 years in each case. If the benefit conferred under Section 427 in not extended to him, he may have to undergo imprisonment for a total period of 35 years in jail, on the other had, we allow the appellants to have the benefit of all the sentences to run concurrently, he would be out by now after serving only imprisonment for a period of 7 years awarded in one case. Both courses are unacceptable to us and therefore we thought of a via media which would be consistent with the administration of criminal justice. If the appellants would undergo a total period of 14 years of imprisonment in respect of all the convictions passed against them that that will be sufficient to meet the ends of Justice. *Ammavasai* v. *Inspector of Police, Valliyanar,* AIR 2000 SC 3544 : (2000) 9 SCC 749 : 2000 CrLJ 4662.

CONSENT

[8862] ● ***Consent.***—Section 92, IPC serves as a corollary to Sections 87, 88 and 89, IPC. It says in explicit term that consent will only condone the act causing harm to the person giving the consent which will otherwise be an offence. Acts which are offences independently of any harm which they may cause will not be covered by consent given under Sections 87, 88 and 89, for example causing miscarriage 'public nuisance' offences against public safety, morals *etc.* The expression "harm" connotes hurt, injury, damage, impairment, moral wrong or evil. In Sections 81, 87, 88, 89, 91, 92, 100, 104 and 106 of Penal Code it means physical injury in Section 93 an injurious mental reaction; in Section 415, injury to a person in mind, body reputation or property; in Section 469, and 499 harm to the reputation of the aggrieved party. In Section 95, the expression has a wide connotation and includes physical injury. *Veeda Menzes* v. *Yusuf Khan,* AIR 1966 SC 1773 : 1966 CrLJ 1489.

CONSENT IN OFFENCES AGAINST WOMEN
§ (See also "RAPE")

[8863] ● ***Consent in offences against women.***—The ancient law began with the concept of carnal knowledge effected by direct and overpowering physical force beating down the victim's resistance, in such a situation there was clearly no consent by the woman and this came latter to be regarded as the gist of the offence, so as to cover the case of the woman yielding (but not consenting) when faced with threats of such bodily injury to herself as she dared not resist. This development continued so as to reach cases in which for some other reason than physical intimidation there was in fact no consent. It was also realised that there could be a different situation where the woman's consent was not negatived but was in fact vitiated by intimidation, that is to say, where she had, as it were, been faced with a decision between two evils and had chosen that one which seemed to her to be lesser. Consent obtained by threat of harm to some third person was held to be no consent. *Kenny on Outlines of Criminal Law,* 19th Edition, para 143 p. 200.

[8864] ● ***Consent under fear of death or duress.***—If a woman yields through fear of death or through duress, it is rape. If the consent took place when she was in a state of insensibility from liquor, having been made drunk by the defendant (though the liquor was given only for the purpose of exciting her), it is a rape. So also, if a man gets into bed with a woman while she is asleep and he knows she is asleep and has connection with her while in that state, he is guilty of rape. It is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will, nor is it any excuse that she consented after the fact. ARCHBOLD *on pleading, Evidence and Practice in Criminal cases,* 41st Edition, para 20-345, p. 1571.

[8865] ● *Prosecutrix consenting party.*—Where the prosecutrix alleged that she was compelled, threatened or otherwise induced to go with the appellant, there should be corroboration of some material particular from some independent source, and her bare statement cannot be considered sufficient to sustain the appellant's conviction especially when she was found to have been used to sexual intercourse and appeared to be a consenting party not only to the impugned acts of sexual intercourse in question but also on earlier occasions and in that context the Court should consider the question of her age more closely, especially when the accused was acquitted of the offence under Section 376, I.P.C. The appeal was, therefore, allowed. *Ram Murti* v. *State of Haryana,* AIR 1970 SC 1029 : (1970) 3 SCC 21 : 1970 CrLJ 991 : 1970 SCCrR 510 : 1970 Cur LJ 528 : 72 PunLR 1000 : 1970 SCD 663.

[8866] ● *Prosecutrix consenting party.*—Where the prosecutrix, a grown up and experienced pregnant lady, alleged that three persons had forcible sexual intercourse with her one after the other resulting in her abortion four or five days thereafter, and where there was absence of any injury on any of the accused or on the prosecutrix except some bleeding from her vagina, the only irresistible inference therefrom is that, she was a consenting party. *Pratap Misra* v. *State of Orissa,* AIR 1977 SC 1307 : (1977) 3 SCC 41 : 1977 SCC (Cri) 447 : 1977 CrLJ 817 : 1977 CrLR (SC) 233 : 1977 SCCrR 258 : 1977 CrAppR (SC) 164 : 1977 CurLJ (Cr) 102.

[8867] ● *Sexual intercourse—Consent—Circumstances negativing existence of fear.*—In this case victim's companions consisting of her brother, aunt and the lover while left the police station, the victim was asked to wait at the police station, by the accused head constable, immediately thereafter the head constable took away the victim to a latrine where he was alleged to have committed rape on her. No mark of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair and that the story of a stiff resistance having been put up by the girl is all false. It is further clear that the averments on the part of the girl that she had been shouting loudly for help are also a tissue of lies. In coming to the conclusion that the consent of the girl was a case of "passive submission" the High Court mainly relied on the circumstance that at the relevant time the girl was in the police station where she would feel helpless in the presence of two appellants who were persons in authority and whose advances she could hardly repel all by herself and inferred that her submission to the act of sexual intercourse must be regarded as a result of fear and, therefore, is no consent in the eye of law. The reasoning of the High Court suffers from errors. The fear which clause 4 of Section 375, IPC speaks of is negatived by the circumstance that the girl to said is have been taken away by the appellant right from amongst her near and dear one's at a point of time when they were all leaving the police station together and were crossing the entrance gate to emerge out of it. The sexual intercourse in question is not proved to amount to rape and, therefore, no offence is brought home to appellant. *Tukaram* v. *State of Maharashtra*, AIR 1979 SC 185 (188, 189) : (1979) 2 SCC 143 : 1979 SCC (Cri) 381 : 1978 CrLJ 1864 : 1978 CrLR (SC) 479.

[8868] ● *Victim below sixteen years—Consent irrelevant.*—Evidence of prosecutrix was consistent and reliable. Both lower Courts believed the same and was corroborated by evidence of her own brother and father to whom she had related the details of occurrence, without delay after she was rescued. Argument that no injury was detected on her private parts or that she was found to have been used to sexual intercourse, would be of no avail to the appellants because question of consent became wholly irrelevant once it was proved that the girl was below 16 years of age. *Harpal Singh* v. *State of Himachal Pradesh*, AIR 1981 SC 361 : (1981) 1 SCC 560 : 1981 SCC (Cri) 208 : 1981 CrLJ 1 : 1981 CrLR (SC) 46 : 1981 UJ (SC) 63 : 1981 CrAppR (SC) 29 : 1981 ACrC 57 : 1981 AWC 153 : 1981 ACrR 90 : 1981 CurLJ (Cri) 82 : 1981 Bihar CrC (SC) 40 : 1981 UP CrC (SC) 40.

[8869] ● *Gang rape—Absence of injuries not to falsify case of rape.*—As to gang rape, the absence of injury on back of prosecutrix, a victim of gang rape does not falsify the case of rape. When the culprits were four in number and the victim a girl of 19/20, she is not expected to offer such resistance as would cause injuries on her (here, however, the medical evidence report showed red abrasions on her right breast). *Balwant Singh* v. *State of Punjab,* AIR 1987 SC 1080 : (1987) 2 SCC 27 : 1987 CrLJ 971 : 1987 (1) Crimes 910 (SC).

[8870] ● *Consent to sexual intercourse obtained by coercion.*—The accused persons charged for having committed rape on the wife of a labourer was a police constable in uniform and a businessman. The victim lady and her husband came to see a fair and were residing in the house of one friend of theirs. The victim and husband were called in the residence of the police constable where he was threatened to sign some papers in default of which he was to be taken into custody. The businessman accused then called the lady inside and committed rape on her and thereafter the constable too went inside and had sex with her. The consent to sexual intercourse was thus obtained by coercion. It was nothing but a helpless resignation. The two accused persons are guilty of the offence of rape. *State of Maharashtra* v. *Prakash,* AIR 1992 SC 1275 : 1993 Supp (1) SCC 653 : 1992 CrLJ 1924.

[8871] ● ***Rape—Testimony of prosecutrix acceptable.***—When the husband of the prosecutrix had gone out and she was preparing to serve fodder to the cattle, the accused came from behind, put one hand on her mouth and the other on her back and tried to push her into the cattle shed. She resisted him where upon he threw her on the ground, lifted her ghagra, untied his dhoti and forcibly raped her. The prosecutrix being a strong woman resisted the accused and in the process sustained abrasions on her lumber region as well as elbow joints. It is not possible to believe that a woman would suffer such abrasions while having sexual intercourse with her husband. The presence of abrasions on her elbow joints and the lumber region supply evidence of struggle during the act. The evidence of PW1, Dr. Soni also shows that there were teeth marks near the nipple of one of her breasts lending corroboration to her testimony that the accused had violated her person- The abrasions on the vaginal wall and the consequential inflammation of the labia majora as well as minora and the clitoris provide corroborative evidence that someone had forcible sex with her. *State of Rajasthan* v. *Narayan,* AIR 1992 SC 2004 (2007, 2008) : (1992) 3 SCC 615 : 1992 SCC (Cri) 781 : 1992 CrLJ 3655 : JT 1992 (4) SC 282 : 1992 (2) Crimes 1154.

[8872] ● ***Prosecutrix willing party.***—The two appellants were friends. They were young people at the time of the commission of the offence in the year 1984. Out of them, Shyam, A-1, wanted to marry the prosecutrix, Lalita. He made a proposal to her about two to three months prior to the occurrence which was spurned by her. On the day of the occurrence, she was incidentally at the common tap for washing clothes and to fetch water back home. The appellants riding their respective bicycles came at that time and at their asking she sat on the carrier of the bicycle of Suresh, A-2 and Shyam, A-1 followed that bicycle as if escorting. The prosecutrix was taken to a room in the house of someone where she was made to perform a ritual signifying marriage between her and Shyam, A-1.

In her statement in Court the prosecutrix has put blame on the appellants. She has deposed that she was threatened right from the beginning when being kidnapped and she was kept under threat till the Police ultimately recovered her. Normally, her statement in that regard would be difficult to dislodge, but having regard to her conduct, as also the manner of the so-called "taking", it does not seem that the prosecutrix was truthful in that regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found alone, or that her whereabouts would be under check by both the appellants/ accused and that they would emerge at the scene abruptly to commit the offence of kidnapping by "taking" her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society to which the parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not touched 18 years of age, but still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, that he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam on her own and in that sense there was no 'taking" out of the guardianship of her mother. The culpability of neither Shyam, A-1 nor that of Suresh, A-2 in these circumstances appears to as established.

The appeal was allowed. *Shyam* v. *State of Maharashtra,* AIR 1995 SC 2169 : 1995 SCC (Cri) 851 : 1995 CrLJ 3974.

[8873] ● ***Prosecutrix consenting party.***—The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of neighbours from the said village. The medical evidence of Dr. Maya Shanker Thakur, PW-2 also indicates that there were no injuries on the person of the prosecutrix including her private part. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376, IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant. *Kuldeep K. Mahato* v. *State of Bihar*, AIR 1998 SC 2694 (2696) : (1998) 6 SCC 420 : 1998 SCC (Cri) 1460 : 1998 CrLJ 4033 : JT 1998 (5) SC 395 : 1998 Cr AppR (SC) 424.

[8874] ● ***Prosecutrix not consenting party.***—According to the prosecution she resisted the accused by scratching him with nails but as no nail marks were found on the body of the accused, the learned Sessions Judge was of the view that for this reason, it is to be assumed that there was consent on the part of the prosecutrix. The accused was examined on 20-4-1993. As the incident occurred on 17-4-1993, even if there were any marks of violence on the body of accused, the same would have been obliterated and were not so prominent so as to be noticed by the Medical Officer who examined him. Therefore, the absence of nail marks or minor injuries on the body of the accused is of not much significance.

The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between the resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. From the evidence on record, it cannot be said that the prosecutrix had given consent and thereafter she turned round and acted against the interest of the accused. There is a clear credible evidence that she resisted the onslaught and made all possible efforts to prevent the accused from committing rape on her. Therefore the finding entered by the learned Sessions Judge that there was consent on the part of the prosecutrix, is without any basis. *State of Himachal Pradesh* v. *Mange Ram*, AIR 2000 SC 2798 (2801) : (2000) 7 SCC 224 : 2000 SCC (Cri) 1331 : 2000 CrLJ 4027 : 2000 CrLR (SC) 731.

[8875] ● ***Consent immaterial in certain circumstances.***—Consent is immaterial in certain circumstances covered by clauses thirdly to sixthly the last one being when the woman is under 16 years of age. Based on these provisions, an argument is usually advanced on behalf of the accused charged with rape that the absence of proof of want of consent where the prosecutrix is not under 16 years of age takes the assault out of the purview of Section 375, 2 IPC. Certainly consent is no defence if the victim has been proved to be under 16 years of age.

If the presecutrix be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable. The prosecutrix before us had just crossed the age of 16 years. She has clearly stated that she was subjected to sexual intercourse forcibly by the accused. She was not a consenting party. She offered resistance to the best of her ability but she succumbed and fell victim to the force employed by the accused. *State of Rajasthan* v. *N.K.*, AIR 2000 SC 1812 : (2000) 5 SCC 30 : 2000 SCC (Cri) 898 (910) : 2000 CrLJ 2205 : 2000 CrLR (SC) 388.

[8876] ● ***Absence of injuries on person of prosecutrix not sufficient to draw inference of consent.***—In the instant case, the prosecutrix was in her teens. The perpetrator of the crime was an able-bodied youth bustling with energy and determined to fulfil his lust armed with a knife in his hand and having succeeded on forcefully removing the victim to a secluded place where there was none around to help the prosecutrix in her defence. The injuries which the prosecutrix suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal up in ordinary course of nature within 2 to 3 days of the incident. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. *State of Rajasthan* v. *Noore Khan*, AIR 2000 SC 1812 : (2000) 5 SCC 30 : 2000 SCC (Cri) 898 : 2000 CrLJ 2205 : 2000 (2) Crimes 84 (SC).

[8877] ● *Appellant not tried to rape deceased forcefully.*—In the absence of explanation as to the serious nature of injuries sustained by the appellant giving rise to serious doubt as to the very genesis of the incident, the said portion of the statement in the complaint of PW - 5 that "she died due to deep head injuries caused by Ramkat. Ramkat also tried to kill himself stabbing by knife on the stomach" appears to have been inserted after deliberation and consultation. This insertion probabilises the defence version that the appellant and the deceased were in love. The very fact that the deceased was totally naked and the under-clothes of both the deceased and the appellant were found in the same room probabilises the theory of intercourse by consent and negatives the story of rape. PW 5 did not tolerate his sister having sex with Ramkat and that might have led to an attack on both of them on that day. In this background it appears improbable that the appellant forcefully tried to rape the deceased. Since the injuries found on the appellant could not be said to be self-inflicted, his defence, that he sustained injuries at the hands of unknown person when he tried to save the deceased, appears to be probable. Having regard to infirmities, improbabilities and contradictions found in the case it is unsafe to act upon the dying declaration. *Ronald Kiprono Ramkant* v. *State of Haryana*, AIR 2001 SC 2488 : (2001) 6 SCC 423 : 2001 SCC (Cri) 1034 (1037, 1038) : 2001 CrLJ 3942 : 2001 CrLR (SC) 500.

[8878] ● *Consent—Representation deliberately made to obtain consent.*—The crucial expression in Section 375 which defines rape as against her will. It seems to connote that the offending act was despite resistance and opposition of the woman. IPC does not define consent in positive terms. But what cannot be regarded as consent is explained by Section 90 which reads as follows:

> "Consent given firstly under fear of injury and secondly under a misconception of fact is not consent at all."

That is what is explained in first part of Section 90. There are two grounds specified in Section 90 which are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries. The factors set out in first part of Section 90 are from the point of view of the victim and second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury of misconception of fact. Thus the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent has given it under fear or misconception of fact and the court should also be satisfied that the person doing the act *i.e.* the alleged offender is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology. As observed by his Court in *Deelip Singh @ Dilip Kumar* v. *State of Bihar,* AIR 2005 SC 203 : AIR 2004 SCW 6479 : 2005 (1) SCC 88 : (2004) 4 Crimes 371, Section 90 cannot be considered as an exhaustive definition of consent for the purposes of IPC. The normal connotation and concept of consent is not intended to be excluded. *Pradeep Kumar Verma* v. *State of Bihar,* AIR 2007 SC 3059 : (2007) 7 SCC 413 : (2007) 3 SCC (Cri) 407 : 2007 CrLJ 4333 (4337) (SC) : 2007 (3) Crimes 346.

[8879] ● *Plea of consent of prosecutrix when unsustainable.*—On scrutiny of the evidence of the prosecutrix, it appears to us that the defence tried to build up a case that the prosecutrix is a consenting party to the sexual intercourse as she did not make any attempt to resist the accused from committing the offence nor the Doctors noticed any mark of injury on any part of her body. This plea of the accused, in our view, is wholly unfounded and baseless and it is falsified by the subsequent conduct of the prosecutrix, who as noticed above after the incident rushed to her mother and disclosed the entire episode to her and the prosecutrix emotionally and mentally felt so depressed and humiliated that she could not bear the insult and disrepute imprinted on her character and moral conduct by the cruel act of the accused. The prosecutrix took the extreme step of ending her life by jumping in a water tank. Further, the incident was disclosed to PW Shashappa. PW Yashodhara, Babu and Vishwanath, who eventually pulled out the prosecutrix out of the water tank and rescued her life. The incident was also disclosed to PW-6 Estate Writer, who advised the prosecutrix and her parents to lodge a report in the Police Station, which step was promptly taken by the prosecutrix on the same night. *B.C. Deva* v. *State of Kerala,* (2007) 12 SCC 122 : (2007) 3 Crimes 281 : 2007 (8) SCR 509 : 2007 (9) Scale 338.

[8880] ● *A Promise to marry without anything more—Not to give use to misconception of fact.*—A promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90, IPC. It needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause second. *Pradeep Kumar Verma* v. *State of Bihar,* AIR 2007 SC 3059 : (2007) 7 SCC 413 : 2007 (3) SCC (Cri) 407 : 2007 CrLJ 4333 (4337) (SC) : 2007 (3) Crimes 346.

[8881] ● ***Rape—Consent.***—It is found from the medical evidence and from the chemical examiner's reports that the vaginal swab and clothes taken from the dead body did indicate the presence of semen. There is however absolutely no evidence to suggest (even assuming that the intercourse had been committed by the appellant) that he had done so without Mukhtiar Kaur's consent or against her will. Some suspicions of rape could perhaps have been raised had some tell tale injuries been detected on Mukhtiar Kaur's person but the two injuries other than the gun shot wounds *i.e.* injury No. 3 being on the left pinn and No. 4 an abrasion near the right eye do not indicate an attempt to rape or the commission of rape. It is also significant that the investigators had made no attempt whatsoever to have the appellant medically examined to ascertain his capacity to perform sexual intercourse. The State counsel relying on the statement of PW 14 Inspector Harjinder Pal Singh has however submitted that the examination had not been possible as the appellant had received a very serious gun shot injury and was hanging between life and death. The submission of the counsel that an examination could not have been carried out immediately is agreeable but there is no justification in the omission of the prosecution to have him examined after he had recovered his health and been discharged from hospital. Even assuming for a moment that sexual intercourse between the two had indeed taken place it cannot be said from the evidence before us that it was without the consent or against the wishes of Mukhtiar Kaur. Ujjagar Singh's conviction under Section 376 of the IPC cannot be sustained. *Ujjagar Singh* v. *State of Punjab,* (2007) 13 SCC 90 : 2008 CrLJ 808 : 2007 (13) SCR 653 : 2008 Crimes 31 (SC).

[8882] ● ***Age of prosecutrix less than 16 years—Consent not relevant.***—Where the prosecutrix was less than 16 years of age at the time of occurrence and she admitted she had sexual intercourse with the accused because he was in live with accused, consent of victim was held not relevant. *State of Punjab* v. *Rakesh Kumar,* AIR 2009 SC 391 : (2008) 12 SCC 33 : (2008) 4 Crimes 55 : JT 2008 (9) SC 424. **To the same effect** : *Nehru* v. *State of Chhattisgarh,* AIR 2008 SC 2574 : (2008) 7 SCC 341 : 2008 (3) SCC (Cri) 96 : 2008 CrLJ 3490.

CONSENT FOR INVESTIGATION

[8883] ● ***Consent for investigation.***—It has been accepted by counsel for all the parties including the Solicitor General while S.6 of the Delhi Special Police Establishment Act, 1946 would require the consent of the State Government before jurisdiction under S.5 of that Act is exercised by the officers of that establishment, when a direction is given by the Court in an appropriate case, consent envisaged under S.6 of the Act would not be a condition precedent to compliance with the Court's direction. In our considered opinion S.6 of the Act does not apply when the Court gives direction to the CBI to conduct an investigation and counsel for the parties rightly did not dispute this position. *State of West Bengal* v. *Sampat Lal*, AIR 1985 SC 195 : (1985) 1 SCC 317 : 1985 SCC (Cri) 62 : 1985 CrLJ 516 : 1985 CrLR (SC) 7 : (1985) 1 Crimes 86.

[8884] ● ***Investigation entrusted to CBI with consent of State Govt. concerned.***—Indeed the question that falls for our determination is altogether different : and that is, when the investigation into an offence is transferred and entrusted to CBI for investigation pursuant to consent given under Section 6 of the Act and the CBI has not only started but completed the investigation armed with that consent and submitted its report under Section 173 (2) of the Code can the State Government withdraw the consent and, if so, what is the effect thereof.

That the Government of Kerala was also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated June 27, 1996 that the consent was being withdrawn in public interest to order a re-investigation of the case by a special team of State police officers, in the amendatory notification it made it clear that they wanted a further investigation of the case instead of 're-investigation of the case'. The dictionary meaning of 'further' (when used as an adjective) is 'additional', more supplemental. 'Further' investigation therefore is the continuation of the earlier investigation and not a fresh investigation or re-investigation to be started *ab initio* wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports—and not fresh report or reports—regarding the 'further' evidence obtained during such investigation. Once it is accepted—and it has got to be accepted in view of the judgment in Kazi Lhendup Dorji, (1994 AIR SCW 2190) that an investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that 'further investigation' is a continuation of such investigation which culminates in a further police report under sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State police, to further investigate into the case. To put it differently, if any further investigation is to be made it is the CBI alone which can do so, for it was entrusted to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law. In view of this finding of ours we need not go into the question, whether Section 21 of the General Clauses Act applies to the consent given under Section 6 of Act and whether consent given for investigating into Crime No. 246/94 was redundant in view of the general consent earlier given by the State of Kerala.

Even if we were to hold that the State Government had the requisite power and authority to issue the impugned notification, still the same would be liable to be quashed on the ground of *mala fide* exercise of power. *K. Chandrasekhar* v. *State of Kerala*, AIR 1998 SC 2001 (2007, 2009) : (1998) 5 SCC 223 : 1998 SCC (Cri) 1291 : 1998 CrLJ 2897 : 1998 (2) Crimes 300.

CONSENT FOR PROSECUTION

[8885] ● ***Consent for prosecution.***—As the language of Section 196 - A of the Code of CrPC stands there is no bar at all against the power of Chief Presidency Magistrate to consent to the initiation of proceedings being exercised on an application made by any person whatsoever, whether or not he is connected with the official machinery normally burdened with the duty of initiating prosecutions. It is no doubt true that the consent to be given has to follow a consideration of all the material facts of the case, but then the status of the person who supplies such facts is not relevant. If the legislature had intended to restrict the accord of consent under Section 196-A of the Code to cases in which application had been made by persons authorised in a particular manner, the exercise of the power would surely have been made subject to such a condition in specific terms. Holding that no application was at all needed for the accord of consent provided for in the section and that in any case such an application need not have been made by a person authorized. *S.N. Banerjee* v. *Babu Lal Gupta*, AIR 1979 SC 1526 (1527-1528) : (1979) 2 SCC 390 : 1979 SCC (Cri) 507 : 1979 CrLJ 950 : 1980 CrLR (SC) 8 : 1980 UJ (SC) 258.

[8886] ● ***Consent given under Section 20 of PFA Act when not proper.***—In this case the respondents were convicted by the trial Court for offences under Section 16(1)(a)(1) of the Prevention of Food Adulteration Act, 1954. The Appellate Court set aside the conviction solely on the ground that the written consent given under Section 20 of the said Act for their prosecution was not proper as the authority concerned did not give reason therefor. In recording such finding the Appellate Court relied upon the judgment of this Court in. *A.K. Roy* v. *State of Punjab*, AIR 1986 SC 2160 : (1986) 4 SCC 326 : 1986 SCC (Cri) 443 : 1986 CrLJ 2037.

[8887] ● ***Person authorised to institute complaint could give consent for prosecution.***—A complaint under S.20 of the Prevention of Food Adulteration Act, 1954 could be instituted apart from Central or State Government, by a person authorised in that behalf. Such a person who is authorised to institute complaint could "give his written consent for the prosecution by the Food Inspector", A.K. Roy, Chief Medical Officer, Chandigarh undisputedly, and as is clear from Notification No. 5210-UTF-4-67/9461 issued on 29th April, 1967 by the Chandigarh Administration in exercise of powers conferred by sub-s. (1) of Section 20 of the Prevention of Food Adulteration Act, 1954, was a person authorised to institute a complaint. Therefore, he could give his consent as well for launching of prosecution. In doing so he was neither delegating his power nor acting contrary to S.20. He was acting within the scope of authority as a person authorised to institute complaint under S.20 (1) of the Act and has been placed at par with other authorities designated in the sub-section for purposes of granting consent. *Food Inspector, Health Dept., U.T. Chandigarh* v. *Krishna Dhaba*, AIR 1994 SC 664 : 1995 SCC (Cri) 172 : 1994 CrLJ 624.

[8888] ● *Prosecution after consent by AG of India.*—After obtaining consent of the Attorney General of India, Mr. K. Parasaran (respondent no. 1 herein) under S.26 (2) of the Atomic Energy Act, 1962 and authorization from the Chief Vigilance Officer of the Department of Atomic Energy, Mr. S.K. Bhandarkar (respondent No. 2 herein) for proceeding against the applicant and prosecuting him for the various offences alleged against him, he was committed by the learned committing Magistrate to stand his trial in Court of Session. In the instant case, the applicant, a retired captain in Navy was detained while on his way to foreign country. He was charged for carrying atomic and defence secrets with him. He was prosecuted after consent by Attorney-General of India and authorisation by Department of Atomic Energy.

By no stretch of imagination, on the basis of the allegations made in this application, can it be said that either respondent No. 1 or respondent No. 2 had fabricated "false evidence" or had given "false evidence" while giving "consent" and "authorisation" as required by law for the prosecution of the applicant is discharge of their official duties. A bare look at Ss. 191, 192 and 193, IPC would show that the said provisions have no application to the case. Neither respondent No. 1 nor respondent No. 2 can be said to have given "false" evidence while giving the "consent" and "authorisation" unless the expressions "false" and "fabricated" are used as an 'abuse' rather than in the legal sense as defined in Section 191/192, IPC. How the applicant can allege that the recording of "satisfaction" by the Attorney General was a "false statement" defies logic and sense. The accusation is reckless and bereft of any factual foundation. *Buddhi Kota Subbarao* (*Dr.*) v. *K. Parasaran*, AIR 1996 SC 2687 (2690) : (1996) 5 SCC 530 : 1996 SCC (Cri) 1038 : 1996 CrLJ 3983 : 1996 CrLR (SC) 3983.

[8889] ● *Order granting consent fulfilling all requirements of Section 20 PFA Act.*—Wherein it has been observed that the consenting authority can give its consent in writing on being satisfied that a *prima facie* case exists in the facts of a particular case and on recording reason for the launching of such prosecution in public interest.

To ascertain whether the orders granting consent were proper or not we called for and looked into the relevant orders. Our such exercise persuades us to hold that the appellate Court and for that matter, the High Court were not justified in concluding that the consent was not proper. The orders show that the Joint Commissioner, Food and Drug Pune Division (the consulting authority) had gone through the relevant records of the cases including the reports of the Public Analyst and he specifically recorded therein that the prosecutions against the appellants were called for the alleged offences committed. The orders granting consent fulfil all the requirements of Section 20 of the Act. *State of Maharashtra* v. *Gopalprasad, Govindprasad Agarwal*, AIR 1999 SC 1507 : (1998) 9 SCC 274 : 1998 SCC (Cri) 1003 (1003, 1004) : 1999 CrLJ 468.

[8890] ● *Consent for trial for offences under Section 7 of Explosive Substances Act.*—The consent for the prosecution of the respondent was granted by the Additional District Magistrate of the district concerned and, in this behalf, reliance was placed, on behalf of the appellant, upon a notification dated 24th April, 1995 issued by the appellant whereunder it appointed the Joint Collector and Executive Magistrate as Additional District Magistrate for the District of Gwalior and directed that he should "exercise powers of District Magistrate conferred under the said Code (Criminal Procedure Code) or under any other law for the time being in force."

The power of giving consent under Section 7 of the Explosive Substances Act 1908, rests with the Central Government. The Central Government has delegated it to the District Magistrate. It is in our view not competent for the State Government to further delegate to the Additional District Magistrate a power of the Central Government which the Central Government has delegated to the District Magistrate. *State of Madhya Pradesh* v. *Bhupendra Singh*, AIR 2000 SC 679 : (2000) 1 SCC 555 : 2000 CrLJ 805 : 2000 CrLR (SC) 152 : JT 2000 (1) SC 82.

[8891] ● *Fresh consent to institute prosecution and recommence proceedings not required—When.*—The stage at which the prosecution proceedings reached in the trial Court was the receipt of the certificate from the Director of the Central Food Laboratory holding that there is no Kesari dal in the sample, nevertheless the sample is adulterated inasmuch as it contained synthetic coal-tar dye. When the certificate superseded the report of the Public Analyst the latter stands sunk to the bottom and in that place the certificate alone would remain on the surface of the evidence and hence that certificate alone can be considered as for the facts stated therein regarding the sample concerned. Thus the real contention posed is whether a fresh consent of the authority concerned is required when the said certificate has taken the place of the report of the Public Analyst.

What is intended by Section 216(5), CrPC is that a prosecution which requires previous sanction, cannot be started with out such sanction even by way of amending the charge midway through the trial. If the amended charge includes a new offence for which previous sanction is necessary then prosecution for such new offence cannot be started without such sanction. However the second limb of the sub-section makes it clear that if sanction was already obtained for prosecution of the same facts, as those on which the new or altered charge is founded then no fresh sanction is necessary.

The facts on which prosecution is founded under the Act were broadly that the accused had sold adulterated toor dal to the Food Inspector. Variation regarding the reasons or the data by which two different analysts had reached the conclusion that the sample is adulterated is not sufficient to hold that the basic facts on which the prosecution is founded, have been altered. Hence, Section 216(5) of the CrPC would not improve the position of the accused for the purpose of obtaining fresh consent on the facts of this case.

If the prosecution has been validly instituted, neither any new data nor any added reasons contained in the certificate issued by the Director of the Central Food Laboratory would be sufficient to annul the sanction already obtained with which the prosecution was already instituted. The trial has to proceed with the certificate on record which superseded the report of the Public Analyst. *Food Inspector, Ernakulam* v. *P.S. Sreenivasa Shenoy*, AIR 2000 SC 2577 : (2000) 6 SCC 348 : 2000 SCC (Cri) 1116 (1122, 1126) : 2000 CrLJ 3498 : 2000 CrLR (SC) 608.

[8892] ● ***Consent or sanction as envisaged by Section 470(3), CrPC not required for filing complaint.***—Sub-section (3) of Section 13 provides that cognizance of offence under the Official Secrets Act can be taken only upon complaint which is (a) filed by order of appropriate Government; or (b) filed under authority from the appropriate Government; or (c) by some officer empowered by the appropriate Government. No consent or sanction of the Government or any authority, as contemplated by Explanation to sub-section (3) of Section 470, CrPC is required for filing the complaint under the Act. "Consent" or "sanction" envisaged under S.470, CrPC cannot be equated with the "order" or "authority" for the purposes of filing the complaint as envisaged by sub-s. (3) of Section 13 of the Act. Specific provisions have been made in various statutes requiring previous consent or sanction for the purposes of launching of prosecution against the accused under those enactments. Explanation to sub-section (3) of Section 474, CrPC obviously refers to such consents and sanctions and not the order or authority as required under the Act. *Rakesh Kumar Jain* v. *State*, AIR 2000 SC 2754 (2756) : (2000) 7 SCC 656 : 2000 CrLJ 3973 : 2000 CrLR (SC) 649.

CONSENT FOR WITHDRAWAL FROM PROSECUTION

[8893] ● ***Consent for withdrawal from prosecution.***—In this case, on an application made by the Public Prosecutor under Section 494, CrPC for withdrawal from the prosecution of a case under Section 302, Penal Code, pending at the committal stage in a Magistrate's Court, the Magistrate had consented to the withdrawal and had discharged the accused. On an application in revision made by the relatives of the deceased, the High Court set aside the order of discharge and sent the case back with a direction that evidence be recorded to see whether a *prima facie* case was established against the accused.

On appeal by special leave under Article 136, the Supreme Court held that the High Court had erred in the exercise of its powers of revision as the order of the Magistrate consenting to the withdrawal and discharging the accused was in no way illegal or improper, and that therefore it was a fit case for interference. The order of the High Court was set aside, and the order of discharge made in favour of the accused was restored. *State of Bihar* v. *Ram Naresh Pandey*, AIR 1957 SC 389 : 1957 CrLJ 567 : 1957 SCA 350 : 1957 SCR 279 : 1957 SCJ 336 : ILR 36 Pat 513 : 1957 BLJR 406 : 1957 1 MLJ (Cri) 247 : 1957 MPC 420 : 1957 AWR (HC) 430 : 1957 ALJ 609.

CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974

[8894] ● ***Conservation of foreign exchange and prevention of smuggling activities Act, 1974.***—There is nothing in the scheme of Article 22 or the provisions of the COFEPOSA which requires that the representation ought always to be considered by the appropriate Government notwithstanding the fact that the order of detention has been made by an officer specially empowered in that behalf. Undoubtedly the power to revoke the detention order under Section 11 is conferred on the State Government and the Central Government whenever an order of detention is made by an officer of the State Government but that does not imply that the initial representation which a detenu has a right to make after the grounds of detention are furnished to him, must of necessity be made and considered by the State Government.

In fact, the representation can and ought to be made to the detaining authority because it is he who has to apply his mind to the facts of the case and it is he who has furnished the grounds of detention on which he has acted and it is he who has to be convinced that the action taken by him is unjustified and requires reconsideration. After all the purpose of a representation is to convince the authority to consider its decision which has resulted in the detention of the detenu. The representation is not in the form of an appeal to the higher authority and, therefore, *ipso facto* it must go to the State Government undoubtedly it would be open to the detenue to make a representation under Section 11 requesting either the State Government or the Central Government, as the case may be, to revoke the order of detention. But the initial representation that a detenu has a right to make on receipt of the grounds of detention would ordinarily be addressed to the detaining authority because it is that authority which has taken a decision adverse to the detenu and which has to be persuaded to reconsider the same. Therefore, if the detenu made the representation to the third respondent who has passed the detention order it was open to him to consider the same and after applying his mind to accept or reject the same. The failure to submit the representation addressed to the detaining authority and considered by him, to the State Government, would not vitiate the detention order. *Pushpa* v. *Union of India*, AIR 1979 SC 1953 : 1980 Supp SCC 391 : 1979 SCC (Cri) 1015 (1018, 1020) : 1979 CrLJ 1314 : 1979 CrLR (SC) 472.

[8895] ● ***Section 3 of Conservation of Foreign Exchange and prevention of Smuggling Activities Act—Scope and object.***—There is, no doubt, a distinction between an act of smuggling and abetting the smuggling of goods for purposes of preventive detention under Section 3(1) of the Act. Nonetheless, the term "smuggling" as defined in Section 2(e) of the Act has the same meaning as in Section 2(39) of the Customs Act, 1962, which, when read with Section 111 of that Act, is wide enough to include and make liable not only the actual smuggler but also persons abetting the smuggling of contraband goods as well as all persons dealing in such goods *etc*. Though the provisions of Clauses (i) and (ii) of sub-section (1) of Section 3 of the Act may operate on different fields, which may sometimes, as here, overlap still a wider meaning is given to the term 'smuggling' in Section 2 (e) of the Act, with a view to broaden the scope of preventive detention. Sub-section (1) of Section 3 of the Act provides for the different grounds of detention. Clause (ii) relates to abetting the smuggling of goods, clause (iii) relates to engaging in transporting or concealing or keeping smuggled goods. Clause (v) relates to harbouring persons engaged in smuggling goods or in abetting the smuggling of goods. It must, therefore, be assumed that the intention of the legislature was to treat the smuggling of goods and abetting the smuggling of goods as grounds separate and distinct, and both are separate grounds for detention *i.e.*, to take in all such activities which result in accomplishment of smuggling of contraband goods. *Narendra* v. *B.B. Gujral*, AIR 1979 SC 420 : (1979) 2 SCC 637 : 1979 SCC (Cri) 296 (565, 566) : 1979 CrLJ 469 : 1979 CrLR (SC) 50.

[8896] ● ***Appellant actual smugglers—Not more abettor.***—The appellant instigated, organized and facilitated the smuggling of the contraband goods in question. Not only that but he is really the person to whom the goods belonged. The appellant went to the extent of going to Dubai for purchasing the contraband goods, had, thereafter taken delivery of the same at Dubai and had them loaded into the vessel; the vessel actually belonged to the appellant and the crew members were engaged by his agent who was sent from Bombay to Dubai to bring the vessel. During his period of stay at Dubai he purchased 20 rolls of stainless steel sheets worth Rs 20 lacs, only 12 rolls of stainless steel sheets could be loaded in the vessel. During a search of the house of Kunj Mohmed, in whose name the vessel was registered, certain documents relating to the repairs of the vessel and a diary containing telephone numbers of the appellants and one postal receipt showing booking of a trunk call to appellant were recovered. It is quite clear from the facts set out in the grounds of detention that the appellant was the person who was actually engaged in the act of smuggling of the contraband stainless steel rolls into the Indian customs waters. It is, therefore, clear that for all intents and purposes the appellant was the actual smugglers and not a mere abettor. Furthermore, the activities of the appellant were such that his case would be covered by both clauses (i) and (ii) of Section 3(1) of the Act. *Narendra Purshotam Umrao* v. *B.B. Gujral*, AIR 1979 SC 420 : (1979) 2 SCC 637 : 1979 SCC (Cri) 557 : 1979 CrLJ 469 : 1979 CrLR (SC) 50 : (1979) 2 SCR 315.

[8897] ● ***Preventive detention—Grounds of detention to be communicated to detenu.***—Clause (5) of Article 22 of the Constitution makes it obligatory for the authority making an order of preventive detention to communicate to the detnue, as soon as may be, the grounds on which the order has been made and should afford him the earliest opportunity of making a representation against the order. This right to make a representation imposes a corresponding duty on the detaining authority to consider the representation because the representation may furnish such information as may necessitate revocation of the detention order as contemplated by Section 11 of the COFEPOSA. Section 11 confers power for revocation of detention orders. The obligation to furnish grounds for preventive detention and the constitutional rights conferred on the detenu to make a representation on receipt of the grounds of detention when read in the context of Section 11 would spell out a scheme that the representation, if and when made, may furnish such information to the detaining authority which may necessitate revocation of the detention order. Therefore, the importance of the constitutional right to make a representation and the corresponding duty to consider the representation cannot be underestimated and should not be whittled down. *Pushpa* v. *Union of India*, AIR 1979 SC 1953 : 1980 Supp SCC 391 : 1979 SCC (Cri) 1015 (1018) : 1979 CrLJ 1314 : 1979 CrLR (SC) 472.

[8898] ● ***Detention order—Grounds containing elaborate statement of facts—Application of mind by detaining authority.***—The ordinary criminal process is not to be circumvented or short-circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that question too was born in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so borne the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu. *Kanchanlal Maneklal Chokshi* v. *State of Gujarat,* AIR 1979 SC 1945 : (1979) 4 SCC 14 : 1979 CrLJ 1306 (SC).

[8899] ● ***Representation by detenu—Consideration of.***—When a citizen is deprived of his liberty and grounds of detention are furnished to him his representation must be examined as expeditiously as possible, but there is no hard and fast rule as to the measure of time taken by the authority for consideration of the representation. However, the Government should be vigilant in the governance of citizens. *Pushpa* v. *Union of India,* AIR 1979 SC 1953 : 1980 Supp SCC 391 : 1979 CrLJ 1314.

[8900] ● ***Grounds couched in language not known to detenu—Duty of authority to explain them to detenu.***—In cases where the detaining authority is satisfied that the grounds are couched in a language explained to the detenue, it must see to it that the grounds are explained to the detenue, a translated script is given to him and the grounds bear some sort of a certificate to show that the grounds have been explained to the detenue in the language which he understands. In the instant case a specific ground was taken that the detenue does not know English, the grounds of detention and the order of detention were in English. No vernacular translation of the grounds was given nor they were explained to the detenue in a language known to him.

The allegation seems to have been denied by the respondents, in the affidavit of Mr. P.M. Shah on behalf of the detaining authority. It was averred in para 5 that one Mr. A.K. Sharma, Police inspector C.I.D. had explained to detenue the order of detention and the grounds communicated to him. This affidavit is wholly inadmissible in evidence. If it was a fact that Mr. Sharma had personally explained the grounds to the detenue then the respondent should have filed an affidavit of Mr. Sharma himself to show that he had actually explained the contents of the grounds to the detenue by translating the same in the language which he understands. No such affidavit is forthcoming. No contemporaneous record has been produced to show that Mr. Sharma had actually explained or translated the grounds to the detenue, where the grounds are couched in a language which is not known to the detenue, unless the contents of the grounds are fully explained and translated to the detenue it will tantamount to not serving the grounds of detention to the detenue and would thus vitiate the detention *ex facie. Razia Umar Bakshi* v. *Union of India*, AIR 1980 SC 1751 : 1980 Supp SCC 195 : 1980 SCC (Cri) 846 (847) : 1980 CrLR (SC) 502.

[8901] ● ***Power of Central Govt. to revoke order of detention.***—The Central Government is empowered of revoke the order of detention at any stage. The power conferred on the Central Government by Section 11 is wide enough to enable the Central Government to revoke the detention order at any stage for the words used are "a detention order may at any time be revoked or modified". The power of the Central Government to revoke the order of detention implies that the detenue can make a representation for exercise of that power. Any petition for revocation of an order of detention should be dealt with reasonable expedition. It is clear that a representation properly addressed by the detenue to the Central Government was not forwarded to the Central Government and as such no action had been taken up to date. It may be permissible for the Central Government to take reasonable time for disposing any revocation petition. But it would not be justified in ignoring the representation for revocation of the detention as a statutory duty is cast upon the Central Government. It is necessary that the Government should apply its mind and either revoke the order of detention or dismiss the petition, declining to order for revocation. *Shyam Ambalal Siroya* v. *Union of India,* AIR 1980 SC 789 : (1980) 2 SCC 346 : 1980 SCC (Cri) 447 (449, 450) : 1980 CrLJ 555 : 1980 UJ (SC) 372.

[8902] ● ***Order of detention—When not vitiated.***—The Parliament enacted Section 5-A to make it clear that even if one of the grounds is irrelevant but the other grounds are clear and specific that by itself would not vitiate the order of detention. *State of Gujarat* v. *Chamanlal,* AIR 1981 SC 1480 : (1981) 2 SCC 24 : 1981 SCC (Cri) 311 : 1982 SCC Cr R 290 : 1981 CrLJ 1042.

[8903] ● ***Detention under Section 3 of conservation of Foreign Exchange only for purpose of preventing smuggling.***—The detention under Section 3 of the Act is only for the purpose of preventing smuggling and all the grounds, whether there are one or more, would be relatable only by various activities of smuggling and one cannot conceive of any other separate ground which could deal with matters other than smuggling because the act of smuggling covers several activities each forming a separate ground of detention and the Act deals with no other act except smuggling. What the Act provides is that where there are a number of grounds of detention covering various activities of the detenu spreading over a period or periods, each activity is a separate ground by itself and if one of the grounds is irrelevant, vague or unspecific then that will not vitiate the order of detention. Section 5-A has been enacted to make it clear that even if one of the grounds is irrelevant but the other grounds are clear and specific that by itself would not vitiate the order of detention. *State of Gujarat* v. *Chamanlal,* AIR 1981 SC 1480 : (1981) 2 SCC 24 : 1981 SCC (Cri) 311 : 1981 CrLJ 1042 : 1981 CrLR (SC) 314.

[8904] ● ***Requirement of Section 8, IPC and Conservation of Foreign Exchange Act—When complied with.***—Where requirement of Section 8 (f) has been complied with, it can be said that decision to confirm order of detention and continue detenu's detention taken by State Government and hence continuance of detention valid. *Masuma* v. *State of Maharashtra,* AIR 1981 SC 1753 : (1981) 3 SCC 566 : 1981 SCC (Cri) 750 : 1981 CrLJ 1256.

[8905] ● ***Period of one or two years to run from date of actual detention.***—The period of one or two years, as the case may be, as mentioned in Section 10 of the Act will run from the date of his actual detention, and not from the date of the order of detention. *State of Gujarat* v. *Adam Kasam Bhaya,* AIR 1981 SC 2005 : (1981) 4 SCC 216 : 1981 CrLJ 1686 : 1981 CrLR (SC) 541.

[8906] ● ***State Govt. not to withhold representation.***—State Government cannot withhold representation endorsed to Central Government to revoke detention order under Section 11 of the Act. Unexplained delay not sufficient to invalidate detention order. Court must look matter's substance but not act on only technicality. *Satpal* v. *State of Punjab,* AIR 1981 SC 2230 : (1982) 1 SCC 12 : 1982 SCC (Cri) 46 : 1981 CrLJ 1867 : 1981 CrLR (SC) 610.

[8907] ● ***Detenu when deprived opportunity of making representation.***—The detenu was arrested under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on 29th October, 1980 when the grounds of detention were served on him, but some documents relied upon in the order of detention were not supplied to the detenu as part of the grounds alongwith them. On the other hand the documents were supplied to the detenu in three instalments on 8-11-1980, 17-11-1980 and 20-12-1980. Thus, the detenu was deprived of the opportunity of making an effective representation as held by the Supreme Court. It is manifest that the order of detention is rendered void. *Taramati Chandulal Sejpal* v. *State of Maharashtra,* AIR 1981 SC 871 : (1981) 2 SCC 17 : 1981 SCC (Cri) 314 : 1981 CrLJ 445 : 1981CrLR (SC) 318 : 1981 UJ 146.

[8908] ● ***Representation of detenu to be considered with utmost expedition.***—Undoubtedly, the representation made by the detenu has to be considered by the detaining authority with the utmost expedition, but the time imperative can never be absolute or obsessive. The occasional observation made by the Supreme Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu. Law deals with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to make but despotic formulae. Considered in that light it cannot be said that there was any unreasonable delay in the present case in the disposal of the representation by the detaining authority. *L.M.S. Ummu Saleema Mst.* v. *B.B. Gujaral*, AIR 1981 SC 1191 : (1981) 3 SCC 317 : 1981 CrLJ 889 : 1981 CrLR (SC) 587 : 1983 (53) CC 312 : 1981 CAR 270 : 1981 UJ 487 : 1981 (1) Scale 843.

[8909] ● ***No non-application of mind by detaining authority to representation.***—There is no merit in the submission that the detaining authority did not apply his mind to the representation. It was argued that the representation made express reference to the retraction and yet the detaining authority did not enquire or send for retraction which admittedly was not available with him. The Court already found that no letter of retraction was sent to the Assistant Collector of Customs. A perusal of the note filed shows that the detaining authority also considered the question whether the alleged letter of retraction was posted. In the circumstances it is not possible to hold that there was non-application of mind by the detaining authority. *L.M.S. Ummu Saleema Mst.* v. *B.B. Gujaral*, AIR 1981 SC 1191 : (1981) 3 SCC 317 : 1981 SCC (Cri) 720 : 1981 CrLJ 889 : 1981 CrLR (SC) 587 : 1983 (53) CC 312 : 1981 CAR 270 : 1981 UJ 487 : 1981 (1) Scale 843.

[8910] ● ***State Govt. not guilty of unreasonable delay.***—The Customs Authority did not have more than four or five days within which to give their comments in regard to the various allegations contained in the representation of the detenu and this time taken by Customs Authorities cannot be regarded as unreasonable. In these circumstances, the State Government could not be said to be guilty of any unreasonable delay. *Masuma* v. *State of Maharashtra*, AIR 1981 SC 1753 : (1981) 3 SCC 566 : 1981 SCC (Cri) 750 : 1981 CrLJ 1256.

[8911] ● ***Representation by detenu be considered within reasonable time.***—The manner in which the representation made by the appellant has been dealt with reveals a sorry state of affairs in the matter of consideration of representation made by persons detained without trial. It is the duty of the State to proceed to determine representations with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously until a final decision is taken and communicated to the detenu. This not having been done in the present case the Court has no option but to declare the detention unconstitutional. *Harish Palwa* v. *State of Uttar Pradesh*, AIR 1981 SC 1126 : (1981) 2 SCC 710 : 1981 SCC (Cri) 589 : 1981 CrLJ 750 : 1981 CrLR (SC) 384.

[8912] ● ***Unreasonable delay in supplying copies of documents.***—Unreasonable delay of more than 3 weeks in supplying detenu with copies of those basic documents had infringed this constitutional imperative and had stultified and impeded his constitutional right to make a speedy and effective representation. Held, detenu directed by Court to be released. *Suryakant* v. *State of Maharashtra*, (1981) 2 SCC 202 : 1981 SCC (Cri) 408.

[8913] ● ***Representation rejected not by Home Minister but by Secretary.***—The representation made by the detenu was rejected not by Home Minister but by the Secty., thus representation has been rejected by an authority which had no jurisdiction at all to consider or pass any orders on the representation of the detenu. This, therefore, renders the continued detention of the petitioner void. *Kirit Kumar* v. *Union of India*, AIR 1981 SC 1621 : (1981) 2 SCC 436 : 1981 SCC (Cri) 471 : 1981 CrLJ 1267 : 1981 CrLR (SC) 263.

[8914] ● ***Documents referred to in grounds neither considered by Detaining Authority nor copies supplied.***—Whether the documents concerned are referred to, relied upon or taken into consideration by the detaining authority they have to be supplied to the detenu as part of the ground so as to enable that detenu to make an effective representation immediately on receiving the grounds of detention. This not having been done in the present case the continued detention of the petitioner must be held to be void. *Kirit Kumar* v. *Union of India*, AIR 1981 SC 1621 : (1981) 2 SCC 436 : 1981 SCC (Cri) 471 : 1981 CrLJ 1267 : 1981 CrLR (SC) 263.

[8915] ● ***Right of detenu to have interview with lawyer and family members.***—Law of preventive detention has to pass the test not only of Article 22 but also of Article 21 and if the constitutional validity of any such law is challenged the Court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. Prisoner or detenu would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation, regulating the right to have interviews with members of family and friends can be upheld as constitutionally valid under Articles 14 and 21, unless it is reasonable, fair and just. Hence Clause 3 (b) (ii) of the Conditions of Detention Order, which restricts the interview only to one in a month in the case of a detenu cannot be regarded as reasonable and non-arbitrary, particularly when a detenu stands on a higher pedestal than an under-trial prisoner or a convict for whom Rule 559-A and Rule 550 of the Rules set out in the Manual for the Superintendence and Management of Jails in the Punjab provide facility of interviews with relatives and friends twice in a week. *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981 SC 746 : (1981) 1 SCC 608 : 1981 SCC (Cri) 212 : 1981 CrLJ 306 : 1981 CrLR (SC) 437 : (1981) 19 DLT 271 : (1981) CrAppR (SC) 112 : (1981) 2 SCJ 18 : 1981 MLJ (Cri) 331 : (1981) 2 SCR 516.

[8916] ● ***Right of detenu to have interview with legal Advisor of his choice.***—Clause 3(b)(i) of the Conditions of Detention Order regulating the right of a detenu to have interview with a legal adviser of his choice is violative of Articles 14 and 21 because it prescribes that a detenu can have interview with a legal adviser only after obtaining prior permission of the District Magistrate, Delhi and the interview has to take place in the presence of an Officer of Customs/ Central Excise/Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement who has sponsored the case for detention. *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981 SC 746 : (1981) 1 SCC 608 : 1981 CrLJ 306 : 1981 CrLR (SC) 437.

[8917] ● ***Copies of documents or grounds of detention when not furnished.***—If the copies of the documents, or some of the documents, of the grounds of detention, are not furnished to the detenu within five or fifteen days, as the case may be, the continued detention of the detenu would be rendered illegal both on the grounds of violation of Article 22(5) as also on the ground of breach of requirement of Section 3(3). *Lallubhai Jagibhai Patel* v. *Union of India,* AIR 1981 SC 728 : (1981) 2 SCC 427 : 1981 CrLJ 286 : 1982 SCCr R 55

[8918] ● ***Grounds if verbally explained to detenu.***—In the circumstances, that it was not a sufficient compliance of Article 22 (5) of the Constitution of India. If the "grounds" are only verbally explained to the detenu and nothing in writing left with him in a language which he understands, then that purpose is not served and the constitutional mandate in Article 22 (5) is infringed. *Lallubhai Jagibhai Patel* v. *Union of India,* AIR 1981 SC 728 : (1981) 2 SCC 427 : 1981 CrLJ 286 : 1982 SCCr R 55.

[8919] ● ***Section 5-A of COFEPOSA Act come into operation when.***—Section 5-A will come into operation after the communication of grounds and following constitutional safeguards and it will have no application if the grounds themselves are not communicated otherwise the constitutional safeguards guaranteed under Article 22(5) of the Constitution will have no meaning. *Masuma* v. *State of Maharashtra,* AIR 1981 SC 1753 : (1981) 3 SCC 566 : 1981 CrLJ 1256 : 1982 CrLR (SC) 44 : (1982) 1 SCR 288 : 1982 Mad LJ (Cri) 140 (SC).

[8920] ● ***No material to displace correctness of recital in order.***—When no material placed before the Court by detenu to displace correctness of recital in order, the order confirming detention must be said to be made by State Government. *Masuma* v. *State of Maharashtra,* AIR 1981 SC 1753 : (1981) 3 SCC 566 : 1981 CrLJ 1256 : 1982 CrLR (SC) 44 : (1982) 1 SCR 288 :

[8921] ● ***Reference to Advisory Board—Making of.***—The Act of making a reference to the Advisory Board is a mechanical or ministerial act involving no exercise of discretion though, of course, the government is, at this stage, as at all other stages, at liberty to revoke the order of detention. The prescription of five weeks in Section 8(b) of the COFEPOSA Act for the making of a reference to the Advisory Board is with a view to enable the fulfilment of the constitutional requirement of Article 22(4) of the Constitution, and not with a view to imposing an obligation upon the Government to consider the question of the length of detention and arrive at a tentative conclusion even at that stage. Therefore it is not correct to say that because the reference to the Advisory Board was made by one of the subordinate officers of the Government, and not by the Government itself, the detention is not valid. *Kavita* v. *State of Maharashtra,* AIR 1981 SC 1641 : (1981) 3 SCC 558 : 1981 CrLJ 1262 : (1982) 1 SCR 138.

[8922] ● ***Detention for one year or two years from date of detention.***—Section 10 of the Act mentions that the detention will be for a period of one year or two years, as the case may be, from the date of detention but not from the date of order of detention. On serving one part of period of detention, he will have to serve out the balance. *State of Gujarat* v. *Adan Kasam Bhaya,* AIR 1981 SC 2005 : (1981) 4 SCC 216 : 1981 CrLJ 1686 : 1982 SC Cr R 252 : (1982) 1 SCR 740 : 1982 UP Cr Cas (SC) 24.

[8923] ● ***Detenu's representation—When not considered by Central Govt.***—Order of detention will be vitiated if detenu's representation is forwarded by Jailor to Central Government but not considered by Central Government. *Lallubhai Jogibhai Patel* v. *Union of India,* AIR 1981 SC 728 : (1981) 2 SCC 427 : 1981 CrLJ 286 : 1982 SCCr R 55.

[8924] ● ***No requirement in COFEPOSA Act that person making order of detention to consider representation.***—There is no requirement, express or implied, in any provision of the COFEPOSA Act that the person, who acts for the State Government in making the order of detention, must also consider the representation of the detenu, Government business can never get through if the same individual has to act for the Government in every case or proceeding or transaction, however advantageous it may be to do so. *Masuma* v. *State of Maharashtra,* AIR 1981 SC 1753 : (1981) 3 SCC 566 : 1981 CrLJ 1256 : 1982 CrLR (SC) 44 : (1982) 1 SCR 288 : 1982 MLJ (Cri) 140 (SC).

[8925] ● ***Delayed despatch of representation by State Govt.***—On these facts of the case that the detention is not rendered invalid by reason of delayed despatch of the representation by the State Government though delay was not explained. *Satpal* v. *State of Punjab*, AIR 1981 SC 2230 : (1982) 1 SCC 12 : (1982) SCC (Cri) 46 : 1981 CrLJ 1867 : 1982 UJ (SC) 35 : 1982 Cr AR (SC) 41.

[8926] ● ***Detenu not entitled to be represented by lawyer.***—The section does not disentitle detenu from making a request for the services of a lawyer but it disentitles him to be represented by a lawyer. *Kavita* v. *State of Maharashtra,* AIR 1981 SC 1641 : (1981) 3 SCC 558 : 1981 CrLJ 1262 : (1982) 1 SCR 138.

[8927] ● ***No nexus between unlawful activities attributed to detenu and his incarnation.***—Where there is no nexus between the unlawful activities attributed to the detenu and his incarceration and the detention is more of the character of punitive action rather than preventive set-aside. *Harnek Singh* v. *State of Punjab*, AIR 1982 SC 682 : (1982) 1 SCC 116 : 1982 CrLJ 420 (SC) : 1982 CrLR (SC) 26 : All Cr Cas 114 (SC).

[8928] ● ***Detention order—Competent authority—State Govt.***—In the instant case, in the affidavit by Sri P.M. Shah, Dy. Director it has been stated that the entire record was placed before the Home Minister who "after careful consideration of the entire record has passed the impugned order of detention" and that he (Mr. Shah) "only authenticated the impugned order of detention in accordance with sub-clause (2) of Art. 166 of the Constitution of India. As the order has been taken in the name of the Governor of Gujarat and validly authenticated by the Deputy Secretary concerned, the order tantamounts to an order by the State Government of Gujarat. It, therefore, cannot be said that the order of detention was not passed by the competent authority. *State of Gujarat* v. *Mohd. Ismail Juma*, AIR 1982 SC 683 : (1981) 4 SCC 609 : 1982 SCC (Cri) 1 (4) : 1982 CrLJ 421 : 1981 CrLR (SC) 654.

[8929] ● ***Reference to Advisory Board—Making of.***—Section 8 (b) making provisions for reference to the Advisory Board, is not confined to cases where the detaining authority has already come to a decision that the detention shall be continued for a period longer than three months. It equally applies where the detaining authority has not yet made up its mind as to how long the detention shall continue or even where the detention is to continue for a period of three months or less. *Hemlata* v. *State of Maharashtra,* AIR 1982 SC 8 : (1981) 4 SCC 647 : 1982 SCC (Cri) 16 : 1982 CrLJ 150 : (1982) 1 SCR 1028.

[8930] ● ***Defence not entitled to be heard personally nor through lawyer.***—A friend or an agent who in truth and substance, is a friend, or an agent, of the detenu may appear for the detenu but if such a friend or agent also happens to be a legal practitioner he cannot as of right, appear before the Advisory Board on behalf of the detenu. In the absence of any right to give an oral hearing in the form of making a representation under Article 22(5) of the Constitution, the question of hearing a legal practitioner on behalf of the detenu does not arise. *Devji Vallabhbhai Tandel* v. *Administrator of Goa,* AIR 1982 SC 1029 : (1982) 2 SCC 222 : 1982 CrLJ 799 : 1982 CrLR (SC) 157.

[8931] ● ***No denial of right to detenu to make representation.***—Advisory Board heard detenu personally. Hence Board did not permit legal representation of detenu as it was not considered necessary. In the said circumstances, that the detenu was not denied the right to make a proper and effective representation to the Advisory

Board. *Phillippa Anne Duke* v. *State of Tamilnadu,* AIR 1982 SC 1178 : (1982) 2 SCC 389 : 1982 SCC (Cri) 444 : 1982 CrLJ 1389 : 1982 CrLR (SC) 298.

[8932] ● *Maximum period of detention—When expired.*—In view of the fact that the maximum period of detention mentioned in Section 10 of the Act has expired, the appeal had become infructuous. *State of Gujarat* v. *Mohd. Ismail Jumma,* AIR 1982 SC 683 : (1981) 4 SCC 609 : 1982 CrLJ 421 : 1981 CrLR (SC) 654.

[8933] ● *Order of detention—When illegal.*—When representation is rejected by authority having no authority at all to consider or pass any order on representation of detenu, the order of detention would be illegal. *Kirit Kumar* v. *State of Gujarat,* 1982 SCCr R 292.

[8934] ● *Non-supply of documents and statements alongwith grounds of detention.*—Non-supply of such documents and statements along with the grounds of detention amounts of a violation of the safeguard guaranteed under Article 22(5) of the Constitution, and the continued detention of the detenue would, therefore, be illegal and void and liable to be quashed. *Sunil Dutt* v. *Union of India*, AIR 1982 SC 53 : (1982) 3 SCC 405 : 1982 CrLJ 133.

[8935] ● *Satisfaction of detaining authority not of Court.*—The High Court, in its writ jurisdiction under Article 226 of the Constitution, is to see whether the order of detention has been passed on the materials before it. If it is found that the order has been passed by the detaining authority on materials on record, then the Court cannot go further and examine whether the material was adequate or not which is the function of an appellate authority or Court. It can examine the material on record only for the purpose of seeing whether the order of detention has been passed on no material. The satisfaction, mentioned in Section 3 of the Act, is the satisfaction of the detaining authority, and not of the Court. The reason is that the satisfaction of the detaining authority is subjective. *State of Gujarat* v. *Mohd. Ismail Juma*, AIR 1982 SC 683 : (1981) 4 SCC 609 : 1982 SCC (Cri) 1 : 1982 CrLJ 421 : (1982) 1 SCR 1014.

[8936] ● *Order taken in name of Governor and validly authenticated by Deputy Secretary.*—As the order has been taken in the name of the Governor and validly authenticated by the Deputy Secretary concerned the order tantamounts to an order by the State Government. If therefore cannot be said that the order of detention was not passed by the Competent Authority. *State of Gujarat* v. *Mohd. Ismail Juma*, AIR 1982 SC 683 : (1981) 4 SCC 609 : 1982 SCC (Cri) 1 : 1982 CrLJ 421 : 1981 CrLR (SC) 654.

[8937] ● *Expressions "relied on" "referred to" or "based on".*—Once the documents are referred to in the grounds of detention, it becomes the bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or *pari passu* the grounds of detention. There is no particular charm in the expressions "relied on", "referred to" or "based on" because ultimately all these expressions signify one thing, namely, that the subjective satisfaction of the detaining authority has been arrived at on the documents mentioned in the grounds of detention. The question whether the grounds have been referred to, relied on, or based on is merely a matter of describing the nature of the grounds. So, even, the documents referred to in the grounds of detention, have to be furnished to the detenu. If there is undue delay in furnishing the statements and documents referred to in the grounds of detention, the right to make an effective representation is denied. Thus, it is absolutely clear that whether the documents concerned and referred to, relied on or taken into consideration by the detaining authority, they have to be supplied to the detenu as part of the grounds so as to enable the detenu to make an effective representation immediately on receiving the grounds of detention. When this has not been done, the detention is illegal. *Kirit Kumar Chamanlal Kundaliya* v. *State of Gujarat,* 1982 SCCr R 292.

[8938] ● *Past acts of detenu index of his future conduct.*—An inference in each case will depend on the nature of the act and the attendant circumstances. Where the detenu tried to export Indian currency to the tune of Rs. 2,88,900/- to a foreign country in a planned and pre-meditated manner by clever concealment of it in several parts of his luggage, it was held that it fully justified the detaining authority in coming to the conclusion that he might repeat his illegal act in future also and that his detention was necessary to prevent him from repeating the same in future. His past act in the circumstances might be an index of his future conduct. *Saraswathi Seshagiri* v. *State of Kerala*, AIR 1982 SC 1165 : (1982) 2 SCC 310 : 1982 CrLJ 1251 : 1982 CrLJ (SC) 252 : 1982 UJ (SC) 389.

[8939] ● *Supply of copies of documents to detenu—Existence of exceptional circumstances.*—It is true that neither Section 3(3) of the Act, nor Article 22(5) of the Constitution, casts any duty on the detaining authority to inform the detenu anything about the exceptional circumstances, due to which delay might occur, nor about the fact whether reasons have been recorded in writing or not. But one of the requisite safeguards is that unless exceptional circumstances really obtain in a case, the delay in the supply of ground of detention and /or the documents and statements incorporated therein by reference beyond the normal period of five days would be fatal to the continued detention of the detenu. In other words, the detenu is entitled to satisfy either the superior authority or the Advisory Board that the delay, that has occurred on the supply of requisite material to him, was not justified because exceptional circumstances did not exist or those put forward were unreal or invalid. Obviously, the detenu will not be in a position to do so if the alleged exceptional circumstances are not communicated to him. Therefore, a duty to inform the detenu about the existence of exceptional circumstances and what they were for delay in supplying grounds of detention and/or documents and statements incorporated therein arises by necessary implication and flows from the right which is conferred upon the detenu to make representation against his detention. Failure of the detaining authority in this regard constitutes a breach of the safeguards contained in Articles 22 (5), read with Section 3(3) of the Act, and vitiates the continued detention of the detenu. *Ibrahim Ahmed Batti* v. *State of Gujarat*, AIR 1982 SC 1500 : (1982) 3 SCC 440 : 1982 CrLR (SC) 465.

[8940] ● ***Preventive detention—Serious invasion of personal liberty.***—Preventive detention is a serious invasion of personal liberty and the normal methods, open to a person charged with commission of any offence, to disprove the charge or to prove his innocence at the trial, are not available to the person preventively detained, and therefore, in preventive detention jurisprudence, whatever little safeguards, which the Constitution and the enactment, authorising such detention, provide assume utmost importance and must be strictly adhered to, and one of such safeguards is that unless exceptional circumstances really obtain, the delay in the supply of grounds of detention as also the documents and statements, incorporated therein by reference beyond the normal period of five days, would be fatal. *Ibrahim Ahmed Batti* v. *State of Gujarat*, AIR 1982 SC 1500 : (1982) 3 SCC 440 : 1982 CrLR (SC) 465.

[8941] ● ***Detention under Section 3(1), COFEPOSA Act—Supreme Court quashing order of High Court—Effect.***—Once the order, quashing the order of detention of the detenu, is set aside by the Supreme Court, the order of the High Court, rendering the order of detention *non est*, itself becomes *non est* and the order of detention gets life. *State of Gujarat* v. *Mohd. Ismail Juma*, AIR 1982 SC 683 : 1982 SCC (Cri) 1 : 1982 CrLJ 421 (SC) : (1982) 1 SCR 1014 : 1982 SCCr R 254.

[8942] ● ***Document relied on by authorities not supplied with grounds of detention.***—The question of demanding the documents by detenu from the detaining authority is wholly irrelevant because it is constitutional mandate which requires the detaining authority to give the documents relied on, or referred to in the order of detention *pari passu* the grounds of detention in order that the detenu may make an effective representation immediately, instead of waiting for the documents to be supplied with. If the accused has been seriously handicapped in making an effective representation because of the non-supply of the material documents, the detention is illegal. *Mohd. Zakir* v. *Delhi Administration*, AIR 1982 SC 696 : (1982) 3 SCC 216 : 1982 SCC (Cri) 695 : 1982 CrLJ 611 (SC).

[8943] ● ***Prosecution or absence of it not absolute bar to order of preventive detention.***—A prosecution or the absence of it is not an absolute bar to an order of preventive detention, the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that this offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is required is that the detaining authority is to satisfy the Court that it had, in mind, the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. In some cases of prosecution, it may not be possible to bring home the culprit to book as in the case of professional bully, a murderer or a dacoit, as witnesses do not come forward to depose against him out of fear, or in the case of international smuggling, it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt. *Hemlata Kantilal Shah* v. *State of Maharashtra*, AIR 1982 SC 8 : (1981) 4 SCC 647 : 1982 SCC (Cri) 16 : 1982 CrLJ 150 (SC) : (1982) 2 Bom CR (SC) 218.

[8944] ● ***Past conduct or antecedent history of person taken into account in making detention order.***—It is indeed largely from prior events showing tendencies or inclinations of a person that an inference can be drawn whether he is likely, in future, to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the national economy. *Hemlata Kantilal Shah* v. *State of Maharashtra*, AIR 1982 SC 8 : (1981) 4 SCC 647 : 1982 SCC (Cri) 16 : 1982 CrLJ 150 (SC) : (1982) 2 Bom Cr (SC) 218.

[8945] ● ***Detention under Section 3(1) COFEPOSA Act—Subjective satisfaction of authority.***—The authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law; if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is require is that the detaining authority is to satisfy the Court that it has in mind the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. In some cases of prosecution, it may not be possible to bring home the culprit to book as in case of a professional bully, a murderer or a dacoit, as witnesses do not come forward to depose against him out of fear or in case of international smuggling it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt. The past conduct or antecedent history of a person can appropriately be taken into account in making inclinations of a person, that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the national economy. So, when the Legislature has authorized the detaining authority to arrive at a subjective satisfaction for making the order of detention, it is not for the Court to question whether the grounds given in the order are sufficient or not for the subjective satisfaction of the authority. *Saraswathi Seshagiri* v. *State of Kerala*, AIR 1982 SC 1165 : (1982) 2 SCC 310 : 1982 CrLJ 1251 : 1982 UJ (SC) 389 : 1982 All Cr Cas 179.

[8946] ● ***Non-supply of copies of documents and material in support of grounds of detention.***—It is true the under sub-section (3) of Section 3 of the COFEPOSA Act, it is provided that for the purpose of Article 22(5) of the Constitution, the communication, to a person detained in pursuance of the detention order, of the grounds, on which the order has been made, shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention. This provision, under which five days' period in normal circumstances and fifteen days' period in exceptional circumstances, had been provided, relates to the supply for communication of the grounds, on which the order of detention has been made to the detenu. It has no reference to the documents and material on the basis of which the detention order has been made and it is quite clear that there is no reason why the documents and materials in support of the grounds, on the basis of which the detention order has been made, the same being ex hypothest in existence at the time of issuance of the detention order and framing of the grounds, should not be supplied to the detenu along with the grounds. Non-supply of such materials and documents, along with the grounds, clearly amounts to a violation of the safeguard guaranteed under Article 22(5) of the Constitution. *Sunil Dutt* v. *Union of India*, AIR 1982 SC 53 : (1982) 3 SCC 405 : 1982 CrLJ 193 (SC).

[8947] ● ***Failure of Jail Superintendent or State Govt. to forward detenu's representation to Central Govt.***—Section II (1) of The Act confers upon the Central Government the power to revoke an order of detention even if it is made by the Central Government or its officer. That power in order to be real and effective, must imply the right in a detenue to make a representation to the central Government against the order of detention.

The failure of the Jail Superintendent or the State Government to forward the detenu's representation to the Central Government has deprived the detenu of the valuable right to have his detention revoked by that *i.e.,* the Central Government, and, therefore, the detention of the detenu is illegal and liable to be set aside. *Rattan Singh* v. *State of Punjab,* AIR 1982 SC 1 : (1981) 4 SCC 481 : (1982) 1 SCR 1010 : 1982 CrLJ 146 (SC) : 1982 Bih Cr Cas (SC) 70.

[8948] ● ***Right of detenu to be represented by friend.***—The right of a detenu to be represented by a friend, who, in truth and substance, is not a legal practitioner, cannot be disputed. If the Advisory Board has turned down the detenu's request to be represented before it through a non-lawyer educated friend without giving any reasons for rejecting the request, the continued detention of the detention is vitiated, and, therefore, the detenu is entitled to be freed forthwith. *Abdul Zabbar* v. *State of Rajasthan,* AIR 1983 SC 505 : (1984) 1 SCC 443 : 1983 SCC (Cri) 106 : 1983 CrLJ 853.

[8949] ● ***Section 8 of COFEPOSA Act provides for Advisory Board are its procedure.***—Section 8 of the COFEPOSA Act, provides for an Advisory

Board and its procedure for the purpose of reviewing the detention cases. Clause (c) of Section 8 provides that the Board can call for such information as is necessary for the appropriate Government or from any person called for the purpose through the appropriate Government. Where what was done was that the Customs Officer was present before the Advisory Board with the files and documents, as directed by the Board under Section 8 (c) of the Act, and it was not the case of the detenu that they either pleaded or argued the case of the Government, it was held that there could be no question of violation of Article 14 of the Constitution. *Suresh Bhojraj Chelani* v. *State of Maharashtra,* AIR 1983 SC 181 : 1983 (1) SCC 382 : 1983 SCC (Cri) 202 : 1983 CrLJ 342 : 1984 SCCr R 32.

[8950] ● ***Maximum period of detention one year.***—As contemplated by Section 10 of the Act the maximum period shall be one year, but the Government if it so thinks fit, may revoke the order of detention earlier under the proviso. It has nowhere been mentioned that the period of one year or the period lesser than one year shall have to be mentioned in the order of confirmation. The maximum Period (in this case) is one year. When no period in mentioned in an order, the implication is that the detention is for the maximum period of one year (or two years as the case may be). Detention beyond the maximum period will be illegal. *Suresh Bhojraj Chelani* v. *State of Maharashtra,* AIR 1983 SC 181 : (1983) 1 SCC 382 : 1983 SCC (Cri) 202 (206) : 1983 CrLJ 342 : 1983 CrLR (SC) 128.

[8951] ● ***Non-supply of documents not substitute for copies of documents.***—The explanation for the non-supply of the documents cannot be a substitute for the copies of the documents without which the respondent could not have made any effective representation against his detention. This Court has repeatedly held in several decisions that the failure to supply copies of documents referred to and relied upon in the grounds of detention for the purpose of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 vitiates the detention itself.

In the present case also copies of documents which were indisputably material documents and were referred to in the grounds of detention and relied upon for the purpose of detention were admittedly not supplied to the respondent.

Therefore, the detention of the respondent was bad in law and the order of detention could not be sustained and is liable to be quashed. *Union of India* v. *Haji Mastan Mirza*, AIR 1984 SC 681 : (1984) 2 SCC 427 : 1984 SCC (Cri) 271 (276, 277) : 1984 CrLJ 610 : 1984 CrLR (SC) 117 : (1984) 3 SCR 1 : (1984) 1 Crimes 651.

[8952] ● ***Named authorities under Section 11(1)(a) and (b) of COFEPOSA Act entitled to exercise powers of revocation.***—The power conferred under clauses (a) and (b) of sub-section (1) of Section 11 is in fact extension of the power recognised under Section 21 of the General Clauses Act and while under the General Clauses Act, the power is exercisable by the authority making the order, the named authorities under clauses (a) and (b) of Section 11 (1) of the Act are also entitled to exercise the powers of revocation. *Ibrahim Bachu Bafan* v. *State of Gujarat,* AIR 1985 SC 697 : (1985) 2 SCC 24 : 1985 CrLJ 533 at 536 (SC).

[8953] ● ***Order of detention where quashed by Court in exercise of extra-ordinary jurisdiction.***—Court is of the view that this seems to be the legislative scheme. The pronounced judicial view of this Court was that repeated orders of detention are not to be made. Parliament while making provision in Section 11(2) of the Act, must be taken to have been aware of such view and in conferring the power of making repeated orders, safeguards have been provided under subsection (1) by confining the exercise of power to limited situations. Clothing the prescribed authority to exercise power under Section 3 even in a situation where the Court has intervened to bring about nullification of the order of detention would give rise to complicated situations and keeping the scheme of the section in view Court is of the clear opinion that where an order is quashed by a Court in exercise of extraordinary jurisdiction, the power of making a fresh order under sub-section (2) of Section 11 is not available to be exercised. *Ibrahim Bachu Bafan* v. *State of Gujarat,* AIR 1985 SC 697 : (1985) 2 SCC 24 : 1985 CrLJ 533 at 536 (SC).

[8954] ● ***Order of detention—Where quashed by High Court.***—When the High Court exercises jurisdiction under Article 226 of the Constitution it does not make an order of revocation. By issuing a high prerogative writ like *habeas corpus* of certiorari it quashes the order impugned before it and by declaring the order to be void and striking down the same it nullifies the order. The ultimate effect of cancellation of an order by revocation and quashing of the same in exercise of the high prerogative jurisdiction vested in the High Court may be the same but the manner in which the situation is obtained is patently different and while one process is covered by Section 11(1) of the Act, the other is not known to the statute and is exercised by an authority beyond the purview of sub-section (1) of Section 11 of the Act. It is, therefore, Court's clear opinion that in a situation where the order of detention has been quashed by the High Court sub-section (2) of Section 11 is not applicable and the detaining authority is not entitled to make another order under Section 3 of the Act on the same grounds. *Ibrahim Bachu Bafan* v. *State of Gujarat,* AIR 1985 SC 697 : (1985) 2 SCC 24 : 1985 CrLJ 533 at (536) (SC).

[8955] ● *Revocation or modification of order of detention.*—The words "without prejudice to the provisions of Section 21, General Clauses Act, 1897" used in Section 11 (1), COFEPOSA give expression to the legislative intention that without affecting that right which the authority making the order enjoys under Section 21 of the General Clauses Act, an order of detention is also available to be revoked or modified by authorities named in clauses 9(a) and (b) of Section 11(1) of the Act. Power conferred under clauses (a) and (b) of Section 11(1) of the Act could not be exercised by the named authorities under Section 21 of the General Clauses Act as these authorities on whom such power has been conferred under the Act are different from those who made the orders. Therefore, conferment of such power was necessary as Parliament rightly found that Section 21 of the General Clauses Act was not adequate to meet the situation. Thus, while not affecting in any manner and expressly preserving the power under Section 21 of the General Clauses Act of the original authority making the order, power to revoke or modify has been conferred on the named authorities. *Ibrahim Bachu Bafan* v. *State of Gujarat,* AIR 1985 SC 697 : (1985) 2 SCC 24 : 1985 CrLJ 533.

[8956] ● *Object with which detenu detained direct nexus with object sought to be achieved by Act.*—We do not agree with the petitioner's learned counsel that prevention of smuggling of hashish for which the detenu had been detained under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 has no nexus with the object sought to be achieved by that Act. The questions of smuggling and foreign exchange are very much involved in the act of smuggling of hashish pursuant to the conspiracy of which the detenu is alleged to be the principal conspirator and they have direct nexus with the object sought to be achieved by the provisions of the Act. The hashish has been smuggled from Pakistan and was intended to be smuggled out of India evidently in exchange for foreign currency or foreign goods. Therefore we find that the object with which the detenu has been detained has direct nexus with the object sought to be achieved by the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. *Tusher Govindji Shah* v. *Union of India*, AIR 1985 SC 511 : (1985) 1 SCC 571 : 1985 SCC (Cri) 135 : 1985 CrLJ 793 : 1985 CrLR (SC) 143.

[8957] ● *Advisory Board merely stating "the detention" as necessary—Detenu not to be detained for more than one year.*—In the instant case an order of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act was made by the Additional Secretary to the Government of India, Finance Department against Satar Habib Hamdani. The grounds of detention were served on him. On July 13, 1984 the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act was amended by an Ordinance which was replaced by an Amending Act. Purporting to act under S. 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act as amended, the Additional Secretary to the Government of India made a declaration that he was satisfied that "Shri Satar Habib Hamdani abets and is likely to abet the smuggling of goods into and through Porbandar which is an area highly vulnerable to smuggling, as defined in *Explanation* 1 to S. 9 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974". Thereafter, the usual reference to the Advisory Board was made and after obtaining the opinion of the Advisory Board, the Government of India confirmed the detention of Satar Habib Hamdani for a period of two years. The scheme of Sections 3, 8, 9 and 10 appears to be that while generally the period for which a person may be preventively detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 in connection with smuggling activities, may not exceed a period of one year, in case of certain kinds of activities of smuggling into, out of or through "any area highly vulnerable to smuggling", the period may extend upto two years. In the latter event a declaration is required to be made within five weeks of the detention of such person in the manner provided by S. 9(1) of the Act. That is not enough. In a case to which S. 9 applies, S. 8 stands suitably amended, a reference is required to be made within four months and two weeks by the Government to the Advisory Board and the Advisory Board is required to state its opinion within five months and three weeks from the order of detention whether there is sufficient cause for the "continued detention" of the person concerned. In other words, the Advisory Board is to state its opinion not merely whether detention is necessary but whether continued detention is necessary. The Advisory Board will necessarily have to go behind the declaration under S. 9(1) to consider the question whether there is sufficient cause for "Continued detention". The two safeguards provided to the detenue against a "continued detention", at that stage, are the application of mind by the specified authority before making a declaration under S. 9(1) and the consideration of the question by the Advisory Board . . . . In the absence of the Advisory Board's opinion to the effect that there is sufficient cause for the "continued detention" of the detenu, their detention for a period exceeding one year is without legal sanction. *Satar Habib Hamdani* v. *K. S. Dilip Sinhji,* AIR 1986 SC 418 : (1986) 1 SCC 544 : 1986 SCC (Cri) 91 : 1986 CrLJ 378 : 1986 CrLR (SC) 84 : (1986) 1 Crimes 370. **TO THE SAME EFFECT** : (1) *Jusab Hazi Ismail* v. *K.S. Dalip Singh, Secretary to Govt. of India,* AIR 1986 SC 418 : (1986) 1 SCC 544 : 1986 SCC (Cri) 91 : 1986 CrLJ 378 : 1986 CrLR (SC) 84 : (1986) 1 Crimes 370.

[8958] ● ***Advisory Board merely stating "the detention" as necessary—Detenu not to be detained for more than one year.***—If the Advisory Board merely states that the detention of the person is necessary it is not for any one else to supplement the Advisory Board's opinion and substitute the words "continued detention" for the word "detention". The matter is of vital importance for that. The omission of the words "continued detention" in the opinion of the Advisory Board cannot be slurred over in the fashion we are invited to do in the counter-affidavit. Nor can we treat the omission as a mere clerical or typographical error when that is not the express case of the respondents. We are of the opinion that in the absence of the Advisory Board's opinion to the effect that there is sufficient cause for the 'continued detention' of the detenus, their detention for a period exceeding one year is without legal sanction. It is already much more than one year since the appellants have been detained. *Satar Habib Hamdani* v. *K. S. Dilip Sinhji,* AIR 1986 SC 418 : (1986) 1 SCC 544 : 1986 SCC (Cri) 91 : 1986 CrLJ 378 : 1986 CrLR (SC) 84 : (1986) 1 Crimes 370.

[8959] ● ***Satisfaction of detaining authority—When reached on bona fide basis.***—It is interesting to note that the contraband articles alleged to be worth more than 1/2 crores of rupees had been received on the sea-shore at the back of the Raj Bhavan of Bombay. Access to this place was only through the Raj Bhavan. Sabnis was an employee of the Raj Bhavan at the relevant time and the detenu had asked Sabnis to allow the truck to enter into the Raj Bhavan compound for the purpose of transporting the contraband articles. It was upto the detaining authority to accept the statement of Sabnis and to be satisfied that such statement provided the link between the detenu and the receipt of the contraband articles and the bundle of facts relating thereto. This satisfaction under the law is subjective and it is not for the Court to test the adequacy of the material on which satisfaction is reached. It is quite possible that at a trial conviction may not have been secured on the basis of statement of Sabnis. But that argument is nor available for challenging an order of detention if the satisfaction of detaining authority has been reached on *bona fide* basis. *Asha Keshavrao Bhosale* v. *Union of India*, AIR 1986 SC 283 (287) : (1985) 4 SCC 361 : 1985 SCC (Cri) 561 : 1986 CrLJ 177 : 1986 CrLR (SC) 4 : (1985) 2 Crimes 799.

[8960] ● ***Order of detention—Intelligence report relied upon not supplied.***—On the facts of the case we are, however, satisfied that adequate material had been disclosed and no prejudice appears to have been caused for want of further disclosure.

It may be that the exact information received from the intelligence source had not been made available to the petitioner or placed on record but sufficient material with reference to the intelligence report has been made available. *Asha Keshavrao Bhosale* v. *Union of India*, AIR 1986 SC 283 (288) : (1985) 4 SCC 361 : 1985 SCC (Cri) 561 : 1986 CrLJ 177 : 1986 CrLR (SC) 4 : (1985) 2 Crimes 799.

[8961] ● ***Preventive Detention—Grounds.***—The Constitution requires that the grounds must be communicated. Therefore, it must follow as an imperative that the grounds must be communicated in a language understood by the person concerned so that he can make effective representation. Here the definite case of the petitioner's father is that he does not understand English or Hindi or Malayalam and does understand only Gujarati language. The facts revealed that the detenu Venilal was constantly accompanied and was in the company of his daughter as well as son—both of them knew English very well. The father signed document in Gujarati which was written in English which is his mercy petition in which he completely accepted the guilt of the involvement in smuggling. That document contained *inter alia* a statement "I myself am surprised two understand what prompted me to involve in such activity as dealing in imported Gold". He further asked for mercy.

There is no rule of law that commonsense should be put in cold storage while considering constitutional provisions for safeguards against misuse of powers by authorities though these constitutional provisions should be strictly construed. Bearing this principle in mind and, having regard to the conduct of the detenue, Venilal Mehta, specially in the mercy petition and other communications, the version of the detenu Venilal is feigning lack of any knowledge of English must be judged in the proper perspective. He was, however, in any event given by 30th June, 1984, the Hindi translation of the grounds of which he claimed ignorance. The gist of the annexures which were given in Malayalam language had been stated in the grounds. That he does not know anything except Gujarati is merely the *ipse dixit* of Venilal Mehta and is not the last word and the Court is not denuded of its powers to examine the truth. He goes to the extent that he signed the mercy petition not knowing the contents nor understanding the same because his wife sent it though he was 60 years old and he was in business, and he was writing at a time when he was under arrest, his room had been searched, gold biscuits had been recovered from him.

The detaining authority rightly came to the conclusion that he knew both Hindi and English. It has been stated so in the affidavit filed on behalf of the respondent. The detenu Venilal Mehta was merely feigning ignorance in English. *Prakash Chandra Mehta* v. *Commissioner and Secretary, Government of Kerala*, AIR 1986 SC 687 : 1985 Supp SCC 144 : 1988 SCC (Cri) 332 : 1986 CrLJ 786 : 1985 CrLR (SC) 301 : 1985 Cr App R (SC) 266 : (1985) 3 SCR 697.

[8962] ● ***Detention—Word "grounds" concept of—Explained.***—"The "grounds" under Art. 22(5) of the Constitution do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The concept of "grounds," therefore has to receive an interpretation which will keep it meaningfully in tune with the contemporary notions of the reatihes of the society and the purpose of the Act in the light of concepts of liberty and fundamental freedoms guaranteed by Arts. 19(1), 21 and 22 of the Constitution. The concept of "grounds" used in the context of detention in Art. 22(5) of the Constitution and in sub-s. (3) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, therefore, has to receive an interpretation which will keep in meaningfully in tune with a contemporary notion. While the expression "grounds" for that matter includes not only conclusions of fact but also all the "basic facts" on which those conclusions were founded, they are different from subsidiary facts or further particulars of the basic facts." *Prakash Chandra Mehta* v. *Commissioner and Secretary, Government of Kerala*, AIR 1986 SC 687 : 1985 Supp SCC 144 : 1985 SCC (Cri) 332 : 1986 CrLJ 786 : 1985 CrLR (SC) 301 : 1985 Cr App R (SC) 266 : (1985) 3 SCR 697.

[8963] ● ***Pendency of prosecution—Order of detention vitiates whole case.***—Pendency of prosecution, order of detention passed vitiates whole case. *Sita Ram* v. *State of Rajasthan*, AIR 1986 SC 1072.

[8964] ● ***Preventive detention—Delay in passing order of detention.***—It is no doubt true that where an unreasonable long period has elapsed between the date of the incident and the date of the order of detention, an inference may legitimately be drawn that there is no nexus between the incident and the order of detention and the order of detention may be liable to be struck down as invalid. *Shiv Ratan Makim* v. *Union of India*, AIR 1986 SC 610 : (1986) 1 SCC 404 : 1986 SCC (Cri) 74 : 1986 CrLJ 813 : 1986 CrLR (SC) 89 : (1986) 1 Crimes 465.

[8965] ● ***No hard and fast rule as to what length of time snaps nexus between incident and order of detention.***—But there can be no hard and fast rule as to what is the length of time which should be regarded sufficient to snap the nexus between the incident and the order of detention. In the present case the lapse of time between the date of the incident and the date of the order of detention has been sufficiently explained by the detaining authority and hence no inference of *mala fides* can be drawn merely because the order of detention happened to be made about five months after the petitioner was found carrying two pieces of foreign marked gold. *Shiv Ratan Makim* v. *Union of India*, AIR 1986 SC 610 (612, 613) : (1986) 1 SCC 404 : 1986 SCC (Cri) 74 : 1986 CrLJ 813 : 1986 CrLR (SC) 89 : (1986) 1 Crimes 465.

[8966] ● ***Preventive detention—Plea of solitary incident.***—On the basis of information received, the customs officers intercepted an autoriksha coming from Nepal. The occupants of autoriksha were searched by the customs officers and as a result of search from the pocket of the trousers worn by the petitioner, two pieces of foreign marked gold in the shape of round tablets weighing 373.800 grms, and valued at Rs. 74,760 were recovered and they were seized under the Customs Act. The petitioner was immediately arrested and on interrogation, he filed a written statement on the same day stating that he had been unemployed for a long time and that he was introduced in the business of purchase and sale of foreign marked gold by one Prakash Pincha and that on 16th November, 1984, he left Kathiar by bus and arrived in Kathmandu at 6 a.m. on 18th November, 1984 and stayed at Kanji Lodge in Kathmandu and as per prior arrangement, he contacted one Dena Lal Aggarwal on telephone no. 344889 and Dena Lal Aggarwal thereupon came to Kanji Lodge along with the requisite quantity of gold and he took delivery of gold from Dena Lal Aggarwal and paid him Rs. 70,400 in Indian currency and thereafter he left Kathmandu at 18.00 hrs on 19th November 1984. Having regard to the nature of the activity of smuggling, an inference could legitimately be drawn even from a single incident of smuggling that the petitioner was indulging in smuggling of gold. Moreover, the written statement given by the petitioner clearly indicated that the petitioner was engaged in the business of purchase and sale of foreign marked gold and that this incident in which he was caught was not a solitary incident. The facts stated by the petitioner in his written statement could legitimately give rise to the inference that the petitioner was a member of a smuggling syndicate and merely because only one incident of smuggling by the petitioner came to light, it did not mean that this was the first and only occasion on which the petitioner tried to smuggle gold. *Shiv Ratan Makim* v. *Union of India*, AIR 1986 SC 610 (611, 612) : (1986) 1 SCC 404 : 1986 SCC (Cri) 74 : 1986 CrLJ 813 : 1986 CrLR (SC) 89 : (1986) 1 Crimes 465.

[8967] ● ***No power of Court to substitute period of detention.***—The Court has no power to substitute the period of detention either by abridging or enlarging it. The only power that is available to the Court is to quash the order in case it is found to be illegal. That being so, it would not be open to the Court to reduce the period of detention by admitting the detenu on parole. What in a given situation should be the sufficient period for a person to be detained for the purposes of the Act is one for the subjective satisfaction of the detaining authority.

The period during which the detenu is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, for in such a case he was not in actual custody. The order of detention prescribes the place where the detenu is to be detained. Parole brings him out of confinement from that place. Whatever may be the terms and conditions imposed for grant of parole, detention as contemplated by the Act is interrupted when release on parole is obtained. The position would be well met by the appropriate answer to the question "how long has the detenu been in actual custody pursuant to the order?" According to its plain construction, the purpose and object of Section 10 is to prescribe not only for the maximum period but also the method by which the period is to be computed. The computation has to commence from the date on which the detenu is taken into actual custody but if it is interrupted by an order of parole, the detention would not continue when parole operates and until the detenu is put back into custody. The running of the period recommences then and a total period of one year has to be counted by putting the different periods of actual detention together. We see no force in Shri Jethamalani's submission that the period during which the detenu was on parole has to be taken into consideration in computing the maximum period of detention authorized by Section 10 of the Act. *Poonam Lata* v. *M.L. Wadhawan,* AIR 1987 SC 1383 : (1987) 3 SCC 347 : 1987 SCC (Cri) 506 : 1987 CrLJ 1130 : 1987 CrLR (SC) 410.

[8968] ● ***Omission of representation in declaration.***—In the circumstances even though the representation has not been referred to in the declaration, there is ample evidence to show that respondent 2 had considered the representation before he made the declaration. The non-mention of the representation in the declaration seems to be a mere omission. *Madhu Khanna* v. *Administrator, Union Territory of Delhi,* AIR 1987 SC 48 (50) : 1986 SCC (Cri) 426 : (1986) 4 SCC 240 : 1987 CrLJ 318 : 1986 CrLR (SC) 401.

[8969] ● ***Report of Advisory Committee when considered by Confirming Authority.***—The report of the Advisory Committee was considered by the confirming authority. In the circumstances, it cannot be said that the confirming authority had not applied his mind to the evidence of the defence witness as contended on behalf of the appellant. It is, however, submitted by the learned Counsel for the appellant that the relevant portion of the evidence of the defence witness has not been mentioned in the report of the Advisory Committee and, accordingly the confirming authority had no occasion to consider the same. We do not think that it is incumbent upon the Advisory Board to refer in detail the evidence of defence witnesses in its report. It will not be unreasonable to presume that all the records including the deposition of the said M.L. Khanna were before the confirming authority. It will be a mere surmise to hold that the confirming authority had not applied his mind to the deposition of the defence witness, even though such deposition has been referred to in the report of the Advisory Committee. *Madhu*

Khanna v. *Administrator, Union Territory of Delhi,* AIR 1987 SC 48 (51) : (1986) 4 SCC 240 : 1986 SCC (Cri) 426 : 1987 CrLJ 318 : 1986 CrLR (SC) 401.

[8970] ● ***Nothing in Section 8 of COFEPOSA Act prohibiting oral evidence of witnesses tendered by defence being taken.***—Article 22(7)(e) of the Constitution enables Parliament to prescribe by law the procedure to be followed by an Advisory Board on enquiry made under Art. 22(4)(a). S.8 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act is a sequel to this prescription. There is nothing in S. 8 prohibiting oral evidence of the witnesses tendered by a detenu being taken. The concept of enquiry by the Advisory Board takes within its ambit this aspect of "hearing" also. *Harbans Lal* v. *M.L. Wadhawan,* AIR 1987 SC 217 (220) : (1987) 1 SCC 151 : 1987 SCC (Cri) 47 : (1987) CrLJ 324 : 1987 CrLR (SC) 23 : (1987) 1 SCR 425.

[8971] ● ***Right of detenu to lead evidence in rebuttal.***—The law laid down by this Court recognizes the right in a detenu to lead evidence in rebuttal of the allegation against him before the Advisory Board. All that is necessary is that the detenu should keep the witness ready for examination at the appointed time. There is no obligation cast on the Advisory Board to summon them. This Court recognizes a right in the Advisory Board to regulate its own procedure within the constraints of the Constitution and the statute and this procedure is referable to the time limit within which the Advisory Board must complete its enquiry. *Harbans Lal* v. *M.L. Wadhawan,* AIR 1987 SC 217 (220) : (1987) 1 SCC 151 : 1987 SCC (Cri) 47 : 1987 CrLJ 324 : 1987 CrLR (SC) 23.

[8972] ● ***Prosecution of persons responsible for fabrication of evidence.***—This Court feels fully persuaded to hold that this is a fit case in which the detenue, his wife (petitioner) and all other persons responsible for fabrication of false evidence should be prosecuted for the offences committed by them. Nevertheless Supreme Court wishes to defer the passing of final orders on the application made under Section 340 of CrPC, 1973 by the Union of India because of the fact that the Central Bureau of Investigation is said to be engaged in making a thorough investigation of the matter so that suitable action could be taken against all the perpetrators of the fraudulent acts and the offences. Such a situation should not come to pass because the manipulation of the detenu and his agents on the one hand and the connivance of staff in the President's Secretariat on the other cannot be treated as innocuous features or mere coincidence and cannot, therefore, be taken lightly or viewed leniently. On the contrary they are matters which have to be taken serious note of and dealt with a high degree of vigilance, care and concern. *Pushpadevi* v. *M.L. Wadhavan*, AIR 1987 SC 1748 : (1987) 3 SCC 367 : 1985 CrLJ 1888.

[8973] ● ***Person against whom order of detention passed not to be released on bail on bail bond.***—So far as preventive detention under the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 are concerned, the Act specifically lays down that a person against whom an order of detention has been passed shall not be released on bail or bail bond or otherwise (*vide* Section 12 (6) of the Act) and that any revocation or modification of the order of detention can be made only by the Government in exercise of its powers under Section 11. Incidentally it may be pointed out that by reason of sub-section (6) of Section 12 of the Act placing an embargo on the grant of bail to a detenue there was no necessity for the Legislature to make a provision similar to Section 389 (4) of the Code of criminal procedure, 1973 for excluding the period of bail from the term of detention period. For these reasons the plea for treating the period of parole as part of the detention period has to necessarily fail. *Pushpadevi M. Jatia* v. *M.L. Wadhavan, Addl. Secretary, Govt. of India*, AIR 1987 SC 1748 (1765) : (1987) 3 SCC 367 : 1987 SCC (Cri) 526 : 1987 CrLJ 1888 : 1987 CrLR (SC) 447 : (1987) 2 Crimes 705. **TO THE SAME EFFECT :** *Pushpadevi Jatia* v. *Union of India*, AIR 1987 SC 1748 (1765) : (1987) 3 SCC 367 : 1987 SCC (Cri) 526 : 1987 CrLJ 1888 : 1987 CrLR (SC) 447 : (1987) 2 Crimes 705.

[8974] ● ***Non-existent, not relevant irrational or invalid order of detention.***—Though one or more of the grounds of detention were found to be vague, non-existent not relevant, not connected, irrational or invalid for any other reasons whatsoever the detention could be sustained on the remaining grounds *Pushpadevi M. Jatia* v. *M.L. Wadhavan, Addl. Secretary, Govt. of India*, AIR 1987 SC 1748 (1755) : (1987) 3 SCC 367 : 1987 SCC (Cri) 536 : 1987 CrLJ 1888 : 1987 CrLR (SC) 444 : (1987) 2 Crimes 705. **TO THE SAME EFFECT :** *Pushpadevi Jatia* v. *Union of India*, AIR 1987 SC 1748 (1755) : (1987) 3 SCC 367 : 1987 SCC (Cri) 536 : 1987 CrLJ 1888 : 1987 CrLR (SC) 444 : (1987) 2 Crimes 705.

[8975] ● ***Sufficiency of grounds not for Court but for detaining authority for formation of subjective satisfaction.***—If material and vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order are not placed, it would vitiate its subjective satisfaction rendering the detention order illegal.

Sufficiency of grounds is not for the Court but for the detaining authority for the formation of his subjective satisfaction that the detention of a person under Section 3 (1) of the Act is necessary with a view to preventing him from acting in any manner prejudicial to the augmentation of foreign exchange.

The Government must, therefore, ensure that the constitutional safeguards of Art. 22(5), Constitution of India, read with sub-s. (1) of S.3 of the Act are fully complied with. In the instant case, however, there was no infraction of the constitutional safeguards contained in Art. 22(5). The relevant records of the Enforcement Directorate clearly show that there was sufficient material for the formation of the subjective satisfaction of the detaining authority under sub-section (1) of Section 3 of the Act. They also show that detenu was afforded a reasonable opportunity for making an effective representation against his detention. *Pushpadevi M. Jatia* v. *M.L. Wadhavan, Addl. Secretary, Govt. of India*, AIR 1987 SC 1748 (1757) : (1987) 3 SCC 367 : 1987 SCC (Cri) 526 : 1987 CrLJ 1888 : 1987 CrLR (SC) 447 : JT 1987 (3) SC 296 : (1987) 2 Crimes 705. **TO THE SAME EFFECT :** *Pushpadevi Jatri* v. *Union of India*, AIR 1987 SC 1748 (1757) : (1987) 3 SCC 367 : 1987 SCC (Cri) 526 : 1987 CrLJ 1888 : 1987 CrLR (SC) 447 : JT 1987 (3) SC 296 : (1987) 2 Crimes 705.

[8976] ● ***Sufficiency of grounds for detaining authority not for Court.***—It is quite apparent that the so-called factual mis-statements in the grounds of detention are not mis statements at all. The High Court rightly held that the alleged mistakes or infirmities pointed out were not so material or serious in nature as to vitiate the impugned order of detention. Sufficiency of the grounds is for the detaining authority and not for the Court. It cannot be said on a perusal of the grounds that there was no material on which the detaining authority could have acted. *Pushpadevi* v. *M.L. Wadhavan*, AIR 1987 SC 1748 : (1987) 3 SCC 367 : 1987 CrLJ 1888.

[8977] ● ***Non-service of summons under Section 108 Customs Act.***—Non-service of summons under Section 108 Customs Act—No prejudice caused to detenu—Detention order—Valid. *Poonam Lata* v. *M.L. Wadhawan*, AIR 1987 SC 1383 : (1987) 3 SCC 347 : 1987 SCC (Cri) 506 : 1987 CrLJ 1130 : 1987 CrLR (SC) 410 : 1987 (1) Scale 849 : 1988 (63) CC 50 : 1987 (1) Bank CLR 108 : (1988) CCJ (SC) 1.

[8978] ● ***Revocation or modification of order of detention.***—If the Advisory Board reports that there is in its opinion sufficient cause for the detention of the person, the concerned authority may confirm and continue the detention of the person for such period as it thinks fit. The expression "as it " thinks fit in Section 8(6) of the Act indicates that the concerned authority after considering the report of the Advisory Board may fix any period for detention. The authority is not required to give any special reason either for fixing a shorter period or for fixing the maximum period presented under Section 10. The opinion of the Advisory Board and the grounds of detention are the only basis for confirming and continuing the detention for any period, even up to the maximum presented. The detention order may at any time be revoked or modified. When the power to revoke the order of detention could be exercised at any time, it is not necessary for the authority to articulate special reasons for continuing the detention for any period much less for the maximum period presented under the Act. *Vijay Kumar* v. *Union of India,* AIR 1988 SC 934 (943) : (1988) 2 SCC 57 : 1988 SCC (Cri) 293 : 1988 CrLJ 951 : 1988 CrLR (SC)217.

[8979] ● ***Detenu entitled to assistance of friend.***—The detenue is entitled to the assistance of a friend. The word "friend" used there was obviously not intended to carry the meaning of the term in common parlance. One of the meanings of the word "friend", according to the Collins English Dictionary is "an ally in a fight or cause; supporter". The term "friend" used in the various judgments of this Court was more in this sense than meaning "a person known well to another and regarded with liking, affection and loyalty". A person not being a friend in the normal sense could be picked up for rendering assistance within the frame of the law as settled by this Court. The Advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. As has been indicated by this Court, what cannot be permitted directly should not be allowed to be done in an indirect way. Sundararajan, in the view of the matter, was perhaps a friend prepared to assist the detenu before the Advisory Board and the refusal of such assistance to the appellant was not justified. It is not for this Court to examine and assess what prejudice has been caused to the appellant on account of such denial. This Court has reiterated the position that matters relating to preventing detention are strict proceedings and warrant full compliance with the requirements of law.

The case before the Board involved certain facts which require acquaintance with the legal provisions and the procedure and practice adopted by the Customs authorities. It is the case of the appellant that he was not very much acquainted with them and that is why he had sought the assistance of Sundararajan and even brought him before the Board that day. In view of the position of law and the facts of the case it must be held that the refusal by the Advisory Board to permit the appellant to be assisted by Sundararajan as a friend was bad and continued detention of the appellant became vitiated. *Johney D' Couto* v. *State of Tamil Nadu*, AIR 1988 SC 109 (112) : (1988) 1 SCC 116 : 1988 SCC (Cri) 70 : 1988 CrLJ 178 : 1988 CrLR (SC) 36 : JT 1987 (5) SC 248 : (1987) 3 Crimes 894.

[8980] ● *Detenu when already under detention for offence bailable or non-bailable.*—When a detenu is already under detention for an offence, whether bailable or non-bailable, the detaining authority will take into his consideration the fact of detention of the detenu and there must be compelling reasons to justify his preventive detention in spite of the fact that he is already under detention on a charge of a criminal offence. There must be material for such compelling reasons and the material or compelling reasons must appear from the grounds of detention that will be communicated to the detenu. In other words, two facts must appear from the grounds of detention, namely, (1) awareness of the detaining authority of the fact that the detenu is already in detention, and (2) there must be compelling reasons justifying such detention, despite the fact that the detenu is already under detention.

In the instant case, it has been already noticed that the detaining authority was aware of the fact that the appellant was arrested and produced before the Additional Metropolitan Magistrate, New Delhi. The grounds of detention also disclosed compelling reasons that the appellant should be preventively detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 in spite of his detention on a charge under Section 135 of the Customs Act. It is not the case of the appellant that the grounds of detention do not disclose compelling reasons. All that has been urged on behalf of the appellant is that there has been non-application of mind by the detaining authority of the fact of detention of the appellant. We are however unable to accept the contention made on behalf of the appellant that there has been non-application of mind by the detaining authority to the relevant facts. The detaining authority, besides being aware of the fact that the appellant was already in detention, has taken into consideration the relevant facts before passing the impugned order of detention under the Act, which is apparent from the grounds of detention. In the circumstances, the contention that the impugned order of detention should be struck down on the ground of non-application of mind by the detaining authority, is rejected. *Vijay Kumar* v. *Union of India*, AIR 1988 SC 934 (938) : (1988) 2 SCC 57 : 1988 SCC (Cri) 293 : 1988 CrLJ 951 : 1988 CrLR (SC) 217.

[8981] ● *Satisfaction of detaining authority.*—Detaining authority has correctly verified nature and purport of document containing retraction statements to arrive at its satisfaction. It was misdescribed in ground of detention. Detaining authority after considering the document was of the view that not much credence could be given to it. Error in description of document in grounds of detention could not in the situation vitiate detention order. *State of Gujarat* v. *Sunil Fulchand Shah*, AIR 1988 SC 723 : (1988) 1 SCC 600 : 1988 SCC (Cri) 201 : 1988 CrLJ 933 (SC) : 1988 CrLR (SC) 125 : (1988) 1 Crimes 854.

[8982] ● *Order of detention—When made by officer especially empowered by Govt.*—Even if an order of detention is made by a specially empowered officer of the Central Government or the State Government, as the case may be, the said order will give rise to obligations to be fulfilled by the Government to the same degree and extent to which it will stand obligated if the detention order had been made by the Government itself. If that be so, then it is the concerned Government that would constitute the detaining authority under the Act and not the officer concerned who made the order of detention, and it is to that Government the detenu should be afforded opportunity to make representation against the detention order at the earliest opportunity, as envisaged under Art. 22(5), and not to the officer making the order of detention in order to provide the detenu an opportunity to make a further representation to the State Government and thereafter to the Central Government if the need arises for doing so. Though by reason of Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act a specially empowered officer is entitled to pass an order of detention, his constitutional obligation is only to communicate expeditiously to the detenu the grounds of detention and also afford him opportunity to make representation to the appropriate Government against his detention. The only further duty to be performed thereafter is to place the representation made by the detenu before the concerned officer or the Minister empowered under the Rules of Business of the Government to deal with such representation if the detenu addresses his representation to the officer himself. *State of Maharashtra* v. *Sushila Mafatlal Shah*, AIR 1988 SC 2090 (2098, 2099) : (1988) 4 SCC 490 : 1989 SCC (Cri) 1 : 1989 CrLJ 99 : 1988 CrLR (SC) 741 : JT 1988 (3) SC 646.

[8983] ● *Detaining authority mentioned his satisfaction about necessity of detention.*—A perusal of the grounds which run into many pages clearly indicates that the detaining authority was conscious of the fact that the petitioner was in judicial custody and was apprehensive that he would be released on bail. The detaining authority had mentioned his satisfaction about the necessity of the detention. *Bal Chand Bansal* v. *Union of India*, AIR 1988 SC 1175 (1177) : (1988) 2 SCC 527 : 1988 SCC (Cri) 356 : 1988 CrLJ 1092 : 1988 CrLR (SC) 256 : JT 1988 (2) SC 65.

[8984] ● *Order of detention passed by officer specially empowered and by Govt. itself has same force.*—Unlike in other Preventive Detention Acts such as the National Security Act, Maintenance of International Security Act, Preventive Detention Act, etc., the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 does not provide for any approval by the Government of an order of detention passed by an officer specially empowered to make a detention order. In all the above said Acts, an order of detention passed by an officer specially empowered under the Acts will cease to have force after the expiry of the number of days prescribed under the relevant Act unless the said order is approved by the Government within that period. On the contrary, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 does not provide for the State Government or Central Government passing an order of approving of a detention order made by one of its officers and, therefore, the detention order will continue to be operative, for the full period of detention unless the order is revoked by the State Government or the Central Government or is quashed by the Court for any reason. This is an additional factor to show that an order of detention passed by an officer has the same force and status as an order of detention passed by the Government itself and this could happen only if an order of detention made by an officer is treated as an order of detention made by the Government itself, although through the instrumentality of an officer empowered under Section 3. *State of Maharashtra* v. *Sushila Mafatlal Shah*, AIR 1988 SC 2090 (2099) : (1988) 4 SCC 490 : 1989 SCC (Cri) 1 : 1989 CrLJ 99 : 1988 CrLR (SC) 741 : JT 1988 (3) SC 646.

[8985] ● *Unsatisfactory and unexplained delay between date of order of detention and date of securing arrest.*—The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinize whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the casual connection has been broken in the circumstances of each case.

Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay, would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to prevent him from acting in a prejudicial manner. *T.A. Abdul Rahman* v. *State of Kerala*, AIR 1990 SC 225 : (1989) 4 SCC 741 : 1990 CrLJ 578 : JT 1989 (3) (SC) 444 (449).

[8986] ● *Obligators on State Govt. to consider detenu's representation.*—Article 22(5) of the Constitution of India itself does not say to whom the representation is made or who will consider the representation. By virtue of provision of the statute under which he has been detained. The appropriate Government is legally obliged to comply with these requirements. It is obligatory on the appropriate Government to consider the detenu's representation separate from the consideration of the detenu's case by the Advisory Board. *Abdul Salam* v. *Union of India,* AIR 1990 SC 1446 : (1990) 3 SCC 15 : 1990 CrLJ 1502 : 1990 CrLR (SC) 408.

[8987] ● ***Detenu in Jail—Authority if satisfied can make valid order of detention a few days before release.***—If the authority is *bone fide* satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The antecedent history and the past conduct on which the order of detention would be based would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his release is necessary. *Sanjay Kumar Aggarwal* v. *Union of India*, AIR 1990 SC 1202 : (1990) 3 SCC 309 (314) : 1990 CrLJ 1238.

[8988] ● ***Detention order—Detenu already in jail.***—In fact even in the grounds of detention, the detaining authority has mentioned that the High Court had granted conditional bail, but the detenu had not availed of it and his subsequent application for modification of the condition attached to the bail order was dismissed. *Alocious Fernandez* v. *Union of India*, (1990) 2 SCC 668 : 1990 SCC (Cri) 369 : (1990) 3 Crimes 270 (SC).

[8989] ● ***Detention—Goods imported in violation of condition of advance licence.***—The detenu Madan Lal Anand was arrested on 21-6-1988 under S.104 of the Customs Act, 1962 for his involvement in the import, clearance and sale of polyester filament yarn and polyester fibre in the names of the above two firms and on his application he was released on bail. Again, the Chief Judicial Magistrate, Chandigarh, granted bail to the detenu on 11-7-1988 and adjourned the case *sine die*.

In Para 47 of the grounds of detention, it has been stated by the detaining authority that the detenu has played a very active and major role for obtaining advance licences in the names of the said firms, importing the polyester filament yarn and polyester fibre, getting the same cleared from Bombay customs and also for selling it in the local market in India in violation of the conditions of the Notification dated 9-6-1978 and also of the advance licences. The detenu has been abetting the smuggling of the goods and also has been dealing with smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods.

It is true that before the expiry of six months from the date of the first clearance of the imported goods, an abeyance order was passed against M/s Expo International. The question is whether by such abeyance order the said firm or the detenu was prevented from manufacturing the readymade garments and exporting the same within six months from the date of the first clearance. In the grounds of detention, It has been clearly stated with all relevant particulars that the said two firms had really no existence and they did not have any factory whatsoever or any manufacturing device for the purpose of manufacturing readymade garments. It is apparent from the grounds of detention and the counter-affidavit filed on behalf of the respondents that with a view to procuring the licences for the purpose of importation of the goods without payment of any duty and for selling the same in the market the said firms were created and/or set up by the detenus including the detenu Madan Lal Anand. In these circumstances, no exception can be taken to the passing of the abeyance order against M/s. Expo International and, as it was more than certain that the imported goods would not and could not be utilised in accordance with the condition of the advance licence, the provision of Section 111(I) of the Customs Act, was violated on the very importation of the goods. There is, therefore, no substance in the contention made on behalf of the appellant that there was no smuggling in this case and, as such, the order of detention was not at all justified. The contention is rejected. *Madan Lal Anand* v. *Union of India*, AIR 1990 SC 176 (178, 180) : (1990) 1 SCC 81 : 1990 SCC (Cri) 51 : 1990 CrLJ 659 : 1990 CrLR (SC) 69.

[8990] ● ***Preventive detention—Order of—Revocation of—Power as to.***—Where an officer of the State Government or the Central Government has passed any detention order and on receipt of a representation he is convinced that the detention order needs to be revoked he can do so by virtue of Section 21 of the General Clauses Act since Section 11 of the Act does not entitle him to do so. If the State Government passes an order of detention and later desires to revoke it, whether upon receipt of a representation from the detenu or otherwise, it would be entitled to do so under Section 21 of the General Clauses Act but if the Central Government desires to revoke any order passed by the State Government or its officer it can do so only under clause (b) of Section 11(1) of the Act and not under Section 21 of the General Clauses Act. This clarifies why the power under Section 11 is conferred without prejudice to the provisions of Section 21 of the General Clauses Act.

Thus on a conjoint reading of Section 21 of the General Clauses Act and Section 11 of the Act it becomes clear that the power of revocation can be exercised by three authorities, namely, the officer of the State Government or the Central Government, the State Government as well as the Central Government. The power of revocation conferred by Section 8(f) on the appropriate

Government is clearly independent of this power. It is thus clear that Section 8(f) of the Act satisfies the requirement of Article 22(4) whereas Section 11 of the Act satisfies the requirement of the latter part of Article 22(5) of the Constitution. The statutory of provisions, therefore, when read the context of the relevant clauses of Article 22, make it clear that they are intended to satisfy the constitutional requirements and provide for enforcement of the right conferred on the detenu to represent against his detention order. Viewed in this perspective it cannot be said that the power conferred by Section 11 of the Act has no relation whatsoever with the constitutional obligation cast by Art. 22(5). *Amir Shad Khan* v. *L. Hmingliana,* AIR 1991 SC 1983 : (1991) 4 SCC 39 : 1991 CrLJ 2713 : JT 1991 (3) SC 367.

[8991] ● ***Preventive Detention—Right to make representation.***—When a person is placed under detention he has certain handicaps and if he makes a request that a representation prepared by him may be forwarded to the Central Government as well as the State Government for consideration after taking out copies thereof it would be a denial of his right to represent to the Central Government if the Detaining Authority as well as the State Government refuse to accede to his request and omit to forward his representation to the Central Government for consideration. It is difficult to understand why such a technical and rigid view should be taken by the concerned authorities in matters of personal liberty where a person is kept in preventive detention without trial. Detenus may be illiterate or it literate, they may have access to legal advice or otherwise, they may or may not be in a position to prepare more than one copy of the representation and if they make a request to the authorities which have the facilities to take out copies to do so and forward them for consideration to the Central Government would it be just and fair to refuse to do so? In such circumstances refusal to accede to their request would be wholly unreasonable and in total disregard of the right conferred on the detenu by Article 22(5) of the Constitution read with Section 11 of the Act. We are, therefore, of the opinion that the Detaining Authority as well as the State Government were not justified in taking a hypertechnical stand that they were under no obligation to take out copies of the representations and forward them to the Central Government. We think that this approach on the part of Detaining Authority and the State Government has robbed the appellants of their constitutional right under Article 22(5) read with S. 11 of the Act to have their representation considered by the Central Government. The request of the detenus was not unreasonable. On the contrary the action of the Detaining Authority and the State Government was unreasonable and resulted in a denial of the appellants' constitutional right. The impugned detention orders are, therefore, liable to be quashed. *Amir Shad Khan* v. *L. Hmingliana,* AIR 1991 SC 1983 : (1991) 4 SCC 39 : 1991 CrLJ 2713 : JT 1991 (3) SC 367.

[8992] ● ***Withdrawal of confessional statement.***—Not placing the withdrawal of confessional statement by detenu before detaining authority *Held*, vitiates the order of detention. *K. Satyanarayana Subudhi* v. *Union of India*, AIR 1991 SC 1375 : 1991 Supp (2) SCC 153 : 1991 CrLJ 1536.

[8993] ● ***Detenu already in Jail—Compelling reason to pass order of detention.***—The detaining authority was aware that the detenue was in custody but he was satisfied that there is every likelihood of his being released on bail and he is likely to indulge in such smuggling activities. It is mentioned in the counter affidavit that the remand period of the detenue was to expire on 10-11-90 and that was also a ground which impelled the detaining authority to think that he was likely to be released on bail. This was the material before the detaining authority on the basis of which he was satisfied that there were compelling reasons to pass the detention order. *Abdul Sathar Ibrahim Manak* v. *Union of India*, AIR 1991 SC 2261 (2264) : (1992) 1 SCC 1 : 1991 CrLJ 3291 : JT 1991 (4) SC 103.

[8994] ● ***Detention order—Can be based on solitary incident.***—Even a solitary incident which has been detected may speak volumes about the potentialities of the detenu and merely on the ground that there were no antecedents the detention order cannot be quashed. The authorities cannot and may not in every case salvage the antecedents but as noted above even a solitary incident may manifest the potentialities of a detenu on the activities of smuggling. *Abdul Sathar Ibrahim Manak* v. *Union of India*, AIR 1991 SC 2261 (2264) : (1992) 1 SCC 1 : 1991 CrLJ 3291 : JT 1991 (4) SC 103.

[8995] ● ***Detention order—Non-existent ground.***—The submission of the learned counsel is that the petitioner being in custody in India can no more indulge in smuggling and therefore, the detention on the ground that he is likely to indulge in smuggling is on-existent. There is no force in this submission. The potentialities of the detenue as gathered from his act of smuggling that form basis for detention. It is difficult to comprehend precisely the manner in which such a detenue with such potentiabilities may likely to indulge in the activities of smuggling. It is for the detaining authority to derive the necessary satisfaction on the basis of the materials placed before him. *Abdul Sathar Ibrahim Manak* v. *Union of India*, AIR 1991 SC 2261 (2272) : (1992) 1 SCC 1 : 1991 CrLJ 3291 : JT 1991 (4) SC 103.

[8996] ● ***Representation—Delay in disposal of.***—"The representations were received by the COFEPOSA Unit on 28th December, 1989. On the very next day, *i.e.*, 29th December, 1989 they were forwarded to the sponsoring authority for comments.

The contention that the views of the sponsoring authority were totally unnecessary and the time taken by that authority could have been saved does not appeal to us because consulting the authority which initiated the proposal can never be said to be an unwarranted exercise." *Kamarunnissa* v. *Union of India*, AIR 1991 SC 1640 (1644) : (1991) 1 SCC 128 : 1991 CrLJ 2058 : 1991 SCC (Cri) 88 : JT 1991 (4) SC 7.

[8997] ● ***Detention Order—Pre-execution challenge to Judicial review.***—In face of clear provisions of the Constitution and the valid COFEPOSA Act, 1974, it is clear that the State or its delegate the detaining authority is not precluded from serving the grounds of detention on the detenu along with the order of detention. But it is not possible to accept the contention that the order of detention and the grounds of detention should be served on the proposed detenu in advance to enable him to challenge them in a Court of law before submitting it to the order as it would amount to securing to the proposed detenu the right to seek the judicial review of the detention order even before it is executed but also to enable him thereby to bypass the procedure laid down by the law to challenge it after it is executed. *Additional Secretary to the Government of India* v. *Alka Subhash Gadia,* 1992 SCC (Cri) 301 (303) : 1991 CrLR (SC) 128 : JT 1991 (1) SC 549.

[8998] ● ***Detention order—Pre-execution challenge to.***—So far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed the very purpose of the order and the law under which it is made will be frustrated since such orders are in operation only for a limited period. The Courts have power and they have used it in proper cases although such cases have been few and the grounds on which the Courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number *viz.*, where the Courts are *prima facie* satisfied.

(i) that the impugned order is not passed under the Act under which it is purported to have been passed;

(ii) that it is sought to be executed against a wrong person;

(iii) that it is passed for a wrong purpose;

(iv) that it is passed on vague, extraneous and irrelevant grounds; or

(v) that the authority which passed it had no authority to do so. *Additional Secretary to the Government of India* v. *Alka Subhash Gadia,* 1992 SCC (Cri) 301 (326) : 1991 CrLR (SC) 128 : JT 1991 (1) SC 549.

[8999] ● ***Detention order validity—Delay in arresting detenu.***—If there is unreasonable delay between the date of the order of detention and the date of arrest of the detenue such delay unless satisfactorily explained throws considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently render the detention order bad and invalid because the "line and proximate link" between the grounds of the detention and the purpose of detention is snapped in arresting the detenue. A question whether the delay is unreasonable and stands unexplained depends on the facts and circumstances of each case. In the instant case the circumstances indicate that the detaining authority after passing the detention order was indifferent in securing the detenue by not taking proper action with greater promptitude. The police delayed its execution. In particular, the Inspector of police to whom the warrant was forwarded for execution, was indolent inspite of the repeated reminders and was giving evasive answers till the detenu was secured in his native place itself. This recalcitrant and refractory conduct of the Inspector has allowed the detenu to remain at large for such a long period and has consequently defeated the very purpose of the impugned order. For all the aforementioned reasons the impugned order of detention was set aside. *P.U. Iqbal* v. *Union of India*, AIR 1992 SC 1900 (1904) : (1992) 1 SCC 434 : 1992 SCC (Cri) 184 : 1992 CrLJ (SC) 2924.

[9000] ● ***Detention order—Validity—Delay in arresting detenu.***—In the instant case the circumstances indicate that the detaining authority after passing the detention order was indifferent in securing the detenu by not taking proper action with greater promptitude. The Police officials have treated the warrant of arrest in a very casual manner and undue delay in the execution. In particular, the Inspector of Police to whom the warrant was forwarded for execution, was indolent in spite of the repeated reminders and was giving evasive answers till the detenu was secured in his native place itself. This recalcitrant and refractory conduct of the Inspector has allowed to detenu to remain at large for such a long period and has, consequently, defeated the very purpose of the impugned order. *P.U. Iqbal* v. *Union of India*, AIR 1992 SC 1990 (1904) : (1992) 1 SCC 434 : 1992 SCC (Cri) 184 : 1992 CrLJ 2924.

[9001] ● ***Representation of detenu—Undue and unexplained delay of 28 days in forwarding comments of sponsoring authority.***—The sponsoring authority from whom the comments were called for had delayed in sending the comments upto 1.1.91 despite the facts that the comments were called for from him on 4.12.90. Barring that no explanation is forthcoming as to why the delay had occasioned at the hands of the sponsoring authority to send the parawise remarks or the comments to the first respondent. In our considered opinion, explanation now offered cannot be accepted for more than one reason. First, the first respondent has not preferred such explanation in his counter. Secondly, even accepting this present explanation, the delay cannot be said to have been explained, because the postal transmission, according to the learned counsel was by speed post. Thirdly, no supporting affidavit is filed by the sponsoring authority who alone could explain the delay at his end. The first respondent, thus, has failed to explain the undue delay of nearly 28 days in obtaining the comments by giving all necessary particulars. In these circumstances, we are constrained to hold that the undue and unexplained delay in the present case in the disposal of the representation of the detenu has rendered the impugned order invalid. *Julia Jose Mavely* v. *Union of India*, AIR 1992 SC 139 (141) : 1993 Supp (1) SCC 428 : 1993 SCC (Cri) 234 : 1992 CrLJ 109.

[9002] ● ***Section 5-A of COFEPOSA Act not invalid or void.***—Section 5-A of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is not invalid or void. It is not violative of Cl. (5) of Art. 22 of the Constitution. *Attorney General of India* v. *Amratlal Prajivandas,* AIR 1994 SC 2179 : (1994) 5 SCC 54 : 1995 CrLJ 426 : 1994 SCC (Cri) 1325 : JT 1994 (3) SC 583.

[9003] ● ***Retraction of confessional statement made by detenu not placed before detaining authority.***—The detenu was apprehended on 26.8.1992 and was questioned and his statement along with the statements of others was recorded. On 18.9.1992 the detention order was passed. By then there was no retraction. However, the detenu claimed that he retracted on the same day and the fact remains that it was not before the detention order was passed. There is no such request for the presence of a lawyer which would have a bearing on the voluntary nature of the confession and the subsequent retraction. Therefore the retraction is clearly an after thought and if the same is not placed before the detaining authority that will not vitiate his subjective satisfaction. *Noor Salman Makani* v. *Union of India,* AIR 1994 SC 575 (578) : (1994) 1 SCC 381 : 1994 SCC (Cri) 521 : 1994 CrLJ 602 : 1994 CrLR (SC) 10 : (1993) 3 Crimes 1108.

[9004] ● ***Security of State and Security of India—Distinction.***—The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is clearly relatable to Entry 3 List III of the Seventh Schedule to the Constitution inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community. While Entry 3 of List III speaks of "Security of a State", Entry 9 of List I speaks of "Security of India". Evidently, they are two distinct and different expressions. "Security of a State" is a much wider expression. A State with a weak and vulnerable economy cannot guard its security well. It will be an easy prey to economic colonizers.

It is therefore idle to contend that the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is unrelated to the security of the State. Indeed in the very Preamble to the Act, the Parliament states that the violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy thereby casting serious adverse effect on the security of the State. *Attorney General of India* v. *Amratlal Projivandas*, AIR 1994 SC 2179 : (1994) 5 SCC 54 : 1994 SCC (Cri) 1325 : 1995 CrLJ 426 : JT 1994 (3) SC 583.

[9005] ● ***Representation before appropriate authority—Delay in disposal of.***—Representation of the detenu addressed to the Joint Secretary, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, New Delhi was forwarded by Dum Dum Central Jail authority under registered post on 15-10-1992 and it was received by the Ministry's Office on 22-10-1992 and it was forwarded to the Sponsoring Unit on 23-10-1992 who received it on 26-10-1992. After offering parawise comments, the same was sent by speed post to the Ministry's Office on 29-10-1992 which was received by the Ministry's Office on 2-11-1992. The representation was put up before the Joint Secretary on 3-11-1992 and the same was rejected on 4-11-1992. The Finance Secretary recommended the rejection of the representation on 5-11-1992 and finally the Minister for Finance rejected the same on the same day and a memo dated 6-11-1992 was issued to the petitioner intimating him about the rejection.

The entire delay was due to the delay in postal delivery. Therefore, the same cannot be said to be unreasonable and unexplained. As regards the period between 23-10-1992 and 2-11-1992, there were intervening two Saturdays and two Sundays. However, on receipt of the representation on 22-10-1992 the same was forwarded on 23-10-1992 for parawise comments. In this context, the High Court also has noted that to offer parawise remarks it would have taken some time because the representation contained several allegations against the Customs authorities and necessary information had to be gathered for offering the remarks. The Sponsoring Unit received it on 26-10-1992 and with the parawise remarks forwarded the same by speed post to the Ministry on 29-10-1992. In between there were two holidays and if we exclude these holidays then the delay comes to only five days which cannot be said to be undue. *Noor Salman Makani* v. *Union of India,* AIR 1994 SC 575 (576, 577) : (1994) 1 SCC 381 : 1994 SCC (Cri) 521 : 1994 CrLJ 602 : 1994 CrLR (SC) 10 : JT 1993 (6) SC 491 : (1993) 2 UJ (SC) 788 : 1993 (3) Crimes 1108.

[9006] ● ***Representation if received before case referred to Advisory Board.***—In a case where the representation has been received before the case is referred to the Advisory Board, the appropriate Government must consider the same before the matter is referred to the Advisory Board and it would be justified in not considering the same only if there is no responsible time to consider and dispose of the representation before the case is referred to the Advisory Board and in such case, the representation may be forwarded to the Advisory Board alongwith the case of the detenu. In the instant case, the representation dated March 15, 1991, was received by the detaining authority on March 18, 1991 and the case of the appellant was referred to the Advisory Board on March 25, 1991, and the representation was actually considered by the Advisory Board on April 30, 1991. It is not the case of the respondents—and this is the important distinction in the case—that there was no time for the State Government to consider the said representation of the appellant before referring the matter of the appellant's detention to the Advisory Board on March 25, 1991, or before the said matter was considered by the Advisory Board. The only explanation that has been offered by the State Government is that there were holidays on March 23, 1991 and March 24, 1991 and there was hardly five days' time with the authorities between the time they received the representation and the time the reference was made to the Advisory Board. The State Govt. has not given any reason to indicate that the said period was insufficient. *Moosa Husein Sanghar* v. *State of Gujarat,* AIR 1994 SC 1479 : 1993 SCC (Cri) 340 : (1993) 1 SCC 511 : 1993 CrLR (SC) 113 : JT 1993 (1) SC 44 : (1993) 1 Crimes 215.

[9007] ● ***Detention order passed—When Detenu in Jail.***—In the instant case the submission is that the law requires that all the relevant materials and vital facts which would have bearing on the issue and would influence the mind of the detaining authority one way or the other ought to be placed before the authority empowered to make the declaration. According to the learned counsel, the stringent conditions imposed while releasing the detenue have not been placed before the authority. The detention order itself was passed when the detenu was in Jail and the detaining authority noted this fact and being satisfied that there was every possibility of his being released on bail, passed the detention order. If, subsequently, the detenu is released on bail even subject to certain conditions that does not bring about any material change. On the other hand, release on bail is a stronger ground showing that the detenu who is not in custody is likely to indulge in the prejudicial activities again. The conditions imposed would show that the detenu could move freely in the vast area of Calcutta Municipal Corporation, and therefore this order of release with conditions cannot be said to be vital document. *Noor Salman Makani* v. *Union of India,* AIR 1994 SC 575 (576-578) : (1994) 1 SCC 381 : 1994 SCC (Cri) 521 : 1994 CrLJ 602 : 1994 CrLR (SC) 10 : JT 1993 (6) SC 491 : (1993) 2 UJ (SC) 788 : 1993 (3) Crimes 1108.

[9008] ● ***Representation addressed to Advisory Board—State Govt. receiving same not absolved from obligation of considering it.***—Sri Krishna Rao is right in his submission that even though the representation was addressed to the Advisory Board but since it was forwarded to the Advisory Board through the State Government, It was incumbent upon the State Government to have considered the said representation and it could not return the same to the appellant without considering it on the ground that it was not addressed to it but was addressed to the Advisory Board.

It must be held that merely because the representation was addressed to the Advisory Board and not to the State Government did not absolve the State Government from the Constitutional obligation flowing from Art. 22(5) to consider the said representation. *Moosa Husein Sanghar* v. *State of Gujarat,* AIR 1994 SC 1479 (1481, 1482) : (1993) 1 SCC 511 : 1993 SCC (Cri) 340 : 1993 CrLR (SC) 113 : JT 1993 (1) SC 44 : 1993 (1) Crimes 215.

[9009] ● ***Order of detention to which Section 12-A of COFEPOSA applied—Validity.***—An order of detention to which S. 12-A is applicable as well as an order of detention to which S. 12-A was not applicable can serve as the foundation, as the basis, for applying the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 to such detenu and to his relatives and associates provided such order of detention does not attract any of the sub-clauses in the proviso to S. 2(2) (*b*). If such detenu did not choose to question the said detention (either by himself or through his next friend) before the Court during the period when such order of detention was in force—or is unsuccessful in his attack thereon—he, or his relatives and associates cannot attack or question its validity when it is made the basis for applying the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 to him or to his relatives or associates. *Attorney-General of India* v. *Anratlal Pragwandas,* AIR 1994 SC 2179 : (1994) 5 SCC 54 : 1994 SCC (Cri) 1325 : JT 1994 (3) SC 583.

[9010] ● ***Interference at pre-execution stage not justified.***—Interference at pre-execution stage not justified and order is valid. *Subhash Muljimal Gandhi* v. *L. Himingliana,* (1994) 6 SCC 14 : (1994) 3 Crimes 242 (SC).

[9011] ● ***Order of detention—Challenge to.***—The detenu or anyone on his behalf is entitled to challenge an order of detention without the detenu submitting or surrendering to it. *Subhash Muljimal Gandhi* v. *L. Himingliana,* (1994) 31 ACC 754 (SC).

[9012] ● ***Detention order to which Section 12-A of COFEPOSA Act applied—Order of detention for purpose of Section 2(2)(b) SAFEMA.***—An order of detention made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, to which the provisions in S. 12-A applied, is an order of detention within the meaning of and for the purposes of S. 2(2) (*b*) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 and can, therefore, constitute the basis for applying the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 to such person. *Attorney General of India* v. *Amrathal Prajivandas,* AIR 1994 SC 2179 : (1994) 5 SCC 54 : 1994 SCC (Cri) 1325 : JT 1994 (3) SC 583.

[9013] ● ***Order of detention to which Section 12-A of COFEPOSA Act applied.***—The validity of an order of detention to which S. 12-A of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 applied, could yet be examined even during the emergency on the touchstone of the law as it obtained during the operation of the Presidential Order under Art. 359(1)—say on the ground that the provisions of S. 12-A were not complied with, or on other grounds, as may not have barred during the said period. But a person who could have so challenged the order of detention and yet chose not to do, cannot be allowed to do so when such an order of detention is made the basis for applying the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 to him—this is for the reason that even if he is allowed to challenge the said order when, he is served with the notice under S. 6 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, the challenge has to be examined with reference to the position of law as was obtaining at the time the said order was made and the law in force during the period the said order of detention was in operation. Same would be the position in the case of a person who challenged the order but failed in his challenges. Even in the case of a normal order of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, the position would be the same. A person who did not challenge, (either by himself or through his next friend) the order of detention or challenged it but failed cannot be allowed to challenge the order of detention when action is taken against him under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. *Attorney General of India* v. *Amratlal Prajivandas,* AIR 1994 SC 2179 : (1994) 5 SCC 54 : 1994 SCC (Cri) 1325 : JT 1994 (3) SC 583.

[9014] ● ***Detention order under Section 3 of COFEPOSA Act passed during emergency to which S. 12-A thereof applied.***—An order of detention made under S. 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, which was governed by S. 12-A thereof is yet an order of detention for the purpose of and within the meaning of S. 2(2)(*b*) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. Since the President had issued an order under Art.

359(1) suspending Arts. 14, 21 and 22, it became competent for the Parliament, by virtue of cl. (1-A) of Art. 359 to enact S. 12-A of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 for the duration of and limited to the period for which the Presidential Order was in force. It was meant to achieve the purposes of emergency. Once S. 12-A is held to be a competent piece of legislation, orders of detention made thereunder (*i.e.,* orders of detention to which the said provision applied) cannot be held to be not amounting to orders of detention for the purpose of and within the meaning of S. 2(2)(*b*) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, particularly in view of the express language of S. 2(2) (*b*) (including proviso (*iii*) thereto), and the protection enjoyed by both the enactments by virtue of their inclusion in the IXth Schedule to the Constitution. *Attorney General of India* v. *Amratlal Prajivandas,* AIR 1994 SC 2179 : (1994) 5 SCC 54 : 1994 SCC (Cri) 1325 : JT 1994 (3) SC 583.

[9015] ● ***Person detained be informed his right to make representation.***—Having regard to the provisions of Art. 22(5) of the Constitution and the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, the question posed is answered as under : Where the detention order has been made under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 by an Officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an Officer specially authorised by a State Government and to the Central Government where the detention order has been made by an Officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation. *Kamlesh Kumar Ishwardas Patel* v. *Union of India*, (1995) 4 SCC 51 : 1995 SCC (Cri) 643 (659) : (1995) 3 Crimes 26.

[9016] ● ***Delay in disposal of petition of about 23 days not fatal.***—It is not mandatory that the report of the sponsoring authority should be supplied to the detenu under Art 22 (5) of the Constitution. It is only a material furnished to the detaining authority. All the material on which reliance was placed for order of detention was admittedly supplied to the detenu. In the facts and circumstances of the case, the delay in disposal of the representation of about 23 days is not fatal. *State of Uttar Pradesh* v. *Shakeel Ahmad,* (1996) 1 SCC 337 : 1996 SCC (Cri) 108 (109) : JT 1995 (8) SC 561

[9017] ● ***Preventive detention—Challenge as to.***—Though in the ordinary course, the death of a detenu should bring the writ petition challenging the order of detention to an end, the position in the instant case is different because of the fact that the order of detention is being made a foundation for initiating proceedings for forfeiting the petitioner's properties on the ground that she is a relative of the deceased-detenu. It is in these pecular circumstances the Court has adopted the unusual course and held that the wife can continue the writ petition of detenu challenging order of detention. *Ganga Devi* v. *Union of Inida,* AIR 1996 SC 401 : 1997 CrLJ 228.

[9018] ● ***Forfeiting of property held by detenu under SAFEMA subsequent petition.***—An order of detention to which Section 112-A is applicable as well as an order of detention to which Section 12-A was not applicable can serve as the foundation, as the basis for applying SAFEMA to such detenu and to his relatives and associates provided such order of detention does not attract any of the sub-clauses in the proviso to Section 2(2). If such detenu did not choose to question the said detention either by himself or through the next friend before the Court during the period when such order of detention was in force—or is unsuccessful in his attack thereon—he or his relatives and associates cannot attack or question its validity when it is made the basis for applying SAFEMA to him or to his relatives or associates. *State of Goa* v. *Hirabhai Somabhai Tandel, Nani, Daman,* AIR 1998 SC 218 : (1998) 1 SCC 111 : 1998 CrLJ 386 (SC).

[9019] ● ***Order of detention—Habeas corpus—Petition against its validity.***—True, it is not enough that there is a mere challenge and that challenge has to be upheld or negatived by the Court. When there is challenge to the legality of detention in writ of *habeas corpus* the challenge is in effect to the legality and validity of the grounds on which the order of detention is made. It is not that to challenge the legality and validity of the grounds on which order of detention is passed the detenu has to file a separate writ petition seeking a writ of *certiorari*. Once the detenu is released during pendency of his writ of *habeas corpus* by the detaining authority it cannot always be said that writ petition had become infructuous and that the grounds on which the order of detention is based become invalid. But then if the Court refuses or itself does not go into the merit of controversy in writ of *habeas corpus* when detenu is released the detenu on that account cannot be made to suffer holding that he did not successfully challenge his order of detention. *Competent Authority Ahmedabad* v. *Amritlal Chandmal Jain,* AIR 1998 SC 2083 : (1998) 5 SCC 615 : 1998 CrLJ 2920 (at 2923, 2924) (SC).

[9020] ● ***Undue delay in considering representation.***—Where there was undue delay in considering representation before making declaration, of the continued detention of detenu was rendered. *Narungal Pathamma* v. *Union of India,* AIR 1999 SC 142 : (1998) 7 SCC 287 : 1999 CrLJ 26.

[9021] ● ***Section 5-A of COFEPOSA Act—Applicability of.***—S. 5-A of COFEPOSA Act applies where the detention is based on more than one ground, not where it is based on single ground. *A. Sowkath Ali* v. *Union of India,* AIR 2000 SC 2662 : (2000) 7 SCC 148 : 2000 SCC (Cri) 1304 (1305) : 2000 CrLJ 3691 : 2000 CrLR (SC) 568.

[9022] ● ***Parole granted to detenu in accordance with administrative rules or instructions framed by Govt.***—Parole *stricto sensu* may be granted by way of temporary release as contemplated by Section 12(1) or Section 12(1-A) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 by the Government or its functionaries in accordance with the parole rules or administrative instructions framed by the Government which are administrative in character and shall be subject to the terms of the rules or the instructions as the case may be, for securing release on parole. A detenue has therefore to approach the Government concerned or the Jail authorities, who may impose condition as envisaged by Section 12(2) *etc.* and the grant of parole shall be subject to those terms and conditions. The Courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, in cases covered by COFEPOSA during the period an order of detention is in force because of the express prohibition contained in Section 12(6). Temporary release of a detenue can be ordered by the Govt. or an officer. The bar of judicial intervention to direct temporary release of a detenu would not affect the jurisdiction of the High Courts under Art. 226 of the Constitution or of this Court under Art. 32, 136 or Art. 142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice, such an order of temporary release is required to be made. That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the Court leaves it to the administrative or Jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu. Since the release on parole is only a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and thus needs to be counted towards the total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise. The period during which a detenu has been out of custody on temporary release on parole, unless otherwise prescribed by the order granting parole, or by rules, or instructions, has to be included as a part of the total period of detention because of the very nature of parole. An order made under S. 12 of temporary release of a detenu on parole does not bring the detention to an end for any period—it does not interrupt the period of detention—it only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. *Sunil Fulchand Shah* v. *Union of India,* AIR 2000 SC 1023 : (2000) 3 SCC 409 : 2000 SCC (Cri) 659 : 2000 CrLJ 1444 : 2000 CrLR (SC) 281 : JT 2000 (2) SC 230 : 2000 Cr AppR (SC) 374.

[9023] ● ***Representation to be dealt with utmost expedition.***—Taking into account the facts that holidays intervened in between and the manner in which the representation has been dealt with by the authority concerned it must be held that the representation has been dealt with utmost expedition and there has been no delay in the manner of disposal of the representation. *Kantilal Hirji Shah* v. *State of Tamil Nadu,* (2000) 7 SCC 606 : 2000 SCC (Cri) 1427 (1431) : 2002 CrLJ 261 : 2000 CrLR (SC) 728.

[9024] ● ***Preventive detention—Subjective satisfaction.***—Action by way of preventive detention is largely based on suspicion and the Court is not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person. The language of Section 3 indicates that the responsibility for making a detention order rests on the detaining authority which alone is entrusted with the duty in that regard and it will be a serious derogation from the responsibility of Courts if the Court substitutes its judgment.

The Court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detenu from engaging in smuggling activity. The said satisfaction is subjective in nature.

The authorities concerned have to take note of the various facts including the fact that this was a solitary incident in the case of the detenu and that he had been granted bail earlier in respect of which the application for cancellation of the same was made but was rejected by the Court. In this case, there has been due application of mind by the concerned authority to that aspect of the matter. *Union of India* v. *Arvind Shergill,* AIR 2000 SC 2924 : (2000) 7 SCC 601 : 2000 SCC (Cri) 1422 (1425, 1426) : 2000 CrLJ 4055 : 2000 CrLR (SC) 756.

[9025] ● ***Solitary incident of smuggling—Detention order can be based on when.***—It is true that in appropriate case, an inference could legitimately be drawn even from a single incident of smuggling that the person may indulge in smuggling activity but for that purpose antecedents and nature of the activities carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a view to prevent, it was necessary to detain him. It is also settled law that an order of preventive detention is founded on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act of a series of acts. It must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts so as to warrant his detention. If there is non-application of mind by the authority on this aspect, then the Court is required and is bound to protect the citizen's personal liberty which is guaranteed under the Constitution. Subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. The question, therefore, would be from the past conduct of the petitioner as set out in the grounds of detention or other circumstances, whether reasonable inference could be drawn that he is likely to repeat such acts in the future. *Chowdarapu Raghunandan* v. *State of T.N.*, AIR 2002 SC 1460 : (2002) 3 SCC 754 : 2002 SCC (Cri) 714 : 2002 CrLJ 1836 : JT 2002 (3) SC 110 : (2002) 2 Crimes 47 (SC).

[9026] ● ***Petitioner not involved in smuggling activity.***—In the present case, past conduct of the petitioner is that he is Engineering graduate and at the relevant time he was managing director of a public limited company. There is no other allegation that he was involved in any other anti-social activities. Only allegation is that he visited Singapore twice as a 'tourist'. Admittedly, the petitioner has filed bail application in a criminal prosecution for the alleged offence narrating the fact that his so-called statement was not voluntary and was recorded under coercion. The baggages were not belonging to him and there were no tags on the same so as to connect him with the said baggages and the crime. At the time of hearing of this matter also, it is admitted that the baggages were without any tags. It is also an admitted fact that there is nothing on record to hold that the petitioner was involved in any smuggling activity. *Chowdarapu Raghunandan* v. *State of T.N.*, AIR 2002 SC 1460 : (2002) 3 SCC 754 : 2002 SCC (Cri) 714 : 2002 CrLJ 1836 : JT 2002 (3) SC 110 : (2002) 2 Crimes 47 (SC).

[9027] ● ***Power of detention—Preventive measure.***—Conservation of COFEPOSA Act contemplates two situations for exercise of power of preventive detention (a) to prevent violation of foreign exchange regulations; and (b) to prevent smuggling activities. Under Section 2(e) of COFE POSA Act, "smuggling" is to be understood as defined under clause (39) of Section 2 of the Customs Act, 1962 which provides that "smuggling" in relation to any act or omission will render such goods liable to confiscation under Section 111 or Section 113. Section 111 contemplates confiscation of improperly imported goods and Section 113 contemplates confiscation of goods attempted to be improperly exported. This has nothing to do with the penal provisions, *i.e.*, Sections 135 and 135-A of the Customs Act which provide for punishment of an offence relating to smuggling activities. Hence, to contend that for exercising power under COFE POSA Act for detaining a person he must be involved in criminal offence, is not born out by the said provisions. The other important aspect is that COFE POSA Act and the Foreign Exchange Management Act occupy different fields. COFE POSA Act deals with preventive detention for violation of foreign exchange regulations and Foreign Exchange Management Act is for regulation and management of foreign exchange through authorised person and provides for penalty for contravention of the said provisions. The object as stated above is for promoting orderly development and maintenance of foreign exchange market in India. Preventive detention law is for effectively keeping out of circulation the detenu during a prescribed period by means of preventive detention. (*Pronam Lata* v. *M.L. Wadhawa*, (1987) 3 SCC 347 : 1987 SCC (Cri) 506). The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. *Union of India* v. *Venkateshan S.*, AIR 2002 SC 1890 : (2002) 5 SCC 285 : 2002 SCC (Cri)1121 : 2002 CrLJ 2790 : JT 2002 (4) SC 263.

[9028] ● ***Purpose of passing detention order to prevent detenu from continuing his prejudicial activity.***—At the time of hearing of this matter learned counsel for the appellant pointed out that similar detention orders were passed against six persons during the period from 7.12.1995 to 12.8.1996. He pointed out that five out of six detention orders were revoked by the competent authority on the ground that the custom duty which was required to be paid was paid by them before the execution of the detention orders. Despite this fact the detention order passed against the appellant was not revoked even though he has also paid the custom duty as demanded. It has also been pointed out that the sponsoring authority submitted its report before the detaining authority to revoke the detention order which was passed against the appellant. He has also pointed out that after the detention order was passed the appellant surrendered his licence and had ceased all economic activities of exporting or importing of goods. In our view, there is no reason to discriminate the appellant and the reason given by the authority in not revoking the detention order could hardly be justified. It is true that normally before the execution of the detention order the same is not required to be quashed and set aside. However, considering the peculiar facts and circumstances of the case, in our view, no purpose will be served by continuing the detention order. It is pointed out that the appellant has ceased his activities in the field of import or export. He has already paid the tax with penalty as demanded by the authority. There is nothing on record that since the last five years the appellant has indulged in any such activity. It is to be noted that the purpose of passing the detention order is to prevent the detenue from continuing his prejudicial activity but not to punish him. Hence, in view of the facts and circumstances of the present case, the impugned order dated 30.7.1996 passed by the Joint Secretary to the Government of India under Section 3(1) of COFEPOSA is quashed and set aside. *Pawan Bhartiya* v. *Union of India*, (2003) 11 SCC 479 : 2004 SCC (Cri) 177 (178) : (2002) 82 ECC 1.

[9029] ● ***Order of detention passed by whom.***—An order of detention under the COFEPOSA can be passed : (1) by an authority specially empowered by the Central Government; (2) by the State Government; and (3) by the Central Government. *Union of India* v. *Sneh Khemka*, (2004) 2 SCC 570 : 2004 SCC (Cri) 579 (583) : 2004 CrLJ 941.

[9030] ● ***Detenu entitled to make representation.***—The detenu on being served with the order of detention having regard to the constitutional protection contained in clause (5) of Article 22 of the Constitution of India is entitled to be afforded an earliest opportunity of making a representation there against. Clause (5) of Article 22 of the Constitution of India obligates the authority making the order of preventive detention : (1) to communicate to the detenu the grounds on which the order of detention has been made; (2) to afford the detenu the earliest opportunity of making a representation against the order of detention. *Union of India* v. *Sneh Khemka*, (2004) 2 SCC 570 : 2004 SCC (Cri) 579 (583-84) : 2004 CrLJ 941.

[9031] ● ***Detaining authority obligated to forward to Central Govt. report about service of order of detention.***—Upon service of the order of detention on the detenu, the detaining authority or the State Government is obligated to forward to the Central Government a report thereabout; whereafter the latter is entitled to consider at its earliest opportunity, the validity or otherwise thereof so as to enable it to intervene in appropriate cases by exercising its power of revocation. Furthermore, the representation of the detenu if any, at a later stage is required to be considered by the Central Government in terms of Section 11 of the Act. *Union of India* v. *Sneh Khemka*, (2004) 2 SCC 570 : 2004 SCC (Cri) 579 (584) : 2004 CrLJ 941.

[9032] ● ***Power vested in Central or State Govt. to revoke order of detention.***—Bare perusal of Section 11 of the Act would clearly show that the authority vested in the Central Government or the State Government to revoke an order of detention is without prejudice to the provisions contained in Section 21 of the General Clauses Act, 1897. In terms of Section 21 of the General Clauses Act, an authority who passes an order has the jurisdiction and can revoke the same.

The power of the State Government or the Central Government, therefore, is in addition to the power of the detaining authority to revoke an order of detention. A detenu in law, therefore, is entitled to make different representations before different authorities at different times in terms of statutory as also constitutional schemes.

Each authority, concededly, is required to apply its mind on the materials placed on record and pass an order either rejecting or allowing the said representation. A representation of the detenu having regard to clause (5) of Article 22 of the Constitution of India must also be disposed of within a reasonable time.

It is equally well settled that the constitutional right to make a representation includes the right to obtain proper consideration thereof by the authority to whom it is made. *Union of India* v. *Sneh Khemka*, (2004) 2 SCC 570 : 2004 SCC (Cri) 579 (584) : 2004 CrLJ 941.

[9033] ● ***Representation made before authority not to be considered by other authorities.***—A representation made before an authority need not be considered by the other authorities, for disposal of representations made to them by the detenue. *Union of India* v. *Sneh Khemka*, (2004) 2 SCC 570 : 2004 SCC (Cri) 579 (585) : 2004 CrLJ 941.

[9034] ● ***Copy of representation of detenu—Placing of before authorities.***—This Court has nowhere laid down that copy of the representation made by the detenu to one authority must be placed before all the authorities and all such authorities also should consider and pass orders on those representations, though really not made to any one of them. *Union of India* v. *Sneh Khemka*, (2004) 2 SCC 570 : 2004 SCC (Cri) 579 (587) : 2004 CrLJ 941.

[9035] ● ***Detenu's right to make representation to authorities.***—The additional remedy or safeguard provided by Section 11 has been projected into the fabric of Article 22(5) so as to be absorbed into the ambit of safeguard provided by the latter part of Article 22(5). A provision like Section 11 may or may not be necessary to give effect to that safeguard, but, once a provision like Section 11 finds its place in the detention law, the detenu's constitutional right to make representation gets amplified. His right extends to making representations to all those authorities who can grant him relief and the opportunity afforded to the detenu to submit such representations thus becomes a part of the guaranteed right under Articles 22(5). *A.C. Razia* v. *Government of Kerala*, (2004) 2 SCC 621 : 2004 SCC (Cri) 618 (634).

[9036] ● ***Power under Section 11 of COFEPOSA supervisory in nature.***—The principle is well settled that the Government in exercise of the power under Section 11 does not consider the question of sufficiency or adequacy of the grounds but it would only see whether the detention order is within the parameters of the power conferred under the statute. In other words, it will not review the case as if it is an original or appellate authority. That is why the power under Section 11 has been described as supervisory in nature. The proposition that the power conferred under Section 11 is supervisory does not, however, mean that the exercise of power is purely discretionary or that the process of consideration could be casual and superficial. No doubt, there need not be a speaking order in disposing of such representation. However, the Government has a duty to consider the representation in proper perspective in order to see whether the order of detention is in conformity with law. The Government, should, quite apart from the points raised in the representation, apply its mind broadly to the question whether the detention is in accordance with law. For instance, if the material relied upon by the detaining authority does not *ex facie* establish a nexus with the preconditions for the exercise of the power or the conclusions of the detaining authority are found to be wholly perverse or the prescribed procedure has not been followed by the detaining authority, the appropriate Government acting under Section 11 has a duty to interfere and revoke the order of detention. In order to achieve this end, the Central Government must necessarily have regard to the representation, the report received from the State Government, the detention order and the material relied upon in the detention order or referred to in the representation. The exercise of the power under Section 11 should not be a mere formality or a farce. Care and vigilance should inform the action of the Government while discharging its supervisory responsibility. *A.C. Razia* v. *Government of Kerala*, (2004) 2 SCC 621 : 2004 SCC (Cri) 618 (634).

[9037] ● ***Detention order when itself makes elaborate reference to statements/letters of concerned persons.***—When the detention order itself makes an elaborate reference to the statements/letters of concerned persons which were either relied upon or rejected by the detaining authority in the detention order, the authority exercising the power under Section 11 would in no way be handicapped in dealing with the issue in general and the representation in particular. In the representations made by the petitioner (detenu's wife) the English version of which were on the record of Central Government, the plea taken was that the statements were obtained under threat and coercion and that is why they retracted from the previous statements. Of Course, certain other grounds. *A.C. Razia* v. *Government of Kerala*, (2004) 2 SCC 621 : 2004 SCC (Cri) 618.

[9038] ● ***Detention does not get vitiated where there is reasonable explanation for delay.***—The question whether any or all of the documents which formed the basis of the detention order should be before the Central Government or not, depends on the facts of each case. There can be no hard-and-fast rule that the appropriate Government called upon to take a decision under Section 11 should necessarily have copies of all the documents relied upon by the detaining authority with the translated version thereof. It is unnecessary to furnish copies of documents to which casual or passing reference is made and which are not relied upon by the detaining authority. This Court is of the view that the proposition laid down by this Court that the copies of translated documents forming the basis of the detention order should be furnished to the detenu in order to give effect to the guarantee enshrined in Articles 22(5) cannot be imported while dealing with the question in the context of exercise of power of revocation under Section 11 on the basis of representation or otherwise. The question whether there was due consideration of representation has to be judged by general principles of administrative law. There is no constitutional requirement—Express or necessarily implied that the authority considering the representation should have before it all the documents referred to in detention order with translated version thereof. But, the availability or non-availability of such documents with the empowered authority under Section 11 will only have bearing on the manner of consideration of representation, which in turn depends on the facts of a particular case. The endeavour of the Court in this regard is only to assess whether there was fair and proper consideration by the Government by applying its mind to the crucial aspects warranting its attention. The necessity or otherwise of having copies of documents should be viewed in that light. The Court has to be satisfied that there was due application of mind to the crucial aspects. The points raised by the detenu in the representation would naturally assume importance, as pointed out by MATHUR, J. though the Government ought not to confine itself to the points highlighted in the representation alone. If, for the purpose of appreciating the points in the representation, the documents are required to be seen, naturally, the Central Government will be failing in its duty if it does not call for the documents with translation. For instance, the detenu may say that a particular statement relied upon in the detention order is something different and it was misread. The document has to be necessarily seen to appreciate that point. That apart, the Government shall have a clear idea of the nature of incriminating material against the detenu. If the detention order does not spell out the details thereof, but only makes a bare reference, here again, the need to peruse the crucial documents or statements so as to judge the validity of detention does arise; otherwise the Central Government will not be fulfilling the supervisory responsibility cast on it in the manner expected of it. However, we hasten to add that there can be no rule similar to the one laid down in the context of detenu's right under the first part of clause (5) of Article 22. The question whether there could have been due application of mind and proper consideration of representation by the Government in the absence of crucial documents/ translated copies thereof has to be decided on case-to-case basis. The approach cannot be abstract and unrealistic. No inflexible rule of general application can be laid down. However, we would like to make it clear that if in a given case, the perusal of certain documents becomes necessary, it is no answer to say that the translation involves delay. It is trite to say that where there is reasonable explanation for delay, the detention does not get invalidated. *A.C. Razia* v. *Government of Kerala*, (2004) 2 SCC 621 : 2004 SCC (Cri) 618 (637).

[9039] ● ***Duty to consider representation with reasonable expedition.***—The dual rights under clause (5) are : (i) the right to be informed as soon as may be of the grounds on which the order has been made, that is to say, the grounds on which the subjective satisfaction has been formed by the detaining authority, and (ii) the right to be afforded the earliest opportunity of making a representation against the order of detention. By judicial craftsmanship certain ancillary and concomitant rights have been read into this article so as to effectuate the guarantees/safeguards envisaged by the Constitution under clause (5) of Article 22. For instance, it has been laid down by this Court that the grounds of detention together with the supporting documents should be made available to the detneu in a language known to the detenue. The duty to apprise the detenu of the right to make representation to one or more authorities who have power to reconsider or revoke the detention has been cast on the detaining authority. So also the duty to consider the representation filed by or on behalf of the detenu with reasonable expedition has been emphasised in more than one case and where there was inordinate delay in the disposal of representation, the detention was set aside on that very ground. *A.C. Razia* v. *Government of Kerala*, (2004) 2 SCC 621 : 2004 SCC (Cri) 618 (637).

[9040] ● ***Power of Central Govt. to revoke orders made by State Govt. and officers specially empowered by State/Central Govt.***—The combined effect of the constitutional and statutory provisions from the point of view of the detenu's right to make the representation is to provide more than one forum to re-examine or review the case of the detenu and to afford him various means of redressal of his grievance. Thus, the matter could be examined by : (i) the Advisory Board, (ii) the detaining authority, and (iii) the State or Central Governments acting under Section 11 or on receipt of Advisory Board's opinion. This is apart from the power of the Central Government to examine the validity of detention acting *suo motu* on receipt of report under Section 3(2). Under Section 11, which is of immediate relevance in the present case, the Central Government has the power to revoke the orders made by : (i) the State Government, (ii) an officer specially empowered by the State Government, and (iii) an officer specially empowered by the Central Government. The order passed by an officer specially empowered by a State Government can be revoked by the State Government as well. *A.C. Razia* v. *Government of Kerala*, (2004) 2 SCC 621 : 2004 SCC (Cri) 618 (637).

[9041] ● ***Petitioner not allowed to have unfair advantage and double benefit of his own action.***—Merely because the High Court had granted stay of the order of detention, the respondent cannot take advantage of the order of stay passed by the High Court to contend that there is a passage of time. The petitioner cannot be allowed to have an unfair advantage and double benefit of his own action, which delayed the execution of the detention order. The reliance sought to be placed on the fate of proceedings taken against others is wholly inappropriate. The individual role, behavioural attitude and prognostic propensities have to be considered, personwise, and no advantage can be allowed to be gained by the petitioners in these cases based on considerations said to have been made as to the role of the others and that too as a matter of post-detention exercise undertaken so far as they are concerned. The appeal is allowed. The order of the High Court is set aside and the writ petition filed before the High Court shall stand dismissed. *Union of India* v. *Amrit Lal Manchanda*, AIR 2004 SC 1625 : 2004 SCC (Cri) 662 (669) : (2004) CrLJ 1426.

[9042] ● ***Judgments of Courts not to be construed as statutes.***—Cases involving challenges to orders of detention before and after execution of the order stand on different footings. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. *Union of India* v. *Amrit Lal Manchanda*, AIR 2004 SC 1625 : 2004 SCC (Cri) 662 (670) : (2004) 375 CrLJ 1426.

[9043] ● ***Cryptic observation that decision "is off the point".***—Several grounds touching legality of grounds on which the order of detention was passed were raised in the writ petition. The present appellants filed a counter affidavit. Primarily, an objection was taken regarding the maintainability of the writ application before the order of detention was actually served and the detenu taken into custody. The various stands regarding the legality of the grounds of detention has been raised by the writ petitioner were also refuted and it was submitted that grounds stated were germane and relevant for directing detention. The High Court elaborately dealt with the legality of the grounds on which the order of detention was founded. But as regards the preliminary objection about the maintainability of the writ petition even before the order of detention was actually served, the same was dealt with and disposed of in a very casual and summary manner observing without even properly adverting to the law laid down by this Court, brought specifically to its notice as follows : "Before I proceed further into the matter, I may say that the case law which has been relied upon by Mr. Sharma is off the point." The High Court does not appear to have considered the case in the background of whether any relief was available to the writ petitioner even before the order of detention was executed. The cryptic observation that the decision "is off the point" seemed to be not only evasive but lacked judicious application of mind. Consequently, the order is liable to be set aside. *Union of India* v. *Vidya Bagaria*, 2004 SCC (Cri) 1696 (1698, 1699, 1701) : 2004 CrLJ 2480 : (2004) 2 Crimes 362.

[9044] ● ***Power under Section 11 Supervisory in nature.***—The principle is well settled that the Government in exercise of the power under Section 11 does not consider the question of sufficiency or adequacy of the grounds but it would only see whether the detention order is within the parameters of the power conferred under the statute. In other words, it will not review the case as if it is an original or appellate authority. That is why the power under Section 11 has been described as supervisory in nature. *A.C. Razia* v. *State of Kerala*, (2004) 2 SCC 621 : 2004 SCC(Cri) 618 (634).

[9045] ● ***Representation of detenu—Consideration of.***—The proposition that the power conferred under Section 11 is supervisory does not, however, mean that the exercise of power is purely discretionary or that the process of consideration could be causal and superficial. No doubt, there need not be a speaking order in disposing of such representation. However, the Government has a duty to consider the representation in proper perspective in order to see whether the order of detention is in conformity with law. The Government, should, quite apart from the points raised in the representation apply its mind broadly to the question whether the detention is in accordance with law. For instance, if the material relied upon by the detaining authority does not *ex facie* establish a nexus with the preconditions for the exercise of the power or the conclusions of the detaining authority are found to be wholly perverse or the prescribed procedure has not been followed by the detaining authority, the appropriate Government acting under Section 11 has a duty to interfere and revoke the order of detention. In order to achieve this end, the Central Government must necessarily have regard to the representation, the report received from the State Government, the detention order and the material relied upon in the detention order or referred to in the representation. The exercise of the power under Section 11 should not be a mere formality or a farce. Care and vigilance should inform the action of the Government while discharging its supervisory responsibility. *A.C. Razia* v. *State of Kerala*, (2004) 2 SCC 621 : 2004 SCC (Cri) 618 (634).

[9046] ● ***Failure to comply with statutory requirements.***—Dispute an earlier order of the Supreme Court quashing the order of detention, primarily on account of lapses or the part of the State in not producing before the Supreme Court the relevant evidence to establish compliance with statutory requirement, the same mistake was again committed by the State which had filed a counter affidavit which had been found wholly unsatisfactory for the same reason. State was granted opportunity, but cast of Rs. 25000/- was imposed to be paid by State to the petitioner. *Suram Chand* v. *State of J&K*, (2005) 13 SCC 433 : (2006) 2 SCC (Cri) 429 (429-430).

[9047] ● ***Application of mind.***—Keeping in view the safeguards envisaged under Article 22 of the Constitution it was absolutely essential for the second respondent herein to apply her mind not only at the time of grant of approval to the proposal for detention but also when the actual order of detention and grounds thereof are prepared. To the aforementioned extent there has been no application of mind on the part of the second respondent herein, and, thus, the impugned order of detention dated 3.11.2004 cannot be sustained. *Rajesh Vashdev Adnani* v. *State of Maharashtra*, (2005) 8 SCC 390 : (2006) 1 SCC (Cri) 61 (64).

[9048] ● ***Delay in disposal of representation.***—In the instant case, the detenu himself filed two representations and on his behalf, his counsel submitted another two representations and there is no allegation that these representations were not considered in time. But the representation filed by the present appellant, the wife of the detenu was disposed of only with a delay of 119 days. The delay was caused mainly due to non-availability of the translated copy of the representation. The representation was made in "Tamil" and it is submitted by the Union Government that it took about three months to get a proper translation of the representation and as soon as the translation was received, the authorities took urgent steps and it was disposed of within a short period. In the facts and circumstances of the case, there is inordinate delay in disposing of the representation. *D. Anuradha* v. *Joint Secretary*, (2006) 5 SCC 142 : (2006) 2 SCC (Cri) 432 (440-41) : 2006 CrLJ 2784 : JT 2006 (5) SC 91 : 2006 (2) Crimes 290.

[9049] ● ***No limitation fixed for disposal of representation.***—There is no right in favour of the detenu to get his successive representations based on the same grounds rejected earlier to be formally disposed of again and in any event no period of limitation is fixed for disposal of an application. *D. Anuradha* v. *Joint Secretary*, (2006) 5 SCC 142 : (2006) 2 SCC (Cri) 432 (441) : 2006 CrLJ 2784 : 2006 (2) Crimes 290.

[9050] ● ***Withholding of irrelevant material.***—The detention order itself is passed on various grounds and even if some materials are not placed before the detaining authority, it would only affect one of the grounds stated in the detention order and the detention order by itself is sufficient to stand on its own on the basis of other grounds. The detention as a whole cannot be held to be illegal. If there are severable grounds, the vague nature of the grounds would not vitiate the entire detention order. *D. Anuradha* v. *Joint Secretary*, AIR 2006 SC 3661 : (2006) 5 SCC 142 : (2006) 2 SCC (Cri) 432 (442) : 2006 CrLJ 2784 : (2006) 2 Crimes 290 : 2006 (2) JCC 784 : 2006 (2) Cur Cr R 147 : 2006 (3) AICLR 602.

[9051] ● ***No prejudice caused to detenu due to non-placement of material before Advisory Board.***—The appellant, the wife of the detenu sent a representation in Tamil and on 24.2.1996 and 26.2.1996 on behalf of the detenu, two representations were sent by S. Ramchander Rao, the Senior Advocate to the Central Government. The detenu also sent two other representations, one on 27th February in Tamil and another on 16.3.1996. Whatever materials were available with the State Government were sent to the Advisory Board and the representations were disposed of in time and the only representation sent by the appellant on 22.2.1996 was pending with the authorities when the reference was made. The non-placement of that representation had not caused any prejudice to the detenu. *D. Anuradha* v. *Joint Secretary*, AIR 2006 SC 3661 : (2006) 5 SCC 142 : (2006) 2 SCC (Cri) 432 (439) : 2006 CrLJ 2784 : JT 2006 (5) SC 91 : 2006 (2) Crimes 290.

[9052] ● ***Delay in sending some relevant papers to Advisory Board.***—The delay of only one week in sending some of the relevant records may not by itself make the whole reference illegal and vitiated. Under clause (c) of Section 8 of the COFEPOSA Act, a period of eleven weeks from the date of the detention is given to the Advisory Board to give its opinion. The Advisory Board is also empowered to call for any information from the appropriate Government. If the relevant materials were not placed before the Advisory Board at the time it had taken the decision, that would have been a serious violation of the right guaranteed under Article 22 of the Constitution. The fact that merely because some of the materials were inadvertently not sent along with the reference, will not vitiate the proceedings. *D. Anuradha* v. *Joint Secretary*, AIR 2006 SC 3661 : (2006) 5 SCC 142 : (2006) 2 SCC (Cri) 432 (439) : 2006 CrLJ 2784 : 2006 (2) Crimes 290.

[9053] ● ***Sending representation to various authorities concerned.***—In *Union of India* v. *Paul Manikant*, 2004 SCC (Cri) 239, the Apex Court deprecated the practice of sending representations to various authorities which were not directly or immediately concerned with the detention, and delay, if any, in disposing of such representations shall not be taken advantage of by the detenu. In the present case also, all the representations were not addressed to the authorities concerned. *D. Anuradha* v. *Joint Secretary*, AIR 2006 SC 3661 : (2006) 5 SCC 142 : (2006) 2 SCC (Cri) 432 (441) : 2006 CrLJ 2784 : 2006 (2) Crimes 290.

[9054] ● ***Delay in passing detention order.***—The allegations made against the detenu are of serious nature. It involved several crores of rupees. The various transactions had been done in a clandestine manner with the help of foreign nationals and the detenu himself had claimed to be a non-resident Indian. All these materials had contributed to the delay and the detaining authority had to consider these materials and cross-check the transactions. The contention regarding in passing detention order is liable to be rejected. *D. Anuradha* v. *Joint Secretary*, AIR 2006 SC 3661 : (2006) 5 SCC 142 : (2006) 2 SCC (Cri) 432 (443) : 2006 CrLJ 2784 : 2006 (2) Crimes 290.

[9055] ● ***Non-resident Indian—Applicability of COFEPOSA Act.***—Where no material was placed was placed before the Court to prove that he was a non-resident. Indian and therefore beyond the ken of provisions of COFEPOSA Act, it was held that the detention was rightly passed. *D. Anuradha* v. *Joint Secretary*, AIR 2006 SC 3661 : (2006) 5 SCC 142 : (2006) 2 SCC (Cri) 432 (443) : 2006 CrLJ 2784 : 2006 (2) Crimes 290.

[9056] ● ***Failure to place before detaining authority detenu's letter retracting his confession.***—In the instant case there was no reason as to why the detenu's letter retracting his confession should not have been placed before the detaining authority for his consideration. It was not disputed that the said letter contained the relevant material which ought to have been considered by the detaining authority before passing an order of detention since relevant material was held from the detaining authority, the order of detention was struck down as illegal. *K.S. Nagamuthu* v. *State of T.N.*, AIR 2006 SC 374 : (2006) 4 SCC 792 : (2006) 2 SCC (Cri) 414 (417-18) : 2005 CrLJ 5079 : 2005 (4) Crimes 282.

[9057] ● ***Sending of relevant material to improper authority.***—The detenue had handed over the letter of retraction to his advocate, who got it delivered in the office of Assistant Commissioner of Customs. Having regard to the facts and circumstances of the case, it cannot be said that the letter was not communicated to the appropriate authority because on that date the appellant had no knowledge that the order of detention was about to be passed under COFEPOSA Act. The Assistant Commissioner of Customs is a responsible officer and should have known to whom such letters should be sent. No broad proposition can be laid down, to the affect. That a letter addressed to any officer of any department of the Government would amount to service thereof on the State. It depends on the fact and circumstances of each case. In the fact of this case, we have found that the detenu addressed the letter of retraction to a responsible officer of the Department of Customs and in the circumstances he had no choice in the matter, as he could not anticipate that an order of detention may be passed and therefore, the letter should be addressed to the sponsoring authority. *K.S. Nagamuthu* v. *State of T.N.*, AIR 2006 SC 374 : (2006) 4 SCC 792 : (2006) 2 SCC (Cri) 414 (417) : 2005 CrLJ 5079 : JT 2005 (10) SC 216 : 2005 (4) Crimes 282.

[9058] ● ***Delay in passing detention order predetention order when can be quashed.***—Where the delay caused in issuing the order of detention was not explained, the order of detention was held liable to be set aside. *Rajinder Arora* v. *Union of India*, AIR 2006 SC 1719 : (2006) 4 SCC 796 : (2006) 2 SCC (Cri) 418 (425) : 2006 CrLJ 2102 : 2006 (2) Crimes 61.

[9059] ● ***Relevant material not taken into consideration.***—Where the status report called for from the Custom Department was not taken into consideration by the competent authorities, it was held that the order of detention could not be sustained. *Rajinder Arora* v. *Union of India*, AIR 2006 SC 1719 : (2006) 4 SCC 796 : (2006) 2 SCC (Cri) 418 (425) : 2006 CrLJ 2102 : 2006 (2) Crimes 61.

[9060] ● ***Subjective satisfaction of detaining authority.***—It is, no doubt, that clause (5) of Art. 22 of the Constitution mandates that all the procedural requirements contemplated thereby as also the relevant provisions of COFEPOSA are required to be strictly complied with in a case of preventive detention.

It is no doubt true that whether a detenu on the date of the passing of the order of detention was in custody or not, would be a relevant fact. It would also be a relevant fact that whether he is free on that date and if he is, whether he is subjected to certain conditions in pursuance to and in furtherance of the order of bail. If pursuant to or in furtherance of such conditions he may not be able to flee from justice, that may be held to be relevant consideration for the purpose of passing an order of detention but the converse is not true. Some such other grounds raised in the application for bail and forming the basis of passing an order of bail may also be held to be relevant. It would, however, not be correct to contend that irrespective of the nature of the application for bail or irrespective of the nature of the restrictions, if any, placed by the Court of competent jurisdiction in releasing the detenu on bail, the same must invariably and mandatorily be placed before the detaining authority and the copies thereof supplied to the detenu.

There is no universal rule that irrespective of the facts and circumstances of the case it would be imperative to place all applications for bail as also the orders passed thereupon before the detaining authority and copies thereof supplied to the detenu. On the petitioner's own showing, only that part of the application for grant of bail that the offence in question is bailable, was relevant. The question as to whether an offence is bailable or not be not a vital fact whereupon an order of bail can be based. Application of mind to the averments made in a bail application may be relevant where the grounds stated therein reveal certain facts which are vital for passing an order of detention. In a case of such nature, it may be said that the application for bail was necessary to be placed before the detaining authority and non-furnishing a copy thereof to the detenu would vitiate the order of detention. *Sumla Jain* v. *Union of India*, (2006) 3 SCC 321 : (2006) 2 SCC (Cri) 90 : 2006 CrLJ 1636 : (2006) 1 Crimes 240.

[9061] ● ***All the documents placed before detaining authority not required to be supplied to detenu.***—It is now well-settled that all the documents placed before the detaining authority are not required to be supplied. Only relevant and vital documents are required to be supplied. *Sunil Jain* v. *Union of India*, (2006) 3 SCC 321 : (2006) 2 SCC (Cri) 90 (94, 95, 96, 97) : 2006 CrLJ 1636 : JT 2006 (2) SC 612 : 2006 (1) Crimes 240.

[9062] ● ***Judicial review.***—At the highest, the case of the appellant is that the order of detention was belatedly passed and the State of Bihar thereafter took no steps whatsoever to implement the order of detention. Counsel for the appellant sought to bring this case under the third exception enumerated in *Alka subhash Gadia*, namely, that the order was passed for a wrong purpose. In the facts and circumstances of this case, it is not possible to accept the submission that the order was passed for a wrong purpose. Apparently the order has been passed with a view to prevent the appellant from smuggling goods or abetting the smuggling thereof, *etc.* The High Court was, therefore, justified in refusing to exercise jurisdiction under Article 226 of the Constitution to quash the order of detention at the pre-arrest stage. This appeal is, therefore, devoid of merit and is dismissed. *Naresh Kumar Goyal* v. *Union of India*, AIR 2005 SC 4421 : (2005) 8 SCC 276 : (2006) 1 SCC (Cri) 34 (41) : 2005 CrLJ 4539 : JT 2005 (12) SC 428 : 2005 (4) Crimes 147.

[9063] ● ***Placement of documents before the Detaining authority.***—A reading of the whole of the detention order clearly shows that the detaining authority had placed reliance entirely upon the statement of the appellant Vinod K. Chawla himself and the documents and material recovered from the business premises and godowns of the firms which were admittedly owned by the appellant. The retraction of the statement by Asheesh Chawla has no bearing at all as it in no way could affect the formation of opinion and the subjective satisfaction of the detaining authority. Therefore, the contention raised by the learned counsel for the appellant has no substance and is liable to be rejected. The law does not require that every document or material in possession of sponsoring authority must necessarily be placed by him before the detaining authority and in every case where any such document or material is not placed by the sponsoring authority before the detaining authority, the formation of opinion and the subjective satisfaction of the detaining authority would get vitiated. *Vinod K. Chawla* v. *Union of India,* AIR 2006 SC 2864 : (2006) 7 SCC 337 : 2006 CrLJ 4079 (4084) : (2006) 3 Crimes 245.

[9064] ● ***Possibility of being released on bail—Detenu not yet filing bail application.***—It was also submitted that since the detenu had not filed any bail application, the detaining authority could not have inferred that there was possibility of his being released on bail. Strong reliance is placed on several decisions of this Court. It has to be noted that whether prayer for bail would be accepted depends on circumstances of each case and no hard and fast rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be *ipse-dixit* of the detaining authority. On the basis of materials before him, the detaining authority came to the conclusion that there is likelihood of detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not to be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of detenu being released on bail. *Senthamulselvi* v. *State of Tamil Nadu,* (2006) 5 SCC 676 : 2006 CrLJ 4605 (4607) : 2006 (3) Crimes 63.

[9065] ● ***Prayer for bail—Acceptance depends on circumstances of each case.***—It has to be noted that whatever proper for bail would be accepted depends on circumstances of each case and no hard and fast rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be *ipse dexit* of the detaining authority. On the basis of materials before him the detaining authority came to the conclusion that there is likelihood of detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of detenu being released on bail. It has been clearly stated that in similar cases orders granting bail are passed by various Courts. Appellant has not disputed correctness of this statement. Strong reliance was placed by learned counsel for the appellant on *Rajesh Gulati* v. *Govt. of NCT of Delhi and Another,* (2002 (7) SCC 129). The factual scenario in that case was entirely different. In fact, five bail applications filed had been already rejected. In that background this Court observed that it was not "normal" case. The High Court was justified in rejecting the stand of the appellant. *Ibrahim Nazeer* v. *State of Tamil Nadu,* AIR 2006 SC 3606 : (2006) 6 SCC 64 : 2006 CrLJ 3632 (3633, 3634) : 2006 (3) Crimes 83.

[9066] ● ***Delay in disposal of representation.***—The grounds of detention in the present case are a long one running into 35 paragraphs which were accompanied by 82 documents running into 447 pages. The representation made by the appellant was a also a fairly long one. The representation made by the appellant on 24.3.1998 was received in the Ministry on 27.3.1998. The comments of the sponsoring authority were called on 30.3.1998 which were received on 17.4.1998. The comments were placed before the Secretary (R) through the A.D.G. on 22.4.1998 (18th and 19th being holidays). The decision of the Central Government was taken and communicated on 29.4.1998 (25th and 26th being holidays). The representation was also considered by the detaining authority in the meantime and was rejected on 21.4.1998. In the additional affidavit filed on behalf of the sponsoring authority before the High Court. It was stated that the representation was received by them on 2.4.1998 and the comments were dispatched on 17.4.1998. During this period, there were holidays on 4th, 5th, 8th to 12th April, and only seven working days were available. Again there were holidays on 18th , 19th , 25th and 26th April. Having regard to the facts and circumstances of the case, we are clearly of the opinion that the entire time taken in consideration and disposal of the representation made by the appellant has been fully explained and it cannot be said by any stretch of imagination that there was any inordinate delay or unexplained delay in considering the representation made by the appellant. The challenge to the detention order made on the ground of delay in consideration of the representation made by the appellant has no substance and deserves to be rejected. *Vinod K. Chawla* v. *Union of India,* AIR 2006 SC 2864 : (2006) 7 SCC 337 : 2006 CrLJ 4079 (4086) : 2006 (3) Crimes 245.

[9067] ● ***Delay in disposal of representation.***—Coming to the plea that there was delay in disposal of the representation it is to be noted that the order of detention is dated 1.12.2005. The representation was sent on 11.12.2005 which was received by the respondents on 15.12.2005. The details were called for on 16.12.2005 which were received on 20.12.2005. The file was submitted on 21.12.2005 and dealt with by the Under Secretary and Deputy Secretary on 22.12.2005. The concerned Minister passed order on 22.12.2005 and the order of rejection which was passed on 27.12.2005 was issued on 28.12.2005 which was sent to the Superintendent of the Jail where the detenu was incarcerated, which was communicated to the detenu. It was received by the Jail authority. The factual scenario indicated above indicates that the representation was dealt with utmost expedition. There can be no hard and fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case and if there is no negligence or callous inaction or avoidable red-tapism on the facts of case, the Court would not interfere. *Senthamulsevi* v. *State of Tamil Nadu,* (2006) 5 SCC 676 : 2006 CrLJ 4605 (4606) : (2006) 3 Crimes 63.

[9068] ● ***Effective representation.***—The grounds of detention showed that the detenu was not arrested on the basis of co-accused's statement. On the other hand it was clearly stated in the grounds of detention that the detenu was arrested on suspicion. It was not disputed that the confessional statement of the detenu was supplied to him. *Held,* the High Court was justified in coming to the conclusion that though reference was made to co-accused's statement, that was not relied-upon for the purpose of detention. The detenu was not deprived of his right of make effective representation against the detention. The detention was found not vitiated. *Senthamulselvi* v. *State of Tamil Nadu,* (2006) 5 SCC 676 : 2006 CrLJ 4605 : 2006 (3) Crimes 63.

[9069] ● ***Person himself evading service of detention order.***—Where a person himself *evades service of detention order,* it is not open to him to contend that in view of the long period which has elapsed between the offending activities and the actual arrest and detention, the vital link had snapped and there was no ground for actually detaining him. An otherwise valid detention order cannot be rendered invalid on account of the own act of the detenu of evading arrest and making himself scarce. The contention thus raised has absolutely no merit and has to be rejected. *Vinod K. Chawla* v. *Union of India,* AIR 2006 SC 2864 : (2006) 7 SCC 337 : 2006 CrLJ 4079 (4086, 4087) : (2006) 3 Crimes 245.

[9070] ● ***Delay in disposal of representation.***—Having regard to the nature of representation and reliance having been placed upon several judgments and remark of sponsoring authority, it was not required by the detaining authority to take five days to apply its mind. Detention order was held liable to be quashed. *Harshale Santosh Patil* v. *State of Maharashtra,* (2006) 12 SCC 211 : 2007 (1) SCC (Cri) 680.

[9071] ● ***Revocation of detention order—Remedy.***—Revocation of detention order issued in respect of detenu is not to be governed by provisions of Section 127 F(2), Customs Act *Alpesh Navinchandra Shah* v. *State of Maharashtra,* 2007 (1) SCC (Cri) 653 : (2007) 2 SCC 777 : 2007 (2) Crimes 192 (SC) : 2007 (3) SCR 223.

[9072] ● ***COFEPOSA and settlement commission under Customs Act.***—The orders of the respective authorities should not and cannot be binding or influencing each other. Order of Settlement commission should not have any bearing on detention order under COFEPOSA. *Alpesh Navinchandra Shah* v. *State of Maha-*

rashtra, 2007 (1) SCC (Cri) 653 : 2007 (3) SCR 223 : 2007 (2) SCC 777 : 2007 (2) Crimes 192 (SC).

[9073] ● ***Authority to make detention order.***—An order of detention can be made by (i) the central Government; or (ii) an officer specially empowered by the central Government; or (iii) the State Government; or (iv) an officer specially empowered by the State Government. *Union of India* v. *Harish Kumar,* AIR 2007 SC 1430 : 2007 CrLJ 1815 : 2007 (3) SCR 994 : JT 2007 (10) SC 254.

[9074] ● ***Non-consideration of ground—No arguments raised before High Court.***—In the instant case no arguments were raised before the High Court relating to the documents though they existed in record before the High Court. It was held that the plea that the new ground which was the part of record before High Court was not taken into consideration by the High Court was meritless and liable to be rejected. *Mukesh Tikaji Bora* v. *Union of India,* 2007 (3) SCC (Cri) 439 : 2007 (2) Crimes 236 (SC) : (2007) 9 SCC 28 : JT 2007 (5) SC 548.

[9075] ● ***Delay in execution of detention order—Delay explained.***—Delay in execution of detention order was adequately explained. It was found to be the result of conduct of detenu in evading arrest. Dismissal of writ petition by the High Court was held proper. *Mukesh Tikaji Bora* v. *Union of India,* (2007) 9 SCC 28 : (2007) 3 SCC (Cri) 439 : 2007 (2) Crimes 236 (SC) : 2007 (5) SCR 26 : JT 2007 (5) SCR 26.

[9076] ● ***Revocation of detention order of co-accused.***—This case related to illegal import by firm belonging to the petitioner and his brother. The petitioner was released on bail on the basis of settlement and on the advice of Advisory Board under COFEPOSA Act. *Held,* the petitioner who is similarly placed and having also paid custom duty in pursuance of order of settlement commission and got unconditional immunity is entitled to the same treatment *i.e.* release on bail. Further, there is nothing on record to show that he has indulged in any such activity in the recent past. Detention order is liable to be quashed. *Alpesh Navinchandra Shah* v. *State of Maharashtra,* (2007) 2 SCC 777 : JT 2007 (3) (SC) 630 : 2007 (1) SCR 653 : 2007 (2) Crimes 192.

[9077] ● ***Exoneration in judicial proceedings.***—Exoneration in adjudication proceedings is no ground to nullify the order of detention. *Mukesh Tikaji Bora* v. *Union of India,* (2007) 9 SCC 28 : 2007 (3) SCC (Cri) 439 : JT 2007 (5) (SC) 548 : 2007 (2) Crimes 236 (SC).

[9078] ● ***Failure on the part of central Govt to consider representation.***—The failure on the part of the Central Government to independently consider the representation submitted by the detenu against the detention renders further detention of the detenu illegal. The initial order of detention passed under Section 3(1) of the COFEPOSA Act does not get vitiated. The very order of detention passed under Section 3(1) of COFEPOSA Act cannot be declared void *ab initio Union of India* v. *Harish Kumar,* AIR 2007 SC 1430 : (2008) 1 SCC 195 : 2007 CrLJ 1815 (1817) : JT 2007 (10) SC 254.

[9079] ● ***Failure of Central Government to independently consider representation.***—The failure on the part of the Central Government to independently consider the representation submitted by the detenu against his detention renders further detention of the detenu illegal. The initial order of detention passed under section 3(1) of the COFEPOSA Act does not get vitiated. The very order of detention passed under section 3(1) of the COFEPOSA Act cannot be declared void *ab initio*. *Union of India* v. *Harish Kumar*, AIR 2007 SC 1430 : (2008) 1 SCC 195 : 2007 CrLJ 1815 (1817).

[9080] ● ***Legal aid to detenu before Advisory Board.***—Though a detenu has no right under Section 8(e) of COFEPOSA Act to legal proceedings before the Advisory Board, he can make such a request to the Board and the Board would be bound to consider request, if made *State of Maharashtra* v. *Zubair Haji Qasim,* AIR 2008 SC 2825 : (2008) 12 SCC 792 : 2008 CrLJ 3508 : (2008) 10 SCR 832.

[9081] ● ***"Grounds"—Meaning.***—"Grounds" meaning materials on which order of detention is primarily based. *Tahira Haris* v. *Government of Karnataka,* AIR 2009 SC 2184 : (2009) 11 SCC 438 : 2009 CrLJ 2451 : 2009 (5) SCR 941.

[9082] ● ***Documents and materials relied upon must be supplied to detenu.***—The detenu has a right to be supplied copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detenu at the earliest opportunity to make effective and meaningful representation against his detention. *Thaira Haris* v. *Government of Karnataka,* AIR 2009 SC 2184 : (2009) 11 SCC 438 : 2009 CrLJ 2451 (2456) : JT 2009 (5) SC 417.

[9083] ● *Confirmation order detention order are distinct.*—The order of detention was passed against Anil Kumar. According to the detaining authority, Anil Kumar was the master mind in the entire operation and allegation against the detenu is of abetting him in smuggling, therefore, any order of detention passed against Anil Kumar assumed great, significance and the same would weigh heavily with the detaining authority while passing the detention order. Admittedly the order of detention of Anil Kumar was not supplied to the detenu. The document supplied to the detenu was only the confirmation order passed under COFEPOSA Act. Both are different and distinct and, therefore, the High Court was wrong in holding that the detention order and confirmation was one and the same. *Tahira Haris* v. *Government of Karnataka,* AIR 2009 SC 2184 : (2009) 1 SCC 438 : 2009 CrLJ 2451 (2452) (SC).

[9084] ● *Authority must consider disposal of representation and pass appropriate order.*—It is true that whenever a representation is made either by the representative of the detenu or by the detenu himself, it is incumbent on the part of the named authority to consider disposal of the same and pass appropriate order and communicate it without any unreasonable delay. *Pooja Batra* v. *Union of India,* AIR 2009 SC 2256 : (2009) 5 SCC 296 : 2009 CrLJ 2797 (2800) : 2009 (2) Crimes 49 (SC).

[9085] ● *Detention order passed on incomplete material.*—Use of incomplete material which is either pending or inconsistent cannot be a basis for detention order. *Pooja Batra* v. *Union of India*, AIR 2009 SC 2256 : (2009) 5 SCC 296 : 2009 CrLJ 2797 : 2009 (2) Crimes 49 (SC).

[9086] ● *Single instance of smuggling.*—There is no dispute that even for a solitary instance of sufficient materials are available and if the detaining authority is subjectively satisfied that the detenu is indulging in smuggling activities which is detrimental to the interest of the department the detention order can be clamped. *Pooja Batra* v. *Union of India*, AIR 2009 SC 2256 : 2009 CrLJ 2797 (2800) : 2009 (2) Crimes 49 (SC) : JT 2009 (5) SC 194.

[9087] ● *Delay in passing detention order.*—Regarding delay in passing detention order, the alleged violation relates to Bill of Entry No. 589144 dated 25.04.2007, the detention order was passed on 05.12.2007. After the seizure of the goods from the container covered under Bill of Entry No. 589144 dated 25.04.2007, nobody appeared before the authorities to get the goods cleared till 23.07.2007. The detenu himself appeared before Customs Authorities for the first time on 03.08.2007. His statement under Section 108 of the Customs Act was recorded and he was arrested on 04.08.2007. It was explained that in the light of the fact that earlier also similar eight consignments were got cleared by the detenu, the investigation relied on the statement of witness as if he is the actual owner of the proprietary concern, the statement of the clearing agent and his nominee were recorded and it was only on 29.10.2007 the sponsoring authority recommended to the COFEPOSA Department for consideration of the matter to pass detention order against the detenu. All those actions, various orders/proceedings were mentioned in seriatim both in the grounds of detention, and in the counter affidavit filed by the very same authority. We have carefully gone through the same and find no merit in the contention. On the other hand, we are satisfied that there is proximity to the alleged offence and the detention order. In our view, there was no undue delay so as to snap the link between the incident and the alleged potentiality of the detenu in indulging in smuggling activity. Hence, we reject the said contention. *Pooja Batra* v. *Union of India*, AIR 2009 SC 2256 : (2009) 5 SCC 296 : 2009 CrLJ 2797 : 2009 (2) Crimes 49 (SC).

[9088] ● *Non-supply of relied upon documents.*—On proper construction of Clause (5) of Article 22 read with Section 3(3) of COFEPOSA Act, it is imperative for valid continuance of detention that the detenu must be supplied all documents, statements and other materials relied upon in the grounds of detention. In the instant case, admittedly, the relied upon document, the detention order of Anil Kumar was not supplied to the detenu and the detenu was prevented from making effective representation which has violated his constitutional right under Clause (5) of Article 22 of the Constitution.

Consequently, we accept appeals. The impugned detention order is quashed and the detenue is directed to be released forthwith, if not required in any other case. *Thahira Haris* v. *Government of Karnataka*, AIR 2009 (SC) 2184 : (2009) 11 SCC 438 : 2009 CrLJ 2451 (2456) : 2009 (5) SCR 941.

[9089] ● *Detention order based on extraneous matter.*—We have already pointed out that the authority are free to reopen the case in respect of import of eight consignment/Bill of Entries which is said to have been taking place prior to the Bill of Entry dated 25.04.2007. However even according to the department, those consignments were cleared under proper orders by the authority concerned. It is also not in dispute that on the date of the passing of detention order the authorities have issued notice calling for certain details in respect of import of those eight consignments. In other words, the said issue has not concluded as no adverse finding against him is passed on the date of the passing of the detention order. In such circumstances we are of the view that 'inconclusive state of investigation' can not legitimately help the authorities to pass an order of detention against the detenu on the perfunctory and inchoate material relied upon. *Pooja Batra* v. *Union of India*, AIR 2009 SC 2256 : (2009) 5 SCC 296 : 2009 CrLJ 2797 : 2009 (2) Crimes 49 (SC) : 2009 (5) SCR 67.

[9090] ● ***Consideration of extraneous and inconclusive material.***—Section 111 of Customs Act, 1962 refers to goods brought from a place outside India shall be liable for confiscation. Unless there is proper enquiry and arrive at some conclusion in terms of Section 111 or Section 113 it cannot be concluded that smuggling had taken place. There is nothing in the order of detention which would indicate that any of the said earlier imports were effected in contravention of any of the provisions of the Customs Act, 1962, or that they could have been regarded as having been smuggled into the country within the meaning of Section 2(39) of the said Act. Except notice for reopening the order clearing eight consignments prior to Bills of Entry dated 25.04.2007, there is adjudication and final order by the authority concerned. In other words, the reference to alleged violation of the Customs Act in respect of import of eight consignments which were only at the premature stage and considering extraneous materials, which are inconclusive cannot be a valid ground for clamping detention under COFEPOSA Act. Inasmuch as the Detaining Authority has extensively relied upon the allegations that the detenu was involved in the import of eight consignments through M/s P.P. Dutta, reliance on those irrelevant material vitiates the detention order. This is more so as the said alleged earlier imports, apparently constitute the main basis for the opinion formed by the Detaining Authority that the detenu had the propensity and potentiality to indulge in smuggling activities in future. *Pooja Batra* v. *Union of India*, AIR 2009 SC 2256 : 2009 (5) SCC 296 : 2009 CrLJ 2797 : 2009 (5) SCR 67.

[9091] ● ***Delay in disposal of representation.***—In the instant case, the detenu has taken the plea that he made a representation to the Secretary, Government of India as suggested in the detention order on 13.06.2008 which was received by the Suptd. Of Jail on 16.06.2008, and on the very same day it was forwarded to COFEPOSA Department. It is the contention of the counsel for the appellant that though the representation was sent to the COFEPOSA Department on 16.06.2008 itself and the fact that the Jail and COFEPOSA Department both located in Delhi yet it took time for more than ten days to respond in obtaining the comments from the sponsoring authority and get the same disposed of which is fatal and accordingly the detention order deserves to be quashed. As against the said detention, in the counter affidavit, it is clarified that the representation was received by them on 20.06.2008. The specific assertion made in the counter affidavit has not been refuted by the detenu in his rejoinder. On the same day, *i.e.* 20.06.2008 itself, it was sent to the sponsoring authority, *i.e.* Customs Authority, who sent their comments on 27.06.2008. The comments on the said representation were sent to the COFEPOSA department on 27.06.2008, 28/29.06.2008 were holidays being Saturday and Sunday and on the next day i.e. 30.06.2008, the representation of the denenu was considered by the competent officer of the COFEPOSA department and the same was rejected. The rejection order was communicated to the detenu on 01.07.2008 and received by him on 02.07.2008. In the light of the details furnished in the counter affidavit, there is no substance in the contention. There was no delay much more than the bare minimum time required to obtain the comments of the sponsoring authority. *Pooja Batra* v. *Union of India*, AIR 2009 SC 2256 : (2009) 5 SCC 296 : 2009 CrLJ 2797 : (2009) 2 Crimes 49.

[9092] ● ***Exercise of power under COFEPOSE Act.***—The Act contemplates two situations for exercise of the power of preventive detention, *viz.,* to prevent violation of foreign exchange regulations and to prevent smuggling activities. The justification for passing the order of detention is suspicion or reasonable probability of the person sought to be detained to prevent him in carrying on smuggling activities in the future. In other words, what needs to be proved is the potentiality or propensity of the person to engage in future prejudicial activities. *Gimik Piotr* v. *State of Tamil Nadu,* AIR 2010 SC 924 : (2010) 1 SCC 609 : JT 2009 (14) SC 273 : 2009 (13) Scale 706.

[9093] ● ***Power under sub-Section (1) of Section 3, COFEPOSA Act.***—Sub-Section (1) of Section 3 authorises Central Government or State Government to prevent person from carrying on smuggling activities. *Gimik Piotr* v. *State of Tamil*

Nadu, AIR 2010 SC 924 : (2010) 1 SCC 609 : JT 2009 (14) SC 273.

[9094] ● ***Single instance of smuggling.***—What emerges from the abovementioned cases is that even a single solitary act can prove the propensity and potentiality of the detenu to carry on with similar smuggling activities in future. The mere fact that on one occasion person smuggled goods into the country may constitute a legitimate basis for detaining a person under COFEPOSA. For this purpose, the antecedents of the person, facts and circumstances of the case need to be taken into consideration. *Gimik Piotr* v. *State of Tamil Nadu*, AIR 2010 SC 924 : 2010 (1) SCC 609 : JT 2009 (14) SC 273 : 2009 (13) Scale 706.

[9095] ● ***Section 3(1)(i), COFEPOSA Act—Preventive detention—Validity.***—In the present case, the respondents seek to rely extensively on the confession statement made by the detenu, where he had admitted to be carrying the foreign policy in return for monetary consideration. In the statement made before the customs authorities, the appellant has only narrated his antecedents, the nature of business carried on by him while he was in Singapore and how he was induced to carry the foreign currency by a person who has business dealings in Singapore. In the statement so made, he has not even suggested that he had indulged himself in foreign currency smuggling activities earlier. It is not the case of the respondents that if he is not detained, he would indulge himself in foreign currency smuggling activity and it is their specific case that he may abet the smuggling activity. In matters of personal liberty, the standard of proof needs to be high to justify an order of preventive detention. In our considered view, there were no compelling reasons for the detaining authority to pass the impugned order. Therefore, the order of detention is unsustainable.

In the instant case as the facts reveal, that, there was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as the person cannot move out of the country on account of his passport being impounded. Merely because a person cannot otherwise survive in the country, is no basis to conclude that a person will again resort to smuggling activities, or abetting such activities by staying in the country. There is higher standard of proof required in these circumstances involving the life and liberty of a person. The material provided by the respondents is not enough to justify the curtailment of the liberty of the appellant under an order of preventive detention in the fact and circumstances of the case. *Gimik Piotra* v. *State of Tamil Nadu*, AIR 2010 SC 924 : (2010) 1 SCC 609 : 2010 CrLJ 877 (882, 883) (SC).

[9096] ● ***Object of the Act.***—The object of the Act is to curb smuggling of foreign currencies and other valuable items from India to other countries which are having increasingly deleterious effect on national economy and thereby serious effect on security of State. *Gimik Piotr* v. *State of Tamil Nadu,* AIR 2010 SC 924 : (2010) 1 SCC 609 : JT 2009 (14) SC 273.

[9097] ● ***Compelling reasons for detention order.***—The respondents contend that the confession made by the appellant proves that, the appellant is a part of a smuggling ring and hence his detention is warranted under the provisions of COFEPOSA. This submission of the respondent's learned counsel, in our view, has no merit. In the statement made before the customs authorities, the appellant has only narrated his antecedents, the nature of business carried on by him while he was in Singapore and how he was induced to carry the foreign currency by a person who has business dealings in Singapore. In the statement so made, he has not even suggested that he had indulged himself in foreign currency smuggling activities earlier. It is not the case of the respondents that if he is not detained, he would indulge himself in foreign currency smuggling activities and it is their specific case that he may abet the smuggling activity. In matters of personal liberty, the standard of proof needs to be high to justify an order of preventive detention. In our considered view, there were no compelling reasons for the detaining authority to pass the impugned order. Therefore, the order of detention is unsustainable. *Gimik Piotr* v. *State of Tamil Nadu*, AIR 2010 SC 924 : 2010 (1) SCC 609 : JT 2009 (14) SC 273 : 2009 (13) Scale 706.

CONSOLIDATION OF CASES

[9098] ● ***Consolidation of cases.***—Consolidation of a police case and a complaint case is not permissible when the prosecution version on the police challan case and the complaint case are materially different, contradictory or mutually exclusive. *Harjinder Singh* v. *State of Punjab*, AIR 1985 SC 404 : (1985) 1 SCC 422 : 1985 SCC (Cri) 93 : 1986 CrLJ 831 : 1986 Cr App R (SC) 26 : (1985) 1 SCWR 311 : 1985 SC Cr R 178 : (1984) 11 Cr LT 387 : 1985 BBCJ (SC) 38 : 1985 Pat LJR 32 : 1985 All Cr R 99 : (1985) 87 Punj LR 103.

[9099] ● ***Police report case and complaint case when clubbed together.***—When a police report case and a complaint case are clubbed together, the cases should not be consolidated and that the evidence should be recorded separately in each case one after the other except to the extent that the witness for the prosecution who was common to both the cases be examined in one case and his evidence be availed as evidence in the other. *Harjinder Singh* v. *State of Punjab,* AIR 1985 SC 404 : (1985) 1 SCC 422 : 1985 SCC (Cri) 93 : 1986 CrLJ 831.

CONSPIRACIES WHICH ARE SUBJECT MATTER OF TWO CASES, IF CAN BE ASSUMED TO BE ONE CONSPIRACY

SYNOPSIS

1. **Omission in a charge of conspiracy 1867**
2. **Single conspiracy to cheat public is not converted into several conspiracies merely because of different acts of cheating different members etc.......................................1868**
3. **Section 120-B read with Opium Act Section 9 (a)...1869**
4. **Section 120 – B read with Section 135, Customs Act 1869**

[9100] ● ***Conspiracy whether separate or one—Determination of.***—The alleged object of the first conspiracy was to obtain possession of the pillars from the Court by cheating and to misappropriate them. The alleged object of the second conspiracy was the disposal of the stolen property by exporting the pillars to London. The offences alleged in the first case were Section 120-B read with Section 420 and Section 406, Indian Penal Code, while the offences alleged in the second case were Section 120-B read with Section 411, Indian Penal Code and Section 25 of the Antiquities and Art Treasures Act, 1972. It is true that the Antiquities and Art Treasure Act had not yet come into force on the date when the First Information Report was registered. It is also true that Omi Narang and Manu Narang were not extradited for the offence under the Antiquities and Art Treasures Act and, therefore, they could not be tried for that offence in India. But the question whether any of the accused may be tried for a contravention of the Antiquities and Art Treasures Act or under the corresponding provision of the earlier Act is really irrelevant in deciding whether the two conspiracies are one and the same.

Where the conspiracy discovered later is found to cover a much larger canvas with broader ramifications, it cannot be equated with the earlier conspiracy which covered a smaller field of narrower dimensions. We are clear, in the present case, that the conspiracies which are the subject-matter of the two cases cannot be said to be identical though the conspiracy which is the subject-matter of the first case may, perhaps, be said to have turned out to be part of the conspiracy which is the subject-matter of the second case. *Ram Lal Narang* v. *State (Delhi Admn.)*, AIR 1979 SC 1791 : (1979) 2 SCC 322 : 1979 SCC (Cri) 479 : 1979 CrLJ 1346 : 1979 CrLR (SC) 154.

1. OMISSION IN A CHARGE OF CONSPIRACY

[9101] ● ***Omission in a charge of conspiracy.***—Sections 221 and 222 of the Criminal Procedure Code which deal with the form and contents of the charge, require that the charge shall state the offence charged, the particulars of the time and place of the offence, and the person against whom it is committed. There is no statutory requirement to give the names of the fellow offenders. Therefore, when the offence charged is one under Section 120-B, Panel Code, it is not obligatory to state in the charge, the names of the fellow conspirators, though it is always desirable, that the charge should give their names in order to give to the accused, complete notice of the exact nature of the conspiracy alleged against them. But even assuming, that a charge in a case of conspiracy is defective, by reason of the omission of the names of all the fellow-conspirators, the effect of such omission is to be judged by the application of Sections 225, 232 and 537, CrPC and before a conviction can be set aside on this ground the appellate Court has to be satisfied that the omission has misled the accused in their defence, and has thus caused them prejudice by occasioning a failure of justice. If the convicted accused fail to satisfy the Court that they were so misled and prejudiced, the defect in the charge must be treated as having been cured by the provisions of Section 537, CrPC.

In the present case the prosecution case was that the offence of conspiracy had been committed by the five accused in the case together with one other person who had been made an approver.

The charge against each accused, however, mentioned that he along with "the other accused" committed the offence under Section 120-B and the charge did not give the name of the approver as having been privy to the conspiracy. On appeal to the Supreme Court one of the grounds taken against the legality of the trial was on the score of the defect in the charge arising out of the omission.

The omission of the name of the approver as having been privy to the conspiracy does not make the charge defective in law, but even assuming that it is, it is for the accused to show that he had been misled thereby and since the prosecution case from the beginning is entirely clear that the approver has taken part in the conspiracy from its inception along with the arraigned conspirators, it has to be held that the accused has not been misled in their defence in any way. Further, in view of the fact that the accused, who has been convicted did not raise any objection on the ground of such prejudice before the High Court when his appeal was heard, the Explanation to Section 537. CrPC applies, and he cannot be allowed, to urge the defect in the charge for the first time in his appeal to the Supreme Court. *Bimbadhar Pradhan* v. *State of Orissa*, AIR 1956 SC 469 : 1956 CrLJ 831 : 1956 SCA 857 : 1956 SCJ 441 : ILR (1956) Cut 409 : 1956 AWR (Sup) 89 : 1956 (2) MLJ (SC) 93.

2. SINGLE CONSPIRACY TO CHEAT PUBLIC IS NOT CONVERTED INTO SEVERAL CONSPIRACIES MERELY BECAUSE OF DIFFERENT ACTS OF CHEATING DIFFERENT MEMBERS ETC.

[9102] ● ***Single conspiracy to cheat public is not converted into several conspiracies merely because of different acts of cheating different members etc.***—When only one conspiracy is formed with the object of cheating the members of the public, by offering to double currency notes, and it is in pursuance of that conspiracy that different members of the public are made to part with their moneys as a result of the deception practiced upon them by one or more of the conspirators, the fact that the conspiracy ran for several years, or that in course of time new members joined the original gang, or that several incidents of cheating took place at different times and different places in carrying out the object of the conspiracy, cannot change the character of that conspiracy and cannot go to convert one single conspiracy into several separate and distinct offences of conspiracy.

In such a case it makes no difference, whether the *modus operandi* employed in the different acts of cheating was the same or whether different ways of cheating were adopted for the purpose of inducing the victims to part with their moneys. The authority for joining the several acts of the accused under one charge of a single conspiracy was born of a single agreement between the conspirators, whether they were the original planners or whether they joined the common plan at a later stage after its inception, and not in the uniformity of the method of cheating which was adopted. Therefore, if on the facts on record it is established that the different instances of cheating were in pursuance of a single conspiracy to cheat, all those instances must be held to be parts of the same transaction. In such a case a charge of a single conspiracy against all the persons alleged to have agreed to the common plan is perfectly legal, and for the purpose of determining the legality of such a joint trial, consideration such as the long period covered by the conspiracy, the diversity in the different methods employed by different members thereof in carrying it out, and the spread of the net-work of the conspiracy over a vast area, are entirely immaterial. *Swamirathnam, S.* v. *State of Madras*, AIR 1957 SC 340 : 1957 CrLJ 422.

[9103] ● ***Conspiracy of issuing licenses in names of various fictitious firms.***—A.G. Nelson, Assistant Controller of Imports, P.H. Shingrani, Upper Division Clerk in the Quota licensing section of the office of the Joint Chief Controller of Imports and Exports, Bombay, Shrichand Khetwani and Ramashanker Ramayan Bhargava were parties with other unknown persons to a criminal conspiracy and that, in pursuance of the said conspiracy, a number of licences in the name of several companies which has no existence were prepared. Some of these licenses were actually issued and that two of those licences issued were in the name of M.L. Trading Co., Bombay and were delivered to the appellant by Prabhaker Karnik, a postman, on May 15, 1959. The four conspirators were tried and all of them were convicted for an offence punishable under Section 120-B read with Section 409, IPC and Section 5(2) read with Section 5(1) (d) of the Prevention of Corruption Act. On appeal, the High Court acquitted Bhargava and dismissed the appeals of the other three persons. Out of the three convicted persons, Shrichand Khetwani only preferred appeal to the Supreme Court by Special leave.

The charge, as framed, describes the conspiracy to be the agreeing of the various persons, including persons not put on trial, to do or cause to be done illegal acts. The acts to be done were the abuse of the official positions of Nelson and Shingrani for the issue of import licence in the names of bogus or unknown applicants on the basis of false particulars, *etc;* and the object of conspiring to do such acts by the persons in the conspiracy charged or not charged was to obtain pecuniary advantage. The charge of conspiracy was not that the conspiracy was entered into with each bogus individual firm for the benefit of that firm alone in connection with issue of licences to that particular firm. The charge was that out of the profits made from acts done in furtherance of the conspiracy, all the persons in the conspiracy were to benefit.

The finding that the various firms to whom licences were issued were fictitious is not questioned. The conspiracy was a general conspiracy to keep on issuing licences in the names of fictitious firms and to share the benefits arising out of those licences when no real person was the licensee. The various members of the conspiracy other than the two public servants must have joined with the full knowledge of the *modus operandi* of the conspiracy and with the intention and object of sharing the profits arising out of the acts of the conspirators. We do not, therefore, see that the mere fact that licences were issued in the name of eight different companies make out the case, against the appellant and other conspirators, to be a case of eight different conspiracies, each with respect to the licences issued to one particular fictitious company. *Srichand K. Khetwani* v. *State of Maharashtra*, AIR 1967 SC 450 : 1967 CrLJ 414 : (1967) 2 SCJ 178 : (1967) 1 SCWR 896 : (1967) SCD 1050 : 69 BomLR 313 : 1967 MPLJ 653 : 1967 MLJ (Cri) 609 : 1967 MahLJ 747.

3. SECTION 120-B READ WITH OPIUM ACT SECTION 9(A)

[9104] ● *Section 120-B read with Opium Act Section 9(a).*—In this case the appellants were convicted under the above sections. The plea of the appellants was that, each of them was living separately in the house, that they were not present at the time of the recovery of opium, and that it was possible for some outsider to have thrown the opium into the Court yard of the house. These pleas were all considered in detail by the trial Court and appellate Court as well as by the High Court in revision. The chance of any outsider having thrown the article into the Court-yard of the appellants had been eliminated, as it was found to be a place where various domestic articles were kept and had also been found to be a place in frequent use by the appellants and their presence had also been established at the time of the recovery. Hence, it was in their conscious possession. A further finding was that the presence of such a large quantity of opium could not have been possible without each of them taking the other into confidence. Hence, their conviction was correct. Appellants 2 and 3 were the sons of the first appellant and the fourth appellant was his nephew. Therefore, there was no legal error or infirmity committed by any of the Courts in arriving at that conclusion. *Ashiq Miyan* v. *State of Madhya Pradesh*, AIR 1969 SC 4 : 1969 CrLJ 239 : 1969 SCD 193 : (1969) 1 SCJ 722 : (1968) 2 SCWR 668 : 1969 JabLJ 32 : 1968 MPWR 921 : 1968 BLJR 965 : 1969 MPLJ 200 : 1969 MahLJ 245 : 1968 ALJ 1058 : 1969 MLJ (Cri) 935 : (1968) 2 UmNP 924.

4. SECTION 120-B READ WITH SECTION 135, CUSTOMS ACT

[9105] ● *Section 120-B read with Section 135, Customs Act.*—Circumstances that the accused-appellant was found peeping into the flat which was being watched by the Customs Officials under orders of authorities, that he tried to run away on seeing the Customs Officials searching the premises, that he was in possession of duplicate keys of the flat and that he was found wearing a bandi which was special type of bandi suitable for carrying gold slabs secretly are not incompatible with his innocence. He was a close relative of A-12 who had been found to be the person really in charge of the flat and it would thus be natural for him to share the flat with the permission of A-12. In so living with his brother-in-law he might have been given to wear the bandi found on his person not for the purpose of carrying gold but just for use as ordinary raiment. Again, in a city like Bombay it was not unusual for persons sharing a particular accommodation to be provided with separate sets of keys for each in order to facilitate ingress or egress at will. Further, an innocent man finding his premises being watched by persons in authority might well feel funky at the prospect of a false implication on the basis of a mere suspicion (which might or might not be well founded) and might try to make himself scarce. Without more, the above circumstances, therefore, could not be regarded as incriminating circumstances. So the conviction of the appellant really rested on the confession attributed to him, which was found to be not voluntarily made and therefore untrustworthy. Conviction was set aside. *Sevantilal* v. *State of Maharashtra*, AIR 1979 SC 705 : (1979) 2 SCC 58 : 1979 SCC (Cri) 360 : 1979 CrLJ 645 : 1979 CrLR (SC) 558 : (1979) 2 SCR 1160 : 1979 Cr AppR (SC) 119 : (1979) 3 Mah LR 122 : 1979 Chand LR (Cri) (SC) 165 : 1979 UJ (SC) 702.

CONSPIRACY

SYNOPSIS

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1. MEANING AND IMPORT OF CRIMINAL CONSPIRACY

[9106] ● *Meaning and import of criminal conspiracy.*—In English law conspiracy first began as an agreement of persons who combined to carry on legal proceeding in vexatious or improper way. It is an offence at common law and was for a long time closely allied to attempts and was indeed often regarded as one form of attempt to commit a wrong. However in modern times conspiracy has become a separate crime and is defined as the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it. This definition presents four points for notice : (a) *the actus reus*. (b) the persons agreeing, (c) the purpose agreed upon, (d) *mens rea* : KENNY *on outlines of Criminal Law,* 19th edn. para 448. p. 426

[9107] ● *Conspiracy consists in agreement of two or more persons to do unlawful act.*—Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court.

The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. HALSBURYS *Laws of England,* 4th edn. Vol 11, p. 44, para 58.

[9108] ● *Criminal conspiracy Agreement gist of offence.*—Criminal conspiracy is an agreement, by two or more persons to do, or cause to be done, an illegal act or an act, which is not illegal, by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy, there must be a common design and common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished, from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. *Hussain Umar* v. *Dalipsinhji*, AIR 1970 SC 45 : 1970 SC CrR 76 : 1970 CrLJ 9 : (1970) 1 SCJ 149 : 1970 SCD 58 : (1970) 1 SCR 130 : 1970 MLJ (Cri) 68 : 72 BomLR 774.

2. OBJECT OF SECTION 120-B.

[9109] ● *Object to curb power to do mischief.*—Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. *Chaman Lal* v. *State of Punjab*, AIR 2009 SC 2972 : 2009 (11) SCC 721 : 2009 (5) SCR 351 : 2009 (5) Scale 12 : JT 2009 (4) (SC) 662.

[9110] ● *Form of conspiracy.*—The agreement may be express or implied, or in part express and in part implied. The conspiracy cases and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists..... that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The *actus reas* in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that the two or more persons pursued the same unlawful object at the same time or in the same place. It is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not however, necessary that each conspirator should have in communication with each other. *Halsbury's Laws of England* (Vide 4th Edn. Vol II, P 44, Para 58).

3. GIST AND INGREDIENTS

[9111] ● *Gist and ingredients.*—Conspiracy is a purely mental crime, consisting in the concurrence of the intentions of the parties. Here, as everywhere in our law, bare intention is no crime. 'Agreement', as Lord CHELMSFORD puts it clearly, is an act in advancement of the intention which each person has conceived in his mind'. It is not mere intention, but the announcement and acceptance of intensions. A distinction is to be drawn between the conspiracy and the overt acts which may be given as evidence of the conspiracy. Bodily movement, by word or gesture, is indispensable to effect it. In order of time, this precedes the act agreed upon. But the fact of the parties having come to such an arrangement suffices to constitute a conspiracy. Hence it is not necessary to show that they went on to commit some overt act towards carrying it out, though this (and also some consequent damage) would be necessary in an action of tort for conspiracy. It follows that a person may be convicted of a conspiracy as soon as it has been formed, and before any overt act to carry out the agreed purpose has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it. KENNY on *Outlines of Criminal Law,* 19th edn. Para 449 pp. 426-427.

[9112] ● *Essential of offence—Agreement between two or move persons.*—The gist of the offence under Section 120-A is that the agreement between two or more persons to do or cause to be done an illegal act or a legal act by illegal means subject to the proviso that the agreement does not except agreement to commit offence, amount to a conspiracy unless it is followed by an overt act done by one or more persons in pursuance of such an agreement. An agreement to do an illegal act which amounts to a conspiracy, will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement. *Levart Schussler* v. *Director of Enforcement, New Delhi*, AIR 1970 SC 549 : 1971 CrLJ 707 : (1971) 1 SCJ 199 : (1970) 2 SCR 760 : 1970 SCD 738.

[9113] ● *Criminal conspiracy—Agreement gist of offence.*—Criminal conspiracy as defined in Section 120A of the IPC is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separator conspiracies having a similar general purpose. Where different groups of persons cooperate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. The cases illustrate the distinction between a single general conspiracy and a number of unrelated conspiracies. *Mohd. Hussain Umar Kochra* v. *K.S. Dalipsinghji*, AIR 1970 SC 45 : (1969) 3 SCC 429 : 1970 CrLJ 9 : 1970 (1) SCR 130.

[9114] ● *Criminal conspiracy—Use of English cases.*—Where there is a Code and where words have been designedly chosen in respect of a subject-matter, it is not proper to first go into the English cases on the subject without considering the words of the statute. *Harihar Prasad* v. *State of Bihar,* (1972) 3 SCC 89 : 1972 SCC (Cri) 409 : 1972 CrLJ 707.

[9115] ● *Criminal conspiracy—Ingredients.*—The principal object of the criminal conspiracy in the first charge was thus "cheating by personation", and without achieving that goal other acts would be of no material use in which any person could be necessarily interested. That the appellant himself did not personate another person, was beside the point when he was alleged to be a collaborator of the conspiracy with that object. Some persons had been individually and specifically charged with cheating by personation under Section 419, IPC. They were also charged along with the appellant under Section 120-B, IPC. The object of the criminal conspiracy was absolutely clear and there was no substance in the argument that the object was merely to cheat simpliciter under Section 417, IPC.

The offence of criminal conspiracy under Section 120-A is a distinct offence. The very agreement, concert or league is the ingredient of the offence. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others, it will not affect the culpability of those others when they are associated with the object of the conspiracy. *Yash Pal* v. *State of Punjab*, AIR 1977 SC 2433 : (1977) 4 SCC 540 : 1978 SCC (Cri) 5 : 1978 CrLJ 189 : 1977 CrLR (SC) 503 : 1977 Cr AppR (SC) 407 : 1978 ACrR 23 : 1978 CurLJ (Cri) 1 : 1978 SCCrR 55 : 1978 ACrC 10 : 1978 Chand LR (Cri) 106 (SC) : 1978 1 SCWR 349 : (1978) 1 SCR 781.

[9116] ● ***Conspiracy—Proof—Law in India similar to that in England.***—Sections 120-A and 120-B have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Sections 120-A and 120-B IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy. *Kehar Singh* v. *State (Delhi Administration)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1988 CrLJ 1 : 1988 (3) Crimes 209 (SC).

[9117] ● ***Criminal conspiracy—Ingredients of.***—The essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that even no overt act is necessary to be proved by the prosecution because in such a situation criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub-section (2) of Section 120-A, then in that event mere proof of an agreement between the accused for commission of. Such a crime alone is enough to bring about conviction under Section 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trapping of the provisions contained in Section 120-B. *Devender Pal Singh* v. *State of NCT of Delhi*, AIR 2002 SC 1661 : (2002) 5 SCC 234 : 2002 SCC (Cri) 978 : 2002 CrLJ 2034 : (2002) 2 Crimes 133 (SC).

[9118] ● ***Criminal conspiracy, charge of.***—So far as the charge under Section 120-B IPC is concerned, it stands proved by showing that two or more persons have agreed to do or cause to do an illegal act or an act which is not illegal by illegal means and that some overt act was done by one of the accused in pursuance of the same. Where their common object or design is itself to do an unlawful act, the specification of such act itself which formed their common design would suffice and it would even be unnecessary or superfluous to further substantial the means adopted by all or any of them achieve such object. All the more so, when their common object or design appears to be to commit a series of such serious crimes and proof of any overt act in such cases also is a mere surplus age and that mere proof that they or some of them were concerned in the overt acts alleged would, *per se*, go, long way to establish that there existed such agreement among them. *Government of NCT of Delhi* v. *Jaspal Singh*, (2003) 10 SCC 586 : 2004 SCC (Cri) 933 (941).

[9119] ● ***Privacy and secrecy more characteristics of conspiracy.***—Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available; offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference. Sections 120-A and 120-B, IPC have brought the law of conspiracy in India in line with the English law by making an overt act unessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged the Court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever anyone of the conspirators does an act or series of acts, he would be guilty under Section 120-B, IPC. *Ram Narain Poply* v. *Central Bureau of Investigation*, AIR 2003 SC 2748 : (2003) 3 SCC 641 : 2003 SCC (Cri) 869 (992, 994) : 2003 CrLJ 4801 : JT 2003 (1) SC 184 : (2003) 2 Crimes 312.

[9120] ● ***Criminal conspiracy—Element's of.***—The elements of a criminal conspiracy have been stated to be (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish the object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished in order to constitute an indictable offence. Encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See *American Jurisprudence*, Vol. II, Section 23, p. 559). For an offence punishable under Section 120-B the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra* capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means. *K. Hashim* v. *State of T.N.*, AIR 2005 SC 128 : (2005) 1 SCC 237 : 2005 SCC (Cri) 292 (300) : 2005 CrLJ 143.

[9121] ● ***Conspiracy—Both approvers spoken of presence of A-2 during every transaction.***—Both the approvers have spoken of the presence of A-2 during every transaction. He is not an innocent bystander as was tried to be contended. A stand was taken that there was no period indicated. Though in the examination-in-chief nothing was stated about the period but in the cross-examination by A-2 this matter was brought on record. The confession recorded by PW-19 amply proves the accusations. Though much was made of the fact that some of the seized notes were not produced in Court, the prosecution has explained this by bringing on record the fact that some of the seized notes were sent for the expert's view. There were two reports, one of the persons who had given the report was not available. But the authenticity of the report has been established by the other expert who was acquainted with the signature.

Judged on the background of the legal position as stated above the evidence of PWs-1 and 2 does not suffer from any infirmity to warrant rejection, for their evidence is not really uncorroborated as is submitted by learned counsel for the appellants. The evidence of PWs-8 and 19 clearly provides the materials. As noted above, even circumstantial evidence can provide the corroboration. In the instant case, the evidence of PWs-1 and 2, therefore, clearly meets the requirements of Section 114(b) in the background of Section 133 of the Evidence Act.

In view of the credible, cogent and reliable evidence tendered, the inevitable conclusion is that the appellants have been rightly convicted under Section 120-B read with Sections 489-A, 489-C and 489-D IPC and separately under Section 489-C of the Code. The sentences as imposed do not warrant interference, particularly in view of the object for which these provisions have been enacted. *K. Hashim* v. *State of T.N.*, AIR 2005 SC 128 : (2005) 1 SCC 237 : 2005 SCC (Cri) 292 (299, 304, 306) : 2005 CrLJ 143.

[9122] ● ***Conspiracy—Proof of.***—In the case of *State* v. *Nalini*, AIR 1999 SC 2640 : (1999) 5 SCC 253 : 1999 SCC (Cri) 691 : 1999 CrLJ 3124 : 1999 (2) Crimes 59. S.S.M. QUADRI, J., after a survey of case-law made the following pertinent observations : (SCC at pp. 568-69, para 662).

> "In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences." *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1796) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[9123] ● ***Criminal conspiracy—Ingredients of.***—In *Yash Pal Mittal* v. *State of Punjab*, AIR 1977 SC 2433 : (1977) 4 SCC 540 : 1978 SCC (Cri) 5 : 1978 CrLJ 189. GOSWAMI, J., speaking for a three-Judge Bench analysed the legal position relating to criminal conspiracy. At SCC p. 543, para 9, the learned Judge observed that "the very agreement, concert or league is the ingredient of the offence" and that "it is not necessary that all the conspirators must know each and every detail of the conspiracy". It was then observed that : There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators.

Every one of the conspirators need not take active part in the commission of each and every one of the conspirational acts. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1796) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[9124] ● ***Conspiracy—Tacit consents.***—The criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while others put the conspiracy into effect, is guilty though he intends to take no active part in the crime. *State* v. *Naline*, (1999) 5 SCC 253 : (1999) SCC (Cri) 691 **referred to**; *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1798) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[9125] ● ***Vague allegations.***—In a case where conspiracy to issue false certificate was alleged against the senior offences of a company. In a letter written to alleged conspirators, M.D. of the company by the complainant regarding issuance of false certificate it was claimed that the M.D. Of the company did not raise any objection to the issuance of false certificate in question. It was held that the allegations of conspiracy were too vague and non-specific and therefore charge of conspiracy was not warranted. *J.J. Irani* v. *State of Jharkhand*, (2004) 13 SCC 106 : (2006) 1 SCC (Cri) 755.

[9126] ● ***Conspiracy—Substantive offence—No need for overt act.***—Sections 120-A and 120-B made conspiracy a substantive offence and rendered the mere agreement to commit an offence punishable. Even if an overt act does not take place pursuant to the illegal agreement, the offence of conspiracy would still be attracted. The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. If there is proof to the effect that the accused played a role, attended to certain things or took steps consistent with the common design underlying the conspiracy, that will go a long way in establishing the complicity of the accused, though it is not a legal requirement that the conspirator should do any particular act beyond the agreement to commit the offence. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1794, 1795, 1803) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[9127] ● ***Conspiracy—Nature of agreement.***—Sections 120-A and 120-B were brought on the statute book by way of amendment to IPC in 1913. The Statement of Objects and Reasons to the amending Act reveals that the underlying purpose was to make a mere agreement to do an illegal act or an act which is not illegal by illegal means punishable under law. This definition is almost similar to the definition of conspiracy, which we find in *Halsbury's Laws of England.* The definition given therein is :

> "58. Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law.... The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied.... and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be."

In America, the concept of criminal conspiracy is no different. In *American Jurisprudence*, 2nd Edn., Vol. 16, p. 129, the following definition of conspiracy is given :

> "A conspiracy is said to be an agreement between two or more persons to accomplish together a criminal or unlawful act or to achieve by criminal or unlawful means an act not in itself criminal or unlawful .... The unlawful agreement and not its accomplishment is the gist or essence of the crime of conspiracy." *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1795) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[9128] ● ***Conspiracy.***—While appreciating the evidence of the conspiracy, it is incumbent on the Court to keep in mind the well-known rule governing circumstantial evidence *viz.* each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guild is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is *sine qua non* for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not *per se* constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement. It is true that in most of the cases, it is not possible to prove the agreement between the conspirators by direct evidence but the same can be inferred from the circumstances giving rise to conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

It is cumulative effect of the proved circumstances which should be taken into account in determining the guilt of the accused. Of course, each one of the circumstances should be proved beyond reasonable doubt. The acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution. *K.R. Purushothaman* v. *State of Kerala*, AIR 2006 SC 35 : (2006) 1 SCC (Cri) 686 (692, 693) : 2005 CrLJ 4648 : JT 2005 (9) SC 38 : 2005 (4) Crimes 191.

[9129] ● ***Requirements.***—A criminal conspiracy must be put to action inasmuch as so long a crime is generated in the mind of an accused, it does not become punishable—What is necessary is not thoughts, which may even be criminal in character, often involuntary, but offence would be said to have been committed thereunder only when that take concrete shape of an agreement to do or cause to be done an illegal act or an act which although not illegal by illegal means and then if nothing further is done the agreement would give rise to a criminal conspiracy—Words and Phrases —Criminal conspiracy—Prevention of Corruption Act, 1988—Section 13(1)(d)(ii) & (iii). *State of Madhya Pradesh* v. *Sheetla Sahai*, 2009 (8) SCC 617 : 2009 CrLJ 4436 : 2009 (12) SCR 1048 : 2009 (10) Scale 632. **TO THE SAME EFFECT** : *R. Venkatakrishnan* v. *Central Bureau of Investigation*, AIR 2010 SC 1812 : (2009) 11 SCC 737 : 2009 (12) SCR 762 : JT 2009 (10) (SC) 597.

[9130] ● ***Ingredients of offence.***—The ingredients of Section 120A, IPC are (i) an agreement between two or more persons, (ii) an agreement must relate to doing or causing to be done either (a) an illegal act; (b) an act which is not illegal in itself but is done by illegal means.

What is, therefore, necessary is to show meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. *State of Madhya Pradesh* v. *Sheetla Sahai*, 2009 (8) SCC 617 : 2009 (12) SCR 1048 : 2009 (10) Scale 632. TO THE SAME EFFECT : (1) *Baldev Singh* v. *State of Punjab*, (2009) 6 SCC 564 : 2009 (7) SCR 855 : 2009 (3) Crimes 8 (SC). (2) *Sudhir Shantilal Mehta* v. *CBI*, (2009) 8 SCC 1 : 2009 (2) SCR 682 : JT 2009 (10) (SC) 554.

[9131] ● ***Scope of Section 120A—Ingredients.***––The ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) an agreement must relate to doing or causing to be done either (a) an illegal act; (b) an act which is not illegal in itself but is done by illegal means. Condition precedent for holding the accused persons to be guilty of a charge of criminal conspiracy must, therefore, be considered on the anvil of the fact which must be established by the prosecution, *viz.*, meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. The Courts, however, while drawing an inference from the materials brought on record to arrive at a finding as to whether the charges of the criminal conspiracy have been proved or not, must always bear in mind that a conspiracy is hatched in secrecy and it is difficult, if not impossible, to obtain direct evidence to establish the same. The manner and circumstances in which the offences have been committed and the accused persons took part are relevant. For the said purpose, it is necessary to prove that the propounders had expressly agreed to it or caused it to be done, and it may also be proved consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means. *Chaman Lal* v. *State of Punjab*, AIR 2009 SC 2972 : (2009) 11 SCC 721 : 2009 (5) SCR 351.

[9132] ● ***Essence of criminal conspiracy.***—The essence of criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this it necessarily fallows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished in order to constitute an indictable offence. *Chaman Lal* v. *State of Punjab*, AIR 2009 SC 2972 (2974) : (2009) 11 SCC 721 : 2009 (5) SCR 351.

[9133] ● ***Elements of criminal conspiracy.***—The elements of a criminal conspiracy have been stated to be : (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committee to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. *Chaman Lal* v. *State of Punjab*, AIR 2009 SC 2972 : (2009) 11 SCC 721 : 2009 (5) SCR 351 : 2009 (5) Scale 12.

[9134] ● ***Conspiracy consists in agreement between parties.***—A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means, so long as such a design rests on intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means. *Chaman Lal* v. *State of Punjab*, AIR 2009 SC 2972 (2974) : (2009) 11 SCC 721 : 2009 (3) SCR 351 : JT 2009 (4) SC 662.

4. OVERT ACT—NEED

[9135] ● ***Overt Act—Need.***—The *actus reus* in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other. Turning to the Expl. To Section 120-A, it may be found that no proof of any overt act is necessary for the metamorphosis of an agreement to criminal conspiracy when the agreement is to commit an offence. But some overt act is needed for, other types of agreements to do some act to amount to criminal conspiracy. HALSBURY'S *Laws of England*, Vol. 11 para 58 P 44.

[9136] ● ***Criminal conspiracy postulates agreement between two or more persons.***—Criminal conspiracy under Section 120-B postulates an agreement between two or more persons to do or cause to be done, an illegal act or legal act by illegal means. Under Section 120-B a mere agreement to commit an offence is an offence even of no step is taken to carry out the agreement. *Noor Mohammad* v. *State of Maharashtra*, AIR 1971 SC 885 : (1970) 1 SCC 696 : 1971 CrLJ 793 : (1971) 1 SCJ 43 : (1971) 1 SCR 119.

[9137] ● ***Offence of conspiracy distinct offence.***—The offence of criminal conspiracy is a distinct offence. The very agreement, concert or league is the ingredient of the offence. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two the conspirators without the knowledge of the others, it will not affect the culpability of those others when they are associated with the object of the conspiracy. *Yash Pal* v. *State of Punjab*, AIR 1977 SC 2433 : (1977) 4 SCC 540 : 1978 CrLJ 189.

[9138] ● ***Everyone of conspirators need not have taken active part.***—Every one of the conspirators need not have taken active part in the commission of each and every one of the conspiratorial acts and it is not only then, the offence of conspiracy will be mode out. *State of Himachal Pradesh* v. *Kishan Lal,* AIR 1987 SC 773 : (1987) 2 SCC 17 : 1987 CrLJ 709.

5. ILLEGAL ACT

[9139] ● ***Illegal Act.***—Under the principle contained in Section 10 of the Evidence Act, once a conspiracy to commit an illegal act is proved, act of one conspirator becomes the act of the other. *Shivanarayan Laxminarayan Joshi* v. *State of Maharashtra*, AIR 1980 SC 439 : 1980 SCC (Cri) 493 : 1980 CrLJ 388 : 1980 CrLR (SC) 1 : 1980 CAR 78.

[9140] ● ***Everyone of conspirators need not take part in illegal act.***—Everyone of the conspirators need not take part in the illegal act or in illegal means to achieve the conspiratory act, to make up conspiracy. *State of Himachal Pradesh* v. *Kishanlal*, AIR 1987 SC 733 : (1987) 2 SCC 17 : 1987 CrLJ 709.

[9141] ● ***Entire gist of conspiracy agreement to commit offence.***—Similarly in a case certain office bearers and members of cooperative society sanctioned the loan to 16 members of society but instead of making payment to them misappropriated it. It was held that all were guilty for committing offence under Section 120-A. The entire gist of conspiracy is the agreement to commit the offence. Sixteen members, as per evidence, did not receive the loan in the manner alleged by the accused as certain cultivator-members did not take the loan but on records it was shown that the disbursement was made to each one of them. *Sambhu Singh* v. *State of Uttar Pradesh,* AIR 1994 SC 1595 : 1994 CrLJ 1584 (SC).

[9142] ● ***Criminal conspiracy—Ingredient.***—To establish the charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. The prosecution has not to establish that a particular unlawful use was intended, so long as the goods or services in question could not be put to any lawful use. When the ultimate offence consists of chain of actions, it would not be necessary for the prosecution to establish, to prove the charge of conspiracy, that each of the conspirator had the knowledge of what collaborator would do, so long as it is known that the collaborator would put the goods or services to an unlawful use. *State of Maharashtra* v. *Som Nath Thapa*, AIR 1996 SC 1744 : (1996) 4 SCC 659 : 1996 SCC (Cri) 820 : 1996 CrLJ 2448 : 1996 (2) Crimes 64.

6. TWO OR MORE PERSONS REQUIRED

[9143] ● ***Two or more persons required.***—The need of two or more parties to constitute a conspiracy, may produce two interesting consequences namely,

(a) A Director who is the 'one man' of a 'one man' company cannot be convicted of conspiring with the company in spite of the fact that a company can be held guilty of conspiracy and is in law a separate entity from its directors. This is because, in order that there should be a conspiracy, there must be an agreement between two minds, and the director's mind is that of the company only in a purely artificial sense. A company can be convicted of conspiring with several of its directors, but presumably the rule with regard to the one man company would prevent two companies with the same 'one man' from being convicted of conspiring together.

(b) A husband and wife who are the only parties to an agreement cannot be guilty of conspiracy, a rule which has been held recently not to apply to the tort of conspiracy. It remains undecided whether the rule applies to a husband and wife whose marriage is of a type which is actually or potentially polygamous. It seems odd that if a husband and wife agree between themselves to commit an offence they cannot be convicted of conspiracy, whereas if the substantive offence is committed they can both be convicted of that offence. A husband and wife can be convicted of conspiring together with a third party. C. ROSS & JONES *on Introduction to Criminal Law*, 9th edn. Para 17.7 pp. 342-343

[9144] ● ***Conviction of one person for conspiracy.***—By the terms of Section 120-A there must be an agreement between two or more persons to commit an offence for the purpose of constituting the offence of criminal conspiracy. One person alone cannot be held guilty of the charge for the simple reason that one man cannot conspire with himself. Therefore, if upon a charge of criminal conspiracy against several persons all the accused except one are acquitted, the remaining one also must be acquitted of that charge, unless the charge against him has been that he conspired to commit an offence not only with the acquitted co-accused but also with some other persons who have not been tried in the same case along with the others (for instance, an offender who cannot be traced), and such a charge has been proved. When all the accused except one are acquitted of the charge under Section 120-B and the prosecution case has been that the offence was committed by them alone, conviction of the remaining single accused on that charge is illegal even though he may have made a confession of conspiracy with the co-accused, or he may have pleaded guilty to the charge when questioned in Court. In the present case four accused were charged before a Magistrate under Section 120-B read with Sections 471 and 420 and also with substantive offences under those sections. The prosecution case was that they conspired to use forged documents and thereby induced the Controller of Imports to grant import licences. The Magistrate acquitted all the accused on all the charges. On appeal by the State, the High Court confirmed the acquittal of Accused Nos. 2, 3 and 4 but reversed the acquittal of Accused No. 1 and convicted him not only of the substantive offences of which he was charged, but also under Section 120-B. In view of the fact that the charge under Section 120-B as framed has been levelled against four named individuals who are the four accused in the case, and is not a charge against them and other persons unknown, the conviction of Accused No. 1 alone on that charge is clearly illegal. Conviction under Section 120-B is set aside, though his conviction for the substantive offences under Sections 471 and 420, Penal Code, is not interfered with. *Topandas* v. *State of Bombay*, AIR 1956 SC 33 : 1956 CrLJ 138 : 1955 SCA 74 : 1956 SCJ 86 : 1956 AWR (Sup) 24 : 1956 BLJR 139 : 1956 NLJ 204 : 1956 ALJ 161 : 1956 1 MLJ (SC) 60 : 1955 (2) SCR 881 : 58 BomLR 492 : 58 PunLR 178.

[9145] ● ***Accused charged with having conspired to do certain illegal acts.***—The scope of the offence of criminal conspiracy defined in Section 120-A and made punishable in Section 120-B of the Penal Code is as under. The gist of the offence is an agreement to break the law. The parties to an agreement are all guilty of criminal conspiracy whether the illegal act agreed to be done has been done or has not been done. So too, it is not an ingredient of the offence that all the accused should agree to do single illegal act. The conspiracy may comprise the commission of a number of illegal acts. Where the accused are charged with having conspired to do different categories of illegal acts, the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevance in considering the question—whether the offence of conspiracy has been committed by them all. They are all guilty of the offence of conspiracy to do illegal acts, though all of them may not be liable for all the individual offences for committing which the conspiracy was formed. In the present case, six persons were charged under Section 120-B Penal Code in respect of offences under the Prevention of Corruption Act, and of them three were public servants and three were not public servants. Such a charge is perfectly legal, even though it is true that the offences under the Act can be committed only by public servants. *Barsay, Major E.G.* v. *State of Bombay*, AIR 1961 SC 1762 : 1961 (2) CrLJ 828.

[9146] ● ***Conspiracy—Not necessary that each member to know all details of.***—The accused was chosen for the purpose of the conspiracy because he had connection, both, with the Union Agencies and with Asia Udyog Ltd. He was in employment of Dalmia concern for a long time and as Director of Union Agencies knew that it had suffered heavy losses as a result of share speculation business and must have known how the funds, to meet the losses were secured from the funds of the Insurance Company, through Bhagwati Trading Company. He must have also known that this was wrong. It is only with knowledge that he could have been a party to the making of the false advices and vouchers. There could be no other reason. It could not have been possible for the prosecution to lead direct evidence about accused's knowledge, with respect to the full working of the scheme to provide for the losses of the Union Agencies from the funds of the Insurance Company. It is further not necessary, that each member of a conspiracy must know all the details of the conspiracy. *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821 : 1962 (2) CrLJ 805 : (1962) 32 Com Cas 699.

[9147] ● ***Offence of conspiracy not to survive acquittal of alleged conspirators.***—The offence of conspiracy cannot survive the acquittal of the alleged co-conspirators. Fakhruddin cannot be convicted unless there be proof that he had conspired with person or persons other than his co-accused. If all the other accused have been acquitted of the charge of conspiracy, Fakhruddin alone cannot be held guilty. Moreover, the offences charged are such that they could have been perpetrated by different persons acting in the same manner but independently and the large number of petitions does not show *per se* that there was necessarily a conspiracy. When it must have been known that there was no verification, persons wishing to take advantage, need not have conspired for they could act on their own and similarity of method followed by them does not establish a planned operation by consensus. The charge of conspiracy must fail and Fakhruddin must, therefore, be acquitted of that charge and the sentence passed under that charge against him is set aside. *Fakhruddin* v. *State of Madhya Pradesh*, AIR 1967 SC 1326 : 1967 CrLJ 1197 : 1967 SCD 495 : (1967) 1 SCWR 449 : (1967) 2 SCA 135 : (1967) 2 SCJ 885 : 1967 ALJ 303 : 1967 AWR (HC) 322 : 1967 ACrR 222 : (1967) 2 ALT 38 : 1967 LLJR 318 : 1967 Jab LJ 441 : 1967 MPLJ 473 : 1967 MahLJ 571 : 1967 MLJ (Cri) 925.

[9148] ● ***Conspiracy—Agreement to do illegal act.***—Where the agreement between the accused is a conspiracy to do or continue to do something which is illegal, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence does not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what or fact the conspirators intended to do or the object they wanted to achieve— *Lennart* v. *Director of Enforcement*, AIR 1970 SC 549 : (1970) 1 SCC 152 : 1970 CrLJ 707 : 1970 SCD 738.

[9149] ● ***Criminal conspiracy—Agreement to acquire foreign exchange contrary to provision of FERA.***—In these two appeals, against the judgment of the High Court dismissing the petitions of the appellants for quashing the complaint filed against them under Section 120-B, IPC, and Sections 4(3), 5 (1) (a) and 9 of the FERA, the facts were : The complainant reviewed information that A-2, Managing Director of the Rayala Corporation Ltd. was utilizing his position in acquiring foreign exchange illicitly. Some documents were recovered from the premises of A-2 on 20-12-1966. A-1 a Swedish national, was the export manager of the Swedish firm known as ASSAB. In August, 1963 A-2 met A-1 and agreed to purchase certain raw materials from ASSAB. A-2 informed A-1, that the arrangements made between him and the ASSAB was to over-invoice the value of the goods by 40% of the true value, and that he should be paid the difference of 40% thus received by crediting it to his personal account, and that since under the laws of India the said acquisition by him was unlawful and had to be kept secret, it should not be mentioned in the correspondence with Rayala Corporation by the Swedish firm. A-2 requested A-1 to help him in opening the account in a Swedish Bank in order to credit the difference in his personal account and A-1 agreed to do so. From time to time ASSAB was to intimate to A-1 the various amounts credited to A-2's account and A-1 was to keep a watch over the correctness of the account and to further intimate to A-2 the account position from time to time through unofficial channels and whenever A-1 came to India. Thus A-1 and A-2 were alleged to have contravened Sections 4(3), 5(1)(e) and 9 of the FERA and Rule 133-A of DOI (Amendment) Rules between August, 1963 and 1966. A combined effect of the several provisions of Section 21of the Act does not lead to the view that sub-section (1) covers a case of criminal conspiracy similar to Section 120-B IPC. Section 21 does not in terms deal with an agreement to commit an offence or a legal act in an illegal way but merely provides that an agreement or contract by itself ought not to evade or avoid the provisions of the Act. The contracts or agreements under Section 21 (1) are those which are entered into during the course of commercial transactions and it is the intention of the legislation to prohibit that such contracts or agreements ought not to provide for the evasion or avoidance of any of the provisions of the Act either directly or indirectly. The words directly or indirectly do not take in any agreement to do illegal acts in future. The entire agreement should be viewed as a whole and it had to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. Though initially the agreement between A-1 and A-2 might not have been an offence, it was an offence subsequently as A-1 did not withdraw from it and was said to have continued to carry out that agreement and A-1's help was necessary for A-2's design because otherwise he would not know whether ASSAB was in fact crediting his account with the Bank with the amount of over-invoice. The knowledge that the amount was being credited from time to time was an essential part of the agreement between them, and would be in furtherance of illegal and unlawful design to acquire foreign exchange contrary to the provisions of Act. Therefore, A-1 and A-2 could be charged with an offence, under Section 120-B. Appeals were dismissed. *Lennart* v. *Director of Enforcement*, AIR 1970 SC 549 : (1970) 1 SCC 152 : 1970 CrLJ 707 : 1970 SCD 738.

[9150] ● ***Acts not amounting to offence done by one conspirator in furtherance of agreement.***—Where the agreement between certain persons is a conspiracy to do or continue to do something which is illegal, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. Consequently, even if the acts done by a conspirator in furtherance of the criminal conspiracy do not strictly amount to offence, he is liable to be convicted under Section 120-B *Lennart Schussler* v. *Director of Enforcement*, AIR 1970 SC 549 : (1970) 1 SCC 152 : 1970 CrLJ 707.

[9151] ● ***Charge against two persons of conspiracy.***—Since conspiracy requires at least two persons, where two or more named persons only were charged and all but one of them were acquitted, the remaining accused could not be convicted under Section 120-B IPC, as he could not conspire with himself. *Bhagat Ram* v. *State of Rajasthan,* AIR 1972 SC 1502 : (1972) 2 SCC 466 : 1972 CrLJ 909 (SC).

7. THERE MUST BE MEETING OF MINDS

[9152] ● ***There must be meeting of minds.***—For proof of criminal conspiracy, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offense. This clearly envisages, that there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. True in most cases it would be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred, even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. *State (Delhi Admn.)* v. *V.C. Shukla*, AIR 1980 SC 1382 : (1980) 2 SCC 665 : 1980 SCCrR 345 : 1980 SCC (Cri) 561 : 1980 CrLJ 965 : 1980 CrLR (SC) 301.

[9153] ● ***Criminal conspiracy to be established.***—Conspiracy under Section 120-B postulates an agreement between two or more persons to do, or cause to be done, an illegal or legal act by illegal means. Under Section 120-B a mere agreement is offence, even if no step is taken to carry out the agreement. Though there is a close association of conspiracy with incitement and abetment, the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Section 107 of IPC. To substantiate a charge under Section 120-B there must be a criminal conspiracy at least between two or more persons. When there is absence of evidence of association of a particular accused with the conspiracy, charge against him must fall. *State of Uttar Pradesh* v. *Sukbasi*, AIR 1985 SC 1224 : 1985 Supp SCC 79 : 1985 SCC (Cri) 387 : 1985 CrLJ 1479 : 1985 CrLR (SC) 380 : 1985 (2) Crimes 465.

[9154] ● ***Conspiracy—Proof.***—The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. In pursuance of the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences. Every one of the conspirators need not have taken active part in the commission of each and every one of the conspiratorial acts and it is not only then, the offence of conspiracy will be made out. *State of Himachal Pradesh* v. *Kishan Lal*, AIR 1987 SC

773 : (1987) 2 SCC 17 : 1987 CrLJ 709 : JT 1987 SC 349 : (1987) 1 (1) IJ Rep 393.

[9155] ● ***Conspiracy to kill former Prime-Minister—Point laid down relating to conspiracy by Supreme Court.***—The former prime minister, Rajiv Gandhi was killed in bomb blast as a result of conspiracy to eliminate him and the same was proved successful. The High Court had awarded death sentence to all 26 accused but Supreme Court on appeal had partly reversed the decision and had laid down important point relating to conspiracy which was hatched by the accused persons. These are :—

(a) Association of accused with one of main accused or even his knowledge about conspiracy would not make him conspirator as agreement *is sine quo non* of agreement.

(b) Accused harbouring main accused persons knowing fully well their involvement in the commission of offence is itself not sufficient to infer that he was member of conspiracy.

(c) If accused had no knowledge of conspiracy as per evidence produced then his mere association with main conspirator would not make him member of the conspiracy.

(d) If main conspirator is looking after the welfare of the accused who has lost his leg and meeting his medical expenses, then in the absence of any evidence to the contrary, that would not import accused with the knowledge of conspiracy.

(e) Wireless message showed that only main accused conspirators knew the object of conspiracy. So if accused said that he had strong suspicion that targeted person was Rajiv Gandhi, but it would certainly not make him member of conspiracy without something more.

(f) It is not necessary for the conspirator to be present at the scene of crime. If evidence showed that the accused was in thick of conspiracy then his plea that he derived the knowledge of incident after the explosion is not tenable specially when he himself had purchased the battery which he knew will be used for explosion of human bomb.

(g) Mere association with LTTE hard core militant or the fact that those militants turned out to be the persons responsible for the killing of Rajiv Gandhi, would not make them member of any conspiracy to kill the targeted person.

In this case the accused found responsible for killing were awarded death sentence u/s. 302/120B and those who had not played pivotal role were awarded imprisonment for life and those responsible for attempting to destroy evidence in order to save the accused from being apprehended and had provided them with shelter was convicted u/s. 212 and lessor punishment was awarded to him but his wife was acquitted as her only fault was that she was living with accused husband in the house where the shelter to main culprits was provided. *State of Tamil Nadu* v. *Nalini*, AIR 1999 SC 2640 : (1999) 5 SCC 253 : 1999 SCC (Cri) 691 : 1999 CrLJ 3124.

[9156] ● ***Statement by one conspirator in absence of other with reference to past acts done in actual course of carrying out of conspiracy.***—The opening words in Section 10 are "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence". If *prima facie* evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common object is admissible against all. Therefore, there should first be a *prima facie* evidence that the person was a party to the conspiracy before his acts or statements can be used against his co-conspirators. No worthwhile *prima facie* evidence apart from the alleged confessions have been brought to our notice to show that the petitioner along with A-2 and A-4 was party to a conspiracy. The involvement of the petitioner and A-2 and A-4 in the alleged conspiracy is sought to be established by the confessions themselves. The correct import of Section 10 was explained by the Judicial Committee of the Privy Council in *Mirza Akbar* v. *King Emperor*, AIR 1940 PC 176 : 41 CrLJ 871, as under : (AIR p. 177)

> "The words of Section 10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The words 'common intention' signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is

admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference." *Jayendra Sarawathi Swamigal* v. *State of T.N.*, AIR 2005 SC 716 : (2005) 2 SCC 13 : 2005 SCC (Cri) 481 : 2005 CrLJ 883 : 2005 (1) Crimes 113.

[9157] ● ***What is conspiracy—Inference from circumstances.***—It is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is *sine qua non* of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. *Yogesh* v. *State of Maharashtra*, AIR 2008 SC 1116 : 2008 (10) SCC 394 : 2008 CrLJ 3872 : 2008 (6) SCR 1116 : 2008 (6) JT 299 : 2008 (6) Scale 469 : 2008 (6) SRJ 457 : 2008 (2) Crimes 263.

8. PROOF, MODE OF

[9158] ● ***Conspiracy proof of inferential.***—In most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedents and subsequent conduct among other factors, constitute relevant material. *Noor Mohammad Mohd. Yusuf Momin* v. *State of Maharashtra*, AIR 1971 SC 855 : (1970) 1 SCC 696 : 1970 SCC (Cri) 274 : 1971 CrLJ 793.

[9159] ● ***Criminal Conspiracy—Proof.***—In most cases it will be difficult to give direct evidence of an agreement to conspire but a conspiracy can be inferred from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. *V.C. Shukla* v. *State (Delhi Admn.)*, AIR 1980 SC 1382 : (1980) 2 SCC 665 : 1980 SCC (Cri) 561 : 1980 CrLJ 965.

[9160] ● ***Conspiracy, inference of.***—Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done with reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor is it necessary to prove the actual words of communication. The evidence as to transmission of thoughts, sharing the unlawful design may be sufficient. The relative acts or conduct of the parties must be conscientious and clear, to mark that concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. Innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict.

In this case, A-3 having been charged under Section 302 and Section 120-B, IPC, the conviction of the said accused is correct....... (per JAGANNATHA SHETTY, J) *Kehar Singh* v. *State (Delhi Admn.)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1989 CrLJ 1 : (1988) Cal CrLR (SC) 146 : (1988) 3 Crimes 209 : (1988) 15 DRJ 114 : (1988) 2 ACrLR 575 : 1988 BLJR 630.

[9161] ● ***Conspiracies to be proved by circumstantial evidence.***—Mostly conspiracies are proved by circumstantial evidence, as the conspiracy in seldom an open affair, usually both the existence of the conspiracy and its object have to be inferred from the circumstances and the conduct of the accused. (per WADHWA J.) *State* v. *Nalini*, AIR 1999 SC 2640 : (1999) 5 SCC 253 : 1999 SCC (Cri) 691 : 1999 CrLJ 3124 : 1999 (2) Crimes 59.

[9162] ● ***Conspiracy, link of.***—Where trustworthy evidence establishing all links of circumstantial evidence is available, confession of co-accused as to conspiracy even without corroborative evidence can be taken into consideration—Evidence Act, 1872—Section 24. *Mohd. Khalid* v. *State of W.B.*, (2002) 7 SCC 334 : 2002 SCC (Cri) 1734 : (2002) 4 Crimes 160 (SC).

[9163] ● ***Conspiracies not hatched in open.***—Conspiracies are not hatched in the open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence. *Mohd. Khalid* v. *State of W.B.*, (2002) 7 SCC 334 : 2002 SCC (Cri) 1734 : JT 2002 (6) SC 486 : (2002) 4 Crimes 132.

[9164] ● *To establish charge of conspiracy—Agreement between parties necessary.*—To bring home the charge of conspiracy within the ambit of Section 120-B of the Indian Penal Code, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. It is difficult to establish conspiracy by direct evidence. *Hira Lal Hari Lal Bhagwati* v. *Central Bureau of Investigation*, AIR 2003 SC 2545 : (2003) 5 SCC 257 : 2003 CrLJ 3041 : 2003 SCC (Cri) 1121.

[9165] ● *Conspiracy, starting point of.*—It is not necessary to mention in FIR the starting point of conspiracy since it is difficult to spell out with exactiude the details relating to the starting point of conspiracy. *State (NCT of Delhi)* v. *Navjot Sandhu,* 2005 SCC (Cri) 1715.

[9166] ● *Expression "physical manifestation" not to be equated with "overt act".*—There is one particular observation made by JAGANNATHA SHETTY, J. in *Kehar Singh case*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1989 CrLJ 1 : 1988 (2) Crimes 981 which needs to be explained. The learned Judge observed : (SCC p. 733, para 275)

> "It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. ... Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient."

The expression "physical manifestation" seems to be the phraseology used in the article referred to by the learned Judge. However, the said expression shall not be equated to "overt act" which is a different concept. As rightly stated by the learned Senior Counsel Mr. Gopal Subramanium, the phrase has reference to the manifestation of the agreement itself, such as by way of meetings and communications. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1797) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[9167] ● *Circumstantial evidence—Meeting of minds.*—The Court for arriving at a finding as to whether the offence criminal conspiracy has been committed or not they take into consideration the circumstantial because conspiracy is ordinarily hatched up in secrecy. While considering circumstantial evidence the Court must keep in mind the meeting of minds. *Baldev Singh* v. *State of Punjab*, (2009) 6 SCC 564 : 2009 (7) SCR 855 : JT 2009 (7) SC 334. TO THE SAME EFFECT : *R. Venkatakrishnan* v. *Central Bureau of Investigation*, AIR 2010 SC 1812 : (2009) 11 SCC 737 : 2009 (12) SCR 762 : JT 2009 (10) (SC) 597.

[9168] ● *Proof.*—Criminal conspiracy is an independent offence. It is punishable separately. Prosecution, therefore, for the purpose of bringing the charge of criminal conspiracy read with provisions of Prevention of Corruption Act required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of bringing a criminal misconduct on the part of an accused. *State of Madhya Pradesh* v. *Sheetla Sahai*, 2009 (8) SCC 617 : 2009 CrLJ 4436 (4446) : 2009 (12) SCR 1048 : 2009 (10) Scale 632.

[9169] ● *Mode of proof.*—Often conspiracy is hatched in secrecy and for proving the said offence substantial direct evidence may not be possible to be obtained. An offence of conspiracy can also be proved by circumstantial evidence. *State of Madhya Pradesh* v. *Sheetla Sahai*, (2009) 8 SCC 617 : 2009 CrLJ 4436 (4446) : 2009 (12) SCR 1048 : JT 2009 (10) (SC) 388.

[9170] ● *Conspiracy—Not proved.*—Sufficient evidence is available on record to show that the Officers had done so for the purpose of promoting the business of the Bank. In relation whereto or in respect whereof, initiatives had been taken by P.Ws. 19 and 20. It is furthermore not denied or disputed that after the cheque discounting facility was stopped in April, 1989 by Accused No. 4, there has been a meeting at the residence of P.W. 20. In his deposition, the said witness categorically admitted that the said meeting was arranged at the instance of Accused No. 1. It is incomprehensible that a meeting has been arranged at his residence on the day he was on leave at the instance of Accused No. 1. He must have developed grievance against the Accused No. 4 as regards the stoppage of the said facility. If immediately thereafter the said facility had been restored by the Accused No. 4, a stand taken by him that it was done under the oral instructions of the higher authorities appears to be plausible.

The prosecution apart from the fact that it had utterly failed to bring on record any evidence of conspiracy must also be held to have failed to bring on record any evidence of wrongful gain so as to attract the provisions of the Prevention of Corruption Act, 1988 or otherwise.

The entire argument of Mr. B. Datta, learned Additional Solicitor General as also the findings arrived at by the learned Special Judge as also the High Court proved the ingredients of offence under Section 409 of the IPC. The accused persons, however, have not been charged for commission of the said offence. Conspiracy by and between the Bank officials and the Accused Nos. 1 to 3 has been stated to be for commission of the offence of cheating for the purpose of arriving at a finding that there has been a conspiracy so as to cheat the Bank. It was necessary for the prosecution to establish that there had been a meeting of mind at the time when the facility had been granted. Such meeting of mind on the part of the accused persons has not been proved. Furthermore, the prosecution case even if given face value and taken to be correct in its entirety does not lead to a finding that even Accused Nos. 1 to 3 had any wrongful intention at the time when the contract was initiated.

We do not mean to suggest that in the matter of operating the account, no offence might have been committed by them. The offence, if any, it will be bear repetition to state, was committed under Section 409 of the IPC. *S.V.L. Murthy* v. *State*, AIR 2009 SC 2717 (2727, 2728) : (2009) 6 SCC 77 : 2009 CrLJ 3930 : 2009 (7) SCR 784.

9. JOINT TRIAL—PROOF OF CONSPIRACY

[9171] ● ***Joint trial—Proof of conspiracy.***—In *Daniel Youth* v. *R.*, AIR 1945 PC 140 : 1945 All LJ 269 the Privy Council warned that in a joint trial care must be taken to separate the admissible evidence against each accused and the judicial mind should not be allowed to be influenced by evidence admissible only against others. "A co-defendant in a conspiracy trial", observed JACKSON, J.(US p. 454), "occupies an uneasy seat".

> "it is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together". In *State* v. *Nalini*, AIR 1999 SC 2640 : (1999) 5 SCC 253 : 1999 SCC (Cri) 691 : 1999 CrLJ 3124 : 1999 (2) Crimes 59 WADHWA, J. pointed out, at p. 517 of SCC, the need to guard against prejudice being caused to the accused on account of joint trial with other conspirators. The learned Judge observed that : (SCC p. 517, para 583)
>
> "There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy."

The pertinent observation of Judge Hand in *U.S.* v. *Falcone*, 109 F 2d 579 Land Cir 1940 was referred to : (SCC p. 511, para 572).

> "The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders."

At para 518, WADHWA J., pointed out that the criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. The learned Judge then set out the legal position regarding the criminal liability of the persons accused of the conspiracy as follows : (SCC p. 518, para 583)

> "One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime." *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1798) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[9172] ● ***Proof of criminal conspiracy—Standard.***—Mere circumstantial evidence to prove involvement of particular accused is not sufficient to prove criminal conspiracy. A meeting of mind to form a criminal conspiracy is also to be proved by substantive evidence. *S. Arul Raja* v. *State of Tamil Nadu*, (2010) 8 SCC 233 : 2010 (3) Crimes 320.

10. SECTION 120-A AND SECTION 34, IPC

[9173] ● ***Section 34 and 109, IPC—Relative Scope.***—Section 34 embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention; participation in the commission of the offence in furtherance of the common intention invites its application. Section 109 may, on the other hand, be attracted even if an abettor is not present when the offence abetted is with one or more other persons and in the conspiracy to commit an offence and in pursuance of that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. Under Section 120-B, IPC criminal conspiracy postulates an agreement between two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. It differs from other offences in that here a mere agreement is made an offence even if no step is taken to carry out the agreement. *Noor Mohammad* v. *State of Maharashtra*, AIR 1971 SC 885 : 1971 CrLJ 793 : 1971 SCD 81 : 1971 Mah LJ 792 : (1971) 1 SCJ 43 : 1971

Mad LJ (Cri) 33 : 73 Bom LR 516 : (1971) 1 SCR 19.

11. SECTION 120-B AND 34 IPC— RELATIVE SCOPE

[9174] ● ***Conspiracy—Theory of agency not to be extended to.***—The theory of agency cannot be extended thus far, that is to say, to find all the conspirators guilty of the actual offences committed in execution of the common design even if such offences were ultimately committed by some of them, without the participation of others. Those who committed the offences pursuant to the conspiracy by indulging in various overt acts will be individually liable for those offences in addition to being liable for criminal conspiracy; but, the non-participant conspirators cannot be found guilty of the offence or offences committed by the other conspirators. There is hardly any scope for the application of the principle of agency in order to find the conspirators guilty of a substantive offence not committed by them. Criminal offences and punishments therefore are governed by the statute. The offender will be liable only if he comes within the plain terms of the penal statute. Criminal liability for an offence cannot be fastened by way of analogy or by extension of a common law principle.

> "Conspiracy to commit a crime itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence for which individual offenders are liable to punishment, independent of the conspiracy."

Thus, a distinction was maintained between the conspiracy and the offences committed pursuant to the conspiracy. It is only in order to prove the existence of conspiracy and parties to the conspiracy, that a rule of evidence is enacted in Section 10 based on the principle of agency.

Whether or not the conspirators will be liable for substantive offences other than the conspiracy and, if so, to what extent and what punishment has to be given for the conspiracy and the other offences committed pursuant thereto, depend on the specific scheme and provisions of the penal law. The offence cannot be spelt out by applying the principle of agency if the statute does not say so. For instance, in the case of Section 34, IPC, the constructive liability for the crime is specifically fastened on each of those who participate in the crime in furtherance of the common intention. But Section 120-B does not convey that idea.

Once the application of theory of agency is negatived, there is no scope to hold that the appellant, in spite of not having done any act or thing by using the weapons and substances set out in Section (1)(a) POTA, he, as a conspirator, can be brought within the sweep and ambit of sub-sections (1) and (2) POTA. The wording of clause (a) of Section 3(1) POTA is clear that it applies to those who do any acts or things by using explosives substances *etc.* with the intention referred to in clause (a), but not to conspirators who remained in the background. *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 1715 (1799, 1801, 1856) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

[9175] ● ***Section 120-B and 302 IPC—Criminal Conspiracy hatched by family members.***— Thus according to the prosecution version, when accused, A-1 to A-5, A-11 and A-12 learnt about the marriage of Kunal with some other girl, they hatched a conspiracy to teach a lesson to the father of Kunal, the deceased. In furtherance thereof, accused A-1 contracted one of the assassins to kill Kunal. It is alleged that accused A-1 to A-4 also contacted accused A-16, a notorious criminal. In other words, the gravamen of the accusation by the prosecution is that it is accused A-1 to A-5, A-11 and A-12 who had hatched the conspiracy; acted in concert to give effect to their plan to get Kunal murdered and in pursuance of the aforesaid criminal conspiracy, the other accused facilitated commission of the said crime. It is common ground that the case of the prosecution is based on the circumstantial evidence, namely, threatening calls from the side of the accused to the complainant his family and the earlier relationship between the deceased and accused No. 4. From the material on record, it is manifestly clear that it was the family members of the appellant, one of their employees and a friend who allegedly had all entered into an agreement to eliminate the deceased. However, as noted above, accused A-1, A-2, A-4, A-11 and A-12 already stand discharged from the charges framed against them under Sections 120B and 302 I.P.C. vide orders dated 7th July, 2006 and 14th May, 2007, passed by the High Court and the Sessions Judge respectively. While discharging the said accused, both the Courts have come to the conclusion that there is no material on record to show that they had hatched a conspiracy to commit murder of Kunal. Thus, the stand of the prosecution to the effect that the parents, sister and friends of the appellants had entered into a criminal conspiracy stands rejected by virtue of the said orders of discharge. Furthermore, in its order dated 7th July, 2006 the High Court has opined that the circumstances, relied upon by the prosecution, even if accepted in its entirety, only create a suspicion of motive, which is not sufficient to bring home an offence of murder. As noted above, State's petition for special leave against the said judgment has already been dismissed.

"We are, therefore, of the view that in the light of the subsequent events, namely, the orders of the High Court dated 7th July, 2006 in Criminal Writ Petitions No. 1283 & 1284 of 2006, discharging appellant's mother, sister and two close associates, accused Nos. 2, 4, 11 and 12 respectively; order dated 30th April, 2007 passed by this Court dismissing the Special Leave Petition preferred by the State against order dated 7th July, 2006 and order dated 14th May, 2007 passed by the Sessions Judge, Satara, discharging the father (A-1) of the appellant, stated to be the mastermind behind the entire conspiracy, for offences under Sections 120B and 302 I.P.C., on same set of circumstances and accusations, no sufficient ground survives to proceed against the appellant for the aforementioned offences". *Yogesh* v. *State of Maharashtra*, AIR 2008 SC 2991 : (2008) 10 SCC 394 : 2008 CrLJ 3872 : 2008 (6) SCR 1116 : 2008 (2) Crimes 263.

[9176] ● ***Forgery of permit.***—P.W. 6 stated in his examination-in-chief that he knew the accused persons, *viz.*, A1 to A3 and that A2 was working in Civil Supplies Inspector's Office in the rank of UDC and that he had earlier worked with him in the Finance Department. P.W. 6 has however, nowhere stated in the examination-in-chief that the present instance of interpolation or forgery was in the hand of A2. In the cross-examination, P.W. 6 stated that although he had worked along with A2 in the Finance Department, but he was working in a different Section of the Department. He has clearly stated that he was working in the Budget Section called F1 whereas A2 was working in the Motor Conveyance Section called F2 Section. It has also been brought to our notice that in cross-examination, it was said that the files dealt by A2 and F2 Section in the Finance Department never came to the F1 Section where P.W. 6 was working. Therefore, in our considered opinion the interpolation as also the initials appended thereto have not been proved and established to be in the hand of A2 and A1. *Ravichandran* v. *State*, AIR 2010 SC 1922 : 2010 CrLJ 2879 : JT 2010 (3) 571.

CONSPIRACY AND ABETMENT

[9177] ● ***Conspiracy containing element of abetment.***—There is no analogy between Section 120-B and Section 109, IPC. There may be an element of abetment in a conspiracy; but conspiracy is something more than an abetment. Offences created by Sections 109 and 120-B, IPC are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, that is, abetment when the allegation is that what a person did was something over and above that. Where a number of offences are committed by several persons in pursuances of a conspiracy it is usual to charge them with those offences as well as with the offence of conspiracy to commit those offences. Though it is not desirable to charge the accused persons with conspiracy with the ulterior object of letting in evidence which would otherwise be inadmissible and though it is undesirable to complicate a trial by introducing a large number of charges spread over a long period this is only a question of propriety and it should be left to the Judge or the Magistrate trying the case to adopt the course which he thinks to be appropriate in the facts, and circumstances of the case. Such a trial is not prohibited by the Code of Criminal Procedure. *State of Andhra Pradesh* v. *Kandimalla*, AIR 1961 SC 241 : 1961 (2) CrLJ 302 : 1962 (1) SCR 194.

[9178] ● ***Offence of abetment of conspiracy—Mere agreement not enough.***—When for an offence of abetment by conspiracy, mere agreement is not enough; an act or illegal omission must take place in pursuance thereof, for an offence of conspiracy the very agreement or plot is an offence. *Promotha Nath* v. *Saroj Ranjan*, AIR 1962 SC 876 : 1962 (1) CrLJ 770 : 1962 SCA 253.

[9179] ● ***Close association between conspiracy and incitement and abetment.***—There is indeed a close association between conspiracy on the one hand and incitement and abetment, the substantive offence of criminal conspiracy is somewhat wider in amplitude then abatement by conspiracy as contemplated by Section 107, IPC. *Noor Mohammed* v. *State of Maharashtra*, AIR 1971 SC 885 : (1970) 1 SCC 696 : 1971 CrLJ 793 : (1971) 1 SCJ 43 : 1971 MadLJ (Cri) 33.

[9180] ● ***Conspiracy hatched in secrecy.***—It is urged on behalf of A-3 (Kehar Singh) that there was no charge against him under Section 109, IPC and without such a charge the accused are liable to be sentenced only for the offence of abetment and not for murder and so the validity of sentence of death on A-3 was questioned.

When an accused is a party to a criminal conspiracy, which led to the commission of the offence of murder by his co-accused, it cannot be said that the accused (conspirator) who did not himself participate in the commission of the offence, could not be sentenced for the main offence of murder, and that he could be sentenced only for abetment of the offence in the absence of a charge under Section 109 against him. There is vital difference between the two crimes : (i) abetment in any conspiracy, (ii) criminal conspiracy. The former is defined under the second clause of Section 107 and the latter is under Section 120-A. The gist of the offence of criminal conspiracy created under Section 120-A is a bare agreement to commit an offence which is made punishable under Section 120-B. The offence of abetment created under Section 107 (2) requires that there must be something more than a mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by the wording of Section 107 (Secondly) : "engages in any conspiracy..... for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy...." The punishments for these two categories of crimes are also quite different. Section 109, IPC, is concerned only with the punishment of abetments for which no express provision is made under the Penal Code. A charge under Section 109 should, therefore, be along with some other substantive offence committed in consequence of abetment. The offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under Section 120-B for which a charge under Section 109, IPC, is unnecessary and indeed inappropriate. *Kehar Singh* v. *State (Delhi Administration),* AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1989 CrLJ 1 : (1988) 3 Crimes 209.

[9181] ● ***Conspiracy and abetment—Punishment for.***—Earlier to the introduction of Sections 120-A and 120-B, conspiracy *per se* was not an offence under the Penal Code except in respect of the offence mentioned in Section 121-A. However, abetment by conspiracy was and still remains to be an ingredient of abetment under clause secondly of Section 107, IPC. The punishment therefor is provided under various sections *viz.* Sections 108 to 117. Whereas under Section 120-A, the essence of the offence of criminal conspiracy is a bare agreement to commit the offence, the abetment under Section 107 requires the commission of some act or illegal omission pursuant to the conspiracy. A charge under Sections 107/109 should therefore be in combination with a substantive offence, whereas the charge under Sections 120-A/120-B could be an independent charge. *State (NCT of Delhi* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 (1795) : 2005 CrLJ 3950 : 2005 (3) Crimes 87.

1. FOREIGNER HATCHING UP CONSPIRACY OUTSIDE INDIA—INPLEMENTATION IN INDIA

[9182] ● ***Foreigner hatching up conspiracy outside India—Implementation in India.***—In view of Section 3, IPC, a foreigner committing offence within India without being physically present in India may be held liable under the Act. In view of the phrase "as if such act had been committed within India" in Section 3—the words "every person" comprehending all persons without limitation irrespective of nationality allegiance, status *etc.* barring as may be specially exempted by virtue of Art. 361 (2) of the Constitution of India and any other statutory provisions of some well-recognised international law *Mobank Ali* v. *State of Bombay*, AIR 1957 SC 857 : 1957 CrLJ 1346 : 1958 SCR 328.

CONSPIRACY CHARGE—ACQUITTAL FROM BASIC OFFENCE

[9183] ● ***Conspiracy charge—Acquittal from basic offence.***—If an accused has been charged under Section 120-B and also with a substantive offence and he has been acquitted of the charge in respect of the substantive offence, he cannot contend merely on that account, that he should also be acquitted of the charge under Section 120-B. It is because conspiracy itself is a distinct and substantive offence. The offence of criminal conspiracy consists in the agreement to commit an offence, irrespective of whether the offence in respect of which, the conspiracy is hatched, is in fact committed or not. The very fact of the agreement constitutes the offence and nothing more needs to be proved to have been done in pursuance of the criminal agreement. *Bimbadhar Pradhan* v. *State of Orissa,* AIR 1956 SC 469 : 1956 CrLJ 831 : 1956 SCA 857 : 1956 SCJ 441 : 1956 2 MLJ (SC) 93.

1. VENUE OF CONSPIRACY

[9184] ● ***Venue of Conspiracy.***—When offence of criminal conspiracy is tried along with other offence committed in pursuance thereof committed in different local limits, the Court having jurisdiction to try offence of conspiracy can also try the offence committed outside his jurisdiction, if the offence is committed in pursuance of the conspiracy. *Purushottam Das Dalmia* v. *State of West Bengal*, AIR 1961 SC 1589 : 1961 (2) CrLJ 728 : 1962 (2) SCR 101.

[9185] ● ***Territorial jurisdiction.***—A Court trying an accused for an offence of conspiracy is competent to try him for all offences committed in pursuance of conspiracy inspective of the fact that any or all the other offences were not committed within the territorial jurisdiction. *Rajendra Ramchandra Kavalekar* v. *State of Maharashtra*, AIR 2009 SC 1792 : (2009) 11 SCC 286 : 2009 CrLJ 1592, 1596 (SC) : 2009 (1) SCR 480.

2. JOINT TRIAL

[9186] ● ***Joint trial.***—Where the alleged offences have been committed in the course of the same transaction the limitation placed by Section 219, CrPC cannot operate. Where the offence is alleged to have been committed not by just one person but by all the accused all these persons can be jointly tried in respect of all these offences. To this kind of charge Section 223 would apply. It would, however, be desirable to split up the charge suitably so that the accused persons will not be prejudiced in answering the charges and in defending themselves. *State of Andhra Pradesh* v. *Kandimalla*, AIR 1961 SC 1241 : 1961 (2) CrLJ 302 : (1962) 1 SCR 194.

3. SANCTION

[9187] ● ***Sanction.***—This section has to be read along with Section 196 (1-A)(2), CrPC, which requires previous sanction of the State Government or the District Magistrate to launch prosecution in respect of a criminal conspiracy to commit an offence punishable with less than two years' imprisonment. The new section introduced by CrPC, 1973 brings about a change. The old section classified criminal conspiracies into two groups and made a fine distinction as to the manner of initiating proceedings in respect of each. This refinement has since been done away with. The section has, therefore, been simplified and revised without any change in the core of the provision as interpreted by the Supreme Court. *Bhanwar Singh* v. *State of Rajasthan*, AIR 1968 SC 709 : 1968 CrLJ 867.

[9188] ● ***Cheating by personation.***—Thus where the object of the conspiracy was cheating by false personation under Section 419, IPC, which is an offence punishable with three years' imprisonment, the mere fact that there were other non-cognizable offences for which too the accused had been charged would not vitiate the trial in absence of sanction under Section 196(1-A)(2), CrPC, as that section is meant to be applicable to a case where the object of the conspiracy is to commit an offence punishable with less than two years' imprisonment. *Yash Pal* v. *State of Punjab*, AIR 1977 SC 2433 : (1977) 4 SCC 540 : 1978 CrLJ 189.

[9189] ● ***Accused cheating Bank in furtherance of conspiracy—All acts committed in India—Sanction of Central Govt. for prosecution not necessary.***—The agreement does not come to an end with its making, but would endure till it is accomplished or abandoned or proved abortive. Being a continuing offence, if any acts or omissions which constitute an offence are done in India or outside its territory the conspirators continuing to be parties to the conspiracy and since part of the act were done in India, they would obviate the need to obtain sanction of the Central Govt. All of them need not be present in India nor continue to remain in India.

A conspiracy thus, is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalised or done, attempted or even frustrated and vice versa.

Sanction under Section 188 is not a condition precedent to take cognizance of the offence. If need be it could be obtained before trial begins. Conspiracy was initially hatched at Chandigarh and though itself is a completed offence, being continuing offence, even accepting appellant's case that he was at Dubai and part of the conspiracy and overt acts in furtherance thereof had taken place at Dubai and partly at Chandigarh; and in consequence thereof other offences had been ensued. Since the offences have been committed during the continuing course of transaction culminated in cheating PNB at Chandigarh, the need to obtain sanction for various offences under proviso to Section 188 is obviated. Therefore, there is no need to obtain sanction from Central Govt. The case may be different if the offences were committed outside India.

Preparation of bill of lading at Dubai or payment at Dubai were not isolated acts. They were part of chain activities between the appellant and his associates with whom he entered into agreement to cheat the bank at Chandigarh, Any isolated act or omission committed at Dubai was insufficient to constitute an offence. The illegal act of dishonestly inducing the bank at Chandigarh was committed not by preparation of bill at Dubai but its presentation in pursuance of agreement to cheat. The submission thus founded was on residence or on preparation of bills of lading or encashment at Dubai are of no consequence.

Nor is there nay merit in the submission that even part of the offence would attract Section 188 as the section operates when offence is committed outside India. An offence is committed when all the ingredients are satisfied. The section having used the word offence it cannot be understood as part of the offence. Section 179, CrPC empowers a Court to try an offence either at a place where the offence is committed or the consequences ensue. On the allegations in the complaint the act or omissions were committed in India. In any case the consequence of conspiracy, cheating and forging having taken place at Chandigarh the offence was not committed outside the country therefore provisions of Section 188, CrPC were not attracted. *Ajay Agarwal* v. *Union of India,* AIR 1993 SC 1637 : (1993) 3 SCC 609 : 1993 CrLJ 2516 : 1993 CrLR (SC) 445 : 1993 (2) Crimes 342.

[9190] ● *Minister for electricity entering into criminal conspiracy with co-accused—Connected with official duty as Minister attracts protection of Section 197(1), CrPC.*—There can be no general proposition that whenever there is a charge of criminal conspiracy levelled against a public servant in or out of office, the bar of Section 197(1) of the Cr PC would have no application. Such a view would render Section 197(1) of the Cr PC specious. Therefore, the question would have to be examined in the facts of each case.

In the present case, the appellant is charged with having entered into a criminal conspiracy with the co-accused while functioning as a Minister. The criminal conspiracy alleged is that he sold electricity to an industry in the State of Karnataka without the consent of the Government of Kerala which is an illegal act under the provisions of the Electricity (Supply) Act, 1948 and the Kerala Electricity Board Rules framed thereunder. The allegation is that he in pursuance of the said alleged conspiracy abused his official position and illegally sold certain units to the private industry in Bangalore (Karnataka) which profited the private industry to the tune of Rs. 19,58,630.40 or more and it is, therefore, obvious that the criminal conspiracy alleged against the appellant is that while functioning as the Minister for Electricity he without the consent of Government of Kerala supplied certain units of electricity to a private industry in Karnataka. Obviously, he did this in the discharge of his duties as a Minister. The allegation is that it was an illegal act in as much as the consent of the Government of Kerala was not obtained before this arrangement was entered into and the supply was effected. For that reason, it is said that he had committed an illegality and, hence, he was liable to be punished for criminal conspiracy under Section 120-B, IPC. It is, therefore, clear from the charge that the act alleged is directly and reasonably connected with his official duty as a Minister and would, therefore, attract the protection of Section 197(1) of the Code. *R. Bala Krishna Pillai* v. *State of Kerala,* AIR 1996 SC 901(903) : (1996) 1 SCC 478 : 1996 SCC (Cri) 128.

CONSPIRACY IS A CONTINUING OFFENCE

[9191] ● *Conspiracy is a continuing offence.*— Although conspiracy is committed as soon as the agreement for the unlawful act is made out, it is clear that conspiracy is a continuing offence and is committed not only when agreement is first reached but also as long as the agreement to effect the unlawful object continues- CROSS and JONES on *Introduction to Criminal Law* 9th edn. Para 17.6, p. 342.

A conspiracy thus is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. It's continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India. When part of the acts, pursuant to the agreement are agreed to be finalised or done, attempted or even frustrated and *vice versa. Ajay Agarwal* v. *Union of India*, AIR 1993 SC 1637 : (1993) 3 SCC 609 : 1993 SCC (Cri) 1637 : 1993 CrLJ 2516.

CONSPIRATOR'S CONNECTION WITH CONSPIRACY

[9192] ● *Conspirator's connection with conspiracy.*—Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10 of the Evidence Act, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent threats cannot be used as against the other conspirators under Section 10. Whether a particular accused had ceased to be a conspirator or not, at any point of time, is a matter which can be decided on the facts of that particular case. Normally, a conspirator's connection with the conspiracy would get snapped after he is nabbed by the Police and kept in their custody because he would thereby cease to be the agent of the other conspirators. Of course we are not unmindful of rare cases in which a conspirator would continue no confabulate with the other conspirators and persists with the conspiracy even after his arrest. That is precisely the reason why we said that it may not be possible to lay down a proposition of law that one conspirator's connection with the conspiracy would necessarily be cut off with this arrest. *State of Tamil Nadu* v. *Nalini,* AIR 1999 SC 2640 (2666) : (1999) 5 SCC 253 : 1999 CrLJ 3124 : 1999 CrLR (SC) 424 : JT 1999 (4) SC 106 : 1999 GLJ 3124 : (1999) 2 Crimes 59.

CONSPIRATORS COMMITTING SEVERAL OFFENCES : CONVICTION

[9193] ● ***Conspirators committing several offences : Conviction.***—The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences. *State of Himachal Pradesh* v. *Krishan Lal Pradhan,* AIR 1987 SC 773 : (1987) 2 SCC 17 : 1987 SCC (Cri) 270 : 1987 CrLJ 709

CONSPIRATORS NEED HAVE KNOWLEDGE OF ALL OBJECTS AND MEANS

[9194] ● ***Conspirators need have knowledge of all objects and means.***—As conspiracy is a common law offence, *mens rea* is an essential ingredient. It consists in the intention of executing the illegal elements in the conduct contemplated by the agreement, in the knowledge of those facts which render the conduct illegal. Thus it must be shown that the defendant knew of all the circumstances which rendered the combination unlawful; and this is so even where the indictment alleges a conspiracy to an offence of strict liability.

[9195] ● ***Conspiracy, accused intending to carry agreement into effect.***—A person is not to be convicted of conspiracy unless it is shown that he intended to carry the agreement into effect; but if he did so intend, it is immaterial that nothing was done in pursuance of it. Where the agreement is to do an unlawful act it must be shown that the parties knew of the circumstances which rendered that act unlawful. *Halsbury's Laws of England,* 4th Edn. Vol. II, para 60 p. 46.

[9196] ● ***Conspirators need not know each and every detail of conspiracy.***—It is not necessary that all the conspirators must know each and every details of the conspiracy as long as they are co-participators in the main object of the conspiracy. There must be unity of object but there may be plurality of means sometimes even unknown to one another. *Yash Pal* v. *State of Punjab*, AIR 1977 SC 2433 : (1977) 4 SCC 540 : 1978 CrLJ 189.

CONSTITUTION OF INDIA

SYNOPSIS

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1. ARTICLES 5 TO 11

[9197] ● ***Articles 5 to 11 of Constitution govern question of Indian citizenship.***—Articles 5 to 11 which form Part II of the Constitution deal with the question of citizenship. Article 5 provides that every person, (a) who has his domicile in India at the commencement of the Constitution and (b) who was either born in India, or whose either parent was born in India or who has been residing in India for more than 5 years before such commencement is a citizen of India. Article 6 extends the right of Indian citizenship to persons who have migrated to India from Pakistan at the commencement of the Constitution if the requirements of clauses (a) and (b) thereof are satisfied. Article 8 confers the right of Indian citizenship on persons of Indian origin who reside outside India upon registration as an Indian citizen in the prescribed manner. Thus, Articles 5, 6 and 8 lay down the different manners by which a person can claim Indian citizenship.

Article 7 provides that notwithstanding anything contained in Articles 5 and 6, a person who has migrated to Pakistan after March 1, 1947, shall not be deemed to be an Indian citizen unless he has returned to India under a permit for resettlement or for permanent return. Article 9 provides that an Indian citizen shall lose his Indian citizenship on his acquiring the citizenship of any foreign State. Thus, Articles 7 and 9 lay down the circumstances in which a person loses his Indian citizenship.

Article 10 provides for continuance of Indian citizenship, subject to any law made by the Parliament and Article 11 recognises the power of the Parliament to make laws with respect to acquisition and termination of citizenship and all other matter relating to citizenship.

This in brief is the scheme of Articles 5 to 11 which govern the question of Indian citizenship. *State of Madhya Pradesh* v. *Peer Mohammad,* AIR 1963 SC 645 : 1963 (1) CrLJ 617 : 1963 (1) SCA 649 : (1963) 2 SCJ 655 : 1963 MLJ (Cri) 609.

2. ARTICLE 5(C)

[9198] ● ***Article 5(c).***—Domicile means the place which a person has fixed as habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home. Every person must have a domicile. A person cannot have two simultaneous domiciles. Domicile denotes connection with the territorial system of law. The burden of proving a change in domicile is on those who allege that a change has occurred. In order to attract Article 5 (c), one must have an Indian domicile. Mere residence is not domicile. *Abdus Samad* v. *State of W.B.,* AIR 1973 SC 505 : (1973) 1 SCC 451 : 1973 CrLJ 1 : 1972 SCD 1134.

3. ARTICLES 5, 21 AND 32 AND ARMY ACT (46 OF 1950) PERSONS SUBJECT TO ARMY ACT ARE CITIZENS OF INDIA AND THEY ARE NOT WHOLLY DEPRIVED OF THEIR RIGHTS UNDER THE CONSTITUTION

[9199] ● ***Articles 5, 21 and 32 and Army Act (46 of 1950) Persons subject to Army Act are citizens of India and they are not wholly deprived of their rights under the Constitution.***—The reference in Article 7 of the Constitution to Articles 5 and 6, taken in conjunction with the fact that both Articles 5 and 6 are concerned with citizenship at the commencement of the Constitution, points to the conclusion that the "migration" referred to in Article 7 is migration before the date when the Constitution came into force. Article 7 does not contemplate migration from India to Pakistan after January 26, 1950. *State of Andhra Pradesh* v. *Abdul Khader,* AIR 1961 SC 1467 : 1961 (2) CrLJ 573 : (1961) 2 SCA 643 : 63 PunLR 751 : 1961 ALT 816 : 1961 AWR (HC) 564 : 1961 ACrR 347 : 1962 MLJ (Cri) 80.

*******[9200]** ● ***Article 7 of Constitution refers to migration taking place between 1.3.1947 and 26.1.1950.***—Under Article 7, a person who shall not be deemed to be citizen of India is one "who has after the first day of March, 1947 migrated" from India to Pakistan. It is true that migrations after January 26, 1950, would be migration after March 1, 1947. However, it is clear that a person who has migrated after January 26, 1950, cannot fall within the relevant clause because the requirement of the clause is that he must have migrated at the date when the Constitution came into force. The words "has migrated" cannot possibly include cases of migration after the date when

Article 7 came into force. The use of the present perfect tense is decisive of the question of the period to which Article 7 refers.

Article 7 clearly refers to migration which has taken place between March 1, 1947 and January 26, 1950 and a person who leaves India for Pakistan after January 26, 1950, is not covered by Article 7.

The question about the citizenship of persons who have migrated to Pakistan from India after January 26, 1950, has to be determined under the provisions of the Citizenship Act, 1955 which has been passed by the Parliament under the powers conferred and recognised by Articles 10 and 11 of the Constitution.

The result is that the respondent cannot be said to be a foreigner by reason of his migration to Pakistan after January 26, 1650. That being so, Clause 7 of the Order made under the Foreigners Act did not apply to him and he could not be prosecuted under Section 14 of the Act. *Izhar Ahmed Khan* v. *Union of India*, AIR 1962 SC 1052, referred to. *State of Madhya Pradesh* v. *Peer Mohammad,* AIR 1963 SC 645 : 1963 (1) CrLJ 617 : (1963) 1 SCA 649 : (1963) 2 SCJ 655 : 1963 MLJ (Cri) 609.

[9201] ● ***Persons subject to Army Act—Citizens of India.***—Persons subject to Army Act are citizens of India. They are not wholly deprived of their rights under the Constitution. Deprivation of their liberty must be preceded by an inquiry ensuring fair, just and reasonable procedure and trial by a Judge of unquestioned integrity and wholly unbiased. Marked difference in the procedure for trial of an offence by the Criminal Court and the Court-Martial is apt to generate dissatisfaction arising out of this differential treatment. *Prithi Pal Singh* v. *Union of India,* AIR 1982 SC 1413 : (1982) 3 SCC 140 : 1982 SCC (Cri) 642 : (1983) 1 SCR 393 : 1983 CrLJ 647 : 1982 CrLR (SC) 523 : 1982 UJ (SC) 695 : (1982) 2 Serv LJ 582 : (1983) 1 Lab LN 9 : 1983 CrAppR (SC) 37 : (1983) 2 Chand LR (Cri) 287 : (1983) 1 Serv LR 365.

4. ARTICLES 5 & 7 AND FOREIGNERS ACT, 1946, S. 2(A)

[9202] ● ***Articles 5 & 7 and Foreigners Act, 1946, S. 2(a).***—The word "law" in Article 13 (2) means only Acts and other enactments made by the Union Parliament or by any State Legislature in the exercise of its ordinary powers of legislation under the Constitution, and not those Acts which amend the Constitution itself and which are made by the Parliament in the exercise of its sovereign constituent powers under Article 368. The constitutionality of a Constitution Amendment Act cannot be questioned on the ground of infringement or violation of any fundamental right existing before the time when such Act comes into force. *Sankari Prasad Singh Deo* v. *Union of India,* AIR 1951 SC 458 : 1951 SCJ 775 : 1952 SCR 89 : 1951 RD (BR) 219 (SC) : 64 MLW 1005 : 1951 ALJ 740 : 1951 (2) MLJ 683 : 88 CalLJ 281 : 30 Pat 1176.

[9203] ● ***Constitution—Retrospective operation.***—The Constitution has no retrospective effect or operation. It is wholly prospective. Every statute is *prima facie* prospective in its operation, unless it is expressly or by necessary implication made retrospective, and this rule of interpretation applies to the Constitution as much as it does to other statutes.

Section 6 of the General Clauses Act provides that when a law is repealed, the repeal shall not affect any right which has already accrued or any liability which has already been incurred under the repealed law before its repeal, nor shall it affect any proceeding in respect of any such right or liability which is pending at the date of the repeal.

Article 367 of the Constitution provides that the General Clauses Act shall apply for the interpretation of the Constitution, as it applies for the interpretation of other laws.

The combined effect of Section 6 of the Act and Article 367 on the interpretation of Article 13 is as under :

a. When a law existing at the date of the Constitution is declared under Article 13 to be void for being in violation of any fundamental right, the effect of such declaration is the same as the effect would be if that law had been repealed.

b. As a result of the declaration of voidness, the law is not obliterated altogether and for all purposes and is not totally erased or wiped out from the statute-book. It remains good and effective for the purpose of rights and liabilities which arose and were completed before the date when the Constitution came into force.

c. It follows that if an offence under any pre-Constitution law has been committed before 26-1-1950 and prosecution in respect of that offence is pending on that date, such prosecution could not be stayed merely by reason of the fact that the law in question has been declared to be void. Such a prosecution can legally be proceeded with even after the date when the law is declared to be void, and conviction of the accused would not be illegal. *Keshavan Madhava Menon* v. *State of Bombay,* AIR 1951 SC 128 : 52 CrLJ 860 : 1951 SCJ 182 : 1951 SCR 228 : 1951 MWN (Cri) 60 : 1951 MWN 232 : 1951 (1) MLJ 370 : 1951 ALJ (SC) 23 : 64 MLW 382 : 28 Bom CrC 155 : 53 Bom LR 458 : ILR (1951) Hyd 294.

[9204] ● ***Word "Law" in Article 13(2) of Constitution—Meaning.***—The word "law" in Article 13(2) means only Acts and other enactments made by the Union Parliament or by any State Legislature in the exercise of its ordinary powers of legislation under the Constitution, and not those Acts which amend the Constitution itself and which are made by the Parliament in the exercise of its sovereign constituent powers under Article 368. The constitutionality of a Constitution Amendment Act cannot be questioned on the ground of infringement or violation of any fundamental right existing before the time when such Act comes into force. *Sankari Prasad Singh Deo* v. *Union of India,* AIR 1951 SC 458 : 1951 SCJ 775 : 1952 SCR 89 : 1951 RD (BR) 219 (SC) : 64 MLW 1005 : 1951 ALJ 740 : 1951 (2) MLJ 683 : 88 Cal LJ 281 : 30 Pat 1176.

[9205] ● ***Guarantee of 'equal protection of law'—Meaning.***—FAZAL ALI J.—The guarantee of 'equal protection of the laws' means protection of equal laws. All that Article 14 requires is that all persons under like circumstances and conditions are treated alike, and that none is singled out as a special subject for arbitrary and discriminatory selection. In construing this Article we should not adopt a doctrinaire approach which might choke off all beneficial legislation.

MUKHERJEE J.—Article 14 which gives the guarantee of equal protection of the laws, does not mean that the same rules of law should apply to all persons irrespective of differences of circumstances and conditions. All that it guarantees is that there should be no discrimination between one person and another who are both in the same position.

DAS J.—"Equal protection of the laws" means subjection to equal laws applying alike to all persons in the same or similar situations. Article 14 protects all persons against discriminative legislation by prohibiting legislation which singles out persons for special treatment which is different from that given to others in like situations, but it does not prevent the State from making laws classifying persons according to differing requirements. *Chiranjit Lal Chowdhuri* v. *Union of India,* AIR 1951 SC 41 : 1951 SCJ 29 : 1950 SCR 869 : 64 MLW 47 : 1951 MWN 111 : 53 BomLR 499 : ILR (1951) Hyd 461.

[9206] ● ***Classification made by Act must be intelligible.***—FAZAL ALI J.—Article 14 requires that a classification made by an Act, in order to be justified, must be intelligible and must bear a reasonable relation to its object. There is no hard and fast rule for determining what is "reasonable" and it is a matter for determination in each case as to whether the relation of the classification to the object sought to be achieved by the Act, is or is not reasonable, depending upon the objectives which the legislature seeks to secure.

MUKHERJEE J.—The test for determining whether a classification is "reasonable" and not arbitrary, is this—does the classification rest upon some substantial distinction bearing a just relation to the thing in respect of which it is made?

S.R. DAS J.—Article 14 does not take away the power of the State to classify persons for legislative purposes according to varying conditions requiring special and separate treatments, such as geographical limits, objects, occupations, etc. Each classification will necessarily produce some inequality, but that in itself will not make it unconstitutional, provided it bears a reasonable and just relation to the thing in respect of which it is made. The test of the constitutionality of a law is, whether the classification made by it has a reasonable relation to its object, or whether not having any such relation it is arbitrary and discriminatory. *Chiranjit Lal Chowdhuri* v. *Union of India,* AIR 1951 SC 41 : 1951 SCJ 29 : 1950 SCR 869.

[9207] ● ***Class of persons for whom law made.***—A class of persons for whom a law is made may well be quite small, and even a single person or corporation may form a class, provided there are special reasons applicable to that class which are not applicable to anyone else. If such reasons exist, legislation applicable even to a single individual or corporation is perfectly constitutional. *Chiranjit Lal Chowdhuri* v. *Union of India,* AIR 1951 SC 41 : 1951 SCJ 29 : 1950 SCR 869.

[9208] ● ***Guarantee of equal protection of law—Meaning.***—The guarantee of the equal protection of the laws does not mean that every law must have universal application for all persons whether they are or are not in the same position or circumstance, and Article 14 does not take away from the State the power of classifying persons upon reasonable grounds of distinction.

Every classification must in some degree produce some inequality, and a law does not become obnoxious merely because of that, provided it deals equally with all persons falling within a particular class. Article 14 permits classification which rests upon some real and substantial distinction which bears a reasonable and just relation to the object sought to be attained by the law in question, and inhibits only such discrimination as singles out a particular person or group for special hostile treatment which takes away from that person or group the rights and freedoms which are enjoyed under the general law by all others in the same class. *State of Bombay* v. *F.N. Balsara,* AIR 1951 SC 318 : 52 CrLJ 1361 : 1951 SCJ 478 : 1951 SCR 682 : 1951 (2) MLJ 141 : 53 BomLR 982.

[9209] ● *Substantive liabilities already incurred before law declared to be void.*—The decision in *Keshavan Madhava Menon's* case related only to substantive liabilities which had already been incurred before a law was declared to be void, and it had no application to the question whether continuation of a pending trial after 26-1-1950 under a procedure which had been declared to be void was or was not unconstitutional and invalid.

There was no vested right in any particular course of procedure, and this applied as much to the State as to the subject. Therefore once the Supreme Court declares that a statute laying down a special procedure for a criminal trial is unconstitutional, continuance of such a trial after 26-1-1950 under that procedure is illegal, and conviction of the accused at the conclusion of such trial is otherwise than in accordance with "procedure established by law" within the meaning of Article 21, and has to be set aside.

After the Constitution came into force, the accused had the right not to be discriminated against in matters of procedure and were entitled to be tried according to law. *Lachmandas Kewalram Ahuja* v. *State of Bombay,* AIR 1952 SC 225 : 1952 SCA 575 : 1952 SCR 869 : 1952 SCJ 305 : 65 MLW 642 : 1952 MWN 507 : 90 Cal LJ 86 : 1952 (2) MLJ 251.

[9210] ● *Law in force at commencement of Constitution when declared to be void.*—Once a law which is in force at the commencement of the Constitution has been declared to be void, the effect of such declaration is not to render it *void ab initio*; even after the declaration, it is not altogether obliterated from the statute book, and it remains operative as regards obligations incurred before 26-1-1950. But with that exception, the declaration as to the unconstitutionality of a law under Article 13 renders it nullified and entirely ineffectual. On the other hand, if a law which conflicts with a fundamental right is a post-Constitution law, it is void from its very birth and is completely devoid of any legal force or effect.

However, so far as obligations and liabilities incurred after 26-1-1950 are concerned, the effect of a law being declared to be void is absolutely the same whether the law is pre-Constitution or post-Constitution, and in either case it has to be treated as being obliterated and effaced from the statute-book for all intents and purposes. *Behram Khurshed Pesikaka* v. *State of Bombay,* AIR 1955 SC 123 : 1955 SCA 1 : 1955 SCJ 73 : 1955 SCR 613 : 1955 CrLJ 215 : 1954 MWN 985 : 57 Bom LR 575 : 1955 (1) MLJ (SC) 32 : 1955 ALT (Cri) 1.

[9211] ● *Law in force before 26.1.1950 be void to the extent of their inconsistency with any fundamental right.*—Under Article 13, All laws in force immediately before 26th January, 1950, shall be void to the extent of their inconsistency with any fundamental right guaranteed under Part III of the Constitution.

The question as to the meaning and effect of the expression "shall be void" is no longer *res integra*, and the matter stands concluded by the judgment in *Keshavan Madhava Menon's* case. By virtue of the operation of Section 6 of the General Clauses Act, even after the declaration that a pre-Constitution law is void, its entire operation does not cease and it is not altogether wiped out of the statute-book; it continues to remain in force so far as concerns the enforcement of all past liabilities incurred under it before 26-1-1950. Further, if the fundamental right with which such law is in conflict accrues under the Constitution only to Indian citizens, such law remains in force even after the declaration of its unconstitutionality so far as it concerns non-Indians residing in India. *Bhikaji Narain Dhakras* v. *State of Madhya Pradesh,* AIR 1955 SC 781 : 1956 SCA 1 : 1955 SCJ 48 : (1955) 2 SCR 589 : 1956 (1) MLJ (SC) 37.

[9212] ● *Distinction between fundamental rights and statutory rights.*—There is a distinction between fundamental rights and statutory rights. Under the Constitution a fundamental right cannot be taken away or abridged by any legislation and if under any law such right is infringed or violated, the person affected can move the Court under Article 32 to get such law declared under Article 13 to be void, and for appropriate relief against the State by the issue of a suitable direction, order or writ. There are no similar provisions in the Constitution in respect of statutory rights, and in the absence of any such provision the, constitutional machinery cannot be of any avail for enforcing what is merely a right conferred by statute. What is given by statute can be taken away by statute, and when a law takes away or abridges some right conferred on the petitioner by some previous law, the validity of that law cannot be questioned on the ground that it is discriminatory or unreasonable.

It follows that when a petitioner seeks to have a law declared to be void under Article 13 on the ground that it invests the executive with uncontrolled power, the Court is bound to inquire whether both the following conditions are satisfied :

a. that the right claimed by the petitioner is a fundamental right conferred by the Constitution and not merely a right given by some statute, and

b. that the power exercised by the executive is violative of such fundamental right.

If the Court finds that the right taken away or curtailed is only statutory, there is no question of invoking Article 13 and the petition under Article 32 has to be dismissed as being misconceived, even though the Court may find that the exercise of power which has been challenged was illegal. The proper remedy in such a case is to move against the Government under the ordinary law, and not by way of a petition under the Constitution. *Pannalal Binjraj* v. *Union of India,* AIR 1957 SC 397 : 1957 SCA 660 : 1957 SCR 233 : (1957) 31 ITR 565.

[9213] ● *Pre-Constitutional law not unconstitutional.*—Pre-Constitution laws are not to be regarded as unconstitutional. All existing laws are continued till the Supreme Court declares them to be in conflict with a fundamental right and therefore void. The burden must be placed on those who contend that a particular law has become void after coming into the force of the Constitution by reason of Article 13(1) read with any of the guaranteed freedoms. *Madhu Limaye* v. *S.D.M., Monghyr,* AIR 1971 SC 2486 : (1970) 3 SCC 746 : 1971 CrLJ 1720 : (1971) 2 SCJ 479 : 1971 MLJ (Cri) 629.

[9214] ● *Person migrated to Pakistan between 1.3.1947 and 26.1.1950 not citizen of India.*—Where a person has migrated to Pakistan between 1-3-1947 and 26-1-1950, he shall not be deemed to be a citizen of India. Such a person coming to India on a short visit on Pakistan passport and visa is a "Foreigner". *State of Assam* v. *Jilkadar Ali,* AIR 1972 SC 2166 : (1972) 2 SCC 320 : 1972 CrLJ 1441.

[9215] ● *Charge of over-staying after expiration of permit.*—It is not proper for the prosecuting authorities to have proceeded with the case against the respondent, when upon the facts set up by the respondent, it became clear that the respondent could not be prosecuted or convicted without a determination under Section 9 of the Citizenship Act that he had voluntarily acquired the citizenship of Pakistan between 26-1-1950 and the commencement of the Act on 30-12-1955. Without a decision on that question whether the respondent is a foreigner and had overstayed, neither an acquittal nor a conviction could be recorded. As no finding can be given by criminal or civil Courts, in a case in which an issue triable exclusively by the Central Government has properly arisen, the question of burden of proof dealt with in Section 9 of the Foreigners Act is immaterial. *State of Gujarat* v. *Yakub Ibrahim,* AIR 1974 SC 645 : (1974) 1 SCC 283 : 1974 SCC (Cri) 107 : 1974 CrLJ 597 : (1974) 1 SCWR 290 : 15 Guj LR 334.

[9216] ● *Departmental instructions.*—Departmental instructions like installation of high-voltage wires on the prison walls are neither "law" within the meaning of Article 13 (3)(a) nor are they "procedure established by law" within the meaning of Article 21 of the Constitution. *D.B.M. Patnaik* v. *State of Andhra Pradesh,* AIR 1974 SC 2092 : (1975) 3 SCC 185 : 1974 SCC (Cri) 803 : 1975 CrLJ 556 : 1974 SCD 931.

[9217] ● *Constitutionality of pre-Constitution statute like Prisons Act.*—While examining the challenge of constitutionality of a pre-Constitution statute like of Prisons Act, the Courts must, consciously and deliberately, focus their attention to one fundamental fact that it is required to examine its validity in the context of the modern reformist theory of punishment, jail being treated as a correctional institution. The Court has, therefore, to strike a just balance between the dehumanising prison atmosphere and the preservation of internal order and discipline, the maintenance of institutional security against escape, and the rehabilitation of the prisoners. *Sunil Batra* v. *Delhi Administration,* AIR 1978 SC 1675 : (1978) 4 SCC 494 : 1978 CrLJ 1741.

[9218] ● *Ordinance issued by President or Governor as much law as Act.*—Ordinance issued by the President or the Governor is as much a law as an Act passed by the Parliament and subject to the same inhibitions. It is law within the meaning of Article 21. President's satisfaction in issuing an Ordinance is justifiable. Ordinance making power is not confined to virgin land or fresh field. Ordinance cannot obliterate

Articles 14, 19 and 21. Preventive detention is constitutionally valid. Amendments introduced by the 44th Amendment Act of the Constitution become part of the Constitution only when they are brought into force by a notification under Section 1(2) of the Act by the Central Government. Section 1(2) is not *ultra vires*. Mandamus cannot be issued against the Central Government for not issuing a notification to bring into force Section 3 of the Amendment Act. Section 1(2) is not violative of Article 14 as conferring uncontrolled power on the Executive. Not bringing into force Section 3 of the Act cannot be said that the Central Government is actuated by any ulterior motive. *A.K. Roy* v. *Union of India,* AIR 1982 SC 710 : (1982) 1 SCC 271 : 1982 SCC (Cri) 152 : 1982 CrLJ 340 : 1982 CrLR (SC) 176 : 1982 BLT (Rep) 164 : (1982) 2 SCJ 68 : (1982) 2 Chand LR (Cri) 333 : 1982 MLJ (Cri) 524.

5. MEANING OF THE EXPRESSION "EQUALITY BEFORE THE LAW"

[9219] ● ***Meaning of the expression "equality before the law".***—In examining the question whether the restrictions imposed by any law on a citizen's right under Article 19(1) are or are not "reasonable" within the meaning of that expression as used in clauses (2) to (6) of that Article, the Court has the power to look into the *substantive* as well as the *procedural* parts of that law. In other words, the Court has the power not only to determine whether the substance of the restriction imposed is "reasonable", but also to determine whether the method of imposing that restriction and the procedure provided for putting that restriction into operation is as well reasonable. *Khare, N.B. (Dr.)* v. *State of Delhi*, AIR 1950 SC 211 : 51 CrLJ 550 : 1950 SCR 519 : 1950 SCJ 328 : 1950 ALJ 506 : 1950 AWR (HC) 514 : 86 CLJ 83 : 1950 MWN 440.

[9220] ● ***Imposing restrictions.***—When a law purports to authorise the imposition of restrictions on a fundamental right conferred by Article 19(1) in language which is wide enough to cover both restrictions which are permissible and those which are not, and its language is not severable so as to apply it to permissible restrictions only, it must be declared to be altogether void. The reason for so holding lies in this that the language in which that law is couched allows it to transgress constitutional limits and the possibility remains that the executive may apply it for purposes not sanctioned by the Constitution. *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 : 51 CrLJ 1514 : 1950 SCR 594 : 1950 SCJ 418 : 1950 ALJ 485 : (1950) 2 MLJ 390 : 63 MLW 929 : 1950 MWN 435.

[9221] ● ***Article 19 of constitution no application to legislation dealing with preventive detention.***—Article 19 has no application to a legislation dealing with preventive detention as its *direct* object. It deals with freedoms conferred and restrictions imposed on a person who is in possession of his personal liberty and the moment a person is deprived of his personal liberty, he ceases to be entitled to the freedoms conferred by Article 19(1), except as to the right conferred by clause (1)(*f*) thereof.

In other words, Article 19 protects only some of the important attributes of personal liberty and not the right to personal liberty itself. It protects the freedom enjoyed by a *free* citizen and ceases to apply when he is deprived of his personal liberty under a procedure established by a valid law.

The true test of the application of Article 19 is the *directness* of the legislation, and not the indirect effect of that legislation on the freedoms conferred by that Article. A law relating to detention, whether punitive or preventive, is primarily directed towards deprivation of personal liberty and its impact on the freedoms conferred by Article 19 is only an incidental consequence of such deprivation. It follows that Article 19 cannot be invoked for the purpose of questioning the "reasonableness" of such a law, and it does not have to run the gauntlet of this Article before its validity can be accepted. If a law relating to preventive detention satisfies the requirements of Article 22(4) to (7) and lays down a procedure for detention which is in accordance therewith, the question of its "reasonableness" within the meaning of Article 19 does not nice.

Article 19 thus protects only freedoms which can be exercised by a citizen in possession of his personal liberty, and once he is deprived of his personal liberty under a valid and constitutional law and ceases to be a free citizen, he also ceases to be entitled to the benefit of Article 19. In other words, a citizen's rights to the freedoms conferred by Article 19 are incidents of personal liberty which attach themselves only to a free citizen. *Gopalan, A.K.* v. *State of Madras*, AIR 1950 SC 27 : 51 CrLJ 1383 : 1950 SCJ 174 : 1950 SCR 88 : (1950) 2 MLJ 42 : 63 MLW 638 : 1950 MWN 495.

[9222] ● ***Liberty of press essential part of freedom of expression.***—Liberty of the press is an essential part of the right to freedom of expression conferred by Article 19(1)(*a*), and every man has the right to lay before the public his sentiments on any matter of public interest. Imposition of a restraint on this right by requiring advance submission to the Government of any matter proposed to be published in a newspaper, and by authorising its publication only when it was approved by an executive officer appointed in that behalf, amounted to imposition of pre-censorship on the press and would destroy its liberty.

Article 19(2) (as it stood before its amendment in the year 1951) authorised the imposition of restrictions on the right to freedom of expression only on the ground of "security of the State". Maintenance of public order was not a ground covered by that Article. It could not be said that every publication involved a threat to the security of the State merely because it might remotely disturb the maintenance of public order. Restrictions on fundamental rights have to be construed strictly, and if a law is found to have imposed restrictions which are not within the permissive cover of Article 19(2) that law is not "reasonable" within the meaning of that Article, and has to be declared to be unconstitutional and void as being an infringement of Article 19(1)(*a*).

The Act impugned in the present case authorised the State Government to demand the advance submission to the Government of matters proposed to be published in newspapers and to forbid publication of any matter which was not approved.

The Act is unconstitutional and void as imposing pre-censorship on the press, and the executive order issued under it had to be quashed by the issue of an appropriate test against the policy of the State Government, such as, "A and B hai hai" may be provocative and annoying to the members of the public who hear those slogans, and may even have a bad effect, but that in itself cannot amount to undermining public order or to incitement to an offence of violence against the State or its representatives.

Those in public positions must not be sensitive of skin, and must accept even unfair and undeserved attacks and criticisms with grace. Vulgar abuse or criticism must be taken as a necessary appendage of public office, and it is better to ignore it, rather than giving it importance by prosecution in a Criminal Court. *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129 : 51 CrLJ 1525 : 1950 SCJ 425 : 1950 SCR 609 : 1950 ALJ 491 : (1950) 2 MLJ 431 : 63 MLW 934 : 1950 MWN 429.

[9223] ● ***Law relating to externment falls within permissive cover of Article 19(5) of Constitution.***—A law relating to externment falls within the permissive cover of Article 19(5) only when the restrictions imposed by it are "reasonable" and in the interest of the general public.

In determining whether such restrictions are "reasonable", the Court must examine the law not only as to its substance but also as to its procedure. A restriction is "reasonable" only when it is reasonable as to all the following things, namely, (a) its duration, (b) its territorial limits, and (c) the procedure it provides for putting the order of externment into operation.

A law relating to externment cannot be assailed as being unreasonable, (a) merely because the question as to the particular person against whom the order of externment should be passed and as to the previous activity of that person which requires the making of such an order, is left to the subjective satisfaction of the executive officer or authority, or (b) merely because it excludes from a judicial review the merits of the order of externment and makes such satisfaction non-justiciable.

A provision in a law relating to externment which authorises the executive to extern a person without communicating to him the grounds for his externment is not reasonable within the meaning of Article 19(5) and must be declared to be void. *Khare N.B.* v. *State of Delhi*, AIR 1950 SC 211 : 51 CrLJ 550 : 1950 SCJ 328 : 1950 SCR 519 : 1950 ALJ 506 : 1950 AWR (HC) 514 : 86 CLJ 83 : 1950 MWN 440.

[9224] ● ***Law relating to preventive detention not justifiable on ground of "reasonableness under Article 19(5) of Constitution".***— MAHAJAN J. : The provisions of a law relating to preventive detention are not justiciable on the ground of "reasonableness" under Article 19(5). The express provisions of Article 22 must be taken to exclude the operation of Article 19(1)(*d*) so far as concerns a law relating to preventive detention. If "reasonableness" under Article 19(5) were to be made the test of the legality of a law relating to preventive detention, the provisions of Article 22 would become redundant. Both are enabling provisions, and one enabling provision in the Constitution cannot be held to be a safeguard against another enabling provision therein.

MUKHERJEE J. : Article 19(1)(*d*) contemplates only freedom of movement and not freedom from detention. Freedom of movement is only an aspect of personal liberty and the validity of a law which takes away liberty has to be determined only by the application of Articles 20, 21 and 22. The freedoms conferred by Article 19 are excluded from the concept of "personal liberty" and vest only in a citizen who is free and in possession of his liberty.

S.R. DAS J. : Article 19(1)(*d*) is not concerned with personal liberty and it would be placing a strain on its plain language to squeeze into it the notion of personal liberty. The expressions "right of free movement" and "personal liberty" are not synonymous. Article 21 protects a person not only against procedural invasions but also against substantive invasions of personal liberty, and it cannot be contended that it protects only against procedural invasions of the right to personal liberty while Article 19(1)(*d*) protects against invasions which are substantive in their nature.

Article 19(1)(*d*) asserts only the citizen's right to move freely throughout the whole of the territory of India unhindered by any State barriers, and Articles 19(1)(*d*) and 19(5) together mean that except when general public interest demands a restriction on that movement (for example, in the case of a leper, or for keeping people out of strategic areas), a free citizen has the right to go anywhere he likes in the Union Territory.

Article 19(1)(*d*) gives protection only to the right to freedom of movement and has nothing to do with freedom of person or personal liberty as such. The right which it gives can be exercised only by a free citizen in possession of his personal liberty, and if freedom of a person is taken away by any valid law, whether it be a law relating to punitive or to preventive detention, such detention operates as a bar to the exercise of the right to freedom of movement so that Articles 19(1)(*d*) and 19(5) cannot be invoked for questioning the "reasonableness" of the restrictions imposed by that law upon personal liberty. *Gopalan A.K.* v. *State of Madras*, AIR 1950 SC 27 : 51 CrLJ 1383 : 1950 SCJ 174 : 1950 SCR 88 : (1950) 2 MLJ 42 : 63 MLW 638 : 1950 MWN 495.

[9225] ● ***Municipal bye-law imposing restrictions on right to carry on particular trade within municipal area.***—A municipal bye-law which authorised the municipality to place a complete ban on the right to carry on a particular trade within the municipal area on all persons except one, in effect authorised the municipality to create a virtual monopoly in that trade in favour of one person to the exclusion of all other persons in that trade. Such a law imposed restrictions on the right of other traders carrying on the same trade within the municipal area which amounted to a total prohibition and was clearly unreasonable.

The impugned bye-law constituted an infringement of the right of the petitioners under Article 19(1)(*g*) and had to be declared to be void. *Rashid Ahmed* v. *Municipal Board, Kairana*, AIR 1950 SC 163 : 1950 SCJ 124 : 1950 SCR 566 : 63 MLW 867 (2).

[9226] ● ***Imposition of restrictions on right to freedom of speech and expression.***—*Article 19(2).*—(As it stood before its amendment by the Constitution First Amendment Act, 1951) permitted the imposition of restrictions on the right to freedom of speech and expression conferred by Article 19(1)(*a*) only as regards matters which "undermined the security of the State" or which tended to "overthrow the State". There was no power under Article 19(2) before its amendment to make laws imposing restrictions in the interests of "public order".

The Madras Maintenance of Public Order Act, 1949, which authorised the State Government to prohibit the entry into and circulation within the State of outside publications on a ground which was outside the permissive cover of Article 19(2) is void as constituting an infringement of the right guaranteed under Article 19(1)(*a*).

(i) Freedom of speech and expression conferred by Article 19(1)(*a*) includes the freedom of publication and circulation. Publication and circulation are the essential attributes of the freedom of expression.

(ii) "Public order" no doubt includes in its concept the security of the State, but it is not every act which disturbs public order which can be said to disturb such security. It is only that serious and aggravated form of public disorder which endangers the security of the State which can justify legislative restriction under Article 19(2).

(iii) The right vested in a State Legislature to impose by law restrictions on the fundamental right to freedom of expression has to be exercised within the strict constitutional limits laid down in Article 19(2), and if a restriction so imposed transgresses such limits it must be held to be "unreasonable". As has been said, "it is far better to leave a few noxious branches to their growth, than, by pruning them away, to injure the vigour of those which yield the proper fruit".

(iv) The impugned Act was "unreasonable" and outside the cover of Article 19(2) inasmuch as it authorised a restraint upon the entry into the State and circulation within it of a publication on a ground which was outside the purview of Article 19(2) (as it then was).

(v) Since the language of the Act was not severable, and it authorised the State executive to impose restrictions upon a publication not only when its circulation within the State involved a danger to the security of the State but also when no such danger was involved, and since the possibility remained that the Act might be applied by the executive for the purpose of restraining such entry and circulation even when there was no such danger, the *whole* law had to be declared to be void as being an infringement of the fundamental right to freedom of expression guaranteed under Article 19(1)(a). *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 : 1951 CrLJ 1514 : 1950 SCJ 418 : 1950 SCR 594 : 1950 ALJ 485 : (1950) 2 MLJ 390 : 63 MLW 929 : 1950 MWN 435.

[9227] ● ***Previous permission of Provincial Govt. required if any publication fell within the meaning of word "news-sheet".***—Under Section 15(1) of the impugned Act, if any publication fell within the meaning of the word "news-sheet" as defined in Section 2(*b*) of the Act, previous permission of the Provincial Government was required for its publication, and under Section 18 of the Act, it was an offence to punish a news-sheet the publication of which had not been so authorised.

The appellant in the present case was prosecuted under the said Section 18.

(1) The impugned provisions of the said Act are unconstitutional and void as being an infringement of the fundamental right guaranteed under Article 19(1)(a).

(2) However, inasmuch as the offence had occurred and the prosecution had been started before the Constitution came into force, the declaration by the Court that the said provisions are void cannot affect the legality of the proceeding which is pending in respect of an offence which was completed before 26th January, 1950. *Keshavan Madhava Menon* v. *State of Bombay*, AIR 1951 SC 128 : 52 CrLJ 860 : 1951 SCJ 182 : 1951 SCR 228 : 1951 MWN (Cri) 60 : 1951 MWN 232 : 1951 (1) MLJ 370 : 1951 ALJ (SC) 23 : 64 MLW 382 : 28 BomCrC 155 : 53 BomLR 458 : ILR (1951) Hyd 294.

[9228] ● ***Law of preventive if satisfied requirements of Article 22 and Article 22 and Article 22(4) to (7) of Constitution.***—If a law relating to preventive detention satisfies the requirements of Article 21 and Article 22(4) to (7), its validity cannot be questioned on the ground that its effect is to curtail the detenu's right to freedom of expression guaranteed under Article 19(1)(*a*).

The question whether a law relating to preventive detention is "reasonable" within the meaning of Article 19(2) does not at all arise, because Article 19 cannot be invoked for the purpose of adjudging the constitutionality of a law relating to preventive detention.

The principles relating to the application of Article 19(1)(*a*) laid down in the case of *Romesh Thappar* and *Brij Bhushan* can be of no help to a person detained under the Preventive Detention Act because of two reasons. Firstly, the benefit of Article 19 can be availed of only by a free citizen, and the moment a citizen's personal liberty is taken away under a law which satisfies the requirements of Articles 21 and 22, he ceases to have the right to invoke Article 19. Secondly, "maintenance of public order" is a good ground for a law relating to preventive detention, under Entry 3 of List III. *Ram Singh* v. *State of Delhi*, AIR 1951 SC 270 : 52 CrLJ 904 : 1951 SCJ 374 : 1951 ALJ (SC) 111 : 1951 SCR 451 : 1951 MWN 765 : 1951 MWN (Cri) 233.

[9229] ● ***Article 19 of Constitution when can be invoked.***—Article 19 can be invoked only when a law imposes a *direct* restriction on one of the freedoms guaranteed by that Article, and not when a right guaranteed under it is abridged or curtailed indirectly as a result of the operation of a law relating to punitive or preventive detention. The true approach is to consider the directness of the legislation and not its indirect effect on a person's mode of life.

Therefore, if a law relating to preventive detention satisfies the requirements of Articles 21 and 22, its validity cannot be challenged on the ground that its effect is to curtail the detenu's right to freedom of speech, or to freedom of movement.

A law relating to preventive detention is governed, not by Article 19, but by Articles 21 and 22. Maintenance of public order is a good ground for such a law (see Entry 3 of the List III), and curtailment of speech is only *an indirect* effect of its operation. Therefore, Article 19(1)(*a*) cannot be invoked for the purpose of challenging its validity. The decisions in *Romesh Thappar's* case and *Brij Bhushan's* case can be of no help for that purpose, because in both cases the law in question was not one relating to preventive detention. *Ram Singh* v. *State of Delhi*, AIR 1951 SC 270 : 52 CrLJ 904 : 1951 SCJ 374 : 1951 SCR 451 : 1951 ALJ (SC) 111 : 1951 MWN 765 : 1951 MWN (Cri) 233.

[9230] ● ***Reasonable restriction—Meaning of.***—The law impugned in the present case was the Central Provinces and Berar Act No. 54 of 1948. The object of the Act was to provide for an adequate supply of agricultural labour which was scant in certain areas of the Province. In order to carry out this object, the Act authorised the Government to issue notification whereby the manufacture of "bidi" was totally prohibited in any notified area during any notified agricultural season. The object of the impugned Act was perfectly reasonable, but the constitutional validity of a law was determined not by its object but by its effect and operation. The object of maintaining an adequate supply of agricultural labour during the busy season could well have been achieved by putting a reasonable restraint on the employment of agricultural labour in the bidi trade during the busy season. For that purpose it was not necessary to place a total restraint on that trade. Imposition of total ban on that trade even for a notified period was a restriction which was not "reasonable" within the meaning of Article 19(6), and since the language of the Act was not severable so as to apply it to reasonable restrictions only, the whole Act had to be declared to be void. *Chintaman Rao* v. *State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCJ 571 : 1950 SCR 759 : 64 MLW 370 : 1951 ALJ (SC) 82 : ILR (1951) Hyd 221.

[9231] ● ***Taking over of management of industrial concern grossly mismanaged.***—A law under which the management of an industrial concern which had been grossly mismanaged was taken over by the Government, but the rights of the shareholders to hold or dispose of their shares were left untouched, was "reasonable and in the interest of the general public" within the meaning of Articles 19(5) and 19(6). *Chiranjitlal Chowdhuri* v. *Union of India,* AIR 1951 SC 41 : 1951 SCJ 29 : 1950 SCR 869 : 64 MLW 47 : 1951 MWN 111 : 53 Bom LR 499 : ILR (1951) Hyd 461.

[9232] ● ***Prohibiting person from commending or encouraging use of intoxicants.***—Sections 23(*a*), 23(*b*) and 24(1)(*a*) of the Bombay Prohibition Act, 1949, which prohibited a person from commending or encouraging the use of intoxicants were void as being an infringement of a person's right to freedom of speech and expression guaranteed under Article 19(1)(*a*). *State of Bombay* v. *F.N. Balsara*, AIR 1951 SC 318 : 52 CrLJ 1361 : 1951 SCJ 478 : 1951 SCR 682 : 1951 (2) MLJ 141 : 53 BomLR 982.

[9233] ● ***Closure of shops for one day in a week.***—A provision in a State law, relating to shops and establishments—the Punjab Trade Employees Act, 1940—which required that shops in the State shall remain closed for one day in the week, and which extended the restriction to all shops in the State, whether they were run by paid employees or were run only by family members of the owner, was perfectly "reasonable" within the meaning of Article 19(6) and did not infringe the right of any such shop owner under Article 19(1)(*g*). *Manohar Lal* v. *State*, AIR 1951 SC 315 : 52 CrLJ 1237 : 1951 SCJ 475 : 1951 SCR 671 : 1951 (2) MLJ 139 : 1951 ALJ 605 : 1951 MWN 763 : 64 MLW 943 : 1951 MWN (Cri) 231.

[9234] ● ***Prohibiting manufacture sale purchase and use of liquid medicinal—Toilet preparations containing alcohol.***—Application of Articles 19(1)(*f*) and 19(5) to Sections 2(24)(*a*), 12 and 13 of the Bombay Prohibition Act, 1949, in so far as they prohibited the manufacture, sale, purchase, consumption and use of liquid medicinal and toilet preparations containing alcohol. These provisions were void as being an infringement of Article 19(1)(*f*). *State of Bombay* v. *F.N. Balsara,* AIR 1951 SC 318 : 52 CrLJ 1361 : 1951 SCJ 478 : 1951 SCR 682 : 1951 (2) MLJ 141 : 53 BomLR 982.

[9235] ● ***Reasonable restriction—Meaning of.***—*Article 19.*—The phrase "reasonable restrictions" in clauses (2) to (6) of Article 19 means that the restrictions imposed on a fundamental right guaranteed under Article 19(1) should not be of an arbitrary or excessive nature, and should not be beyond what is required in the interests of the general public. The word "reasonable" implies due care and thought and the choice of a course dictated by a rational approach. A law cannot be said to be "reasonable" if it does not strike an even balance between individual freedom and social control permitted in public interest. If a law fails to strike such a balance, it must be held to be unreasonable, so as to fall outside the permissive cover of Article 19(2) to (6). *Chintaman Rao* v. *State of M.P.*, AIR 1951 SC 118 : 1950 SCJ 571 : 1950 SCR 759 : 1951 ALJ (SC) 82.

[9236] ● ***Object of law good and laudable not enough.***—It is not enough that the object of a law is good and laudable. It is the effect of it which is the test of its "reasonableness". The restriction imposed has got to be reasonable, that is, it must have a reasonable relation to the object of the legislation. If the restriction imposed is so drastic in its scope and effect as to go far beyond the object of the legislation, the law must be held to be an infringement of Article 19, however laudable its object may be. *Chintaman Rao* v. *State of M.P.*, AIR 1951 SC 118 : 1950 SCJ 571 : 1950 SCR 759.

[9237] ● ***Duty of Supreme Court to guard fundamental rights conferred on citizen.***—The Constitution has cast a duty on the Supreme Court to guard the fundamental rights conferred on the citizen and to judge for itself whether a law made by the State is or is not a violation of any such right vested in the petitioner. The State cannot contend that the Legislature is the best judge of what is "reasonable" or that its determination of what is reasonable should be final and conclusive. In other words, the question whether a restriction imposed by any law is or is not "reasonable" is a justiciable issue. *Chintaman Rao* v. *State of M.P.*, AIR 1951 SC 118 : 1950 SCJ 571 : 1950 SCR 759.

[9238] ● ***Law—Authorising executive to impose restrictions on fundamental right.***—If the language employed in any law is so wide as to authorise the executive to impose restrictions on a fundamental right, some of which are permissible as well as some of which are not, and if its language does not allow of any severance, so that, if that law is allowed to stand, the possibility remains that it might be applied for enforcing restrictions not sanctioned by the Constitution, then the *whole* law must be declared to be void. Such a law cannot be held to be valid partially in view of the fact that a severance between reasonable and unreasonable restrictions is shut out by its very language. *Chintaman Rao* v. *State of M.P.*, AIR 1951 SC 118 : 1950 SCJ 571 : 1950 SCR 759.

[9239] ● ***Expression on "equality before the law".***—The expression "equality before the law" means that as between all subjects of the State placed in the same or similar circumstances, the law of the State must lay an even hand. That, however, does not mean that every law must have a universal application so as to cover persons who are not in the same or similar position. Article 14 recognises that the varying needs of different classes of subjects may require different treatments, and that different laws must be made to meet the differing needs of different people. Therefore it leaves a power to the State to enact laws on special subjects which may apply only to a particular class of persons or things, and to create varying classifications which may be based on different considerations, such as, geographical limits, similarity of occupations etc. Such classification will necessarily produce some inequality between persons falling within that class and persons outside it, but a law creating such classification cannot be said to be violative of Article 14 merely because it has no application to persons who are outside the class created thereby. *State of W.B.* v. *Anwar Ali Sarkar,* AIR 1952 SC 75 : 1952 CrLJ 510 : 1952 SCJ 55 : 1952 SCA 148 : 1952 SCR 284 : 1952 MWN 460 : 1952 MWN (Cri) 124.

[9240] ● ***Test of permissible classification—Law if fails to satisfy.***—Before a law can escape the inhibition of Article 14 it must satisfy the following test :

a. the differentia on which the classification is based must be intelligible, and

b. the differentia must bear a reasonable relation to the object sought to be achieved by the law.

It is not enough that the object of the law is reasonable, or that the classification is clear and intelligible; it is absolutely necessary for the constitutionality of a law that the interrelation between the differentia and the object of the law is reasonable and rational. If a law fails to satisfy this test of a permissible classification it must be held to be in violation of Article 14. *State of West Bengal* v. *Anwar Ali Sarkar,* AIR 1952 SC 75 : 1952 CrLJ 510 : 1952 SCJ 55 : 1952 SCR 284.

[9241] ● ***Law if creates special class and applies to it special provision.***—If a law creates a special class and applies to it special provisions which are not applicable to it under the general law of the land, such law must disclose on the face of it the reasonable grounds for the distinction made. It cannot be urged that it must be presumed that the Legislature knew its own business and that it had in its mind the just grounds for the classification it has created. To accept such a contention will render Article 14 nugatory and the protection it affords a mere eye-wash.

For a charge of denial of equality before the law to succeed, it must be shown that the impugned statute denies to the petitioner the rights or privileges enjoyed by others placed in a similar position or situation. No doubt, the burden of proving this lies upon the petitioner; but if he discharges that burden to the satisfaction of the Court, the unconstitutional character of the impugned statute must be held to have been established.

In order to succeed, it is not incumbent upon the petitioner to go further and show that the Legislature was animated by a hostile or inimical intention. What the intention of the Legislature was, is not the subject of a judicial inquiry. Courts are concerned only with the effect and the operation of a law. So much so that even if the State affirmatively proves that the Legislature had no intention at all to create any discrimination, even that cannot save the law if the result of its operation is in effect to create a discrimination.

There is no reference in Article 14 to intention, and its gravamen is equality of treatment. It would be dangerous to introduce a subjective test in a matter as to which the Article itself lays down only a clear objective test. "Discriminatory" and "hostile" mean the same thing in the present context, because a law which is discriminatory in treatment as between persons who are similarly situated is necessarily "hostile" in the sense that it affects injuriously the person whom it hits. *State of West Bengal* v. *Anwar Ali Sarkar,* AIR 1952 SC 75 : 1952 CrLJ 510 : 1952 SCJ 55 : 1952 SCR 284.

[9242] ● ***Law whom not make arbitrary discrimination.***—Even when a law does not itself expressly make any arbitrary discrimination, if it leaves an unfettered discretion to the executive so as to make it possible for it to make an arbitrary selection between person and person both of whom fall within the same class, that law is as bad as a law which itself creates an arbitrary discrimination. To urge that such law is saved from the taint of discrimination merely because it does not expressly authorise discrimination, is to ignore the fallacy which lies in overlooking the fact that the authority for such discrimination is incorporated in the Act itself. The question as to how the discrimination is worked out is absolutely immaterial, if discrimination is the actual result of the operation of an Act. In either case, the Act must be struck down as being in violation of Article 14. *State of West Bengal* v. *Anwar Ali Sarkar,* AIR 1952 SC 75 : 1952 CrLJ 510 : 1952 SCJ 55 :

[9243] ● ***Fundamental rights—Guaranteed and protected.***—Fundamental rights are guaranteed and protected not only against unconstitutional laws but also against unconstitutional executive orders and actions. A statute is violative of Article 14 not only when it itself creates an arbitrary discrimination but also when it leaves uncontrolled power to the executive to make such discrimination, and in either case it has to be struck down. However, a law may be such that its constitutionality cannot be challenged on the ground of discrimination, but even so, if the executive officer entrusted with the working out of that law makes an arbitrary selection between persons falling within the same class, the executive order so made will be struck down, though the law itself will be left untouched. *State of West Bengal* v. *Anwar Ali Sarkar,* AIR 1952 SC 75 : 1952 CrLJ 510 : 1952 SCJ 55.

[9244] ● ***Rule of procedure as much within purview of Article 14 as rule of substantive law.***—A rule of procedure comes as much within the purview of Article 14 as a rule of substantive law, and all persons who are similarly situated have a right to be governed by the same procedure in a criminal trial and to receive the same facilities of defence. *State of West Bengal* v. *Anwar Ali Sarkar,* AIR 1952 SC 75 : 1952 CrLJ 510 : 1952 SCJ 55.

[9245] ● ***Difference in procedure according to different needs of different parts of territory within State.***—Per SASTRI C.J.—Difference in procedure according to the differing needs of different parts of the territories within a State is not in itself sufficient to rebut the presumption of the constitutionality of any impugned law. When a law prescribes a special procedure applicable only to a particular class of persons, it necessarily creates an inequality between persons falling under that class and persons outside it, merely because such law introduces a procedure for application to a special class which differs or varies from the normal procedure under the general law of the land, such law cannot be condemned as being a violation of the right to equality before the law. A charge of conflict with Article 14 can succeed only when it is shown that the differentiation involves an element of unfavourable bias and that the disparity in treatment goes far beyond the necessity of the occasion.

Per FAZAL ALI J.—The Legislature is entitled to take into consideration the special necessities of the occasion and to pass special laws which meet the requirements of a local area in special circumstances.

Per MUKHERJEA J.—For the purpose of dealing with the complex problems that arise out of an infinite variety of human relations, the legislatures have been given the power to pass laws which necessarily apply only to selected classes of persons. The necessary consequence of such classification is to differentiate the persons belonging to that class from others outside it. That by itself cannot make the law unconstitutional as being in violation of the equality clause under Article14. The violation occurs only when the law operates unequally on persons grouped within the same class, or when it leaves power to the executive to make a capricious selection between members of the same class, or when the law is a palpable abuse of legislative power by making a classification which has no reasonable relation to its object, or when it goes far beyond the necessity of the occasion. *Kathi Raning Rawat* v. *State of Saurashtra,* AIR 1952 SC 123 : 1952 CrLJ 805 : 1952 SCJ 168 : 1952 SCR 435 : 1952 SCA 245 : 1952 MWN 762 : 1952 MWN (Cri) 210.

[9246] ● ***Kinds of statutes to be considered under Article 14 of Constitution.***—Three kinds of statutes which have to be considered under Article 14. (a) Those which lay down the object and policy of the legislature and also make a classification. (b) Those which lay down the object and policy, but leave the classification to the executive. (c) Those which do not lay down any clear policy and yet leave the power of selection to the executive.

Laws in class (a) : When examining the constitutionality of laws in class (a), the Court has merely to see whether the classification made is founded upon an intelligible differentia and whether the special features of the class created under it bear a reasonable relation to the object and policy of the law.

Laws in class (b) : A law is not violative of Article 14 merely because it itself does not make a classification and leaves it to the executive to make a classification at the proper time in accordance with the objectives indicated in the law itself. In such a case the law itself remains good and only the validity of the executive action is to be determined, by seeing whether it has acted in conformity with the policy laid down in the Act for its guidance and whether the classification made by it is reasonable on the same test as is mentioned above, that is, whether the differentia on which it is founded is intelligible and whether it bears a just relation to the object of the Act. The Court will then uphold or strike down the executive order or action depending upon whether it finds that it has or has not passed the aforesaid test, but in either case the Act itself will be left untouched.

Laws in class (c) : An Act which does not lay down any clear policy or objective, and yet confers upon the executive an uncontrolled and unguided power to make at its will and pleasure a classification taking away the rights or privileges under the general law of the land of the persons grouped within that class bears on its very face the stamp of unconstitutionality. In the case of such an Act, the mischief lies in the Act itself and is inherent in its very structure. Such an Act must be straightaway declared to be void as being in clear conflict with Article 14. It follows that every order or action of the executive under such an Act is invalid and has to be put aside. *Kathi Raning Rawat* v. *State of Saurashtra,* AIR 1952 SC 123 : 1952 CrLJ 805 : 1952 SCJ 168 : 1952 SCR 435.

[9247] ● *Right to form association and unions fundamental right.*—The right to form associations and unions is a fundamental right of great value and importance to the citizen, and its curtailment without just cause is fraught with grave reactions in the fields of politics and economics and must be zealously guarded against.

A law which authorises the Government to declare any association to be unlawful on the ground that it had for its object interference with the administration of law or maintenance of public order, and yet denies to that association the right to have the merits of the executive order or action tested by a judicial inquiry, is not "reasonable" within the meaning of Article 19(4). Such a restriction may be justified in the case of a law which imposes it on grounds which are anticipatory, such as, a law relating to preventive detention or a law relating to externment, because in the case of such laws the decision has necessarily got to be left to the subjective satisfaction of the executive. However, no such reason exists in the case of laws in which the grounds on which restrictions are imposed are entirely factual, and the question whether any reasonable ground does in fact exist can be objectively determined in a judicial inquiry. Therefore, in the case of a law in which restrictions are imposed on a citizen's right to form associations on grounds which are only factual, if the law goes further and either expressly or by implication denies to the person affected the right to a judicial inquiry such law is outside the cover of Article 19(4). In such a case even though the law may provide a formula whereunder the association is given the right to make a representation to an Advisory Board appointed under the Act, it cannot be contended that such a right is an adequate substitute for the right to a judicial inquiry. A law which shuts out a right to a judicial inquiry can be justified only on very exceptional grounds such as those mentioned above.

A law which empowers the State to declare an association to be unlawful if its object is interference with public order and to make it an offence to be a member of such association after the declaration, has to be "reasonable" not only in its substance but also in its procedure, so that the restriction imposed must be such as could be justified not only as regards its duration and extent, but also as regards the manner and method prescribed for its imposition. If under any such law the Government is empowered to declare an association to be unlawful and to ban its membership for an indefinite period or until such time as the Government is pleased to cancel the notification issued in that behalf, the law is not "reasonable" within the meaning of Article 19(4). Similarly, if such a law does not provide for adequate communication of the notification to the office-bearers of the association by due service or proclamation at the place where it carries on its activities, the law cannot be said to be "reasonable", because notification in the Gazette is not due communication. *State of Madras* v. *V.G*

Row, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCJ 253 : 1952 SCR 597.

[9248] ● *Power under Sections 15, 16 and 16A of Criminal Law Amendment Acts 1908 (as amended by Madras Act of 1950)—Validity.*— The powers given under the impugned Sections 15, 16 and 16-A of the Criminal Law Amendment Act, 1908 (as amended by Madras Act XI of 1950 to the State Government imposed restrictions on the right guaranteed by Article 19(1)(*c*) which were not "reasonable" within the meaning of Article 19(4), for all the following reasons, namely, (*a*) that they by implication denied to the petitioner Society and its members the right to have the propriety and merits of the Order issued by the Government in the exercise of its powers under the Act objectively tested by a judicial inquiry, (*b*) that the declaration issued by the Government could under these provisions remain in force for an indefinite period at the pleasure of the executive authorities, and (c) that the impugned sections contained no provision for an adequate communication to the association concerned of the Order issued against it. For all these reasons the impugned sections of the Act fell outside the cover of Article 19(4) and were violative of the right conferred by Article 19(1)(*c*). *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCJ 253 : 1952 SCR 597.

[9249] ● *Law placing restriction upon right guaranteed under Article 19 if ultra vires.*—If a law placing any restriction upon a right guaranteed under Article 19 is *ultra vires* as being beyond the powers of the State Legislature which has made it, the restraint placed by it is necessarily bad and constitutes an infringement of Article 19. An illegal impost must at all times be an "unreasonable" one, and therefore the question of its reasonableness or otherwise on its merits does not have to be considered at all. An illegal impost is necessarily an "unreasonable" impost, without proof of anything more besides its illegality. *Mohammad Yasin* v. *Town Area Committee, Jalalabad*, AIR 1952 SC 115 : 1952 SCA 237 : 1952 SCJ 162 : 1952 SCR 572 : 1952 ALJ 313 : 1952 MWN 492.

[9250] ● *Law imposing restriction on fundamental rights.*—A law which authorises the executive to impose restrictions upon fundamental rights guaranteed under Article 19(1) at its discretion, and goes further and denies to the Court the right to test objectively the "reasonableness" of the imposition must be examined with great care before it is held to be constitutional.

A formula which denies to the person concerned a right to have an encroachment upon a fundamental freedom objectively tested by a judicial inquiry cannot be accepted with approval as a general pattern, and can be considered "reasonable" only in exceptional cases and within the narrowest limits. No doubt, such a formula in which the only authority which could review the merits of an executive order was an Advisory Board appointed under the Act itself, was accepted by the Court in the cases of *A.K. Gopalan* and *Dr. N.B. Khare*, but neither case in an authority for the proposition that such a formula should be approved as a general pattern in such matters, and in both these cases the formula was accepted for the special reasons applicable to those cases only.

So far as preventive detention is concerned, the Constitution itself sanctions such a formula in Article 22, and therefore the question of its reasonableness under Article 19 does not at all arise. It was on this ground that the formula was accepted in *Gopalan's* case. *Dr. Khare's* case related to externment, and there the majority of the Court again accepted the formula on account of the peculiar features of an order of externment. Preventive detention and externment are precautionary and anticipatory measures, based upon reasonable belief arising out of the data in the possession of the executive authority relating to the previous activities of the person concerned. The action taken is a preventive measure taken in public interest for the maintenance of public security and order. Both cases involve an element of urgency requiring prompt action. In both cases the grounds of action are anticipatory so as to prevent future prejudicial activity, and when the ground are *anticipatory* it is inevitable that the decision has to be left to the subjective satisfaction of the executive officers. On the other hand, when the grounds on which a restriction on a fundamental freedom is imposed are *factual*, the existence of those grounds is a matter which can be objectively determined, and if by any law a judicial inquiry into the facts underlying an order is shut out, the law is not "reasonable" and its validity cannot be sustained. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCA 399 : 1952 SCJ 253 : 1952 SCR 597 : 65 MLW 420 : 1952 MWN 397 : 1952 MWN (Cri) 101 : 1952 (2) MLJ 135 : 90 CalLJ 218.

[9251] ● *Law authorising State of declare association unlawful unreasonable.*—An Act which authorises the State to declare an association to be unlawful and makes it an offence to be a member of an association so declared to be unlawful is "unreasonable" within the meaning of Article 19(4) if it excludes a judicial inquiry into the merits of the executive order and subjects it only to a scrutiny by an Advisory Board appointed under the Act. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCA 399 : 1952 SCJ 253 : 1952 SCR 597.

[9252] ● ***Law imposing restrictions upon freedom of citizens to be reasonable.***—A law which authorises the State to impose restrictions upon the freedoms of a citizen guaranteed under Article 19 has to be reasonable both in its substance as well as its procedure. The Court has the power to examine the impositions and see not only whether the restrictions are justified as regards their duration and extent, but also whether the manner and method prescribed for the enforcement of those restrictions are as well reasonable. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCR 597 : 1952 SCJ 253.

[9253] ● ***Law "unreasonable" taking away fundamental right.***—If an impugned law is a permanent measure, and it authorises the executive Government to take away a fundamental right or place a restriction upon it for an indefinite period until the executive thinks it fit at some later stage to cancel the notification under which the restriction is imposed, such law must be held to be "unreasonable." *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCA 399 : 1952 SCJ 253.

[9254] ● ***Notification in gazette not good substitute for adequate communication.***—If the impugned law authorises the imposition of restrictions on a fundamental right, but the procedure laid down in it does not provide for an adequate communication of the notification imposing the restriction to the persons concerned, by such means as personal service or service by affixture or any proclamation at the place where they carry on their activity, the procedure is "unreasonable". Notification in the gazette is not a good substitute for some form of adequate communication, since the possibility always remains that the notification may not reach the notice of the persons concerned sufficiently in time for them to make the representation against it which the Act itself provided for. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCA 399 : 1952 SCJ 253 : 1952 SCR 597.

[9255] ● ***Test of reasonableness depend in each case.***—The test of "reasonableness" will depend in each case upon the peculiar features of that case, and no abstract standard or general pattern can be laid down for application to all cases, even though the constitutional criterion is reduced to a single word. In each case the decision must necessarily depend upon the cumulative effect of the various factors governing that case. It follows that a decision in an earlier case depending upon the peculiar facts and circumstances of that case, cannot have much value as a precedent when deciding the validity of a restriction in a later case. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCA 399 : 1952 SCJ 253 : 1952 SCR 597.

[9256] ● ***Whether impugned enactment reasonable—Factors to be considered.***—In arriving at a decision as to whether an impugned enactment is "reasonable", the Court will have to consider the following factors :

(1) the nature of the right infringed;
(2) the purpose of the restriction imposed;
(3) the extent of the evil sought to be remedied;
(4) the extent of the restriction in relation to the evil it seeks to check;
(5) the prevailing conditions in the area sought to be covered by this law; and
(6) the manner and the method of the imposition. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCA 399 : 1952 SCJ 253 : 1952 SCR 597.

[9257] ● ***Excessive judicial interference with social legislation.***—It is inevitable that judicial interference with legislation on the ground of its being unreasonable will be affected by the social philosophy of the Judges of the Supreme Court participating in the decision, but it must be borne in mind that their ever present consciousness of their solemn responsibility, will never allow them to forget that the Constitution is meant for all the people of this country and not only for those of their own way of thinking, and that the elected representatives of the people have, in making such a law, considered the restriction imposed to be reasonable. In view of this, the fear of excessive judicial interference with social legislation on the ground of "unreasonableness" is entirely groundless. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196 : 1952 CrLJ 966 : 1952 SCA 399 : 1952 SCJ 253.

[9258] ● ***Maintenance of public order good ground for imposing restriction on right to freedom speech and expression.***—Article 19(2) as it originally stood covered only laws which imposed restrictions on activities which "undermined the security of the State". In *Romesh Thappar's* case and in *Brij Bhushan's* case it was held that Article 19(2) could not be extended to give cover to laws which imposed restrictions on the right to freedom to expression only for the purpose of maintenance of public order, and that since there was a possibility that an Act which sought to restrain such activities might be abused by placing restrictions on activities which in no way undermined the security of the State, the whole Act had to be declared to be unconstitutional and void.

But after these decisions were pronounced, Article 19(2) has been amended by the First Amendment Act of 1951 with retrospective effect, and therefore maintenance of public order can now be a good ground for imposing a restriction on the right to freedom of speech and expression, and the decisions in the cases of *Romesh Thappar* and *Brij Bhushan* are no longer applicable to laws imposing restrictions on that right for the purpose of maintenance of public order.

Sections 3 and 4 of the Indian Press (Emergency Powers) Act, 1931, authorised a State Government to demand a security from the keeper of a press which was used for printing matter inciting people to the commission of serious crimes of violence.

The provisions fell within the permissive cover of Article 19(2) since the restrictions imposed by them were reasonable and were meant to restrain activities which affected public order. *State of Bihar* v. *Shailabala Devi*, AIR 1952 SC 329 : 1952 CrLJ 1373 : 1953 SCA 152 : 1952 SCJ 465 : 1952 SCR 654.

[9259] ● ***Construction of document—Writing to be considered as a whole.***—In order to determine whether a particular publication falls within the ambit of a law relating to public security, it has to be considered in a fair and liberal spirit, not dwelling too much upon isolated passages or upon a strong word used here and there. The document should be viewed as a whole and in its proper perspective, keeping in mind the place, the circumstances, the occasion and the background of the publication.

In the present outlook of our country, writings such as these, leave their readers cold and unmoved, and nobody takes serious notice of expressions which are the stock-in-trade of political demagogues, and time is long past when they could excite people to violence.

Unless it can be shown that underneath the generalities forming the bulk of a pamphlet there was something concrete and tangible pointing against particular individuals, a cry against "oppressors" generally will not bring a publication within the mischief of a penal provision.

Rhetoric of this kind might, in conceivable circumstances inflame passions and incite people to violence, but if such circumstances exist, it is for the Government to establish them.

The respondent in the present case was the keeper of a press in which a pamphlet was printed which contained objectionable matter. The Government required the press to furnish security, and against that order the respondent moved the High Court under Section 23 of the Act. The High Court allowed the application and set aside the said order. Against the order of the High Court the State appealed to the Supreme Court.

Section 4(1)(*a*) of the Act was constitutional. However, the pamphlet in question did not, when read as a whole, have any tendency to excite the public to commit crimes of violence, and hence the order issued against the press was misconceived. *State of Bihar* v. *Shailabala Devi*, AIR 1952 SC 329 : 1952 CrLJ 1373 : 1953 SCA 152 : 1952 SCJ 465.

[9260] ● ***Illegal impost.***—If it is once found that a licence fee imposed for carrying on any trade or business cannot be justified on the basis of any valid law, the imposition is necessarily unreasonable. An illegal impost is of its very nature an unreasonable restriction, and is necessarily an infringement of the citizen's right to carry on his trade or business under Article 19(1)(*g*). *Mohammad Yasin* v. *Town Area Committee, Jalalabad,* AIR 1952 SC 115 : 1952 SCA 237 : 1952 SCJ 162 : 1952 SCR 572 : 1952 ALJ 313 : 1952 MWN 492.

[9261] ● ***Article 19(1)(d) of Constitution applicability of to law relating to preventive detention.***—The question whether Article 19(1)(*d*) applies to a law relating to preventive detention is concluded by the decision of the Court in *Gopalan's* case, and it is now settled that this Article cannot be invoked for the purpose of challenging the validity of any detention and that the question has to be decided by the application of Articles 20, 21 and 22 only.

The impugned Act provided that when any Muslim abducted person was found by any police officer of a designates rank in any place, he had to take that person into custody and deliver him or her to the officer-in-charge of the nearest refugee camp and that such officer was required to keep that person in the camp until arrangements were made for his or her delivery to some relative entitled to take charge of that person.

Such custody and detention could not be challenged on the ground that the restrictions authorised by the Act were not "reasonable" within the meaning of Article 19(5). *State of Punjab* v. *Ajaib Singh*, AIR 1953 SC 10 : 1953 CrLJ 180 : 1952 SCJ 664 : 1952 SCA 791 : 1953 SCR 254 : 1953 MWN 355 : ILR (1953) Punj 121.

[9262] ● ***Removing stands and terminals of—Transport vehicles.***—A Rule made under the Motor Vehicles Act which authorised the Transport Authority to alter from time to time stands and terminals of transport vehicles for meeting public convenience, and an order made on an owner of a bus-stand in the exercise of the powers conferred under such Rule directing him to remove a stand from one place to another, could not be considered to be unreasonable restrictions on the right to carry on any trade or business under Article 19(1)(*g*). *Ibrahim T.B.* v. *Regional Transport Authority, Tanjore,* AIR 1953 SC 79 : 1953 SCA 277 : 1953 SCJ 31 : 1953 SCR 290 : 1953 (1) MLJ 205.

[9263] ● ***Act authorising Court of wards to take over management of estate at his discretion.***—An Act which authorised a Court of Wards to take over the management of an estate at his discretion, and which denied to the owner the right to resort to a civil Court for the purpose of testing the merits of the executive decision, was clearly unreasonable and the imposition was an infringement of the owner's right to hold property under Article 19(1)(*f*) : [Article 19(1)(*f*) has since been deleted by Constitution (Fourty Fourth) (Am.) Act, 1978. It's place has been occupied by Article 300-A, Constitution of India.] *Raghubir Singh* v. *Court of Wards, Ajmer,* AIR 1953 SC 373 : 1953 SCA 629 : 1953 SCJ 505 : 1953 SCR 1049 : 1954 MWN 433.

[9264] ● ***Scope of equal protection.***—Legislatures have to deal with diverse problems arising out of the infinite variety of human relations. They must, therefore, have the power to make special laws for the purpose of achieving special objects. In making such laws the Legislatures have necessarily got to exercise large powers of section and classification of persons and things. It will, therefore, be seen that a law does not *per se* fall within the inhibition of Article 14 merely because of inequality of treatment between the class of persons or things for whom the law is made and the persons or things remaining outside that class. To attract the operation of Article 14 it is necessary to establish that the classification made under a law is unreasonable or unintelligible or that it has no rational relation to the object of the law. *Ameerunnissa Begum* v. *Mahboob Begum*, AIR 1953 SC 91 : 1953 SCA 565 : 1953 SCJ 61 : 1953 SCR 404 : ILR (1953) Hyd 93.

[9265] ● ***Meanest citizens right of access to Court of law to redress his grievance.***—The meanest of citizens has a right of access to a Court of law for the redress of his grievances. If any law seeks to take away that right in respect of particular transactions between the State and a particular class of persons by imposing a disability which is not imposed on anyone else, without laying down any reasonable and just basis for such imposition, it is one of the worst forms of discrimination.

Laws such as these which do not clearly lay down the distinguishing features of the class of persons to whom they are made to apply, and yet seek to take away from them the rights and liberties which the general law gives to all others, constitute a clear invasion of Article 14. If encouraged, such laws will drain away all vitality from the rule of law, and it is hoped that democratic processes, will not function along such lines. *Ram Prasad Narayan Sahi* v. *State of Bihar*, AIR 1953 SC 215 : 1953 SCA 578 : 1953 SCJ 267 : 1953 SCR 1129 : 32 Pat 375.

[9266] ● ***All laws not to have to be general and universal in their application.***—All laws do not have to be general and universal in their application, and the Legislatures have the power to make laws applicable only to special class, provided such laws are based on intelligible principles which are reasonably related to the objects sought to be achieved thereby.

If a law does not lay down any clear policy and leaves it to the unfettered and unregulated discretion of the executive to apply the special procedure created by it to any person or group of persons at its will and pleasure, such law is a clear negation of Article 14. The mischief lies in the fact that in the absence of any regulative principle or policy the uncontrolled discretion of the executive is the sole determining factor for the application of that law.

On the other hand, if a law clearly indicates its policy and lays down the standards for its application, it is not obnoxious to Article 14 merely because it does not itself create the class to which it may be applied, and leaves it to the executive to decide when, against whom, and in what circumstances it is to be applied.

However, even when a law is not violative of Article 14, it may happen that the executive officer or authority entrusted with its application may exceed the limits of its powers and may seek to proceed under it against persons or in circumstances not contemplated by it. In such a case, even though the aggrieved person cannot succeed in challenging the constitutionality of the law itself, it will be open to him to invoke Article 14 and get the illegal order set aside. *Kedar Nath Bajoria* v. *State of West Bengal*, AIR 1953 SC 404 : 1953 CrLJ 1621 : 1953 SCA 835 : 1953 SCJ 580 : 1954 SCR 30.

[9267] ● ***Court not to adopt doctrinaire approach in construing Article 14 of Constitution.***—In construing Article 14, Courts should not adopt a doctrinaire approach which will choke off all beneficial legislation based upon a rational classification. If a classification is based upon existing local conditions and special circumstances, and bears a reasonable relation to the object which the law seeks to achieve, it cannot be attacked as being a denial of the right to the equal protection of the laws guaranteed under Article 14. *Harnam Singh* v. *Regional Transport Authority, Calcutta,* AIR 1954 SC 190 : 1954 SCA 47 : 1954 SCJ 646 : 1954 SCR 371 : 1954 (1) MLJ 79.

[9268] ● ***Classification can validly founded upon geographical or regional considerations.***—A classification can validly be founded upon geographical or regional considerations. But when only one area in a State is selected for the operation of a special law, while all the other areas in the State continue to remain under the general law, the State must establish that the basis of such differentiation lies in the special local conditions, prevailing in the area which is selected for the operation of that special legislation. If the State is unable to show any rational basis for such differentiation, the law must be declared to be in contravention of Article 14. *State of Rajasthan* v. *Rao Manohar Singhji*, AIR 1954 SC 297 : 1954 SCA 491 : 1954 SCJ 439 : 1954 SCR 996 : 1954 RajLW 220.

[9269] ● ***Classification allowed by Article 14 of Constitution.***—The guarantee of equal protection of the laws does not mean that the same law should apply to all persons whether they be in the same or different situations or circumstances. Classification is permissible provided it is based upon a differentia which has a relation to the object of the law in question. *Syed Mohammed and Co.* v. *State of Andhra,* AIR 1954 SC 314 : 1954 SCA 400 : 1954 SCJ 390 : 1954 SCR 1117 : 1954 (1) MLJ 619 : 67 MLW 611.

[9270] ● ***Article 14 of Constitution prohibits State from making special law which singles out a person or class of persons.***—Article 14 prohibits the State from making a special law which singles out a person or class of persons for a special treatment which is different from the treatment meted out under the general law to all other persons placed in the same or similar circumstances. However, Article 14 does not prohibit the State from making a law which creates a special class of persons for the purpose of applying to them a special rule of procedure, provided that the classification is based on a reasonable and substantial distinction which separates those persons from all others, and such distinction bears a just and reasonable relation to the object sought to be attained by that law.

When an Act or Notification applying a special rule of procedure to a special class of persons is challenged on the ground of violation of Article 14, the test for deciding whether it is or is not hit by Article 14, is this—is the classification made thereunder founded upon a clear distinguishing feature which separates the class to whom the enactment applies from all other persons governed by the general law, or is the segregation made thereunder without any foundation so that an arbitrary discrimination is made between persons falling under the same or similar circumstances? There is no conflict between the earlier decisions of the Court on this subject. The principles relating to the scope and operation of Article 14 which were first laid down in *Anwar Ali Sarkar's* case have not lost any of their force by reason of the later decisions. It is the same test which has been applied throughout, and it is by the application of the same test that some laws have been held to be consistent with Article 14 while others have been held to be violative of that Article. *Dhirendra Kumar Mandal* v. *Supdt. and R.L.A. to Govt. of West Bengal*, AIR 1954 SC 424 : 1954 CrLJ 1036 : 1954 SCA 588 : 1954 SCJ 582 : (1954) 2 MLJ 128 : 1954 MWN 664 : 1955 SCR 224.

[9271] ● ***Charge of discrimination against any Act to be made out on merits of Act itself.***—A charge of discrimination against any Act has to be made out on the merits of the Act itself, and not by its comparison with other Acts made on the same subject in another State or by the Centre. A State legislation on any matter cannot be challenged on the ground that its provisions compare unfavourably with, or are in contrast with, the provisions of another Act on the same or a similar subject which prevails in some other State. It is the discriminatory character of the impugned Act itself which determines its unconstitutionality, and for that purpose the Court must look at the Act itself and nothing else. *State of Madhya Pradesh* v. *G.C. Mandawar*, AIR 1954 SC 493 : 1954 SCA 767 : 1954 SCJ 503 : 1955 SCR 599 : (1954) 2 MLJ 51.

[9272] ● *Article 14 of Constitution assures equality of treatment.*—Article 14 assures equality of treatment to all persons who are in the same or similar place or situation, and guarantees that the same mode of procedure will be applied to them all. If an Act lays down a procedure for a particular matter which is different from the procedure relating to that matter under the general law, and if it leaves it to the will and pleasure of the executive to apply its provisions to any person, while others placed in the same situation continue to be governed by the general law, the Act has to be held to be violative of Article 14, and it is not a good defence to say that the special procedure under the Act is a fair substitute for the procedure under the general law or to say that it does full justice to the person to whom it is applied. The only question for consideration when judging that constitutionality of an impugned law is whether the classification made under it is arbitrary and discriminatory or whether it is reasonable and just and rationally related to the object of the Act. If the classification made under the Act is found to be discriminatory, the Act must be declared to be void as being an infringement of Article 14, and in such case the question of its fairness or of its being a good substitute for the general law does not at all arise. *Suraj Mall Mohta and Co.* v. *A.V.V. Sastri*, AIR 1954 SC 545 : 1954 SCA 743 : 1954 SCJ 611 : 1955 SCR 448 : 67 MLW 759 : (1954) 26 ITR 1.

[9273] ● *State no longer "Police State".*— The State today is no longer the "police State" of olden times and it has to discharge all the functions of a "Welfare State". If a law creates classification which places the State in a special category to enable it to discharge any of the functions of a Welfare State, it is not subject to the charge of discrimination because such a classification is perfectly just and reasonable and bears a rational relation to the object of the legislation. *Saghir Ahmed* v. *State of U.P.*, AIR 1954 SC 728 : 1954 SCA 1218 : 1954 SCJ 819 : 1955 SCR 707 : 1954 (2) MLJ 622 : 1955 AWR 23 : 68 MLW 8 : 1955 ALJ 38.

[9274] ● *Excise Regulation "reasonable" within meaning of Article 19(6).*—An Excise Regulation—the Ajmer Excise Regulation No. 1 of 1915—which prohibited retail trade in intoxicating liquors and authorised the State Government to hold annual public auctions of the monopoly right to sell such liquor, was "reasonable" within the meaning of Article 19(6). *Cooverjee B. Bharucha* v. *Excise Commissioner, Ajmer*, AIR 1954 SC 220 : 1954 SCA 256 : 1954 SCJ 246 : 1954 SCR 873.

[9275] ● *Validity of law relating to preventive detention not to be judged by application of Article 19 of Constitution.*—In *A.K. Gopalan's* case the correlation between Article 19 and Articles 21 and 22 was explained, and it was held by the majority that the rights conferred by Article 19(1) [except the right under Article 19(1)(*f*)] could be enjoyed only so long as a citizen was free and had the liberty of his person, and that the moment a citizen was deprived of his personal liberty under a valid law which satisfied the requirements of Articles 21 and 22, he ceased to be entitled to the benefit of Article 19. Applying this principle the majority held that the validity of a law relating to preventive detention could not be judged by the application of the provisions of Article 19.

In the case of *Ram Singh* v. *State of Delhi*, it was held as under :—

(a) Personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in Article 19(1), and deprivation of personal liberty results in the extinction of those freedoms.

(b) The Constitution has, however, treated these civil liberties as rights distinct from personal liberty, and a law which authorises deprivation of personal liberty does not fall within the purview of Article 19 and its validity could not be judged by the criteria indicated in that Article.

(c) The validity of a law relating to preventive detention depended entirely on its compliance with the requirements of Articles 21 and 22 and if it satisfied those requirements, it was perfectly constitutional.

The combined effect of these decisions is as under :—

(a) The freedoms conferred by Article 19(1) [except Article 19(1)(f)] are guaranteed to a citizen of India while he is a free man. But as soon as he is deprived of his personal liberty as a result of detention, punitive or preventive, he loses his capacity to exercise those freedoms and cannot complain of the infraction of any of them.

(b) These freedoms, even when they are available, are not absolute and unbridled, but are subject to social control, and reasonable restrictions may be imposed on them by law.

(c) A law which deprives a citizen of his personal liberty inevitably destroys his civil freedoms under Article 19, and its validity cannot be judged by the test of reasonableness laid down in clauses (2) to (6) of that Article. Its validity can be determined only by the application of Articles 21 and 22. *State of West Bengal* v. *Subodh Gopal Bose*, AIR 1954 SC 92 : 1954 SCA 65 : 1954 SCJ 127 : 1954 SCR 587 : 67 MLW 206 : 1954 (1) MLJ 314.

[9276] ● *Essentials of what is "reasonable".*—A law placing restrictions on individual freedoms guaranteed under Article 19 fails to contain the quality of "reasonableness" when it confers upon executive officers a power which is unfettered and unregulated by any rule or principle, and leaves it entirely to their discretion to do anything they like, without any check or control by any higher authority.

The essentials of what is "reasonable" have been laid down in *Chintaman Rao's* case.

If an Order made by the Government gives to an executive officer uncontrolled and unregulated power to exempt any person from the operation of the order, without laying down the grounds of such exemption, and without providing any check by any higher authority over his decisions, so as to enable him to make arbitrary decisions which cannot be questioned by anyone, the Order is on the face of it "unreasonable".

Similarly, an Order vesting an executive officer with uncontrolled power to grant or refuse a licence at will without laying down any principle of guidance or policy, and without making any rules or giving any directions to guide or regulate the discretion of the officer, was "unreasonable", because it placed no check upon possible injustice resulting from improper exercise of the powers given in the Order. *Dwarka Prasad Laxmi Narain* v. *State of U.P.*, AIR 1954 SC 224 : 1954 SCA 204 : 1954 SCJ 238 : 1954 SCR 803 : 1954 ALJ 203.

[9277] ● *Right of landlord to evict tenants.*—A law which had for its object prevention of hardship to certain classes of tenants in urban areas and which for the purpose of achieving that object amended the existing law relating to revenue sales collection by landlords by providing that the landlord shall not have the right to evict the tenants except under certain conditions specified in the Act was not unconstitutional.

(*Note*:—In this case differing views were expressed by Their Lordships as to the interrelation between Article 19(1)(*f*) and Article 31 both of which deal with the citizen's right to property, and as to the application of Article 19(1)(*f*) when a concrete right to property is restricted by legislation. However, since this question has nothing whatever to do with criminal law and is outside the scope of the present work it has been left untouched.) *State of West Bengal* v. *Subodh Gopal Bose*, AIR 1954 SC 92 : 1954 SCA 65 : 1954 SCJ 127 : 1954 SCR 587 : 67 MLW 206 : 1954 (1) MLJ 314.

[9278] ● *Uncontrolled and arbitrary power in regulating trade or business.*—A law or order—the Uttar Pradesh Coal Control Order, 1953,—which confers on the Government or any executive officer or authority uncontrolled and arbitrary power in the matter of regulating trade or business in a particular commodity, for example, by giving to a licensing officer absolute power to grant or to refuse to grant any licence to any person at his will and pleasure, must be held to be void as imposing an unreasonable restriction upon the freedom of trade and business guaranteed under Article 19(1)(*g*) which does not come within the cover of Article 19(6). *Dwarka Prasad Laxmi Narain* v. *State of U.P.*, AIR 1954 SC 224 : 1954 SCA 204 : 1954 SCJ 238 : 1954 SCR 803 : 1954 ALJ 203.

[9279] ● *Imposition of restrictions regarding management of properties belonging to institution.*—A law which imposes in the Head of a religious institution restrictions regarding the management of the properties belonging to the institution which interfere with the discharge by him of his obligations and duties as the spiritual head of a religious fraternity is not "reasonable" within the meaning of Article 19(5) and is void as being in conflict with his right to hold property guaranteed under Article 19(1)(*f*). *Commissioner, Hindu Religious Endowments, Madras* v. *Shri Laxmindra Tirtha Swamiar*, AIR 1954 SC 282 : 1954 SCA 415 : 1954 SCJ 335 : 1954 SCR 1005 : 1954 (1) MLJ 596 : 20 CutLT 250 : 1954 MWN 363 : 67 MLW 1220.

[9280] ● *Search and seizure of property to be produced in criminal proceedings.*—The provisions of Section 96 of the Criminal Procedure Code relating to search and seizure of property required to be produced in any criminal proceeding under a warrant issued by a Magistrate are reasonable restrictions on the right to hold property which are covered by Article 19(5). These provisions do not offend against the right guaranteed under Article 19(1)(*f*). *Sharma, M.P.* v. *Satish Chandra, District Magistrate, Delhi*, AIR 1954 SC 300 : 1954 CrLJ 865 : 1954 SCA

449 : 1954 SCJ 428 : 1954 SCR 1077 : 1954 (1) MLJ 680 : 1954 MWN 566 : 56 PunLR 366.

[9281] ● *Freezing stocks of essential commodity.*—Clause 25 of the Rajasthan Foodgrains Control Order, 1949 : An Order which authorises an executive officer appointed in that behalf to freeze stocks of any essential commodity with a view to secure its supply and distribution to the public at fair prices is perfectly "reasonable" within the meaning of Article 19(6).

But if that Order goes further and gives power to such officer to acquire the stocks of that commodity held by dealers at any price fixed by himself, and does not lay down any principle or standard for his guidance in the fixation of the price at which he can requisition those stocks, it cannot be said to be "reasonable" and since it authorises the placing of an unreasonable restriction upon the right to carry on trade or business, the Order is void as being an infringement of the rights of those dealers under Article 19(1)(*g*). *State of Rajasthan* v. *Nath Mal*, AIR 1954 SC 307 : 1954 SCA 347 : 1954 SCJ 404 : 1954 Raj LW 253 : 1954 SCR 982.

[9282] ● *Law authorising Govt. to appoint—Executive officer for settling scheme in respect of running and management of religious institution.*—A law which authorises the Government to appoint an executive officer for settling a scheme in respect of the running and management of a religious institution, and goes further and provides that the Head of that institution shall accept such scheme without having the right of having its merits and utility tested by a judicial inquiry, imposes restrictions on the right of that person to hold property which are not "reasonable" and is, therefore, void as being an infringement of his right under Article 19(1)(*f*). *Mahant Sri Jagannath Ramanuj Das* v. *State of Orissa*, AIR 1954 SC 400 : 1954 SCA 569 : 1954 SCJ 329 : 1954 SCR 1046 : 1954 (1) MLJ 591 : 20 CutLT 293 : ILR (1954) Cut 334.

[9283] ● *Law made by State Legislature if ultra vires.*—If a law made by a State Legislature is *ultra vires* as being outside the powers of that Legislature, imposition of any tax by the State under such a law is necessarily in violation of the assessee's right under Article 19(1)(*g*), because an impost which is illegal is of its very nature unreasonable. *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh*, AIR 1954 SC 403 : 1954 SCA 654 : 1954 SCJ 445 : 1954 SCR 1122 : 1954 (1) MLJ 690 : 67 MLW 629 : 1954 MWN 802.

[9284] ● *Seizure of goods by police otherwise than under due compliance with provisions of CrPC.*—A seizure of goods by the police otherwise than under due compliance with the provisions of the Criminal Procedure Code is of its very nature an illegality, and for that reason such illegal seizure of goods is an infringement of the right of the owner of those goods under Article 19(1)(*f*). Nothing which is against the law can be held to be "reasonable" within the meaning of Article 19(5). *Wazir Chand* v. *State of H.P.*, AIR 1954 SC 415 : 1954 CrLJ 1029 : 1954 SCJ 600 : 1954 SCA 1257 : 1955 SCR 408.

[9285] ● *Section 3 of Essential Supplies (Temporary Powers) Act and Cotton Textile (Control Movement) Order 1948—Validity of.*—Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, and the Cotton Textile (Control of Movement) Order, 1948 : if an Order does not deprive a citizen of his right to dispose of his goods as he pleases, but only requires him to obtain a permit for enabling him to transport them, it cannot be said that such a requirement imposes an unreasonable restriction on the citizen's right under Article 19(1)(*f*) or 19(1)(*g*). Such a restriction is covered by Articles 19(5) and 19(6). *Harishankar Bagla* v. *State of Madhya Pradesh*, AIR 1954 SC 465 : 1954 CrLJ 1322 : 1954 SCA 824 : 1954 SCJ 637 : 1955 SCR 380 : (1954) 2 MLJ 211 : 1954 AWR (Supp) 63 : 1954 MWN 749.

[9286] ● *Section 9 of Bar Councils Act, 1926—Validity of.*—Section 9 of the Bar Councils Act, 1926, which vests in the High Court an absolute discretion to refuse admission on the roll of advocates of that High Court to any advocate applying for such admission, is perfectly "reasonable" within the meaning of Article 19(6) and does not infringe the right to practise any profession guaranteed by Article 19(1)(*g*). *Babul Chandra Mitra* v. *The Chief Justice and Other Judges, Patna High Court,* AIR 1954 SC 524 : 1954 SCA 395 : 33 Pat 553.

[9287] ● *Clause 4 of Cotton Control order not infringement of Article 19(1)(g) of Constitution.*—A Cotton Control Order whereunder forward contracts in cotton are prohibited in a particular Association operating within that State for a specified period for the purpose of placing a check on speculative activities, places a restriction on the right to trade which is entirely "reasonable" within the meaning of Article 19(6) and it cannot be said that the Order in question is an infringement of the Association's right under Article 19(1)(*g*). *Madhya Bharat Cotton Association Ltd.* v. *Union of India*, AIR 1954 SC 634.

[9288] ● ***Restriction imposed on licencee's right to carry on business.***—A Cinematograph Act which requires the licensee to exhibit at each show at his theatre a fixed length of films which have been previously approved by the officer appointed in this behalf by the State Government, imposes a restriction on the licensee's right to carry on his business which is not "reasonable" and hence is void as being an infringement of his right under Article 19(1)(*g*). *Seshadri, R.M.* v. *District Magistrate, Tanjore*, AIR 1954 SC 747 : 1954 SCA 1214 : 1954 SCJ 842 : 1955 SCR 677 : 1954 (2) MLJ 717 : 68 MLW 3.

[9289] ● ***Right to represent workers in particular industry.***—The provisions of these Acts which give the right to represent workers in a particular industry only to a Union which commands a minimum percentage of those workers, and which deny to unions which do not command such percentage the right to interpose in disputes between the mill owners and the representative union, and to exhort workers to go on strike while the dispute is pending before an Industrial Tribunal, do not infringe the constitutional rights under Articles 14, 19(1)(*a*) and 19(1)(*c*) of any worker who does not belong to the representative union. No violation of the fundamental rights to freedom of speech or to form unions and associations is involved in such a restriction. *Raja Kulkarni* v. *State of Bombay*, AIR 1954 SC 73 : 1954 CrLJ 351 : 1954 SCA 973 : 1954 SCJ 50 : 1954 (1) MLJ 83 : 1953 AWR (HC) 146 : 1954 MWN 136 : 56 BomLR 459.

[9290] ● ***Right to stand as candidate at Parliamentary election special right created by statute.***—The right to stand as a candidate at a Parliamentary election is a special right created by statute. It is not a fundamental right guaranteed by the Constitution. The Chapter on Fundamental Rights has no bearing on rights created by statutes. If a man wants to exercise his statutory right to be elected as a member of Parliament, he must observe the provisions of the Statute which gives him that right.

The provisions of the Representation of the People Act, 1951, lay down only the manner in which an election campaign can be carried out, and prescribe the conditions which must be observed by a person who wants to get himself elected. They do not stop him from speaking. If he wants to exercise his fundamental right to freedom of speech otherwise than as a candidate at an election, the impugned provisions do not stop him from doing so. The impugned Act does not constitute any infringement of a citizens fundamental right to freedom of speech guaranteed under Article 19(1)(*a*). *Jumuna Prasad* v. *Lachhi Ram*, AIR 1954 SC 686 : 1955 SCA 151 : 1954 SCJ 835 : 1955 SCR 608 : 1954 (2) MLJ 711 : 1955 NagLJ 112 : MadhBLR 1955 Civ 308.

[9291] ● ***Right to use public highway.***—All public pathways and highways vest in the State. However, the State holds them as trustees on behalf of the citizens who are in the position of beneficiaries. A citizen is entitled as a beneficiary to the use of all public roads as a matter of right, but this right is limited by similar rights possessed by every other citizen. As a trustee, the State is entitled to impose on the use of public roads by citizens such limitations as are requisite for protecting the rights of the public generally, but subject to such limitations a member of the public has full right of user of public roads and this right includes the right to use them for running any vehicle of transport, whether for private use or for carrying on any trade or business in public or private transport. Such a right cannot be denied by the State on the ground that it owns the public roads, and a law which seeks to prohibit that right to any citizen or to restrict that right save on grounds which are reasonable and in the general public interest is in violation of Article 19(1)(*d*), *Saghir Ahmad* v. *State of U.P.*, AIR 1954 SC 728 : 1954 SCA 1218 : 1954 SCJ 819 : 1955 SCR 707 : 1954 (2) MLJ 622 : 1955 AWR 23 : 68 MLW 8 : 1955 ALJ 38.

[9292] ● ***Fixing rate for smaller taxies lower than larger—Taxies reasonable.***—A Notification issued by a transport officer in the exercise of his powers under the Motor Vehicles Act and Rules by which a rate of tariff is fixed for smaller taxies which is lower than that fixed for larger taxies is a "reasonable" restriction and there is no infringement of Article 19(1)(*g*). *Harnam Singh* v. *Regional Transport Authority, Calcutta,* AIR 1954 SC 190 : 1954 SCA 47 : 1954 SCJ 46 : 1954 SCR 371 : 1954 (1) MLJ 79.

[9293] ● ***Validity of provisions of Sections 3, 4 and 5 of Minimum Wages Act 1948.***—The provisions of the Minimum Wages Act, 1948, Sections 3, 4 and 5, which empower the Government to fix the minimum rate of wages in an industrial dispute between the employer and his employees, imposes restrictions on the employer's right of trade which are "reasonable" and "in the interest of the general public" within the meaning of Article 19(6), since they carry out the Directive Principle of State Policy embodied in Article 43, and hence their constitutionality cannot be challenged on the ground of violation of Article 19(1)(*g*). *Bijay Cotton Mills Ltd.* v. *State of Ajmer*, AIR 1955 SC 33 : 1955 SCA 37 : 1955

SCJ 51 : 1955 SCR 752 : 1955 (1) MLJ (SC) 10 : (1955) 1 LabLJ (SC) 129.

[9294] ● ***Orissa Municipal Act not—Violative of Articles 19(1)(g).***—The provisions of Section 16(1) of the Orissa Municipal Act, 1950, whereunder legal practitioners engaged on behalf of or against the Municipality are disqualified from election to a seat in that Municipality, do not violate right to practise his profession guaranteed to such practitioners under Article 19(1)(*g*). *Sakhawat Ali* v. *State of Orissa*, AIR 1955 SC 166 : 1955 SCA 353 : 1955 SCJ 262 : 1955 SCR 1004 : 21 CutLT 88.

[9295] ● ***Right to hold fair on his own land.***—A Rule made by a State Government which authorises an executive officer to refuse to grant a permit to hold a fair on his own grounds to any person without giving any reasons for such refusal, is in effect a law which authorises the imposition of a total prohibition of the exercise of the petitioner's right to hold and enjoy his property, and is thus an infringement of his right guaranteed under Article 19(1)(*f*). *Ganpati Singhji* v. *State of Ajmer*, AIR 1955 SC 188 : 1955 SCA 252 : 1955 SCJ 119 : 1955 SCR 1065.

[9296] ● ***Articles 14 of Constitution guarantees equal protection.***—Article 14 guarantees equal protection to all persons placed in the same situation or proposition, not only as to substantive law but also as to rules of procedure. Two different laws of procedure cannot be allowed to operate in the same field, at the will of the executive, against persons falling under the same class, and it is forbidden by Article 14 that parallel and alternative sets of rules of procedure be left under an Act to the choice of the executive without any provision guiding it in making the choice of a particular set, so that it could at its unregulated and uncontrolled will and pleasure apply either of the two sets of rules against one person while it could apply the other set to another person falling under the same class. Such unfettered selection left to the executive is a clear piece of discrimination, and has to be put down as being in violation of Article 14. *Shree Meenakshi Mills Ltd.* v. *A.V.V. Sastri*, AIR 1955 SC 13 : 1954 SCA 1271 : 1955 SCJ 62 : 1955 SCR 787 : 1954 (26) ITR 713 : 1955 AnWR (SC) 21 : 1955 (1) MadLJ (SC) 21.

[9297] ● ***Legislation enacted for achieving certain object need not be all-embracing.***—If a classification made under any law passes the test of a permissible classification, it cannot be assailed on the ground that the disabilities imposed under it on a particular class of persons for the purpose of achieving its object have not been imposed also on some other class of persons who could also have been covered by the same legislation. A law aiming at a particular object which in itself is quite laudable does not have to be all-embracing for the purpose of passing the test of Article 14, and merely because the Legislature has not thought it fit to cover under the Act certain categories other than those included within it which stand on the same footing, it cannot be said that the Act is violative of Article 14. *Sakhawat Ali* v. *State of Orissa*, AIR 1955 SC 166 : 1955 SCA 353 : 1955 SCJ 262 : 1955 SCR 1004 : 21 CutLT 88.

[9298] ● ***General principles relating to meaning scope and effect of Article 14.***—The general principles relating to the meaning, scope and effect of Article 14 which have been well settled in the earlier decisions of the Court may be summarised as under :

(*a*) While Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation.

(*b*) In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely,

   (i) that the classification must be founded upon an intelligible differentia which distinguishes the persons or things that are grouped together from others left out of that group, and

   (ii) that such differentia must have a rational relation to the object sought to be achieved by the statute in question.

   In other words, what is necessary for a permissible classification is that there must be nexus between the basis of the classification and the object of the Act under consideration.

(*c*) A classification may be founded on different bases, namely, geographical, or according to objects or occupations, or the like.

(*d*) Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

Whenever the validity of a law is challenged before the Court, the matter has to be decided by the application of the above principles. *Budhan Choudhury* v. *State of Bihar*, AIR 1955 SC 191 : 1955 CrLJ 374 : 1955 SCA 173 : 1955 SCJ 163 : 1955 (1) SCR 1045 : 1955 ALT (SC) 135 : 1955 AWR 241 : 1955 BLJR 249 : 1955 ALJ 309.

[9299] ● ***Article 14 prohibits classification.***— As between persons placed in substantially similar positions and circumstances, Article 14 prohibits classification which is discriminatory and arbitrary. It does not prohibit classification which is based upon an intelligible differentia which distinguishes the persons grouped under it from others left out of the group. Therefore, in judging whether a law is hit by Article 14, the test is whether the classification made under it is of the first or the second category.

A classification founded upon a geographical basis is perfectly valid if its object is to promote the welfare of the residents of a particular locality or area, and a State is entitled to make a law which confers on the *bona fide* residents of that State special benefits from which non-residents are excluded. Such a law is not hit by Article 14. *Joshi, D.P.* v. *State of M.B.*, AIR 1955 SC 334 : 1955 SCA 511 : 1955 SCJ 298 : 1955 SCR 1215 : 1955 MWN 406.

[9300] ● ***Article 14 prohibits unequal treatment of persons standing in same situation.***— What Article 14 prohibits is only unequal treatment of persons standing in the same or similar situation. If different conditions prevail in different areas of a State, it is open to that State to make a law which applies only to a particular area within it. Classification on a territorial or regional basis is definitely permissible if conditions vary from locality to locality, and a law made on such a basis will be justified provided the State is able to make out the special conditions prevailing in a locality which justify the making of such a law. *Kishan Singh* v. *State of Rajasthan*, AIR 1955 SC 795 : 1956 SCJ 14 : 1956 SCA 402 : 1955 (2) SCR 531.

[9301] ● ***State not to deny any person equality before law.***—Per S.R. DAS, C.J.—Article 14 enjoins that the State shall not deny to any person equality before the law or the equal protection of the laws. The word "State" includes all the Legislatures, including Parliament, and all the executive Governments within the territory of India. What the right to equality given by Article 14 means and what the scope and effect of that Article is, has been laid down in a series of cases ending with the case of *Budhan Choudhury* v. *State of Bihar* (*see supra*), and when any law is challenged on the ground of violation of Article 14, the question has to be decided in the light of the principles laid down in those cases. (Here the judgment cites the classical passage in *Budhan Choudhury's* case. *Bidi Supply Company* v. *Union of India*, AIR 1956 SC 479 : 1956 SCA 560 : 1956 SCJ 492 : 1956 SCR 267 : 1956 (29) ITR 717.

[9302] ● ***Article 14 sets out attitude of mind rather than precise rule of law.***—Per BOSE J.— To my mind, Article 14 sets out an attitude of the mind and a way of life, rather than a precise rule of law. The question of its application narrows down to a question of fact which must be determined, as each case arises, by the highest judges of the land, always keeping it in mind that the heart and core of democracy lies in the judicial process and in the rule of law.

However rational and scientific a classification may be, and however reasonable the relation between it and the object sought to be achieved by any law, if that object itself is discriminatory, or if the classification made thereunder is discriminatory, or even when the law does not itself make any discriminatory classification, if it invests the executive authority with uncontrolled and unrestricted power of discrimination by authorizing it to pick and choose between persons placed in the same or similar circumstances,— then, in each such case, the law must be held to be violative of Article 14. In other words, the test is whether there is or is not any substantial discrimination between persons in the same situation, and that is a question of fact to be determined on the circumstances of each case as it arises.

In matters which affect the weal of the people, a law cannot be permitted to make or authorise or render possible any discrimination in violation of the right of the subject to equal protection of the laws, and the executive authorities cannot be vested with powers of discrimination which even Parliament does not possess. A law which seeks to encroach upon that right has to be struck down forthwith as being a contravention of Article 14. *Bidi Supply Company* v. *Union of India*, AIR 1956 SC 479 : 1956 SCA 560 : 1956 SCJ 492 : 1956 SCR 267 : 1956 (29) ITR 717.

[9303] ● ***Provocative or irresponsible conduct of person when offence against law relating to public security.***—However provocative or irresponsible the conduct of a person may be, it cannot be said he has committed an offence against a law relating to public security unless his conduct is such as to undermine public order or security.

Inciting people to commit acts of violence against particular individuals or the State is undoubtedly an offence, but it is for the State to establish that the man's conduct was of that nature.

Shouting of slogans against State Ministers during a procession taken out to protest against the policy of the State Government, such as, "A and B hai hai" may be provocative and annoying to the members of the public who hear those slogans, and may even have a bad effect, but that in itself cannot amount to undermining public order or to incitement to an offence of violence against the State or its representatives.

Those in public positions must not be sensitive of skin, and must accept even unfair and undeserved attacks and criticisms with grace. Vulgar abuse or criticism must be taken as a necessary appendage of public office, and it is better to ignore it, rather than giving it importance by prosecution in a Criminal Court. *Kartar Singh* v. *State of Punjab*, AIR 1956 SC 541 : 1956 CrLJ 945 : 1956 SCJ 539 : 1956 SCR 476 : 1956 SCA 775 : ILR (1956) Punj 1190 : 1956 NagLJ 628 : 1956 AWR (Sup) 109.

[9304] ● ***Restriction imposed upon fundamental right amounting to total prohibition when.***—If under any law a restriction is imposed upon a fundamental right which in effect amounts to a total prohibition against the exercise of that right, such a restriction cannot be said to be reasonable, and that law must be declared to be void to the extent of such restriction. *Virendra* v. *State of Punjab*, AIR 1957 SC 896 : 1958 SCJ 88.

[9305] ● ***Reasonableness of restriction— Factors to be considered.***—In judging whether a restriction imposed under an Act is "reasonable" within the meaning of Article 19(2) or Article 19(6), the Court should take into consideration all the following factors, namely,—

(a) the nature of the restriction imposed,

(b) its underlying purpose,

(c) the extent and urgency of the evil sought to be remedied thereby, and

(d) the prevailing conditions of the time.

The words "in the interest of" in Articles 19(2) to 19(6) are words of great amplitude and they make the ambit of the protection given thereby to any statute very wide. A law may not have been designed to directly maintain the public order or to directly protect the general public against any particular evil, and yet that law may be said to have been enacted "in the interest of " the public order or the general public interest, as the case may be.

Although free propagation of ideas and interchange of views is a fundamental right, our Constitution recognises that circumstances may arise which may require a reasonable subordination of this right to the needs of our social interest, and for that purpose it permits the imposition of reasonable restrictions on that right in the interest of public order or public welfare. *Virendra* v. *State of Punjab*, AIR 1957 SC 896 : 1958 SCJ 88.

[9306] ● ***Fundamental and statutory rights—Distinction between.***—There is a distinction between fundamental and statutory rights. Though a statutory right can be taken away by a later statute, a fundamental right cannot be so taken away.

Therefore, when the constitutionality of a Statute is challenged on the ground that it invests the executive authority with "unreasonable" power and is therefore violative of Article 19, the Court has to be satisfied, before it can declare the statute to be void, that *both* the following conditions are fulfilled, namely :

(1) that the right invaded is a fundamental right, such as, the right to freedom of speech or the right to carry on trade, and not merely a statutory right, and

(2) that the restriction imposed on it, say by censorship or by requiring a permit, is "unreasonable" or "not in public interest".

Article 19 can be invoked only when *both* these conditions are satisfied. If the right claimed is found to be only *statutory* and not fundamental, the question as to the second condition does not at all arise, because what is given by statute can be taken away or restricted by statute, and the question whether a restriction or bar imposed by any law is or is not reasonable cannot be raised when no fundamental right is involved.

When an executive order is challenged on the ground of "unreasonableness", it is not enough for the State in its defence to show that the law under which it was made is perfectly constitutional and falls within the cover of the permissible restrictions allowed under Article 19(2) to (6). The question still remains whether the *order itself* is "reasonable". *Pannalal Binjraj* v. *Union of India*, AIR 1957 SC 397 : 1957 SCA 660 : 1957 SCR 233 : 1957 (31) ITR 565.

[9307] ● ***Abuse of power—Burden of.***—The burden of showing that there has been an abuse of power lies on the petitioner, but the burden is not by way of proof to the hilt. If he can show circumstances which *prima facie* make out that the exercise of power was unreasonable, or if there are circumstances which render the absence of *bona fides* to be reasonably probable, the burden will be taken to have been discharged, and thereafter it will be for the States to satisfy the

Court that the order was reasonable and not *mala fide*.

An executive order will be held to be bad if principles of natural justice have not been observed before making it. These principles require the following three things :

(1) notice to the person concerned;

(2) a reasonable opportunity to him to represent his case and to show cause why the order should not be passed; and

(3) a written order setting down the reasons for making it.

If any of these basic rules of natural justice has been violated, the order will be bad without proof of anything more, and its *mala fide* character will be taken to have been established. In such a case, even though the order may be found to be reasonable on merits, it will be struck down as being in violation of a fundamental right vested in the petitioner. *Pannalal Binjraj* v. *Union of India*, AIR 1957 SC 397 : 1957 SCA 660 : 1957 SCR 233.

[9308] ● ***Protection of lawful trading activities.***—An activity undertaken and carried on with a view to earning profits from a business which for all intents and purposes is a business of betting and gambling, will not be protected as falling within the right guaranteed under Article 19(1)(*g*) even though all the forms and semblances of a genuine business are kept up. It is the true intent and object of the activity which determines its character, and not merely its outward appearance. *Chamarbaughwala, R.M.D.* v. *Union of India*, AIR 1957 SC 628 : 1957 SCA 912 : 1957 SCJ 593 : 59 BLR 973 : (1957) 2 MLJ (SC) 76 : (1957) 1 MLJ (Cri) 547 : (1957) 2 AWR 76 : 1957 MPC 630.

[9309] ● ***Section 58 of Bihar Wakfs Act whether imposes unreasonable restriction on exercise of his duties as Mutawalli.***—The Bihar Wakfs Act, 1948, Section 58 : The provisions of a law relating of Wakfs which require the Mutawalli of a Wakf to prepare the annual budget of the trust property for each succeeding year and to send it to the Majlis within a specified time and which make non-compliance with this rule a criminal offence, are "reasonable" within the meaning of Article 19(6) having regard to the fact that the Mutawalli occupies the position of a manager of a public religious institution and that the preparation of a budget is indispensable to the proper management of every public institution. Such a law cannot be held to be void as being an infringement of the Mutawalli's right under Article 19(1)(*g*) to carry on his occupation as a Mutawalli. *Bashiruddin Ashraf* v. *State of Bihar*, AIR 1957 SC 645 : 1957 CrLJ 1023 : 1957 SCJ 714 : (1957) 1 MLJ (Cri) 680 : 1958 BLJR 1 : ILR 36 Pat 942.

[9310] ● ***Freedom of trade, commerce and inter course—Extent of.***—There are certain activities which can under no circumstances be regarded as legitimate trade or business or commerce, although the usual forms and instruments of business and commerce are employed therein. To exclude such activities from the meaning of the words "occupation, trade or business" in Article 19(1)(*g*) is not to cut down the meaning of those words, but is only to say that such activities are not within the true meaning of those words. A law which saves trade and commerce from antisocial activities having as their object the earning of profits from gambling and betting cannot be held to be an interference with the right guaranteed under Article 19(1)(*g*). *State of Bombay* v. *R.M.D. Chamarbaughwala*, AIR 1957 SC 699 : 1957 SCA 867 : 1957 SCJ 607 : 59 BLR 945 : (1957) 2 MLJ (SC) 87 : (1957) 1 MLJ (Cri) 558 : (1957) 2 AWR (SC) 87.

[9311] ● ***To outrage religious feelings of any class of citizens.***—Section 295-A, Penal Code which makes it an offence to outrage the religious feelings of any class of citizens of India by insulting their religious beliefs is both "reasonable" as well as "in the interest of public order" within the meaning of Article 19(2) and a conviction under that section cannot be challenged as being an infringement of the right to freedom of speech and expression guaranteed under Article 19(1)(*a*). *Ramji Lal Modi* v. *State of U.P.*, AIR 1957 SC 620 : 1957 CrLJ 1006 : 1957 SCJ 522 : (1957) 2 MLJ (SC) 65 : (1957) 2 AWR (SC) 65 : 1957 ALJ 773 : 1957 MPC 653 : 1957 BLJR 723 : (1957) 1 MLJ (Cri) 771 : 60 PLR 11 : 1957 AWR (HC) 651.

[9312] ● ***Right to freedom of speech and expression—Sections 2 and 3 of Punjab Act 38 of 1956—Validity.***—The right to freedom of speech and expression cases with it the right to propagate and circulate one's views, but the right is subject to reasonable restrictions imposed on it by the State in the interest of public order.

If the circumstances prevailing in a State at any time are such that agitation in the Press on any controversial topic is likely to bring about a flare-up of communal frenzy between two hostile factions in the State, and that this might at the slightest notice create a danger to the safety of the State, it is only right that a law be made which vests wide powers in the executive to take effective action for placing reasonable restrictions on the Press.

Quick decision and swift action are of the very essence of such powers, and if they are to be effectively exercised they must necessarily be left to the subjective satisfaction of the executive Government. To make the exercise of such powers justiciable and subject to judicial scrutiny would defeat the very purpose of the enactment.

Sections 2 and 3 of the Punjab Special Powers (Press) Act, 1956 Act and the notifications issued thereunder did not take away the entire right to freedom of speech and expression; they only imposed restrictions on that right with reference to a particular topic. A total prohibition on a fundamental right is undoubtedly unconstitutional and there is no question of testing its reasonableness because its very nature renders it unreasonable. But when as distinct from total prohibition what a law imposes is merely a restriction, the Court has to go into the question whether the restriction is reasonable for the purpose of determining the constitutionality of that law.

The impugned provisions laid down the precise purpose for which, and the evils for the prevention of which, the powers given under them had to be exercised, and hence they were in the interest of public order and general public welfare. However that in itself is not enough for the determination of the constitutionality of an impugned law. A restriction may be reasonable in its substance, but the Court has further to see whether the method of imposing that restriction which is prescribed under that law is also reasonable.

Section 2 of the Punjab Special Powers (Ben) Act, 1956 Act provided that purpose for which a notification was issued had to be set out therein and that such purpose could be only the one which was mentioned in the section. The power under this section could not be exercised for any other purpose. Further, the two provisos under clause (1) thereof provided, firstly for a time-limit of two months for the continuance in operation of the notification issued under Section 2, and secondly for the right to make a representation against the order made to the State Government which it was required to consider on its merits. Having regard to these provisions, the power which Section 2 gave to the executive authorities to impose restrictions on the Press was quite reasonable and was in the interest of public order within the meaning of Article 19(2), both as regards substance as well as procedure, and the notifications issued thereunder were themselves perfectly valid.

As regards Section 3 Punjab Special Powers (Ben) Act, 1956 though it did lay down that the purpose for which any notification thereunder could be issued must be the one which was mentioned in the Act, strangely enough, it did not contain any safeguard on the lines of Section 2, so that the notification issued thereunder was not subject to any time-limit and could be continued in effect for an indefinite period at the will of the executive, and further, the person concerned had no right of representation against it. The absence of these safeguards in Section 3 made its provisions unreasonable, and hence Section 3 and the notification issued thereunder had to be declared to be violative of Article 19(1)(*a*) and hence void. *Virendra* v. *State of Punjab*, AIR 1957 SC 896 : 1958 SCJ 88 : 1958 SCR 308.

[9313] ● ***Invoking Article 14 of Constitution.***—Article 14 can be invoked only when a law creates a new rule of procedure which is materially and substantially different from the normal procedure provided under the general law, and not when it only makes deviations from it which are only of a minor character. If under a special law the citizen retains all his normal rights under the general law, so that the treatment meted out to him under it is substantially the same and is not different in any material particulars from that received by all others under the general law of the land, such special law is not hit by Article 14. *Pannalal Binjraj* v. *Union of India*, AIR 1957 SC 397 : 1957 SCA 660 : 1957 SCR 233 : 1957 (31) ITR 565.

[9314] ● ***Basic principles relating to meaning scope and effect of Article 14.***—The basic principles relating to the meaning, scope and effect of Article 14 have been considered by the Court in a number of cases ending with the case of *Budhan Choudhury* v. *State of Bihar*, AIR 1955 SC 191 : 1955 (1) SCR 1045, and they have been summarized in the said case as under.

Statutes challenged on the ground of violation of Article 14 fall under one or the other of the following five classes :

(1) Statutes which are directed against named persons or things, and the basis of the classification made thereunder either appears on the face of the statute itself or can be gathered from surrounding circumstances.

In determining the validity of such a statute, the test is whether the classification is based or can be regarded as based upon some intelligible differentia which distinguishes the persons or things grouped together under the statute from others left out of that group, and whether such differentia bears a reasonable relation to the object sought to be achieved by the statute. If this test is satisfied the validity of the statute will be upheld, and if not, it will be declared to be void as being in violation of Article 14. In determining this question it is immaterial whether the statute is intended to apply to a single person or thing or to a class of persons or things.

The statutes considered by the Court in the following cases fell under this class, and by the application of the aforesaid test they were all held to be valid and constitutional.

(2) Statutes which are directed against named persons or things, but the basis of the classification cannot be gathered either from the statute itself or from any surrounding circumstance.

In the case of such a statute, since the very basis of the classification is absent, the question of applying the aforesaid test of a permissible classification does not at all arise, and the statute has to be struck down as a piece of naked discrimination. The statutes considered by the Court in the following two cases belonged to this class, and were held to be unconstitutional.

(3) Statutes which neither name the persons or things to whom they are intended to apply nor make any basis of classification, and yet leave uncontrolled power of applying the statute to the executive.

This class of statutes does not lay down any principle or policy for the guidance of the executive in the matter of selection or classification of persons or things for the application of the statute, and yet leaves the question of its application entirely to the arbitrary and uncontrolled will and pleasure of the executive, so as to enable it to discriminate between persons or things in the same or similar situation or falling in the same class. In the case of such a statute, the possibility of arbitrary discrimination is inherent in the statute itself, and that being so, not only must the Court strike down the executive action taken under the statute, but also the statute itself. The reason why such a statute is bad is not because it does not itself make a classification, but because as a result of the absence of any guiding principle or policy it enables discrimination by the executive between persons or things belonging to the same group. The statutes considered in the following cases all belonged to this class, and they were all declared to be hit by Article 14.

(4) Statutes which leave the classification thereunder to the discretion of the executive, but the policy or principle which has to be followed by the executive when making that classification is clearly laid down.

Such statutes no doubt leave the power of classification to the executive, but the power is not uncontrolled and unregulated and it is meant to be exercised only in the manner and in accordance with the principle and the policy laid down in the statute itself. Such a statute does not carry the vice of discrimination, because that vice lies not in the absence of classification but in leaving the power of classification to the unguided and uncontrolled will and pleasure of the executive. Such statutes are perfectly constitutional. The statute considered in the case of *Kathi Raning Rawat* v. *State of Saurashtra*, AIR 1952 SC 123, belonged to this class, and was upheld as not being in violation of Article 14.

(5) Statutes which are themselves admitted by the impugner to be quite constitutional, but only the executive order or action made or taken thereunder is challenged.

It is now well settled that Article 14 can be invoked, not only against laws which are violative of Article 14, but also against executive action under a valid law which suffers from that vice. Therefore, even when a law is found or admitted to be quite constitutional, it is open to the impugner to claim that the executive power exercised under it against him was discriminatory and violative of Article 14. In such a case even though the Court may hold that the law itself is good, it has to go into the further question whether the executive action taken thereunder is or is not in accordance with the principle and the policy laid down in the statute, and if it finds that it is not, the Court will strike that action down but will leave the law itself untouched. *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*, AIR 1958 SC 538 : 1958 SCA 754 : 1959 SCJ 147 : (1959) 1 MLJ (SC) 67.

[9315] ● ***Basic principles relating to scope and effect of Article 14.***—The basic principles relating to the scope and effect of Article 14, which are now quite settled and established as a result of the earlier decisions of the Court, were summarized in the case of *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*, AIR 1958 SC 538, as under:

(*a*) While Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation.

(*b*) In order, however, to pass the test of a permissible classification, two conditions must be fulfilled, namely,

- (i) that the classification must be founded on an intelligible differentia which distinguishes the persons or things that are grouped together under it from others left out of that group, and
- (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

(*c*) The classification may be founded upon different bases (such as geographical, or according to objects or occupations, or the like), but what is always necessary is that there must be a nexus between the basis of the classification and the object of the Act under consideration.

(*d*) Article 14 condemns discrimination not only by a substantive law, but also by a law of procedure. *Rehman Shagoo* v. *State of Jammu and Kashmir*, AIR 1960 SC 1 : 1960 CrLJ 126 : 1960 SCJ 172 : (1960) 1 SCR 680.

[9316] ● *Permissible classification need not be of persons only.*—In order to repel the charge of discrimination, a classification need not be of persons only; if a classification made under any special law passes the above laid down test of a permissible classification, it may well be one which creates a new offence not found in the Penal Code and it is open for the Legislature to provide that such offence shall be triable only by a special Court established in that behalf and only under a special procedure which may be more drastic and stringent than the one laid down under the general law.

A law such as this cannot be assailed as being discriminatory. No one has any vested right to a particular procedure, and it is open to the State to enact a law creating a new offence, and if the offence so created is of an aggravated type which demands a special treatment, it is equally open to it to provide a special procedure for its trial, without encountering the charge of discrimination. Such a law applies equally to all persons who have committed that offence, and of its very nature complies with the right to equality before the law guaranteed by Article 14. *Rehman Shagoo* v. *State of Jammu and Kashmir*, AIR 1960 SC 1 : 1960 CrLJ 126 : 1960 SCJ 172 : (1960) 1 SCR 680.

[9317] ● *Principles relating to scope effect and application of Article 14.*—The principles relating to the scope, effect and application of Article 14 have been considered by the Court in a large number of cases, and they have been repeated so often that they now sound almost platitudinous. The enunciation of these principles is fairly easy; difficulty arises only in their application to different sets of facts presented by different cases. However, the result of these decisions is that whenever the validity of a statute is impugned on the ground of violation of the right to equality before the law guaranteed by Article 14, the question has to be determined in the following manner:

(a) The Court shall apply to the classification made under the statute the following dual test—

- (i) is it reasonable and based on an intelligible differentia which distinguishes the persons or things grouped under it from others left out of the group, and
- (ii) does the differentia bear a rational relation to the policy and object of the statute in question?

(b) For the proper application of this test, the Court has to ascertain the policy underlying that statute, the object which it seeks to achieve, and the true effect of its provisions which are under challence. For that purpose the Court has to examine the whole scheme of the statute, including both its preamble and its material parts.

(c) After such examination, if the Court finds that the classification made under the statute satisfies the aforesaid test of a permissible classification, it must be held to be valid, and if not, it must be struck down as being a violation of Article 14.

(d) If any state of facts can reasonably be conceived whereunder the classification made can be sustained, the Court is bound to assume the existence of that state of facts, unless he who assails the statute discharges the burden which lies upon him to show their non-existence.

(e) If the classification made under the statute is found to be permissible, it is outside the realm of judicial inquiry to consider whether the same result which is achieved under the statute in question could or could not have been better achieved by adopting a different classification.

(f) If the classification made under a statute is found to be permissible, the statute must be declared to be valid, even though the Court finds that the order or notification issued by an executive authority in the exercise of its powers under that statute is in excess of its powers, or is colourable or *mala fide*. Such abusive exercise of power by the executive must undoubtedly result in the Court declaring such order or notification, and the proceedings held under it, to be invalid, but the vice of the executive action cannot affect the validity or the vires of the statute itself which on its own independent examination has been found to be quite constitutional. In other words, the decision as to the validity or otherwise of a statute must in every case depend only upon the examination of the statute itself, its policy and object, the classification which it makes, and the character of its operative provisions, and not upon the nature of the executive action taken under it. *Kangshari Haldar* v. *State of West Bengal*, AIR 1960 SC 457 : 1960 CrLJ 654 : 1960 SCJ 629 : (1960) 2 SCR 646 : 1960 MLJ (Cri) 448.

[9318] ● ***Rational basis for making classification mentioned in Section 421, CrPC 1898.***—There is a rational basis for making the classification mentioned in Section 421, CrPC (now Section 384), and it has a reasonable connection with the object of the legislation providing for appeals under Chapter 31 of the Code. When the convicted person who is not in jail is able to present his petition of appeal in person or through a pleader, or when a convicted person who is in jail is able to present his petition through a pleader, his position is entirely different from that of a convicted person who is in jail and is unable to present his petition through a pleader. In the case of a convicted person who presents his petition through the Jailor, no question could arise of his being heard in person because he has not presented the appeal in person, nor could there be any question of his pleader being heard because no pleader has been engaged by him to present his appeal. On the other hand, when a convicted person presents his petition of appeal in person or through a pleader, entirely different considerations arise, and the appeal having been so presented, he or his pleader are required to be heard before the appeal is summarily dismissed. There is, therefore, a rational basis for making the classification which has a reasonable connection with the object of the Code, and it could not be said that the proviso to Section 421 offends against Article 14. *Pratap Singh* v. *State of V.P.*, AIR 1961 SC 586 : 1961 (1) CrLJ 733 : (1961) 2 SCR 509 : 1961 ACrR 257 : 1961 AWR (HC) 468.

[9319] ● ***Classification to be valid must rest on intelligible differentia.***—The principles governing the application of Article 14 are well settled and may be stated as under Article 14 prohibits hostile legislation directed against individuals or groups of individuals, but it does not forbid reasonable classification. In order that a classification be valid, it must rest on an intelligible differentia which distinguishes it from others, and further, that classification must have a reasonable relation to the object of the legislation.

There can be a valid classification based on a geographical differentia, but even then, the differentia must be pertinent to the object of the legislation. *Jia Lal* v. *Delhi Administration*, AIR 1962 SC 1781 : 1963 (1) CrLJ 1 : 64 PunLR 1051 : 1962 ACrR 431 : 1962 AWR (HC) 56.

[9320] ● ***Rule when challenged on ground of violation of Article 14.***—When a rule of this nature is challenged on the ground of violation of Article 14, the Court must start with the strong presumption that the rule creates a valid classification and the burden lies on the petitioner to show by adducing evidence which is cogent and reliable and that the classification made has no rational basis. *State of U.P.* v. *Kartar Singh*, AIR 1964 SC 1135 : 1964 (2) CrLJ 229 : 1964 (1) SCWR 435 : 1964 SCD 939 : (1964) 2 SCJ 666 : 1964 ALJ 732 : 1964 MLJ (Cri) 633 : (1965) 1 ALT 1.

[9321] ● ***Provisions in Army Act not become void because it affects fundamental right.***—Under Article 33, the Parliament has the power to make a law determining the extent to which the fundamental rights conferred by Part III of the Constitution shall be restricted or abrogated, in their application to the members of the Armed Forces or the forces charged with the maintenance of public order. The result is that even if it is found that any of the provisions of the Army Act, 1950, are not consistent with any of the Articles in Part III, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those Articles in their application to the persons subject to the Act. Each and every provision of the Act is as much "law" as the entire Act itself, and if any such provision tends to affect any fundamental right, it does not on that account become void, because it must be taken that Parliament intended to exercise its powers under Article 33 in enacting that provision.

Apart from that, even on the merits it cannot be said that Section 125 of the Army Act which gives power to the Officer Commanding the unit in which the accused person is serving to decide whether the accused shall be tried by a Criminal Court or by a Court Martial, is violative of Article 14 because the discretion vested in the military officer is not an uncontrolled or arbitrary discretion and has to be exercised in accordance with the policy laid down in the Act. Further, in case of difference of opinion between the Criminal Court and the military authority about the forum of the trial, the final choice rests with the Central Government, both under Section 126(2) of the Act and Section 549 of the Code of Criminal Procedure. *Ram Sarup* v. *Union of India*, AIR 1965 SC 247 : 1965 (1) CrLJ 236 : 1964 SCD 661 : (1964) 2 SCJ 619 · (1965) 5 SCR 931 : 1964 CurLJ (SC) 169 : 1964 MLJ (Cri) 629.

[9322] ● ***Section 337 (Section 306 of new Code), CrPC not offend Article 14.***—Section 337 (Section 306 of the new Code) does not offend Article 14. The matter of taking accomplice evidence outside Section 337, CrPC. (Section 306 now), by using Section 494, CrPC (now Section 321) or otherwise and the power to tender self-confessed criminal as a witness instead of trying him as an accused does not violate the Constitution. To hold otherwise would shut out accomplice evidence completely. *Choraria* v. *State of Maharashtra*, AIR 1968 SC 938 : 1968 CrLJ 1124 : (1968) 1 SCA 682 : 1968 SCD 743 : (1968) 2 SCJ 589 : (1968) 2 SCR 624 : 10 BomLR 595 : 1968 MLJ (Cri) 614 : 16 Law Rep 473.

[9323] ● ***Public servant head of—Department found activity responsible for directing commission of offences by subordinates.***—If the accused who was the head of the department was actively responsible for directing the commission of offences by its subordinates in a particular manner, he cannot be allowed to take the plea that unless the subordinates were also joined as co-accused with him the case should not be allowed to proceed. The argument that the accused was singled out from a number of persons who had aided him in the commission of various acts of misconduct and that they were really in the position of accomplices cannot be accepted. The prosecution might have felt that if the subordinate officers were joined along with the accused as co-accused, the whole case might fall for lack of evidence. *P. Sirajuddin* v. *State of Madras*, AIR 1971 SC 520 : (1970) 1 SCC 595 : 1971 CrLJ 523 : (1971) 2 SCJ 591 : (1970) 3 SCR 931 : 1970 SCCrR 457 : 1971 MLW (Cri) 46 : (1971) 2 MLJ (SC) 97 : (1971) 2 AnWR (SC) 97.

[9324] ● ***Detention pursuant to order of remand under Section 344, CrPC 1898.***—When a case is postponed or adjourned and the accused is in custody, the Court has to exercise its judicial discretion whether or not to continue him in custody by making a remand order. The Court is neither bound to make an order of remand nor is it bound to release the accused person. The discretion to make a suitable order is to be exercised judicially keeping in view all the facts and circumstances of the case including the nature of the charge, the gravity of the alleged offence, the area of investigation, the antecedents of the accused and all other relevant factors which may appropriately help the Court in determining whether to keep the accused in custody or to release him on bail. The power conferred being judicial, the absence of an express, precise standard or determination of question would not render the section unconstitutional. Detention pursuant to an order of remand which appropriately falls within the terms of Section 344 of the Code is accordingly not open to challenge in *habeas corpus*. If the discretion is exercised in an arbitrary or unjudicial manner, remedy by way of resort to the higher Courts is always open to the aggrieved party. Not only are the guidelines clearly contained in the statute but the discretion being judicial is required to be exercised on general principles guided by rules of reason and justice on the facts of each case, and not in any arbitrary or fanciful manner. *Lakshamanrao* v. *Judicial Magistrate, Parvathipuram*, AIR 1971 SC 186 : 1971 CrLJ 253 : (1970) 3 SCC 501 : (1971) 2 SCJ 391 : 1971 CrAppR (SC) 45 : 1971 MLJ (Cri) 608 : (1971) 2 AnWR (SC) 92 : (1971) 2 MLJ (SC) 92 : 1971 CurLJ 1040.

[9325] ● ***Area of detention by Magistrate under CrPC and preventive detention laws under Article 22.***—Area of detention by Magistrates under the CrPC and that under the preventive detention laws under Article 22 are entirely different and therefore there is good classification. *Madhu Limaye* v. *S.D.M., Monghyr*, AIR 1971 SC 2486 : (1970) 3 SCC 746 : 1971 CrLJ 1720 : (1971) 2 SCJ 479 : 1971 MLJ (Cri) 629.

[9326] ● ***Persons contravening provisions specified in Section 23(1A) of FERA not similarly situated with persons contravening other provi-***

sions of Act.—The question was whether persons contravening the provisions specified in Section 23(1)(a) of FERA, 1947, were similarly situated with persons contravening the other provisions of the Act with respect to the purpose or object of the Act, or whether by reason of the nature of the offences resulting from the contravention of the provisions specified in Section 23(1)(a) the persons contravening them formed class by themselves distinct from the persons contravening the other provisions of the Act and therefore the legislative judgment to deal with them under a different procedure was justified with reference to the ultimate purpose of the Act. Often at times the Courts held that under-inclusion did not deny the equal protection of laws under Article 14. The Government thought that imposition of penalty by departmental adjudication would prove a more effective means of checking certain types of foreign exchange offences as against the previous system of prosecution of all offences on the basis of the strict standard of proof required for criminal prosecution—which proof was, by and large, so much within the special knowledge of the offender and so much out of the reach of the department. It was only on the basis of the experience gained by the working of the Act that a decision could be taken about the classification of offences in respect of which trial by a Court would be expedient and those in respect of which summary procedure visualized by Section 23(1)(a) might be necessary. The basis of the classification was that in cases where there was likelihood of getting sufficiently unimpeachable evidence as, for instance, in cases involving contravention of Sections 14, 13(2), 15, 18, *etc.*, where the Reserve Bank of India as a specialized agency came into the picture and be in possession of relevant materials, those cases were left to be dealt with under Section 23(1A) by criminal Courts. Broadly speaking, the classes of offences which were brought under Sections 23(1) and 23-A were what might be termed as "primary" offences and those brought under Section 23(1A) may be termed as "secondary" offences. Primary offences were those which needed detection and action at executive or field level by the concerned specialized agency. It was not a question of the seriousness or the gravity of the offences. The difference was that primary offences were distinguished by the volume and areas of incidence and might need greater deterrence which sometimes might lie in large pecuniary penalty and sometimes in criminal punishment by way of imprisonment. In respect of secondary offences there were already built-in institutional checks laid down by the Reserve Bank or other Government agencies. Hence the classification made in Section 23(1A) was not discriminatory. Even according to the respondents, it was the classification made in Section 23(1)(a) which was under-inclusive and was therefore unreasonable. The High Court was wrong in holding that Section 23(1A) was bad. *Superintendent & Remembrr., West Bengal* v. *G. Navalkha*, AIR 1975 SC 1030 : (1975) 4 SCC 754 : 1975 CrLJ 874.

[9327] ● ***Racial discrimination—Rules in Punjab Jail manual.***—Rules in the Punjab Jail Manual discriminating between Indian and European prisoners in the matter of treatment and diet, are obsolete and are inconsistent with the equality enshrined in Articles 14 and 15. But the Supreme Court was not inclined to examine the matter more incisively for two reasons : (1) that the petitioner was no longer in prison and (2) that the Solicitor-General assured the Court that he would draw the attention of the Punjab Government to the need for revision of the impugned rules from the point of view of racial equality. *Madhu Limaye* v. *Supdt., Tihar Jail*, AIR 1975 SC 1505 : (1975) 1 SCC 525 : 1975 SCC (Cri) 235 : 1975 CrLJ 1319.

[9328] ● ***Special Judge to apply well established tests for appreciation of accomplice evidence.***—Where a person has accepted a tender of pardon under Section 337(1) of the Code (Section 306 of the new Code) at the stage of investigation in a case involving any of the offences specified in sub-section (2)(b) (Section 306(2) of the new Code), the prosecution can file the charge-sheet either in the Court of a competent Magistrate or before the Special Judge empowered under Section 8(1) of the Criminal Law Amendment Act, 1952, to take cognizance of the offence without the accused being committed to him for trial. It follows that if the Magistrate takes cognizance of the offence, the approver will have to be examined as a witness twice, once in the Court of the Magistrate and again in the Court of the Special Judge to whom the Magistrate has to send the case for trial, but if the charge-sheet is filed directly in the Court of the Special Judge, he can be examined once only before the Special Judge. Though in such a case there would be no previous evidence of the approver against which his evidence at the trial could be tested, that does not affect in any way the jurisdiction of the Special Judge to take cognizance without committal. The fact that the approver's evidence cannot be tested against any previous statement does not make any material difference to the detriment of the accused transgressing Article 14 of the Constitution. The Special Judge in any case will have to apply the well-established tests for the appreciation of the accomplice's evidence. There is no qualitative difference in the two procedures whether a witness is examined once or twice as it does not make any substantial difference, *viz.*, that one of them could be described as more drastic than the other. *Iqbal Singh* v. *State (Delhi Administration)*, AIR 1977 SC 2437 : (1977) 4 SCC 536 : (1978) 2 SCR 174 : 1978 SCC (Cri) 1 : 1978 CrLJ 192 : 1977 CrLR (SC) 508 : 1978 SCCrR 52 : 1977 CrAppR (SC) 396 : 1978 ACrC 105 : 1978 ChandLR (Cri) 59.

[9329] ● ***Sections 7 and 16 of PFA Act not unconstitutional.***—The fact that small retail traders will have to suffer the standardised imprisonment on some variations in the chemical composition of food sold, without *mens rea* may be because some bigger trader has fobbed off inferior commodities on them and the fact that there is no executive policy which guides prosecution of offenders and the fact that the petty victuallers and big sharks operate on society in different degrees and draconian equality will be tempered by flexible policy—is a matter of penal policy in constitutionality and so it is in a sense out of bounds for judicial advice. Prescription of equal protection is not breached either, because within the range of judicial discretion the Court deals out to each what he deserves according to established principles. Judge-proof sentencing is not *per se* bad. Fact that Sections 7 and 16 of the Act read together imposed inflexible minimum sentence of 6 months' R.I. on offenders, does not by itself render those provisions unconstitutional. *Inderjeet* v. *State of Uttar Pradesh*, AIR 1979 SC 1867 : (1979) 4 SCC 246 : 1979 SCC (Cri) 966 : 1979 CrLJ 1410 : 1979 UJ (SC) 679 : 1979 ACrR 428 : (1979) 2 FAC 153 : (1980) 1 SCWR 33 : 1979 ACrC 350 : ILR (1979) HP 148.

[9330] ● ***Different procedure prescribed for collection of tax.***—In Taxation Laws, different procedures for collection of tax, levy of penalty and criminal prosecution, cannot be held to be invalid. Commissioner is given discretion under the Act to resort to one of the two remedies as the facts of the case may require. In graver cases he will be justified in taking the drastic remedy and resorting to prosecution in the criminal Court if he is satisfied that such a course in necessary for the collection of the tax expeditiously. If the discretion is not properly exercised, the Court may be justified in interfering in such cases but the law cannot be held to be invalid. In the instant case there is nothing illegal in the Commissioner coming to the conclusion that resort to prosecution is necessary. *S.T. Commissioner, M.P.* v. *Radhakrishan*, AIR 1979 SC 1588 : (1979) 2 SCC 249 : 1979 CrLR (SC) 620 : 1979 SCC (Tax) 108 : (1979) 2 SCR 33 : (1978) 2 SCWR 410 : 1979 CrAppR (SC) 36 : 1978 STI (SC) 103 : 43 STC 4 : 1979 CSNR 46 : 118 ITR 534 : 1979 TaxLR 1843 : 1979 UPTC 719 : 1979 JabLJ 654.

[9331] ● ***State to organise special strategies to protect and punish brutality by Police.***—The State, at the highest administrative and political levels, must organise special strategies to prevent and punish brutality by police methodology. Otherwise, the credibility of the rule of law in our Republic *vis-à-vis* the people of the country will deteriorate. *Raghubir Singh* v. *State of Haryana*, AIR 1980 SC 1087 : (1980) 3 SCC 70 : 1980 SCC (Cri) 526 : 1980 CrLJ 801 : (1980) 2 SCJ 261 : 1980 CrAppR (SC) 125 : 1980 UJ (SC) 424 : ILR (1980) HP 175 (SC) : 1980 CurLJ (Cri) 89 : 1980 (6) ALR 266.

[9332] ● ***Handcuffing inhuman.***—Handcuffing is *prima facie* inhuman and therefore unreasonable, over-harsh and arbitrary and is violative of Articles 14, 19 and 21. It will be unreasonable to fetter a person's limbs unless the State is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances, so hostile to safe-keeping. Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reasons for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. Para 26. 22(1)(d), (e) and (f) also however perilously near unconstitutionality unless it is absolutely necessary. The rule regarding a prisoner in transit between prison house and Court house is freedom from handcuffs and the exception, under conditions of Judicial supervision. will be restraints with irons, to be justified before or after. *Prem Shankar* v. *Delhi Administration*, AIR 1980 SC 1535 : (1980) 3 SCC 526 : 1980 SCC (Cri) 815 : 1980 CrLJ 930.

[9333] ● ***Special Courts Act not to contravene Article 14 of Constitution.***—The Special Courts Act does not contravene the provisions of Article 14. 'High public or political offices' in the Act has not been defined. The term is self-explanatory. Mere absence of definition of the expression would not vitiate the classification made by the Act. Act is not void on the ground of some persons getting special benefit on account of some fortuitous circumstances, arising out of a peculiar situation if there is equality and uniformity within each group, so long as some included in a class are not singled out for special treatment even though they get an advantage over others. Act is not void on the ground of vice of excessive delegation of power. Act is not void even if the procedure provided by it is held to be harsher than that available under the ordinary law as the Act complies with the dual test laid down by the Supreme Court as regards the classification made by the Act and is a reasonable classification. On the other hand, the procedure prescribed by the Act cannot be said to be prejudicial or less advantageous to the accused, much less or more rigorous than the one provided in the CrPC.

Under the Special Courts Act not only is the appointment of Special Judge made free of control by the Government as it now rests with the Chief Justice of the High Court concerned subject to the only condition that he must obtain the concurrence of the Chief Justice of India therefor. A provision for transfer of cases from one Special Court to another Special Court has also been inserted in Section 10(1). The Act cannot be challenged on the ground of violation of Article 21 of the Constitution. *State (Delhi Administration)* v. *V.C. Shukla*, AIR 1980 SC 1382 : (1980) 2 SCC 665 : 1980 SCC (Cri) 561 : 1980 CrLJ 965 : 1980 CrLR (SC) 301 : 1980 SCCrR 345.

[9334] ● ***Law of preventive detention to pass test not only of Article 22 but also of Article 21.***—Law of preventive detention has to pass the test not only of Article 22 but also of Article 21 and if the constitutional validity of any such law is challenged the Court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. Prisoner or detenu would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation, regulating the right to have interviews with members of family and friends can be upheld as constitutionally valid under Articles 14 and 21, unless it is reasonable, fair and just. Hence clause 3(b)(ii) of the Conditions of Detention Order, which restricts the interview only to one in a month in the case of a detenu cannot be regarded as reasonable and non-arbitrary, particularly when a detenu stands on a higher pedestal than an under-trial prisoner or a convict for whom Rule 559-A and Rule 550 of the Rules set out in the Manual for the Superintendence and Management of Jails in the Punjab provide facility of interviews with relatives and friends twice in a week.

Clause 3(b)(i) of the said Detention Order regulating the right of a detenu to have interview with a legal adviser of his choice is violative of Articles 14 and 21 because it prescribes that a detenu can have interview with a legal adviser only after obtaining prior permission of the District Magistrate, Delhi and the interview has to take place in the presence of an Officer of Customs/Central Excise/Enforcement to be nominated by the local Collector of Customs/Central Excise or Deputy Director of Enforcement who has sponsored the case for detention. *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981 SC 746 : (1981) 1 SCC 608 : 1981 SCC (Cri) 212 : 1981 CrLJ 306 : 1981 CrLR (SC) 437 : (1981) 19 DLT 271 : (1981) CrAppR (SC) 112 : (1981) 2 SCJ 18 : 1981 MLJ (Cri) 331 : (1981) 2 SCR 516.

[9335] ● ***Human dignity not to be ignored even in prison.***—Flimsy grounds like 'loitering in the prison', 'behaving insolently and in an uncivilised manner', 'tearing of his history ticket' cannot be the foundation for the torturesome treatment of solitary confinement for long periods from 8 to 11 months and cross-bar fetters. It is enough to be regarded as barbarous and would amount to breach of fundamental rights. Solitary confinement disguised as 'keeping in separate cell' and imposition of fetters are not to be resorted to, save in the rarest of rare cases and with strict adherence to the procedural safe-guards contained in the decisions of the Supreme Court relating to punishment of prisoners. Section 46 of the Prisons Act and the relevant rules of the Rajasthan Prisons Rules should not be read in the absolutist expansionism. The old rules and circulars and instructions issued under the Prisons Act were read incongruously with the Constitution especially Article 21 and interpretation put upon it by the Supreme Court. All the State Governments in the country are directed to convert the rulings of the Supreme Court bearing on Prison Administration into rules and instructions forthwith so that violation of the prisoners' freedoms could be avoided. Use of "third degree" methods by police is deprecated and importance of human life underlying Article 21 emphasised. *Kishor Singh* v. *State of Rajasthan*, AIR 1981 SC 625 : (1981) 1 SCC 503 : 1981 SCC (Cri) 191 : 1981 CrLJ 17 : 1981 CrLR (SC) 59 : 1981 CrAppR (SC) 41 : 1981 MLJ (Cri) 401 : (1981) 2 SCJ 97.

[9336] ● ***Custodial violence to women prisoners.***—In a complaint of custodial violence to women prisoners whilst confined in police lock-up, certain guidelines were laid down for ensuring protection against torture and maltreatment of women in police lock-up. Directions were given for making available legal aid to indigent prisoners in general and legal assistance to under-trial and convicted prisoners. Duty of lawyers to help people in distress was also indicated. *Sheela Berse* v. *State of Maharashtra*, AIR 1983 SC 378 : (1983) 2 SCC 96 : 1983 SCC (Cri) 353 : 1983 CrLJ 642 : 1983 CrLR (SC) 207 : (1983) 15

Lawyer 10 : 1983 CrAppR (SC) 245 : 1983 BBCJ (SC) 73 : (1983) 2 Chand LR (Cri) 10 : 1983 SCCrR 245 : (1983) 1 Crimes 602.

[9337] ● ***Removal of encroachment on footpath—Procedure applied.***—The procedure applied for removal of encroachments on footpaths cannot be treated as unreasonable, unfair or unjust. *Olga Tellis* v. *Bombay Municipal Corpn.*, AIR 1986 SC 180 : (1985) 3 SCC 545 : 1986 CrLR (SC) 24 : 1985 (2) Scale 5.

[9338] ● ***Article 14 guarantees general right of equality.***—Article 14 enshrines the fundamental right of equality before law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming is a citizen or not. Article 15 prohibits discrimination on some social grounds- religion, race, caste, sex, place of birth or any of them. It is available to citizens only, but is not restricted to any employment or office under the State. Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or office under the State and clause (2) prohibits discrimination on certain grounds in respect of any such employment or appointment. *Yogendra Pal Singh* v. *Union of India*, AIR 1987 SC 1015 (1023) : (1987) 15 SCC 631 : (1987) 1 Cur LR 178 : (1987) 54 Fac LR 225.

[9339] ● ***Every action of executive authority must be subject to rule of law.***—Where there is arbitrariness in State action, Article 14, Constitution springs in and judicial review strikes it down – Every action of executive authority must be subject to rule of law and must be informed by reason, so, whatever be the activity of the public authority, it should meet the test of Article 14. *Dwarka Das Marfatia* v. *Port Trust Bombay*, AIR 1989 SC 1642 (1648) : (1989) 3 SCC 293. **TO THE SAME EFFECT :** (1) *Srilekha Bidyarthi* v. *State of Uttar Pradesh*, AIR 1991 SC 537 (555) : (1991) 1 SCC 212.

[9340] ● ***Absence of arbitrariness first essential of rule of law.***—The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is base. In a system governed by rule of law, discretion, when conferred upon executive authorities must be confined within defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. *Delhi Transport* v. *D.T.C. Majdoor*, AIR 1991 SC 101 (108-109) : 1991 Supp (1) SCC 600 : 1991 SCC (Lab) 1213.

[9341] ● ***Expressions "equality before law" or the "equal protection of laws".***—Article 14 of the Constitution enjoins upon the State not to deny to any person "equality before law" or "the equal protection of laws" within the territory of India. The two expressions do not mean the same thing even if there may be much in common. The meaning of these expressions has to be found and determined having regard to the context and scheme of our Constitution. It appears that the word 'law' in the former expression is used in a generic sense – a philosophical sense whereas the word "laws" in the latter expression denotes specific laws in force. A facet which is of immediate relevant herein is the obligation upon the State to bring about, through the machinery of law, a more equal society envisaged by the preamble and Part IV of our Constitution. Equality before law can be predicated meaningfully only in an equal society *i.e.,* in a society contemplated by Article 38 of the Constitution. *Srinivasa Theatre* v. *Govt. of T.N.*, AIR 1992 SC 999 : (1992) 2 SCC 643.

[9342] ● ***Doctrine of equality has many facts.***—Doctrine of equality has many facets. It is a dynamic, and an evolving concept. Its main facets relevant in Indian Society have been referred to in the preamble and the articles under the subheading "Right to equality" (Article 14 to 18). In short the goal is "equality of status and of opportunity". Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of several articles in Part IV (Directive Principles of State Policy) as the sum total of the aspiration incorporated in Part IV of the Constitution. *Indra Sawhney* v. *Union of India*, AIR 1993 SC 47 (502) : (1992) 4 SCC 363.

6. ARTICLE 17

[9343] ● ***Court to keep in mind constitutional goals and purpose of Act and interprets provisions of Act.***—The thrust of Article 17 is to liberate the society from blind and ritualistic adherence and traditional beliefs which lost all legal or moral base. It seeks to establish new ideal for society – equality to the Dalits, at par with general public, absence of disabilities, restrictions or prohibitions on grounds of caste or religion, availability of opportunities and a sense of being a participant in the main stream of national life. In interpreting the Act, the Judge should be cognizant to and always keep at the back of his/her mind the constitutional goals and the purpose of the Act and interpret the provisions of the Act in the light thus, shed to annihilate untouchability, to accord to the Dalits and the Tribals right to equality, social integration a fruition and fraternity a reality. Harijans were stopped on point of gun from taking water from well on the ground of their untouchability. It is an offence under Section 4, Protection of Civil Rights Act. *State of Karnataka* v. *Appa Balu Ingale,* AIR 1993 SC 1126 : 1993 CrLJ 1029 (SC).

[9344] ● ***Race club—Acquisition and transfer of under Act.***—The consistent policy of the State Government, as projected through various legislations from 1949 onwards, had been to declare horse racing as gambling and as such prohibited under the two Acts namely Madras City Police Act, 1888 and J.N. Gambling Act, 1930. The operation of the 1974 Act was stayed by this Court and as consequence the horse races are continuing under the orders of the Supreme Court. The policy of the State Government as projected in all the enactments on the subject prior to 1985 shows that the State Government considered horse racing as gambling and as such prohibited under the law. The 1985 Act on the other hand declares horse racing as a public purpose and in the interest of the general public. There is apparent contradiction in the two stands. It is understand on to how the State Government can acquire and take over the functioning of the race club when it has already enacted the 1974 Act with the object of declaring horse racing as gambling.

Having enacted a law to abolish betting on horse racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State Government to acquire the undertaking of horse racing again in the name of public good and public purpose. It is *ex facie* irrational to invoke public gambling and as such prohibited under law, and at the same time speak of public purpose and public good for acquiring the race club and conducting the horse racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1985 Act. *K.R. Lakshmanan* v. *State of Tamil Nadu*, AIR 1996 SC 1153 : (1996) 2 SCC 226 : 1996 CrLJ 1635.

[9345] ● ***Freedom of Press regarded as mother of all other liberties.***—The freedom of Press is regarded as the mother of all other liberties, in a democratic society. But it has to be remembered that this freedom of Press is not absolute, unlimited and unfettered as all times and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled licence. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. In fact, the element of responsibility must be present in the conscience of the journalists. In an organised society, the rights of the Press have to be recognised with its duties and responsibilities towards the society. The protective cover of Press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper mischievously false or illegal and abuses its liberty it must be punished by Court of law. The Editor of the News paper or a journal has a greater responsibility to guard against untruthful news and publications of greater circulation and impact than the utterance of an individual and by reason of their appearing in print they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself. *In re Harijai Singh,* AIR 1997 SC 73 : (1996) 6 SCC 460 : 1997 CrLJ 58 (SC).

7. ARTICLE 19

[9346] ● ***Restriction imposed be reasonable and in interest of general public.***—The provisions of Article 19(1) which guarantee to the citizen the protection of important fundamental rights have to be construed broadly and liberally in favour of the citizen. But at the same time the Court has to keep in mind the limitations on those rights set out in Article 19 itself in clauses (2) to (6) which are for the general welfare of all citizens taken as a whole. Therefore, the proper construction of Article 19 demands that when determining the validity of any law challenged on the ground of violation of any right under Article 19(1) the Court has to see that the restriction imposed under it on such a right is "reasonable" and in the interest of the general public welfare. If the limitation on the citizen's right is arbitrary, or disproportionately heavy or unnecessarily restrictive, the law must be struck down as being not "reasonable". But if the limitation does not suffer from the vice of unreasonableness, the law must be upheld notwithstanding the restrictions it places on the citizens' rights. *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554 : 1960 CrLJ 735 : (1960) 1 SCA 314 : 1960 SCJ 611 : (1960) 2 SCR 671 : 1960 MLJ (Cri) 358 : (1960) 2 AnWR (SC) 1 : (1960) 2 MLJ (SC) 1.

[9347] ● ***Reasonableness of restrictions Comparison with corresponding laws in other countries.***—It cannot be contended that in determining whether a restriction imposed under any law is "reasonable", the Court is required to compare that law with corresponding laws in other countries relating to the same subject and to see whether the impugned section is or is not as liberal as the corresponding section of the foreign law. Such a contention is not tenable. The question whether a restraint imposed under the impugned law is unduly heavy and disproportionate to the object sought to be achieved by that law or is reasonable in the general public interest has to be judged on its own merits, and it is not a proper approach to compare that restriction with a parallel restriction under a foreign law and then to hold it to be unreasonable on the basis of the difference between the two. Conditions in the two countries may differ, though the evil sought to be checked or eradicated may be the same, and a restriction which could be considered improper, looking to the conditions prevailing in one country, may be considered quite appropriate by the legislature of another country in view of different conditions prevailing there. *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554 : 1960 Cri LJ 735

[9348] ● ***Drugs and Magic Remedies (objectionable Advertisements) Act, its object.***—[*Note*.—The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, had for its object the control to advertisements of drugs and medicinal remedies alleged to possess magic qualities. The operative provisions of the Act were assailed in this case on various constitutional grounds including the one that they constituted an infringement of the right to freedom of expression guaranteed under Article 19(1)(*a*).]

It cannot be contended that every limitation on the right to advertise proprietary goods necessarily constitutes an infringement of the right to freedom of speech and the right to carry on trade and business. Such a broadly stated contention is not true, and what the Court has to see is whether the limitation placed in each case on the right to advertise goods is reasonable and is not offensive to decency and morality. An advertisement is no doubt a form of speech, but its true character is reflected by the object which it seeks to promote. When an advertisement seeks to propagate ideas, whether they be social or political or economic, or seeks to further public thought on any subject or matter by bringing it to the notice of the public, it holds the attributes and elements of the right to freedom of speech. When, however, an advertisement does no such thing, but only commends to the public the value or importance of a certain drug or medicine in the treatment of certain diseases, it takes on element of an activity which seeks to promote some trade or business, and does not fall within the concept of the right to freedom of speech. Therefore, it cannot be said that every advertisement is necessarily a matter containing the concept of freedom of speech and expression of ideas. One has to see in each case what is the nature of the advertisement and what particular activity it seeks to promote.

In a civilized and freedom loving society, freedom of speech goes to the very heart of the natural right to impart and acquire ideas and information about matters of common interest, and if any limitation is placed on that right which results in depriving society of the benefit of free exchange of ideas and information, then, no doubt, such a limitation operates as a restriction on the right to freedom of speech and expression guaranteed by Article 19(1)(*a*). But if what a limitation does is only to deprive a trader from commending his wares, it does not have to be considered in the light of Article 19(1)(a) and its validity has to be judged with reference only to Article 19(1)(*g*).

(i) The advertisements banned under Section 3 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 related only to commerce and trade and not to propagation of ideas. The Act read as a whole, enforced a ban upon a particular form of trade or business, and its main purpose and aim was to prevent self-medication, and for that purpose it prohibited advertisements commending certain drugs and medicines. It did not restrict any of the elements or attributes of the right to freedom of speech. Therefore, the ban imposed under Section 3 of the Band Act on advertisements of prohibited drugs did not constitute any infringement or abridgement of the right to freedom of speech and expression guaranteed under Article 19(1)(*a*).

(ii) Even assuming that the ban imposed by Section 3 incidentally interfered with the petitioner's right to freedom of speech, there was no *direct* interference with that right. In its true nature and character, the Act imposed only restrictions on trade or business, and it is the true character of a law which determines the validity of its impositions. In other words, the question whether a law does or does not constitute an infringement of a right claimed by the petitioner depends upon its pith and substance, that is, upon its real character and not upon its incidental operation, and even if there is some incidental interference with some right other than the one which the law directly restrains, that in itself cannot be urged as a ground for casting a doubt on its validity. *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554 : 1960 CrLJ 735 : (1960) 1 SCA 314 : 1960 SCJ 611 : (1960) 2 SCR 671 : 1960 MLJ (Cri) 358 : (1960) 2 AnWR (SC) 1 : (1960) 2 MLJ (SC) 1.

[9349] ● ***Challenge to validity of criminal proceedings instituted against any person for contravention of notification.***—When a notification is issued by any officer or authority under the powers vested in him by an Order made by the Government in the exercise of powers vested in it under any Act, and criminal proceedings are instituted against any person for a contravention of such Notification, it is open to that person to challenge the validity of such proceedings on any of the following alternative grounds—

(*a*) that the Act itself is *ultra vires* and unconstitutional, and hence neither the Order made under it nor the Notification issued under that Order could be held to be valid;

(*b*) that the Act itself is not bad, but the Order made by the Government is unreasonable and not in conformity with the policy and the principles laid down in the Act;

(*c*) that though both the Act and the Order made thereunder may not be unconstitutional, the actual direction in the Notification issued by such officer or authority is unreasonable as being in excess of the requirements of the situation or *mala fide* and in abuse of the power vested in him.

If the petitioner succeeds on any one of these alternative grounds, the proceedings taken against him under the Notification have to be declared to be invalid. *Union of India* v. *Bhanamal Gulzarimal Ltd.*, AIR 1960 SC 475 : 1960 CrLJ 664 : 1960 SCJ 584 : (1960) 2 SCR 627 : 1960 (1) SCA 438 : 1960 MLJ (Cri) 349 : ILR (1960) 1 Punj 895.

[9350] ● ***Nothing unreasonable in leaving power to State Govt. to determine time and extent to which restriction be imposed.***—There is nothing unreasonable in leaving the power to the State to determine the time when, the extent to which, and the person against whom a restriction under any law may be imposed. It is the executive Government of a State which is charged with the duty to preserve law and order in the State, and it alone is in possession of all the material facts from which to assess the urgency of a situation, and it alone is in a position to determine what anticipatory action that situation calls for. Therefore, the determination of the question as to the time for taking action, the person against whom it should be taken, and the extent of the action, must necessarily be left to the judgment and discretion of the executive authorities. *Union of India* v. *Bhanamal Gulzarimal Ltd.*, AIR 1960 SC 475 : 1960 CrLJ 664 : 1960 SCJ 584 : (1960) 2 SCR 627 : 1960 (1) SCA 438.

[9351] ● ***Law not in itself violative of any fundamental right when.***—Even when a law is not in itself violative of any fundamental right, the possibility always remains that the executive authority entrusted with the powers under that law may act in excess or in abuse of those powers. Merely because such possibility exists, it cannot be urged that the law itself is unreasonable. May be, that an executive officer exercising the powers under an Act may untruthfully say, as a matter of form that he has been satisfied, when in fact he is not; but merely on that account it cannot be contended that the law which gave him that power is itself bad because it does not provide for the prevention of such excess or abuse. The contention cannot be accepted for two reasons. Firstly, no argument can be allowed to be based on the assumption that the State Government or the authority to whom the power is given will act in abuse of that power, and secondly, even if it is found that in a particular case such abuse has in fact occurred, what will be struck down is not the law itself, but only the abusive order made thereunder. *Union of India* v. *Bhanamal Gulzarimal Ltd.*, AIR 1960 SC 475 : 1960 CrLJ 664 : 1960 SCJ 584.

[9352] ● ***Act constitutional and not violative of any fundamental right.***—Once it is held that an Act is constitutional and not in violation of any fundamental right, an Order issued by the Government in the exercise of the powers vested in it under the Act, whereby the policy of the Act is implemented and carried out, cannot be challenged on the ground of violation of the same fundamental right.

If the provisions of an Order issued under an Act form part of an integrated scheme whereunder the whole policy of the Act is worked out, it is not open to any person to pick out for attack any particular provision therein, because each such provision is only a measure which is necessary for carrying out the policy of the Act. *Union of India* v. *Bhanamal Gulzarimal Ltd.*, AIR 1960 SC 475 : 1960 CrLJ 664 : (1960) 1 SCA 438.

[9353] ● ***Public order—Connotation.***—The words "public order" are words of a very wide connotation and mean "orderly state of society in which citizens can follow their normal activities of life in peace, tranquility and safety". So defined, public order is synonymous with public safety, peace and tranquillity. *Supdt. Central Prison, Fatehgarh* v. *Ram Mohan Lohia (Dr.),* AIR 1960 SC 633 : 1960 CrLJ 1002 : 1960 SCJ 567 : (1960) 2 SCR 710 : 1960 ALJ 320 : 1960 AWR (HC) 247 : 1960 ACrR 166.

[9354] ● ***Public order equated with public safety, peace and tranquillity.***—In *Romesh Thappar* v. *State of Madras*, and in *Brij Bhushan* v. *State of Delhi*, the Court had before it Article 19(2), only as it originally stood before its amendment in the year 1951 by the Constitution (First Amendment) Act, 1951, when it did not carry the words "public order" and was limited in its application to laws which were made only in the interest of "the security of the State". Quite naturally, the Court laid down the following two propositions as result of the construction of Article 19(2) as it then stood, namely, (*a*) that offences against the State were divisible into two categories,—major offences which affect the very security of the State, and minor offences which affect public order and peace in local areas within the State, but which did not affect the security of the State itself, and (*b*) that a law restricting the citizen's right to freedom of speech and expression fell within the permissive cover of Article 19(2) only when the restriction imposed under it prohibited an incitement to commit major offences which undermined the security of the State; and that if the incitement prohibited under it was in respect only of some offence which affected the maintenance of public order, the law was outside the cover of Article 19(2) and had to be declared to be void as being an infringement of Article 19(1)(*a*).

These principles cannot be invoked now after the amendment of Article 19(2) because that Article as it now stands covers laws made "in the interest of public order", and the validity of a law which prohibits incitement to commit an offence affecting public order cannot any longer be questioned provided that such law is reasonable in its substance and procedure.

As said above, "public order" is equated with public safety, peace and tranquility, and any law which prohibits incitement to acts which disturb public peace or tranquillity or which endanger public safety has to be held to be valid, irrespective of the question whether the prohibited incitement relates or does not relate to acts affecting the security of the State. *Supdt. Central Prison, Fatehgarh* v. *Ram Manohar Lohia (Dr.)*, AIR 1960 SC 633 : 1960 CrLJ 1002 : 1960 SCJ 567 : (1960) 2 SCR 710.

[9355] ● ***Restriction in "interest of public order".***—In *Ramji Lal Modi* v. *State of U.P.*, AIR 1957 SC 620 and *Virendra* v. *State of Punjab*, AIR 1957 SC 896, the Court observed that the words used in Article 19(2) are "in the interest of" and not "for the maintenance of". On the basis of this distinction it was held that a law may not have been designed for the direct maintenance of public order, and yet it can be a law "in the interest of" public order. These observations meant only that if a law had the effect of bringing about the preservation of public order as a result of its operation, then, even if that law did not directly and expressly purport to be for the maintenance of public order, it would still be within the cover of Article 19(2) as being "in the interest of public order". These observations could not be construed as laying down that any remote or fanciful connection between the impugned Act and public order is sufficient for sustaining its validity.

Fundamental rights cannot be permitted to be restricted or curtailed on hypothetical or imaginary considerations, and a restriction on the right to freedom of speech is reasonable and in the interest of public order only when there is a real and proximate relation or nexus between the restriction and preservation of public order. In other words, the existence of an intimate connection between the restriction imposed and preservation of public order is essential in every case before it could be said that the Act imposing that restriction is in the interest of public order. If the connection sought to be established between the two is not real and proximate but only remote or far-fetched or hypothetical or problematic, it cannot be said that the restriction is either "reasonable" or "in the interest of public order". The use of the word "reasonable" in this context means that the restriction imposed by any law will be upheld only if it has a rational relation to the object sought to be achieved by the Act and does not go in excess of that object. *Supdt. Central Prison, Fatehgarh* v. *Ram Manohar Lohia (Dr.)*, AIR 1960 SC 633 : 1960 CrLJ 1002 : 1960 SCJ 567.

[9356] ● ***Section 3 of U.P. Special Powers Act to be struck down as being infringement of fundamental right to freedom of speech and expression.***—The accused in the present case was prosecuted under Section 3 of the U.P. Special Powers Act, 1932, which made it an offence to instigate any person or class of persons not to pay any tax or revenue to the Government. The case against the accused was that he had made public speeches in which he instigated the persons gathered not to pay to the Government the dues for the supply of irrigation waters at rates which had been recently enhanced. The accused contended that he was justified in making such speeches since the enhancement was oppressive and uncalled for. On behalf of the State it was contended that in a democratic set-up there is no scope for an agitational approach, that if a law is thought to be bad and if an imposition under it is thought to be excessive, the only way in which the position can be rectified is by the democratic process of getting the law amended, that an instigation to break the law is itself a breach of public order, and that, in any case, an instigation not to pay a tax or a revenue due to the Government under any law is an act which may ignite a movement which is destructive of public order, and a law which prohibits such an act is within the cover of Article 19(2).

Laws imposing restrictions on the right to freedom of speech and expression cannot be sustained on such hypothetical considerations as were advanced on behalf of the State. If those arguments were accepted without any reservation, the effect would be to destroy altogether the right to freedom of speech and expression which is the very foundation of a democratic way of life. Every restriction on that right to be justified had to be intimately connected with the preservation of public order. There was no such proximate connection between the restriction imposed by Section 3 of the impugned Act and preservation of public order, and hence the restriction could not be said to be either reasonable or in the interest of public order. For these reasons Section 3 of the Act had to be struck down as being an infringement of the fundamental right to freedom of speech and expression guaranteed by Article 19(1)(*a*). *Supdt. Central Prison, Fatehgarh* v. *Ram Monohar Lohia (Dr.)*, AIR 1960 SC 633 : 1960 CrLJ 1002 : 1960 SCJ 567.

[9357] ● *Iron and Steel (Control of Production and Distribution) Order—Validity.*—Clause II-B of the Iron and Steel (Control of Production and Distribution) Order, 1941 : A provision in an Order which authorises the executive officer entrusted with the implementation of that Order to fix the maximum selling price of an essential commodity like iron or steel with a view to secure its supply to the public at fair prices, and with that object empowers him to issue Notifications from time to time whereunder dealers and stockists in such commodity are prohibited from selling that commodity at any price above the maximum price fixed in such notification, is not unconstitutional as being an infringement of Article 19(1)(*f*) or 19(1)(*g*). Such an Order authorises the imposition of restrictions which are absolutely "reasonable" and "in the interest of the general public" within the meaning of Articles 19(5) and 19(6). *Union of India* v. *Bhanamal Gulzarimal Ltd.*, AIR 1960 SC 475 : 1960 CrLJ 664 : (1960) 1 SCA 438 : 1960 SCJ 584 : (1960) 2 SCR 627 : 1960 MLJ (Cri) 349 : ILR (1960) 1 Punj 895.

[9358] ● *Drugs and Magic Remedies (Objectionable Advertisement) Act—Prohibition of advertisement under.*—The Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954; A law which imposes restrictions on advertisements which are objectionable and unethical, with a view to discourage the use of proprietary drugs and medicines for the purpose of self-medication and self-treatment is within the permissive cover of Articles 19(5) and 19(6), and it cannot be said that the prohibition of such advertisements is either unreasonable or otherwise than in the general public interest.

Further, if under such an Act a ban is imposed not only on advertisements in newspapers and other publications, but also on advertisements on the cartoons and labels and wrappers of medicine bottles, such a ban cannot be challenged as being too wide and disproportionate to the object of the Act. The definition of the word "advertisement" in such an Act has necessarily got to be broad enough to include advertisements in the packages in which such medicines are sold, and if that definition were not so inclusive, the very purpose for which the Act was brought into existence would be defeated. *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554 : 1960 CrLJ 735 : (1960) 1 SCA 314 : 1960 SCJ 611 : (1960) 2 SCR 671 : 1960 MLJ (Cri) 358 : (1960) 2 AnWR (SC) 1 : (1960) 2 MLJ (SC) 1.

[9359] ● *Section 44, CrPC validity section does not confer arbitrary power on Magistrate.*—Section 144 authorises the placing of restrictions which are in the interests of the general public and also in the interest of public order. The power conferred by the section is not arbitrary or unlimited or untrammelled, but one which is to be exercised upon material facts gathered either from proper enquiry or based upon proper report and only upon being satisfied that a disturbance of public order exists or is to be apprehended and the factors conditioning its exercise in fact exist. The power is to be judicially exercised as is subject to judicial review, and is not left to the subjective satisfaction of the Magistrate. Anticipatory action by the executive is often essential for preventing disturbance of public order, and the power given to take such anticipatory action is quite reasonable. Therefore, Section 144 is valid and constitutional. The restrictions which it authorises a Magistrate to place by a prohibitory order are reasonable and in the interests of public order. They are covered by clauses (2) and (3) of Article 19 and hence the section is not violative of Article 19(1)(*a*) or 19(1)(*b*). It is true that Section 144 does not expressly mention that order made under it must be preceded by an enquiry. But the section must be construed as a whole. The latter part of sub-section (1) requires that the order must set out the material facts of the case. This clearly requires the making of an enquiry unless the Magistrate is satisfied about the facts from personal knowledge or on a report made to him which he accepts as correct. Clearly, therefore, Section 144 does not confer any arbitrary power on the Magistrate in the matter of making the order.

No doubt, though the powers conferred on the Magistrate under Section 144 are very wide and authorise him to place restrictions which are heavy, the power can be exercised only in an emergency and only for purposes of preventing activities which are dangerous to the safety or the health of the public generally or are disruptive of public peace. No one has a right to carry on activities of such a nature. In view of the factors which condition the exercise of the powers under Section 144, it would be wrong to regard these powers as being unlimited or untrammelled. It must be assumed that the powers given under Section 144 will be exercised legitimately and honestly and the section cannot be struck down on the ground that the Magistrate may possibly abuse his powers.

The provisions of Section 144 are attracted only in an emergency, and the initial judge of an emergency which attracts its provisions is the Magistrate named in the section. But then, the maintenance of law and order is primarily the duty and the function of the executive department of the State and it is inevitable that the question of formation of the opinion as to whether an emergency has arisen or not must necessarily rest in the first instance with the persons through whom the executive exercises its functions and discharges its duties. It would be wrong to require that the State Government itself must exercise those functions and duties in each and every case. It must, therefore, be held that the provisions of Section 144, which assign to a Magistrate belonging to any of the classes mentioned therein the power to decide whether an emergency requiring the exercise of the powers under Section 144 has arisen or not, are not unreasonable.

The satisfaction of the Magistrate as to the necessity of promulgating the order under Section 144 is not made entirely subjective by the section and has to be based upon adequate material.

It cannot be said that the section has given unrestricted powers to the Magistrate merely because no appeal has been provided in the Code against the orders made under Section 144. Under Section 435 read with Section 439 of the Code, the High Court has power to entertain an application for revision of such an order, and to quash the order if it is found that it cannot be supported by the materials upon which it purports to be based. When dealing with such a revision application, the High Court has the power to examine the propriety of the order as well as its legality. And further, in a prosecution under Section 188, Penal Code for infringement of the order made under Section 144, it would be open to the accused to challenge the validity of the order in his defence. It will, thus, be seen that the exercise of power given under Section 144 is not entirely left to the subjective satisfaction of the Magistrate. It is subject to judicial review and the remedy of judicial review is substantial, and not illusory as contended.

Section 144, CrPC confers upon the Magistrate mentioned therein to take action not only where present danger exists but also when there is an apprehension of danger, and thus casts upon the Magistrate the duty to maintain law and order by taking immediate appropriate action.

Anticipatory action taken by a Magistrate in an emergency where danger to public order is genuinely apprehended is only action taken in the discharge of the duty to maintain public order, and it cannot be said that this power to determine apprehension of acts dangerous to public order is unreasonable.

The framework of our Constitution is different from that of the Constitution of the United States, and whatever may be the law there about anticipatory action of the kind authorised under Section 144, CrPC., it cannot be said that such action is not permissible under Article 19(1) of our Constitution. The fundamental rights guaranteed under Article 19 are not absolute rights, but are subject to the restrictions placed in the subsequent clauses of that Article. In clauses (2) and (3) of Article 19 power is expressly given to the legislature to make laws placing reasonable restrictions on the exercise of the rights conferred by clause (1) in the interest of public order. In order to ensure the maintenance of public order, action has often necessarily got to be taken in advance for the purpose of averting anticipatory disturbance of public order. Therefore, it is competent to the legislature to pass a law permitting the appropriate authority to take anticipatory action and to place reasonable anticipatory restrictions upon activities which are likely to endanger or disturb public tranquillity and public order. In fact, in circumstances such anticipatory action is the only safe method of discharging the duty of maintaining public order. Therefore, it cannot be said that a law which authorises such anticipatory action substitutes suppression of the lawful activities or rights of the citizens for it is the duty of the public authorities to maintain public order. It must, therefore, be held that the power given under Section 144 of the Code to the specified Magistrates to take anticipatory action in advance of apprehended disturbance of or danger to public order is a reasonable restriction within the meaning of clauses (2) and (3) of Article 19. *Babulal Parate* v. *State of Maharashtra*, AIR 1961 SC 884 : 1961 (2) CrLJ 16 : 1961 (2) SCJ 497.

[9360] ● ***Slaughter of bulls, bullocks and buffaloes.***—The question which arose in this case was whether certain Acts passed by different State Legislatures for the purposes of preservation of animals useful to humanity, such as, bullocks, cows and buffaloes, and prevention of their indiscriminate slaughter, were "reasonable restrictions" within the meaning of clauses (5) and (6) of Article 19 on the exercise of the rights conferred by Articles 19(1)(*f*) and 19(1)(*g*) of the Constitution on the owners of such animals.

(In examining the provisions of the impugned Acts the Court laid down the general principles governing the question of the correct approach in determining the "reasonableness" of a statute assailed on the ground of violation of Articles 19(1)(*f*) and 19(1)(*g*). The principles enunciated find place in different parts of a long judgment.)

(1) Though the Legislature is the best judge of what is good for the community the ultimate responsibility of determining validity of the law made by the legislature is cast by the Constitution on the Supreme Court and so that responsibility must always rest with the Court, and it cannot shrink from the solemn duty placed upon it by the Constitution.

(2) In deciding whether laws which place restrictions on the citizen's rights to carry on a particular trade or business or to dispose of property is or is not violative of Article 19(1), the test of "reasonableness" must be applied to each individual statute which is impugned as and when the question arises, and no abstract standard or general pattern of "reasonableness" can be laid down as being applicable to all cases.

(3) In arriving at a decision on this question of the "reasonableness" of an impugned statute, all the following considerations must enter into the judicial verdict—

   (a) the nature of the right alleged to have been infringed,

   (b) the underlying purpose of the restrictions imposed,

   (c) the extent of the evil sought to be remedied thereby,

   (d) the urgency of the need to remove that evil,

   (e) the prevailing conditions at the time of the passing of the Act, and

   (f) the proportion or disproportion of the restrictions imposed under the Act to the evil which it seeks to cure or remedy.

(4) The word "reasonable" connotes that the restriction or limitation imposed under the Act on the rights of the citizen should not be arbitrary or of an excessive nature, or beyond what is required in the interests of the general public. It implies intelligent care and deliberation, that is, the choice of a course which reason dictates.

(5) Legislation which arbitrarily or excessively invades the rights conferred by Article 19(1) cannot be said to have the quality of "reasonableness", and if it does not strike a proper balance between the freedoms guaranteed in Article 19(1) and the social control permitted by clauses (5) and (6) of that Article, it must be held to be wanting in that quality.

(6) Within the limits laid down in Article 19, it is open to the Legislature to enact ancillary provisions to give effect to the main object of the Act, and the restrictions placed in that regard must be considered to be "reasonable" if they are necessary to secure the efficient enforcement of the valid provisions of the Act and to serve its object. In other words, it is the undisputed right of the Legislature to decide what substantive provisions are necessary to give effect to the main object of the Act, and to make ancillary provisions necessary for reducing to the minimum the possibility of its evasion. *Abdul Hakim Qureshi* v. *State of Bihar*, AIR 1961 SC 448 : (1961) 1 CrLJ 573 : (1961) 2 SCR 610 : (1961) 1 SCA 713.

[9361] ● *Test of reasonableness—Interest of general public.*—The test of "reasonableness" laid down in clauses (2) to (6) of Article 19 has to be applied to a statute in the context of all the relevant factors governing the case, such as, the purpose of the restriction imposed, the extent and the urgency of the evil sought to be remedied, the prevailing conditions at the time, the nature of restrictions imposed are all relevant matters which have to be carefully considered. The central principle underlying the structure of Article 19 is that a balance must be held between the guaranteed rights of the citizen and the need for social control by the State in the larger interest of the community as a whole.

If a law in the form and with the amplitude necessary for the prevention of an evil is found to be reasonable and in the interests of the public generally, that law cannot be said to be unreasonable merely because a marginal small section of the public might be adversely affected thereby. It is open to the legislature to make a law placing effective restrictions on the rights of the individual which are reasonable even though the effect thereof is to restrict or even prohibit actions of a small section of the public which are innocent in themselves. A law which is reasonable and valid in the context of the wider interest of the community as a whole cannot be stamped with the character of unconstitutionality by looking merely at its effect on a marginal section of the community. *Collector of Customs, Madras* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316 : 1962 (1) CrLJ 364 : (1962) 1 SCJ 68 : (1962) 3 SCR 786 : 1962 MLJ (Cri) 1 : (1962) 1 MLJ (SC) 43 : (1962) 1 AnWR (SC) 43.

[9362] ● *Unconstitutionality of legislation.*—It is now well settled that the possibility of the abuse of the powers given under a statute by the executive is no ground for declaring the provisions contained in that statute to be unreasonable or void. The principle is founded upon the fact that the powers given under a statute are capable of being exercised reasonably as well as unreasonably, and the manner of their exercise cannot have any bearing on the question whether the statute itself is reasonable. The validity of a measure has to be determined by an examination of its contents and the nature of the powers conferred under it on the executive and not by the manner of its actual application to particular cases.

Since the possibility of abuse of a statute valid in itself does not impart to it any element of invalidity, the converse also must follow, namely, that a statute which is in itself invalid as placing restrictions upon the rights of the citizen which are unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and the ambit of its operation. If so tested, it passes the test of reasonableness it must be held to be valid and the possibility of improper use of the powers conferred by it, is no ground for pronouncing the law itself to be invalid. Similarly, if the law on being tested in the light of constitutional requirements, does not pass the test it cannot be held to be valid merely because it is administered in a manner which might not conflict with the constitutional requirements. *Collector of Customs, Madras* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316 : 1962 (1) CrLJ 364 : (1962) 1 SCJ 68.

[9363] ● *Section 178-A—Sea Customs Act—Validity of.*—In the present case, the question was whether Section 178-A of the Sea Customs Act, 1878, was in violation of Articles 19(1)(*f*) and 19(1)(*g*) of the Constitution. It was urged that the Central Board of Revenue had issued certain administrative instructions as regards the manner in which the Customs Officers should regulate their procedure in adjudging the confiscation of the goods seized under the provisions of the Act. The argument was that as Section 178-A was being administered subject to the safeguards contained in those instructions, the provision must be held to be a reasonable restriction within the meaning of clause (6) of Article 19. The contention that the said administrative instructions had relevance on the question of validity of Section 178-A of the Sea Customs Act is incorrect and must be rejected. *Collector of Customs*, *Madras* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316 : 1962 (1) CrLJ 364 : (1962) 1 SCJ 68 : (1962) 3 SCR 786.

[9364] ● *Constitutional provisions dealing with citizenship—Articles 5 to 11.*—The Constitutional provisions dealing with citizenship are Articles 5 to 11. Article 5 provides that every person who at the commencement of the Constitution has his domicile in India and who was either born in India or was born of an Indian parent shall be a citizen of India. Article 6 lays down that a person who has migrated to India from Pakistan shall be deemed to be citizen of India if he satisfies the tests prescribed in that Article. Article 7 provides that notwithstanding anything contained in Article 5 and 6, a person who has migrated from India to Pakistan after 1-3-1947, shall not be deemed to be a citizen of India. Article 8 provides for citizenship of India by registration of persons of Indian origin residing outside India. Article 9 provides that if any person has voluntarily acquired the citizenship of a Foreign State prior to the commencement of the Constitution, he shall not be able to claim Indian citizenship by virtue of Articles 5, 6 and 8. Article 10 guarantees continuance of the rights of citizenship to every person who is or is deemed to be a citizen of India under Article 5, 6 or 8, but this guarantee is subject to the condition that Parliament is empowered to make any law affecting this right. Then comes the last Article 11 which empowers Parliament to make laws regulating the right of citizenship and provides that nothing in Part II shall derogate from this power of the Parliament.

It will thus be seen that under the Constitution, Parliament is expressly vested with the power to make laws relating to acquisition, continuance and termination of citizenship and a law so made cannot be impeached on the ground of inconsistency with provisions of Part II of the Constitution. Therefore, the sovereign legislative competence of Parliament to deal with the topic of citizenship under List I, Entry 17, of the Seventh Schedule is not fettered by the provisions of Articles 5 to 10, and it cannot be contended that a provision in an Act of Parliament or Rule made thereunder is *ultra vires* because it affects the status of citizenship conferred under any Article in Part II of the Constitution.

The scheme of the relevant Article of Part II which deals with citizenship clearly suggests that the status of citizenship can be adversely affected by a statute made by the Parliament in exercise of its legislative powers. If may *prima facie* sound somewhat surprising, but it is nevertheless true, that though the citizens of India are guaranteed the fundamental rights specified in Article 19 of the Constitution, the status of citizenship on which the existence or continuance of the said rights rests is itself not one of the fundamental rights guaranteed to anyone. If a law is properly passed by the Parliament affecting the status of citizenship of any citizen in the country, it can be no challenge to the validity of the said law that it affects the fundamental rights of those whose citizenship is thereby terminated. Article 19 proceeds on the assumption that the person who claims the rights guaranteed by it is a citizen of India. If the basic status of citizenship is validly terminated by a Parliamentary statute, the person whose citizenship is terminated has no right to claim the fundamental rights under Article 19.

For these reasons, it must be held that the validity of Section 9(2) of the Citizenship Act, 1955, which delegates to the Central Government the power to determine the question as to whether an Indian citizen has acquired the citizenship of another country cannot be challenged, on the ground of violation of the right of citizenship conferred under Part II of the Constitution, or on the ground of violating the right to residence in India guaranteed under Article 19(1)(e). *Izhar Ahmad Khan* v. *Union of India*, AIR 1962 SC 1052 : 1962 (2) CrLJ 215 : (1963) 1 SCA 136 : 1963 BLJR 99.

[9365] ● ***Reasonable restrictions on fundamental rights.***—There are situations when the points regarding a violation of Article 14 and an objection that a restriction is not reasonable with the meaning of clause (5) or (6) of Article 19 may converge and may appear as presenting the same question viewed from different angles. Such, for instance, are cases where the denial of equality before the law is based on the ground that the power vested in an administrative authority to affect the rights guaranteed to a citizen is arbitrary, being unguided and uncanalised. The vesting of such a power in the executive would also amount to the imposition of an unreasonable restriction on the exercise of the guaranteed right to trade or carry on business. In such cases, it might be open to urge that once the challenge to the validity of the impugned provision on the ground of violation of Article 14 is rejected, the reasoning by which it is rejected would cover also the attack on its validity on the ground of infringement of Article 19(1)(f) and (g).

However, where there is a guidance and the challenge is only on the ground that the law imposes a restraint which is unreasonable, the scope and the content of the enquiry is far removed from the tests of conformity to rational classification adopted for judging whether the law is violative of Article 14. In such a case, it cannot be said that the previous decision, in which the contention that the impugned law was violative of Article 14 was rejected, also covers the question of infringement of Articles 19(1)(f) and 19(1)(g). *Collector of Customs, Madras* v. *Nathella Sampathu Chetty*, AIR 1962 SC 316 : 1962 (1) CrLJ 364 : (1962) 1 SCJ 68 : (1962) 3 SCR 786 : 1962 MLJ (Cri) 1 : (1962) 1 MLJ (SC) 43 : (1962) 1 AnWR (SC) 43.

[9366] ● ***Regulation 236 of U.P. Police Regulations—Constitutional validity of.***—The question which arose in this case was as to the constitutional validity of Regulation 236 of the U.P. Police Regulations which defines "surveillance" as consisting of any of the following measures, namely :

(a) secret picketing of the houses or approaches to the houses of suspects;

(b) domiciliary visits at night;

(c) inquiries into the repute, habits, associations, income, expenses and occupation;

(d) reporting by constables and chowkidars of movements and absences from home;

(e) verification of movements and absences by means of inquiry slips; and

(f) collection and record on a history-sheet of all information bearing on conduct.

The Regulations had no statutory basis and were not made under Section 12 or any other provision of the Indian Penal Code. They were merely executive or departmental instructions for the guidance of the police officers. Therefore, the only question was whether action taken under Regulation 236 by the executive was violative of the freedom guaranteed under Article 19(1).

"Secret picketing" in clause (a) of Regulation 236 clearly meant secret watch over the house of the suspect for finding the nature of his activities. Such watch would not affect either his right of free movement or his personal liberty. That only can constitute an infringement of these rights which is both direct as well as tangible, and it would not be that what was intended to be protected was mere personal sensitiveness. Under this clause the police had no power to offer resistance to the movements of the suspect or to prevent anyone from visiting the suspect.

"Domiciliary visit" means visit to a private dwelling by official person for search or inspection. Under the provision, the police authorities were authorised to enter the premises of the suspect and have it opened and search it for the purpose of ascertaining his presence in the house. Such an intrusion into the house of a citizen, however annoying it might be, by causing him personal discomfort and disturbance to his sleep, does not impede any right to free movement and hence would not constitute a violation of Article 19(1)(d). However, unauthorised intrusion into a person's home and the disturbance caused to him thereby is a violation of his right to personal liberty guaranteed under Article 21. Therefore, clause (b) of Regulation 236 was plainly violative of Article 21 and as there was no law on which the Regulation was based, it must be struck down as unconstitutional.

Clauses (c), (d) and (e) may be dealt with together. They authorised actions in the nature of shadowing of the person concerned for the purpose of building up a record of his movements and activities. They did not involve any physical obstruction or restraint upon the movement of the person. Article 19(1)(d) does not contemplate or include psychological inhibitions. These clauses did not infringe Article 19(1)(d) or Article 21. *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : 1963 (2) CrLJ 1329. (Per SINHA, C.J., AYYANGAR and MUDHOLKAR, JJ.) Per SUBBA RAO and SHAH, JJ.

[9367] ● ***Regulation 236 of U.P. Police Regulations unconstitutional.***—We are of the opinion that not only clause (b) of the Regulation, but the entire Regulation is unconstitutional as it infringes both Article 19(1)(d) and Article 21 of the Constitution. The petition raises a question of far reaching importance, namely, the right of a citizen to lead a free life subject to control imposed by valid law.

The operation of the Regulation includes posting of policemen near the person's house, close and constant watch over his movements, entering his house at night and waking him up at any hour of the night, inquiry about his habits, associations, income, expenses and occupation. In short, his entire life day to day is made an open book and every activity of his closely followed and observed. It cannot be said that this is possible without the knowledge of the person concerned or his friends and associates and others in the locality. It is not realistic to dissect and cut down this act of surveillance into its various parts. All the measures taken under Regulation 236 are parts of one process of surveillance, and the question which has to be decided is whether such surveillance is constitutionally valid. The person under the constant shadow of surveillance is certainly deprived of his right to freedom of movement, that is, the right to go where he likes and do what he likes, and to speak to whomsoever he wants, without any apprehension or restraint. He can move physically but he cannot do so freely when all his movements are watched and he is constantly shadowed. The shroud of surveillance necessarily places inhibitions and restraints which prevent him from moving and acting freely as he would like to do. Similarly, the right of personal liberty in Article 21 is equally infringed by such surveillance. The right to personal liberty takes in the right to be free from encroachments and intrusions on his movements and on his private life. A person's house is his "castle", that is, his rampart against encroachment on his personal liberty, and that includes security of one's privacy against arbitrary intrusion by the police. We would, therefore, define the right to personal liberty in Article 21 as a right to be free from all restrictions and encroachments on one's liberty, whether they are directly imposed or indirectly brought about by calculated measures.

It must, therefore, be held that the entire Regulation 236 offends both Article 19(1)(d) and

Article 21 of the Constitution. *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : 1963 (2) CrLJ 1329. (Per Subba Rao and Shah, JJ.) Per Sinha, C.J., and Imam, Ayyangar and Mudholkar, JJ.

[9368] ● *Term "Liberty" in Article 21 of Constitution connotation.*—By the term "liberty" in Article 21 something more is meant than mere freedom from physical restraint or the bounds of a prison. It is true that the word "liberty" is qualified by the word "personal", but the qualifying adjective has been used only in order to avoid overlapping between the elements and incidents of "liberty" like freedom of speech or freedom of movement which are already dealt with in Article 19(1) and the "liberty" guaranteed by Article 21.

The "liberty" comprehended by Article 21 is not to be construed narrowly so as to mean nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison, but must be construed as including within it all varieties of rights which go to make up the "personal liberties" of man other than those already dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprises the residue of the rights which go to make up "liberty", such as, the sanctity of a man's home, and his rights to personal security and normal comforts, such as, his right to sleep at nights undisturbed by invasions and intrusions by the police. An unauthorised invasion or intrusion upon a person's home and causing him disturbance in the enjoyment of his privacy and personal security is clearly a violation of his right to "personal liberty" within the meaning of Article 21. *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : 1963 (2) CrLJ 329 : 1963 ALJ 711. (Per Sinha, C.J., and Imam, Ayyangar and Mudholkar, JJ.) Per Subba Rao and Shah, JJ.

[9369] ● *Expression "personal liberty"—Right to.*—The expression "personal liberty" is a comprehensive expression and the right to move freely is an attribute of personal liberty. But both are independent fundamental rights, though there is overlapping and it cannot be said that the freedom to move freely is carved out of personal liberty and therefore personal liberty in Article 21 excludes that attribute. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. The right to personal liberty takes in, not only a right to be free from restrictions placed on his movements, but also the right to be free from encroachments on his private life. The right to privacy is an essential ingredient of personal liberty.

Every person has a right to his domestic life undisturbed by encroachments and intrusions which are not authorised by law. In the last resort, a person's house, where he lives with his family is his "castle"; it is his rampart against encroachment on his personal liberty. Encroachments on a man's private life affect him even more than physical restraints on his movements, and nothing is more harmful to a man's happiness and health than a calculated interference with his privacy.

We would, therefore, define the right to personal liberty in Article 21 as a right to be free from restrictions or encroachments on his person, whether they are direct physical restraints or are indirectly brought about by calculated measures which interfere with his privacy and private life. *Kharak Singh* v. *State of Uttar Pradesh*, AIR 1963 SC 1295 : 1963 (2) CrLJ 329 : 1963 ALJ 711.

[9370] ● *Violation of rights under Article 19(1) as a result of some action taken by police.*—In a case in which the petitioner urges the violation of rights under Article 19(1) as a result of some action taken against him by the offices of a State department, such as, the police, if the infringement of any of his freedoms guaranteed to him by Article 19 is established, then, the only way in which such violation could be defended would be by reference to a valid law, be it a statute or a statutory rule or regulation. If the regulation which is pleaded by way of justification for the action taken has no statutory basis, but is merely in the nature of executive or departmental instructions framed for the guidance of the police officers, it does not have the force of law. As such a regulation is not "law" within the meaning of any of the clauses (2) to (6) of Article 19, it would not be available to the State in order to regulate or curtail any of the fundamental rights conferred by Article 19(1), nor would the same be "a procedure established by law" within Article 21. In such a case, the question whether the impugned regulation imposes restrictions which are "reasonable" or are designed to preserve public order or are in the public interest does not at all arise for consideration and is entirely out of place, and the question whether the actions taken by the police authorities under the regulation constitute an infringement of Article 19(1) has to be decided purely on its merits. *Kharak Singh* v. *State of Uttar Pradesh*, AIR 1963 SC 1295 : 1963 (2) CrLJ 329 : 1963 ALJ 711.

[9371] ● *Section 52-A of Sea Customs Act constitutional validity.*—In the present case the constitutional validity of Section 52-A of the Sea Customs Act, 1878, was challenged by a foreign company carrying on the business of transport of passengers and cargo by sea between Japan and India whose ship, "Eastern Saga" was ordered to be confiscated under Section 167(12-A) of the Act on its being proved that the offence under Section 52-A had been committed as the ship which entered the Port of Calcutta from Japan carried secret constructions in several parts of the ship which were meant for the purpose of concealing goods imported in violation of the Act. The validity of Section 52-A was challenged on the ground of violation of Article 19(1)(f).

The appellant was a foreign company, and as such it was not entitled to claim the benefit of Article 19. It is only citizens of India who have been guaranteed the right to the freedoms enshrined in that Article.

The whole argument was that the appellant had been deprived of its property by the operation of the provisions of Section 52-A of the Act which was invalid. A foreign company is not entitled to the benefit of Article 19. The rights guaranteed to the citizens of India on the strength of the rights guaranteed under Article 19 are not available to foreigners. It is not open to a foreign company to resist the confiscation of its ship on the ground that Section 52-A of the Act is invalid as being in violation of Article 19(1)(f) of the Constitution, or as being in violation of Article 14 or Article 31(1) when the plea regarding the violation of these Articles is necessarily based upon the right conferred by Article 19(1)(f). *Indo-China Steam Navigation Co. Ltd.* v. *Additional Collector of Customs, Calcutta*, AIR 1964 SC 1140 : 1964 (2) CrLJ 234 : (1964) 34 Com Cas 435.

[9372] ● ***Use of premises being dangerous to life, health or property—Opinion of corporation as to.***—A provision in a Municipal Act dealing with the power of the Corporation to require a person using any premises to take out a license for such use is unreasonable and violative of Article 19(1)(g) in so far as it lays down that the opinion of the Corporation as to the nature of the use being dangerous to life, health or property shall be conclusive and shall not be justiciable in any Court. *Corporation of Calcutta* v. *Calcutta Tramways Co. Ltd.*, AIR 1964 SC 1279 : 1964 (2) CrLJ 354.

[9373] ● ***Refusal by State Govt. to send manuscript of detenu book out of Jail for publication.***—Article 358 of the Constitution suspends the provisions of Article 19 of Part III of the Constitution during the period the proclamation of emergency is in operation; and the order passed by the President under Article 359 suspended the enforcement, *inter alia*, of Article 21 during the period of the said emergency. But the President's order was a conditional one. In effect, it said that the right to move the High Court or the Supreme Court remained suspended if such a person had been deprived of his personal liberty under the Defence of India Act, 1962, or any rule or order made thereunder. If a person was deprived of his personal liberty not under the Act or a rule or order made thereunder but in contravention thereof, his right to move the said Courts in that regard would not be suspended. The question, therefore, in the instant case was whether the first respondent's liberty had been restricted in terms of the Defence of India Rules whereunder he was detained. If it was in contravention of the said Rules, he would have the right to approach the High Court under Article 226 of the Constitution.

In exercise of the power conferred under sub-rule (4) of Rule 30 of the Rules, the Government of Maharashtra determined that the conditions as to maintenance, discipline and punishment of offences and breaches of discipline governing persons ordered to be detained in any place in the State of Maharashtra, shall be the same as those contained in the Bombay Conditions of Detention Order, 1951. The Bombay Conditions of Detention Order, 1951, does not contain any condition as regards the writing of books by a detenue or sending them out of jail for publication. Briefly stated, the scheme of the said provisions is that a person can be detained if the appropriate Government is satisfied that in order to prevent him from doing the prejudicial acts mentioned in Rule 30 of the Rules it is necessary to detain him in prison subject to the conditions imposed in the manner prescribed in sub-rule (4) of Rule 30 of the Rules. To put it in a negative form, no restrictions other than those prescribed under sub-rule (4) of Rule 30 can be imposed on a detenue. If the appropriate authority seeks to impose on a detenue a restriction not so prescribed the said authority will be interfering with the personal liberty of the detenue in derogation of the law whereunder he is detained. If that happens, the High Court, in terms of Article 226 of the Constitution, can issue an appropriate writ or direction to the authority concerned to act in accordance with law.

We have gone through the provisions of the Bombay Conditions of Detention Order, 1951. There is no provision in that order dealing with the writing or publication of books by the detenue. There is, therefore, no restriction on the detenue in respect of that activity.

Here, the first respondent's liberty is restricted under the Defence of India Rules subject to conditions determined in the manner prescribed in sub-rule (4) of Rule 30 thereof. We find it difficult to accept the argument that the Bombay Conditions of Detention Order, 1951, which lays down the conditions regulating the restrictions on the liberty of a detenue, conferred only such privileges on the detenue as are set out in the order. If this argument were to be accepted it would mean that the detenue could be starved to death, if there was no condition providing for giving food to the detenue. In the matter of liberty of a subject such a construction cannot be given to the said rules and regulations, unless for compelling reasons. We, therefore, hold that the said conditions regulating the restrictions on the personal liberty of a detenue are not privileges conferred on him but are the conditions subject to which his liberty can be restricted. As there is no condition in the Bombay Conditions of Detention Order, 1951, prohibiting a detenue from writing a book or sending it for publication, the State of Maharashtra infringed the personal liberty of the first respondent in derogation of the law whereunder he is detained. The appellant, therefore, acted contrary to law in refusing to send the manuscript book of the detenue out of the jail to his wife for its eventual publication. *State of Maharashtra* v. *Prabhakar Pandurang Sanzgiri*, AIR 1966 SC 424 : 1966 CrLJ 311 : (1966) 1 SCA 14 : 1966 MadMN 16 : 1966 MPLJ 165 : 1966 MahLJ 141.

[9374] ● *Foreigner not entitled to any fundamental right.*—A foreigner as defined in the Foreigners Act, not being a citizen, is not entitled to any fundamental right guaranteed under Article 19. The only rights which he can claim are those contained in Articles 20 to 22. *Anwar* v. *State of J&K*, AIR 1971 SC 337 : (1971) 3 SCC 104 : 1970 UJ (SC) 702 : (1971) 1 SCA 519 : (1971) 1 SCJ 502 : (1971) 1 SCR 637.

[9375] ● *Imposition of reasonable restriction on right to freedom of speech and expression.*—Assuming that Article 19(2) applies to the law relating to contempt, it imposes reasonable restriction on the right to freedom of speech and expression guaranteed by the Constitution. *C.K. Daphtary* v. *O.P. Gupta*, AIR 1971 SC 1132 : (1971) 1 SCC 626 : 1971 CrLJ 844 : (1971) 2 SCCrR 483.

[9376] ● *Express "public order"—Meaning of.*—The expression 'public order' includes absence of all acts which are a danger to the security of State and also acts which are comprehended by the expression '*ordre publique*' under French Law meaning absence of insurrection, riot, turbulance or crimes of violence but not acts which disturb only the serenity of others. The words "public order" and "public tranquillity" overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. No doubt public order also requires absence of disturbance of a state of serenity in society but it goes no further. The expression "in the interests of public order" in the Constitution is very wide and is capable of taking within itself not only those acts which disturb the security of the State or are with *ordre publique* but also certain acts which disturb public tranquillity or are breaches of the peace. It is not necessary to give to the expression a narrow meaning as in the case of the phrase used in the preventive detention law as embracing only graver episodes not involving cases of law and order which are not disturbances of public tranquillity but of *ordre publique*. *Madhu Limaye* v. *S.D.M., Monghyr*, AIR 1971 SC 2486 : (1970) 3 SCC 746 : 1971 CrLJ 1720 : (1971) 2 SCJ 479 : 1971 MLJ (Cri) 629.

[9377] ● *Anything tending to overthrow State prejudicial to security of State.*—Anything tending to overthrow the State must necessarily be prejudicial to the security of the State and therefore a law can be made, placing reasonable restrictions on the right to freedom of speech and expression in that respect, in the interests of security of the State. *Prima facie*, therefore, Section 9 of the Act clearly falls within the express language of Article 19(2). The fundamental right guaranteed by Article 19(1)(*a*) and the interest of public protected by Article 19(2) must be properly adjusted and reasonable balance struck between the two. The test of reasonableness of the restriction has to be considered in each case in the light of the nature of the right infringed, the purpose of the restriction, the extent and the nature of the mischief required to be suppressed and the prevailing social and other conditions at the time. There can be no abstract standard or general pattern of reasonableness. Our Constitution provides reasonably precise, general guidance in this matter. Section 9 of the Act is plainly within the legislative competence of the Punjab Legislature. *Santokh Singh* v. *Delhi Admn.*, AIR 1973 SC 1091 : (1973) 1 SCC 659 : 1973 CrLJ 846.

[9378] ● *Right of privacy itself fundamental right.*—It was contended on behalf of the petitioner that right to privacy was itself a fundamental right and that right was violated as M.P. Police Regulation 856 provided for domiciliary visits and other incursions into it. The question whether right to privacy was itself a fundamental right flowing from the other fundamental rights guaranteed to a citizen under Part III was not easy of solution. Even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech created an independent right of privacy as an emanation from them which one could characterize as a fundamental right, that right was not absolute. Drastic inroads directly into the privacy and indirectly into the fundamental rights, of a citizen would be made if M.P. Police Regulations 855 and 856 were to be read widely. To interpret the rule in harmony with the Constitution was, therefore, necessary and canalisation of the powers vested in the police by the two Regulations became necessary, if they were to be saved at all. The relevant Articles of the Constitution compelled the Supreme Court to narrow down the scope for play of the two Regulations. Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance was made, it could not be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen had penumbral zones and that the right to privacy was itself a fundamental right, that fundamental right should be subject to restriction on the basis of compelling public interest. As Regulation 856 had the force of law, it could not be said that the fundamental right of the petitioner under Article 21 had been violated by the provisions contained in it, as the procedure for deprivation of liberty was reasonable. The question would then arise whether Regulation 856 was a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19(5); or, even if it be assumed that Article 19(5) did not apply in terms, as the right to privacy of movement could not be absolute, a law imposing reasonable restriction upon it for compelling interest of State should be upheld as valid. When there were two interpretations, one wide and unconstitutional and the other narrower but within constitutional bounds, the Supreme Court would read down the overflowing expressions to make them valid. So read, the two Regulations were more restricted than the Counsel for the petitioner sought to contend. Regulation 855 empowered surveillance only of persons against whom reasonable materials existed to induce the opinion that they showed a determination to lead a life of crime involving public peace or security only and if they were dangerous security risks. Mere convictions in criminal cases where nothing gravely imperilling safety of society was involved could not be regarded as warranting surveillance under that Regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer. In truth, legality apart, those Regulations ill-accorded with the essence of personal freedoms and the State would do well to revise those old Police Regulations verging perilously near unconstitutionality. With those observations, the writ petition was dismissed. *Govind* v. *State of M.P.*, AIR 1975 SC 1378 : (1975) 2 SCC 148 : 1975 SCC (Cri) 468 : 1975 CrLJ 1111.

[9379] ● ***Law prescribing procedure for trial of offence by Court Martial.***—Section 21 of the Army Act merely confers an additional power to modify rights conferred by Article 19(1)(a) and (c) by Rules and such rules may set out the limits of restriction. Therefore the law prescribing procedure for trial of offences by Court Martials need not satisfy the requirement of Article 21 because to the extent the procedure is prescribed by law and if it stands in derogation of Article 21, to that extent Article 21 in its application to the Armed Forces is modified by an enactment of the procedure in the Army Act itself. Article 33 confers power on the Parliament to determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of duties and maintenance of discipline amongst them. *Prithipal Singh* v. *Union of India*, AIR 1982 SC 1413 : (1982) 3 SCC 140 : 1982 UJ (SC) 695 : (1982) 2 Sev LJ 582.

[9380] ● ***Delay in forwarding representation.***—Jail Superintendent took seven days time in forwarding representation by the detenu entailing delay of eleven days in its disposal by the Government. For delay its disposal detention is illegal and violative of Article 20(5) or Constitution of India. *Aslam Ahmed* v. *Union of India*, AIR 1989 SC 1403 : (1989) 3 SCC 277.

[9381] ● ***Freedom of speech—Role of electronics and media.***—See *S. Khushboo* v. *Kanmamal*, AIR 2010 SC 3196 : 2010 CrLJ 2828.

8. ARTICLE 20

[9382] ● ***Fundamental right guaranteed under Article 20(2) Constitution enunciates principle of double jeopardy.***—The fundamental right guaranteed under Article 20(2) enunciates the principle of "*autre fois convict*" or "double jeopardy" which means that no person can be punished twice for the same cause and that once a person has been convicted of an offence by a competent Court, such conviction shall operate as a bar to a subsequent criminal proceeding for the same offence or on the same facts for any other offence.

The test for the application of this principle is whether the former offence and the offence subsequently charged have the same ingredients, that is, whether the facts which constituted the first offence were sufficient to justify a conviction for the second offence. The test is *not* whether the State relies at the subsequent trial on the same facts on which it relied at the previous one.

The word "offence" in Article 20(2) has not been defined in the Constitution, but is has been defined in Section 3(38) of the General Clauses Act. Article 367 provides that the General Clauses Act applies for the interpretation of the Constitution. Therefore, the word "offence" in Article 20(2) must be taken to mean "any act or omission made punishable by any law" as defined in Section 3(38) of the General Clauses Act.

The words "before a Court of law or a judicial tribunal" are not found in Article 20(2). But the various expressions used in Article 20 such as "convicted", "commission of offence", "penalty", "prosecuted and punished", etc., indicate that this Article contemplates criminal proceedings before a Court of law or a judicial tribunal and further contemplates that there was a judicial decision in the previous proceeding under which punishment was awarded for the commission of an offence.

Article 20(2) can, therefore, be invoked only when all the following conditions are satisfied :—

1. that there has been a *previous* proceeding before a Court of law or a judicial tribunal;
2. that the previous proceeding was of a criminal nature and in respect of the commission of an "*offence*", that is, act or omission which is punishable under any law;
3. that there was a *judicial decision* in the previous proceeding;
4. that under the decision a "*punishment*" was awarded; and
5. that the offence of which the offender is now being tried is the same offence or has the same ingredients as the previous offence, or is based on the same facts which constituted the previous offence.

In short, Article 20(2) can be invoked only when there has been a previous prosecution for an offence before a Court or judicial tribunal which has resulted in a punishment, and not otherwise. *Maqbool Hussain* v. *State of Bombay*, AIR 1953 SC 325 : 1953 CrLJ 1432 : 1953 SCA 641 : 1953 SCJ 456 : 1953 SCR 730.

[9383] ● ***Custom Authority administrative body.***—A Customs Authority is merely an administrative body with administrative powers and was not a judicial tribunal, and the proceeding before him is not in the nature of a judicial proceeding.

The order of confiscation is only in the nature of a proceeding *in rem*, and not in the nature of a proceeding *in personam*.

The proceedings taken by the Revenue Authorities not being a "prosecution for an offence" and the order of confiscation not being "punishment" of the offender, within the meaning of Article 20(2), they cannot operate as a bar to subsequent prosecution of the offender for an offence under the Foreign Exchange Regulation Act. *Maqbool Hussain* v. *State of Bombay*, AIR 1953 SC 325 : 1953 CrLJ 1432 : 1953 SCA 641 : 1953 SCJ 456.

[9384] ● ***Action of Jail superintendent.***—Another case decided under the same judgment related to a riot which had broken out among detenu prisoners in a jail in course of which some jail officials were assaulted.

The rioting detenus having gone after the incident on a hunger strike, the jail superintendent, acting under his powers under the Rules framed under Section 4(*a*) of the Preventive Detention Act, 1950, passed orders under which the hunger-strikers were placed under solitary confinement and their correspondence and interviews with outsiders were stopped. Thereafter, a complaint was filed in the Court of a Magistrate for prosecution of the rioting detenus for offences under the Penal Code.

Inasmuch as the action taken under the jail rules was only for breach of jail discipline and was not a judicial order made in a judicial proceeding, it could not be said to be prosecution and punishment within the meaning of Article 20(2), and could not operate as a bar to the prosecution of the offenders for offences under the Penal Code. *Maqbool Hussain* v. *State of Bombay*, AIR 1953 SC 325 : 1953 CrLJ 1432 : 1953 SCA 641 : 1953 SCJ 456 : 1953 SCR 730.

[9385] ● ***Article 20(1) prohibits imposition of penalty greater than imposed under law in force.***—Article 20(1) on its true construction prohibits the imposition of a penalty which is greater than that which could have been imposed under the law in force at the time when the act for which the penalty is imposed was done.

If the law in force at the time when an offence was committed imposed a particular punishment therefor, and thereafter another law comes into force which provides a higher punishment, then upon conviction, the Court is bound, so far as award of punishment is concerned, by the old law, and cannot impose a punishment higher than the punishment provided under it. *Kedar Nath Bajoria* v. *State of West Bengal*, AIR 1953 SC 404 : 1953 CrLJ 1621 : 1953 SCA 835 : 1953 SCJ 580 : 1954 SCR 30.

[9386] ● *Article 20(2)—Prosecuted—Meaning of.*—Article 20(2) can have no application if there has been no punishment for an offence as a result of a prosecution, and further it can apply only when there has been a *previous* prosecution for the same offence.

An appeal against an acquittal is only a continuation of the *same* proceeding and therefore if in an appeal against an order of acquittal the High Court sets aside the acquittal and after convicting the accused passes a sentence upon him, the accused cannot invoke Article 20(2) against his conviction and sentence. *Kalawati* v. *State of H.P.*, AIR 1953 SC 131 : 1953 CrLJ 668 : 1953 SCA 660 : 1953 SCJ 144 : 1953 SCR 546 : 1953 MWN 219 : 1953 AWR (Sup) 52.

[9387] ● *Article 20(1) prohibits all convictions under ex post facto laws.*—Article 20(1) provides that a person shall not be convicted for the commission of an act charged as an offence unless at the date of the commission of that act there is in force a law which makes such commission an offence. This Article has been enacted to prohibit convictions under *ex post facto* laws which create offences retrospectively and punish acts which were not unlawful when done. Such punishment is repugnant to civilised notions of criminal jurisprudence and is opposed to the principles of natural justice.

In *Keshavan Madhava Menon's* case, AIR 1951 SC 128, the Court held that Article 13(1) has no retrospective operation and what that decision did was only to declare that an existing law is void *after* 26th January, 1950, so far as it is inconsistent with a fundamental right. On the basis of this decision it was contended for the State that conviction under an *ex post facto* law for an act done before that law came into force was not affected by Article 20(1) if that law had come into force before 26th January, 1950. This contention cannot be accepted. What Article 20(1) prohibits is *conviction* under an *ex post facto* law. The prohibition under it is not concerned with the validity of the law but only with the conviction under it, and there is no question here of giving a retrospective effect to a fundamental right. In other words, Article 20(1) bars the operation of an *ex post facto* law after 26th January, 1950, even though such operation may relate to an act done before that date. Therefore, the principle in *Menon's* case that a fundamental right has no retrospective operation cannot come in the way of giving its full effect to Article 20(1).

Article 20(1) prohibits all convictions after 26th January, 1950, under *ex post facto* laws, and applies equally whether act which is sought to be punished was done before or after 26th January, 1950. *Rao Shiv Bahadur Singh* v. *State of V.P.*, AIR 1953 SC 394 : 1953 CrLJ 1480 : 1953 SCA 803 : 1953 SCJ 563 : 1953 SCR 1188.

[9388] ● *"Law in force"—Meaning of.*—If an Act says that "this Act shall be deemed to have come into force" on a date before its passing and thus seeks to bring within its own ambit and penalise acts done before it came into existence, it could not be contended on the strength of such legal fiction that the Act was "in force" within the meaning of Article 20(1) on a date earlier to the date of its passing.

The words "a law in force" as used in Article 20(1) must be understood in their natural sense as meaning a law in fact in existence and operation at the date of the commission of the act in question, and not a law which was not in existence at that date, but which is "deemed" to have become operative at that date by virtue of the power of the legislature to pass retrospective laws. Otherwise, if the opposite construction were accepted, the whole purpose of Article 20(1) would be defeated in its application to *ex post facto* laws. *Rao Shiv Bahadur Singh* v. *State of V.P.*, AIR 1953 SC 394 : 1953 CrLJ 1480 : 1953 SCA 803 : 1953 SCJ 563 : 1953 SCR 1188.

[9389] ● *Article 20(1) condemns conviction under ex post facto law.*—It must be remembered that what Article 20(1) condemns is only *conviction* under an *ex post facto* law which seeks to punish retrospectively what was not unlawful when done. That Article does not affect the powers of a State to pass a law under which a particular procedural statute which was not applicable to that State till then, is made applicable to the areas within that State as from a mentioned earlier date. In other words, the power of the State to make laws retrospectively applicable is not taken away or affected by Article 20(1) except in so far as convictions under that law are concerned.

An accused person has *no* fundamental right to be tried by a particular procedure or by a particular tribunal or Court, and even if under a law existing at the time when the offence was committed the trial had to be held under a particular procedure or by a certain Court, it is open to the State to pass subsequently a law having retrospective operation under which the trial for that offence could be held under a different procedure or by a different Court, provided such a law does not offend against any constitutional right of the accused under Part III of the Constitution, such as the right against discrimination. *Rao Shiv Bahadur Singh* v. *State of V.P.*, AIR 1953 SC 394 : 1953 CrLJ 1480 : 1953 SCA 803 : 1953 SCJ 563 : 1953 SCR 1188.

[9390] ● ***Sections 3 and 4 of Penal Code and Section 188, CrPC—Enforcement of in Vindhya Pradesh.***—The accused in the present case were charged under Sections 120-B, 161 and 466, Penal Code, as adapted by Vindhya Pradesh Ordinance No. 48 of 1949. This Ordinance was passed in September 1949 whereas the offences themselves were alleged to have been committed in February, March and April 1949. The appeal Court convicted the accused of these offences in March 1951 when Article 20(1) was in force. The contention was that this order of conviction was unconstitutional as being an infringement of Article 20(1), in that it was not for an offence under a law which was in force at the time of the commission of the act charged as an offence and was in respect of an act which was made an offence by an *ex post facto* law.

The question, therefore, was whether the acts for which the accused were convicted had become offences only by virtue of Ordinance 48 of 1949 or whether those acts had already been made offences at the time of their commission under the law then existing. If these acts had become offences only by virtue of Ordinance 48 of 1949, Article 20(1) would apply and the convictions would have to be set aside; if on the other hand there was a law in existence at the time when those acts were done which made those acts offences, Article 20(1) would not apply. This leads to an examination of the state of relevant prevailing law at the period February to April 1949.

The Ruler of Rewa had passed orders in the years 1921 and 1922 by virtue of which the Penal Code and the Criminal Procedure Code, with some adaptations, were in force in Rewa State since that time. After the lapse of British sovereignty, by virtue of the Indian Independence Act, 1947, all the pre-existing native states in the area now covered by the State of Vindhya Pradesh executed a Covenant for the establishment of a United State of Vindhya Pradesh and the Ruler of Rewa became the first Rajpramukh. At the relevant period in February to April 1949 it was the Government of Vindhya Pradesh which was functioning in the area under the authority of the Rajpramukh.

It is a well accepted principle of law that on a change of sovereignty over the component units of a newly created merged area, the pre-existing laws of the various units would continue to be in force until duly replaced.

On the application of this principle, the old Rewa Laws continued to be in force in Rewa even after the sovereignty over the area passed to the Dominion of India in 1948. In 1948 and 1949, the Rajpramukh issued Ordinances No. 4 of 1948 and No. 20 of 1949 whereunder all enactments in force in Rewa State were extended so as to become applicable to the whole of Vindhya Pradesh. These two Ordinances had the effect of extending to the entire State of Vindhya Pradesh the criminal law which was in force previously in Rewa State, which included the Penal Code and the Criminal Procedure Code with due adaptation to local conditions.

For the above reasons we hold that at the relevant period in February to April 1949 the criminal law in force in Vindhya Pradesh, and particularly in the Rewa State portion of it, was the Indian Penal Code and the Criminal Procedure Code with necessary local adaptations.

The question remains whether Sections 3 and 4 of the Penal Code and Section 188 of the Criminal Procedure Code, which are extra-territorial in operation, were also the Rewa State law during the relevant period. The point assumes importance because the charges against accused R, of which he was convicted, were in respect of acts done in Delhi. A study of the laws prevailing during the British rule shows that Rulers of Native States had the power prior to 1947, to pass extra-territorial laws relating to offences committed by their own subjects outside the territories of their own States and that the criminal Courts of these States had the power to try such offences, except when the contrary could be made out by positive evidence in the case of an individual State. No such evidence has been led in the case of Rewa State. Therefore, it must be held that Sections 3 and 4 of the Penal Code and Section 188 of the Criminal Procedure Code were validly in force in Vindhya Pradesh at the relevant period.

(i) The criminal law relating to the offences of which the accused was convicted was substantially the same as that which obtained at the time when the acts which were charged as offences were actually done. This was so both in respect of offences committed within the State of Vindhya Pradesh and of offences committed outside the State by subjects of the State.

(ii) The trial of the accused under Vindhya Pradesh Ordinance No. 5 of 1949 was not in violation of Article 14. (For this point, see this case under the Heading "Vindhya Pradesh Criminal Law Amendment (Special Courts) Ordinance No. V of 1949" under Local Acts in the concerned Volume.)

(iii) The conviction of the accused under the Penal Code sections as adapted in Vindhya Pradesh by Ordinance No. 48 of 1949 was not in violation of Article 20(1). *Rao Shiv Bahadur Singh* v. *State of V.P.*, AIR 1953 SC 394 : 1953 CrLJ 1480 : 1953 SCA 803.

[9391] ● ***Article 20(3)—Applicability of.***—Article 20(3) does not apply to a confession at all. It only says that no one shall be *compelled* to be a witness against himself. An accused person is not bound to make a confession, and a confession can be used as evidence only when it is voluntary and without any inducement, threat or promise. Therefore a "compelled" confession could never be used against the accused. That being the position, the question of the application of Article 20(3) to a confession can never arise.

As to a retracted confession, the principles remain the same. It is true that a retracted confession has little probative value, and none against a co-accused. But that is a matter of law, and has nothing to do with repugnancy to the Constitution. *Kalawati* v. *State of H.P.*, AIR 1953 SC 131 : 1953 CrLJ 668 : 1953 SCA 660 : 1953 SCJ 144 : 1953 SCR 546 : 1953 SCWN 219 : 1953 AWR (Sup) 52.

[9392] ● ***Article 20(3)—Protection against compulsion to be a witness.***—Article 20(3) and Sections 94 and 96 (now Sections 91 and 93) CrPC.

Article 20(3) gives protection to an *accused* person against being compelled to "be" a witness against himself, that is, against every form of "testimonial compulsion".

It follows that a notice or order issued on an accused person under Section 94, CrPC to produce any document or thing which is usable as evidence against him is bad in law as being in conflict with Article 20(3). Article 20(3) cannot, however, protect an accused against search and seizure of property under Section 96 of the Code, since a warrant for search is an order to the executive officers of the State, and not to an accused person. *Sharma M.P.* v. *Satish Chandra, D.M., Delhi*, AIR 1954 SC 300 : 1954 CrLJ 865 : 1954 SCA 449 : 1954 SCJ 428 : 1954 SCR 1077 : 1954 (1) MLJ 680 : 1954 MWN 566 : 56 PunLR 366.

[9393] ● ***Principle of "autre fois acquit" and "autre fois convict"—Meaning of.***—The principle of "*autre fois acquit*" and "*autre fois convict*" of the English common law means that if a man is acquitted or convicted of an offence in a criminal proceeding, he can plead his previous acquittal or convictions as a complete defence in a subsequent trial for the same offence.

The same principle finds place also in the American Constitution, the fifth Amendment, where it is provided that "a man shall not be subjected for the same offence to be put twice in jeopardy of life or limb." This is called the doctrine of "double jeopardy".

This principle has been adopted in Indian law by Section 26 of the General Clauses Act and Section 403 of the Criminal Procedure Code.

Article 20(2) is narrower in scope and ambit and the contents of the guarantee contained in Article 20(2) are not as wide as those of the English common law rule or of the American doctrine of double jeopardy. Article 20(2) does not contain the principle of "*autre fois acquit*" at all, and has left it to be regulated by the general law of the land, under Section 403, CrPC. and Section 26, General Clauses Act. *Venkataraman, S.A.* v. *Union of India*, AIR 1954 SC 375 : 1954 CrLJ 993 : 1954 SCA 466 : 1954 SCJ 461 : 1954 SCR 1150 : (1954) 1 MLJ 702 : 1954 MWN 475 : 1954 AWR (Sup) 54.

[9394] ● ***Article 20(2)—Conditions for invocation of.***—Article 20(2) can be invoked only when all the following conditions are satisfied namely,—

(a) that there was a previous proceeding before a Court of law or before a judicial tribunal,

(b) that the previous proceeding was a criminal proceeding,

(c) that it has resulted in conviction and sentence for an offence, and

(d) that the subsequent proceeding is in respect of the same offence, or on the same facts though for some other offence.

A tribunal which is only a departmental or administrative tribunal has no authority to give a judicial decision which is enforceable against a person, and a proceeding before such a tribunal cannot attract the application of Article 20(2). The fact that such a tribunal is one which has been set up by statute is entirely immaterial for this purpose. The two essential tests of a judicial decision are finality and authoritativeness.

The words used in Article 20(2) are "prosecuted *and* punished". These words are not to be taken distributively so as to mean prosecuted *or* punished. Before the application of Article 20(2) can be invoked it must be shown that there was a previous prosecution which has resulted in conviction and sentence.

The word "offence" in Article 20(2) has to be taken in the sense in which it is defined in Section 3(38) of the General Clauses Act as meaning any act or omission made punishable by any law. It follows that in order to attract the operation of Article 20(2) the previous proceeding must be in reference to a law which creates an offence and provides the punishment for that offence. If the previous proceeding was under a law which does not create any offence, and if the penalties imposed by that law are not in respect of an offence, then, such proceeding and penalty cannot be a ground for invoking Article 20(2) against a subsequent proceeding under another law for the punishment of an offence. *Venkataraman, S.A.* v. *Union of India*, AIR 1954 SC 375 : 1954 CrLJ 993 : 1954 SCA 466 : 1954 SCJ 461 : 1954 SCR 1150.

[9395] ● ***Section 7—Influx from Pakistan (Control) Act if conflicts with Article 20(2).***—The impugned Act made an unlawful entry into India from Pakistan without a valid permit an offence punishable under the Act, and also authorised the Executive authorities to order the expulsion from India of any person found in Indian territory without a valid permit.

The impugned provisions of the Act cannot be challenged as constituting an infringement of Article 20(2) because in such a provision there is no question of prosecution and punishment for the same offence more than once, and therefore the question of "double jeopardy" does not at all arise. *Ebrahim Vazir Mavat* v. *State of Bombay*, AIR 1954 SC 229 : 1954 CrLJ 712 : 1955 SCA 563 : 1954 SCR 933 : 56 BomLR 768.

[9396] ● ***Conduct of public servant—Fact finding inquiry.***—The purpose of an inquiry under Act 37 of 1850 is to enable the Government to come to a conclusion regarding the conduct of a public servant. The inquiry is only a fact-finding inquiry. The Commissioner who makes the inquiry does not arrive at any judicial decision and has merely to make a report to the Government. It follows that such an inquiry and report are not "prosecution" and "punishment" within the meaning of Article 20(2), and if the public servant concerned is subsequently prosecuted, he cannot claim the protection of Article 20(2). *Ebrahim Vazir Mavat* v. *State of Bombay*, AIR 1954 SC 229 : 1954 CrLJ 712 : 1954 SCR 933.

[9397] ● ***Transportation of rationed goods without permit.***—In the present case the facts were that certain persons were caught by a police constable in the act of transporting rationed goods without permit across a river and the goods were seized. Thereafter when the party was proceeding through a jungle, those persons beat the constable and ran away with the seized goods. They were first prosecuted for an offence under Section 7 of the Essential Supplies (Temporary Powers) Act and were convicted but the conviction was set aside on appeal. Thereafter, they were again prosecuted for offences under Sections 332 and 392, Penal Code, and were convicted. The conviction is perfectly legal, and the case falls under Section 403(2) and not under Section 403 (1) of the Code, as the offences of causing hurt to a public servant and robbery are distinct and separate offences committed in course of the same transaction, and though a separate charge could have been framed for these offences at the previous trial under Section 235(1) of the Code, the State was not bound to do so in every case. *Kunjilal* v. *State of Madhya Pradesh*, AIR 1955 SC 280 : 1955 CrLJ 730 : 1955 SCJ 592 : 1955 SCR 872.

[9398] ● ***Two Sections to be treated as distinct when.***—When the Legislature provides that on the same facts proceedings can be taken under two different sections and the penalties provided in those sections are not the same, it is obviously intended to treat the two sections as distinct. There is no question in such a case of the application of Section 403 of the Criminal Code, and previous conviction under one section cannot operate as a bar to a subsequent prosecution under the other section.

When a previous conviction is on a charge for erecting a building without permission and the subsequent prosecution is on a charge relating to breach of Building Rules, it cannot be said that the accused is prosecuted twice over for the same default. *Corporation of Calcutta* v. *Mulchand Agarwalla*, AIR 1956 SC 110 : 1956 CrLJ 285 : 1956 SCA 96 : 1956 SCJ 128 : 1955 (2) SCR 995.

[9399] ● ***Acquittal of accused on certain charge—Verdict binding in all subsequent proceedings.***—The effect of an order of acquittal pronounced by a competent Court after a lawful trial is not completely stated merely by saying that the acquitted person cannot be tried again for the same charge of which he was so acquitted. The order of acquittal has a further effect, namely, that it is binding and conclusive in all subsequent proceedings in which the same question is in issue.

Thus if an accused is charged at a trial under Section 19(*f*) of the Arms Act for possessing a revolver without a licence, and he is acquitted on the ground that the prosecution has failed to establish his possession of the weapon, the fact of such possession cannot be proved against the accused in a subsequent trial for murder, and evidence against the accused on the charge of murder would have to be considered regardless of the evidence of a witness that the weapon was recovered from his possession. *Pritam Singh* v. *State of Punjab*, AIR 1956 SC 415 : 1956 CrLJ 805.

[9400] ● ***Appeal continuation of proceedings in trial Court.***—An appeal is only a continuation of the proceeding in the trial Court and not a subsequent proceeding and Article 20(2) and Section 403, CrPC (now Section 300) cannot apply to appeals.

The provisions of Article 20(2) and Section 403(1), CrPC. are attracted only when the previous acquittal or conviction has been for the same offence, or on the same facts for some other offence to which Sections 236 and 237 of the Code apply. Further, these provisions apply only when the acquittal or conviction was in a *previous proceeding*, and they cannot apply only when it was only at a previous stage of the same proceeding. The proceedings in the High Court in appeal are only a continuation of the proceedings in the trial Court. Once a proceeding has commenced in a trial Court, it is the same proceeding which continues until it is finally disposed of in appeal, and it could not be said for the purposes of Article 20(2) or Section 403(1) that the proceeding in appeal is a *subsequent* and different proceeding from that in the trial Court.

It follows that even though the trial Court has acquitted an accused of an offence, the High Court has the power in appeal to convict him of the same offence, or on the same facts of some other offence to which the provisions of Sections 236 and 237 of the Code apply. Article 20(2) and Section 403(1) of the Code cannot be invoked as a bar against such conviction.

Further, under Section 26 of the General Clauses Act, if an accused is charged on the same facts of two different offences falling under two different enactments, he may be convicted under either of them. Therefore, when an accused is charged alternatively under two different Acts and the trial Court convicts him under one of them and acquits him under the other, it is open to the High Court to convict him on the charge of which he was acquitted in the trial Court. *State of M.P.* v. *Veereshwar Rao Agnihotri*, AIR 1957 SC 592 : 1957 CrLJ 892 : 1958 SCA 249 : 1957 SCJ 519 : 1957 MPC 388 : 1957 BLJR 376 : (1957) 1 MLJ Cri) 482 : 1957 ALJ 567 : 1957 AWR (HC) 488 : 1957 MPLJ 649 : 1957 NagLJ 503.

[9401] ● ***Previous conviction or acquittal when for distinct and separate offence.***—Section 403(1) of the old Code and Article 20(2) do not apply when a previous conviction or acquittal has been for a distinct and separate offence, though one or more ingredients may be common. *State of Madhya Pradesh* v. *Veereshwar Rao Agnihotri*, AIR 1957 SC 592 : 1957 CrLJ 892 : 1958 SCA 249 : 1957 SCJ 519.

[9402] ● ***To bar second trial first trial be by Court of competent jurisdiction.***—The whole basis of Section 403(1) of the Code is that the first trial was held by a Court competent to hear and determine the case and to record an order of conviction or acquittal therein. If the Court before which the accused was previously tried was not so competent, by reason of the fact that sanction for the prosecution of the accused required under Section 6 of the Prevention of Corruption Act was not obtained, the whole trial is null and void. In such a case, it was entirely irrelevant whether the proceedings were quashed for want of such sanction by the trial Court itself, or whether the trial Court having convicted or acquitted the accused the order was set aside for the same reason by the Court of appeal. In either case, the order of conviction or acquittal having been made by a Court which had no jurisdiction to take cognisance of the case because of want of the requisite sanction, Section 403(1) of the Code would not apply, because in such a case it could not be said that there was any "conviction or acquittal in force" within the meaning of that section.

Further, Article 20(2) applies only when a person has been prosecuted and punished for the same offence at a previous trial. If the earlier proceeding is null and void by reason of want of competence, Article 20(2) cannot apply.

If a Court is not competent to take cognizance of an offence without a legal sanction, it is obvious that such Court cannot be said to be a Court of competent jurisdiction to try that offence in the absence of such sanction. Therefore, the absence of the requisite sanction makes the trial null and void.

Article 20(1) and Section 403(1) of the Code (old Code) have no application to a case in which Magistrate has taken cognizance of an offence under Section 161, Penal Code or Section 5, Prevention of Corruption Act, without the legal sanction required by Section 6 of the Act, and a conviction or acquittal in such a trial is no bar to a subsequent trial for the same offence after obtaining the required sanction. *Baij Nath Prasad Tripathi* v. *State of Bhopal*, AIR 1957 SC 494 : 1957 CrLJ 597 : 1957 SCA 459 : 1957 SCJ 405 : 1957 SCR 650 : 1957 MPC 390 : 1957 BLJR 479 : 1957 ALJ 569.

[9403] ● ***Order of confiscation and penalties by Custom Authority under Section 167(8) of Sea Customs Act judicial.***—An order of confiscation and penalties made by a Customs Authority under Section 167(8) of the Sea Customs Act is a judicial and not an executive or administrative order, but the proceedings before the Customs Officer are not in the nature of a "prosecution" for a criminal offence and the order made under Section 167(8) of the Act is not in the nature of a "punishment" within the meaning of Article 20(2).

Therefore, a previous order of confiscation and penalty made by a Customs Officer in the exercise of his powers under Section 167(8) of the Sea Customs Act does not operate as a bar to a subsequent prosecution under Section 120-B, Penal Code, read with Section 23 of the Foreign Exchange Regulation Act, 1947. Section 403 of the Code and Article 20(2) do not apply because such an order is not conviction or punishment "for the same offence" within the meaning of those provisions. *Leo Roy Frey* v. *Supdt, District Jail, Amritsar*, AIR 1958 SC 119 : 1958 CrLJ 260 : 1958 SCA 240 : 1958 SCR 822 : 1958 SCJ 301 : 1958 MLJ (Cri) 289.

[9404] ● ***Article 20(2) protects man from "double jeopardy" for same offence.***—Article 20(2) protects a man from "double jeopardy" for the same offence by declaring that "no person shall be prosecuted and punished for the same offence more than once". In order to bring a case within the prohibition of Article 20(2) three essential conditions must be fulfilled, namely:

(a) that there must be a previous "prosecution" for an "offence";

(b) that such prosecution must result in "punishment"; and

(c) that the prosecution and punishment must be for the "same" offence for which the accused is subsequently tried.

If any of these three essential conditions is not fulfilled, that is, if it is not established that the petitioner had been prosecuted for an offence, or that the prosecution resulted in conviction and sentence, or that such conviction was for the same offence, the case fails to fall within the purview of Article 20(2). The prohibition against double jeopardy becomes operative only when all these three elements are shown to exist, and not till then.

The language employed in various provisions of the Sea Customs Act makes it clear that the Act does not envisage the Customs Authorities to function as a Court. Expressions like "offences" and "penalties" have been used in the Act in their generic sense, and not in their specific sense as acts punishable under any penal law, and the power vested in Customs Authorities to order confiscation or to impose penalty in respect of an offending article, is distinct from a sentence of imprisonment or fine imposed by a Criminal Court. Whenever criminal prosecution and punishment of the offender in the sense of the penal law is contemplated in the Act, it makes a specific reference to a trial by a Magistrate, to a conviction by such a Magistrate, and to imprisonment or fine upon such conviction.

Thus, though in Section 167 the generic expression "offences" is used at the head of column 1 and the expression "penalties" is used at the head of column 3, that does not make all the acts mentioned in Section 167 penal offences. Whenever in that section a criminal prosecution is intended under any Item, trial by a Magistrate is specifically mentioned in the third column (see Item 72, 74, 75, 76, 76A, 76B, 77, 78 and 81) and such reference does not find place in the other Items, where obviously no criminal prosecution is contemplated.

Reference to Items 76-A and 76-C places the intention of the Legislature beyond any doubt. Both Items were introduced in Section 167 by amending Acts which were enacted after the Constitution came into force. While Item 76-A specifically mentions conviction and sentence by a Magistrate, such a mention is absent in Item 76-C. The Legislature must, therefore, be presumed to have been aware of the distinction it was making between a proceeding by a revenue authority and a criminal trial before a Magistrate with a view to the punishment of the offender for an offence.

In view, therefore, of the language employed in the Act, it cannot be contended that the imposition of a penalty by a revenue officer in the exercise of his powers under the Act is the same thing as a punishment imposed by a Criminal Court for an offence under the Act.

Merely because an administrative tribunal has to act under a statute under a judicial procedure in the sense of taking and considering evidence and hearing arguments, that does not make it a Court or a judicial tribunal. The fact that this distinction was clearly in the mind of the Court is shown by the fact that in that very case the Court pointed out the distinction between the nature of the proceedings against offending *articles* and of proceedings against offending *persons,* holding the former to be proceedings *in rem* and the latter to be proceedings *in personem*. (See this case under Article 32.)

The Act, no doubt, draws a distinction between confiscation of goods and imposition of penalties on the person committing an infringement of the law in respect of those goods, but having made that distinction the Act goes further and makes another distinction between penalties which can be imposed by the revenue officers themselves and those for which a prosecution in a Criminal Court is essential for the punishment of the offender. In determining the question whether a particular statutory provision contemplates "prosecution" and "punishment" within the meaning of Article 20(2), the nomenclature used in that statute is not of much matter, and what really matters is the substance of the provision under examination. *Thomas Dona* v. *State of Punjab*, AIR 1959 SC 375 : 1959 CrLJ 392 : 1959 SCJ 699 : 1959 MLJ (Cri) 474.

[9405] ● *Proceedings before Customs Officer under Section 167(8) of Sea Customs Act not prosecution.*—Two foreigners *D* and *F* arrived in India from France bringing with them a car having a secret chamber above the petrol tank. From Delhi they arrived at the frontier outpost of Attari Road on the highway going into Pakistan, and were given Declaration Forms. They filled them in without disclosing that they were carrying any currency which required permission for export from India. The Customs Officers at the outpost searched the car and from the secret chamber recovered Indian currency notes of the value of rupees three and a half lakhs. Thereafter, after giving show cause notices to both of them, the Collector of Customs held an inquiry under the Sea Customs Act and then made an order of confiscation of the currency seized and of personal penalty against each of rupees two and a half lakhs, in the exercise of his powers under Section 167(8) of the Act. Thereafter, he filed a complaint before a District Magistrate against both under Section 23 read with Section 8 of the Foreign Exchange Regulation Act, 1947, and under Section 167(8) of the Sea Customs Act. Both the accused were convicted as charged. They appealed to the High Court and when that appeal failed, to the Supreme Court, under Article 136. They also moved the Supreme Court under Article 32 praying for Writs of *Habeas Corpus* against their detention. These Writ Petitions also invoked Article 20(2) but were dismissed. In the present appeal also the same question was raised and the main point for determination was whether on the above facts there had occurred any infringement of the constitutional protection guaranteed under Article 20(2).

Following the decision of the Court in *Maqbool Hussein* v. *State of Bombay*, AIR 1953 SC 325, and for the reasons set out above it must be held that the proceedings before the Customs Officer under Section 167(8) of the Sea Customs Act were not "prosecution" and the order of the Collector directing confiscation of the currency seized and a penalty on the offenders was not a punishment within the meaning of Article 20(2) and the protection of that Article could not be available to them. It followed that their prosecution and punishment by a Criminal Court for the aforesaid offences did not suffer from any constitutional invalidity. *Thomas Dona* v. *State of Punjab*, AIR 1959 SC 375 : 1959 CrLJ 392 : 1959 SCJ 699 : 1959 MLJ (Cri) 474.

[9406] ● *Accused if once tried and acquitted of offence by Court of competent jurisdiction order of acquittal remains binding and operative unless set aside by superior Court in appeal.*—If an accused person has once been tried and acquitted of an offence by a Court of competent jurisdiction, the order of acquittal remains binding and operative unless it has been set aside by a superior Court in appeal or revision. In such a case, if that person is prosecuted again for the same offence or for another offence constituted by the same facts, he has the right to plead the bar of Section 403 against such prosecution. An acquittal has the effect only of an order of discharge in one circumstance alone, namely, when the Court which made the order is found to have acted without jurisdiction.

(i) Except when a procedural statute expressly so requires, it is not imperative upon a party to a proceeding to appeal against every order made against him, under the penalty that if he does not do so he will forfeit for ever the benefit of consideration by the Supreme Court. Nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule imposing upon a party the necessity of appealing against every order which aggrieves him. For the application of this principle it can make no difference whether the intermediate order complained of is passed by the trial Court and has not been taken to the High Court in revision, or whether it is the order of the High Court made in revision or appeal whereunder the order of the trial Court is confirmed. This principle was accepted by the Privy Council in civil cases, and there is no reason why it should not apply equally to matters of a criminal nature.

(ii) It cannot be contended that if an order of the High Court has not been appealed against, the order becomes final, whether it is right or wrong, and has the effect of debarring the person aggrieved thereby from the benefit of obtaining a review by the Supreme Court even though it is found to be erroneous.

(iii) In a proper case, the Supreme Court has the power, when deciding an appeal to review an order made by the High Court at an intermediate stage of the same proceeding and to set it aside if it finds it erroneous, even though it has not been appealed against.

(iv) As held in *Kedar Nath Bajoria's* case, Act 21 of 1949 was not *ultra vires* and hence the order of acquittal made by the Special Judge at Alipore in favour of accused G was an order made by a Court of competent jurisdiction the benefit of which under Section 403 could not be denied to him. The order was binding and conclusive unless set aside in appeal, and since it was never set aside, it operated as a bar against a second trial of the accused for the same offence or for any other offence constituted by the same facts.

(v) If an order of acquittal is passed by a Court of competent jurisdiction, it is binding and conclusive in all subsequent proceedings against the same accused, unless when it is lawfully set aside in appeal, whether the order is right or wrong. The acquittal has the effect of a discharge only when the order is not of a Court of competent jurisdiction.

(vi) The order of CHUNDER, J. made at an intermediate stage of the subsequent proceeding against the same accused for the same offence having been found to be erroneous, it could not operate as a bar or impediment against the accused in pleading the benefit of Section 403, and the High Court had erred in its view that since that order had not been appealed against it held ground whether it was right or wrong and precluded the accused from contending that his acquittal was by a competent Court notwithstanding the subsequent decision of the Supreme Court in *Bajoria's* case which showed that the view expressed by CHUNDER, J. was clearly erroneous.

(vii) The result was that the Supreme Court was not precluded from rectifying the error or defect in the two orders of the High Court and from giving effect to the plea under Section 403, CrPC which had been rightly set up by the accused, namely, that another trial for the same offence would deny him the protection against double jeopardy given under Section 403, CrPC. *Ghose, N.R.* v. *State of West Bengal*, AIR 1960 SC 239 : 1960 CrLJ 289 : 1960 SCJ 532 : (1960) 2 SCR 58 : 1960 MLJ (Cri) 428 : 1960 AWR (HC) 265 : 1960 ACrR 185.

[9407] ● ***Section 420, IPC providing for unlimited fine—Section 10 of ordinance fixing minimum fine—Ordinance not in contravention of Article 20(1).***—What the second part of Article 20(1) prohibits is the imposition upon conviction of an offence of a penalty which is greater than that which could be inflicted under the law which is in force at the time when such offence was committed. Thus when a trial is held under a law which has come into force after the date when an offence was committed, what the Court has to consider under Article 20(1) is whether the penalty imposed under that law is heavier than the penalty which could have been imposed under the old law. There is no infringement of Article 20(1) if the penalty imposed is not greater than the one which was permissible under the old law.

If the old law which was in force at the time when the offence was committed does not place any limit on the extent of fine which could be awarded upon conviction, a provision in a new subsequent law relating to the same offence which lays down that upon conviction of that offence a specified minimum sentence of fine shall be awarded does not contravene Article 20(1). Such minimum sentence cannot be said to be a "greater penalty" within the meaning of Article 20(1) because the old law is silent as to the extent of the penalty which could be awarded upon conviction.

Reference to Section 63 of the Penal Code can be of no avail to the accused in this connection. That section only says that even when a law does not mention the limit to which fine for an offence may extend, such fine shall not be excessive. Whether a fine imposed in a particular case is excessive is a question of fact to be determined in each case and that question depends upon various considerations such as the gravity of the offence, extenuating circumstances, the means of the accused, etc. But that question is quite apart from the question whether there has occurred a contravention of Article 20(1) and is entirely irrelevant in considering the application of that Article.

In the present case the accused was convicted under Section 420 of the Penal Code. The trial was held by a Special Tribunal established under Ordinance No. 29 of 1943 as amended by Ordinance No. 12 of 1945, promulgated for the trial of offences of bribery, cheating and criminal breach of trust by public servants, a large number of which had come to the notice of the Government at that period.

Section 10 of the Ordinance provided that upon conviction the Tribunal shall impose a fine which shall not be less in amount than the amount of money which the accused had obtained by means of the offence of which he was convicted. In compliance with that provision, the Tribunal awarded in addition to the sentence of imprisonment a sentence of fine to the extent of the amount which the accused was proved to have obtained by means of the offences he had committed. The question was whether there had occurred a contravention of Article 20(1).

Section 420 of the Penal Code has not placed any limit on the amount of fine which could be awarded for an offence under that section and hence the minimum sentence of fine awarded under the Ordinance could not be said to be greater than the sentence of fine which could have been awarded under the Penal Code. It could not be said that Section 10 of the Ordinance was in contravention of Article 20(1). *Satwant Singh* v. *State of Punjab*, AIR 1960 SC 266 : 1960 CrLJ 410 : 1960 SCJ 863 : (1960) 2 SCR 89 : 1960 MLJ (Cri) 603 : ILR (1960) Punj 504.

[9408] ● ***Guarantee in Article 20(3) against "testimonial compulsion".***—The scope and effect of Article 20(3) was considered by a Full Court in the case of *Sharma, M.P.* v. *Satish Chandra,* AIR 1954 SC 300, and the Court laid down the following propositions :

(1) The guarantee in Article 20(3) is against "testimonial compulsion". There is no reason to confine the context of this guarantee only to the oral evidence as a witness of a person standing his trial for an offence. The phrase used in Article 20(3) is "to be a witness", and not "to appear as a witness", and a person can "be" a witness not merely by giving oral evidence, but also by producing documents or things.

(2) "To be a witness" is nothing more or less than "to furnish evidence", whether such evidence is oral or documentary, and the protection of Article 20(3) extends against compulsion to give any form of evidence against himself.

(3) The protection of Article 20(3) to an accused person is not confined only to compelled testimony in the Court room itself, but is also available to the person accused of an offence at any earlier stage during the investigation preceding the trial.

These propositions correctly explain the meaning and scope of Article 20(3) and we do not find any good reason for departing from the view expressed in this decision.

The question which had arisen in the present case was whether calling upon a person accused of an offence to give his thumb impression or the impression of his palm and fingers, or to give a sample of his handwriting or signature amounts to compelling him "to be a witness" within the meaning of Article 20(3). This question was not before the Court in *Sharma's* case, but conflicting views on this question have been expressed by different High Courts, some being of the view that the decision in *Sharma's* case covers this question, and some being of the view that it does not.

"To be a witness" may be equated to 'to furnish evidence' in the sense of making oral or written statements, but not in the wider sense of giving impressions of thumb or fingers or palm or foot, or of giving specimens of writing or signature, or of exposing parts of the body for the purpose of identification. The intention behind Article 20(3) clearly is, to protect an accused person from the hazards of self-incrimination, and not to put obstacles in the way of effective investigation into crime or of bringing criminals to justice, and the aforesaid processes are clearly meant only for the purposes of effective investigation into crime.

It must be assumed that the makers of the Constitution were aware of the existing law on this subject, such as, Section 73 of the Evidence Act which empowers a Court to direct any person to write any words or to give finger impressions for the purpose of enabling the Court to make comparisons with his proved writing or finger impression, or Sections 5 and 6 of the Identification of Prisoners Act, 1920, which authorise a Magistrate to use all necessary means to secure impressions of fingers and foot prints or take photographs of any person for the purposes of investigation or any other proceeding under the Code of Criminal Procedure.

"Testimonial compulsion" means compelling a person to yield testimony against himself, either orally or in writing, by making statements about his personal knowledge in respect of relevant facts, either to a Court or to a person holding an enquiry or investigation. Such compulsion is forbidden under Article 20(3). In other words, Article 20(3) is directed against every form of self-incrimination by an accused person by conveying information based upon his personal knowledge, and the scope of the Article cannot be widened beyond that, and the giving of finger impressions or of specimens of writing or signature by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be witness'.

In one of the cases in the present appeals, a further question was raised, namely, whether Section 27 of the Evidence Act, which provides that any information given by an accused person in police custody is admissible evidence even though it may tend to incriminate himself, if it leads to the discovery of a relevant fact, contravenes the provisions of Article 20(3). In order to bring a statement within the inhibition of Article 20(3) it must be shown, not only that the person making the statement was an accused person at the time when he made it and that the statement was self-incriminatory, but also the statement was made under compulsion or duress. The mere asking by a police officer to an accused to do a certain thing is not compulsion within the meaning of Article 20(3), and the mere fact that the accused person was in police custody at the time when he made the statement in question, would not by itself mean that he was compelled to make the statement. It is only when it can be shown that at the relevant time the accused who was in police custody was subjected to treatment which could be considered to amount to compulsion that the statement made by him would fall within the ambit of Article 20(3). Therefore, whenever such compulsion is pleaded by the accused person against whom a statement made by him is sought to be proved under Section 27 of the Evidence Act, it will be a question of fact in each case to be determined by the Court on weighing all the facts and circumstances described in the evidence before it. *State of Bombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808 : 1961 (2) CrLJ 856 : 1961 (2) KerLR 378 (PER SINHA, C.J., AND IMAM, GAJENDRAGADKAR, SUBBA RAO, WANCHOO, RAGHUBIR DAYAL, RAJAGOPALA, AYYANGAR AND MUDHOLKAR, JJ.)

[9409] ● ***Double jeopardy—Rule as to.***—Article 20(2), Section 403 old CrPC. (now Section 300) and Section 26 of the General Clauses Act operate as a bar against prosecution and punishment twice for the same offence. The ban under these provisions against "double jeopardy" is confined only to cases where the accused is sought to be punished twice for the same offence. Where the offences are distinct and separate and their ingredients are different, the above provisions cannot be invoked and there is no bar against prosecution for one of such offence even after the accused has been tried and convicted of the other offence. *State of Bombay* v. *S.L. Apte*, AIR 1961 SC 578 : 1961 (1) CrLJ 725 : (1961) 2 SCA 446 : (1961) 1 SCJ 685 : 63 BomLR 491 : (1961) 1 KerLR 452 : (1961) 1 AnWR (SC) 210 : (1961) 31 Com Cas (Ins) 39 : (1961) 1MLJ (SC) 210 : 1961 MLJ (Cri) 331 : 1961 MPLJ 1108 : 1961 NagLJ 524.

[9410] ● ***Offence under Section 409, IPC and that under Section 105—Insurance Act not same.***—It will be seen that though some of the ingredients are common, Section 105 differs from Section 405, Penal Code, in two respects :

(1) entrustment of property or dominion over property which is an ingredient of Section 405 Penal Code, is not an ingredient of Section 105 of the Act and all that is required is that the director etc. "obtains possession" of the property;

(2) dishonest intention is essential to the commission of an offence under Section 405, and the act of appropriation or conversion or disposition of the property entrusted is not an offence unless it is done with a dishonest intention; but Section 105 of the Act postulates no intention and punishes as an offence the mere withholding of the property or its application to an unauthorised purpose, whatever be the intention with which the act is done.

(i) It must, therefore, be held that the offence of criminal breach of trust under Section 409 of the Penal Code and the offence under Section 105 of the Insurance Act are not the "same offence" within the meaning of Article 20(2), but are distinct offences. That being so, the rule of double jeopardy embodied in Article 20(2) of the Constitution is not applicable to a case in which a director of an insurance company having been previously convicted of the offence under Section 409, Penal Code, is again prosecuted on a charge under Section 105 of the Indian Insurance Act, while he is undergoing the sentence of imprisonment for the offence under Section 409 Penal Code. *State of Bombay* v. *S.L. Apte*, AIR 1961 SC 578 : 1961 (1) CrLJ 725 : (1961) 2 SCA 446 : (1961) 1 SCJ 685 : 63 BomLR 491 : 1961 MLJ (Cri) 331.

[9411] ● ***Compulsion—Meaning of.***—A confessional statement made by Dalmia before Shri Anandhanam, an investigator under Section 33(3) of the Insurance Act, is not inadmissible in view of clause (3) of Article 20 of the Constitution. It was not made by Dalmia at a time when he was accused of an offence, as is necessary for the application of that clause, in view of the decision of the Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808, where the contention that the statement need not be made by the accused person at a time when he fulfilled that character was not accepted. Dalmia was not in duress at the time he made that statement and therefore was not compelled to make it. It was said in the aforesaid case at p. 1816:

"Compulsion", in the context, must mean what in law is called 'duress'.........The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted.

The various circumstances preceding the making of the statement by Dalmia have all been considered and they fall far short of proving that Dalmia's mind had been so conditioned by some extraneous process as to render the making of that statement involuntary and therefore extorted. *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821 : 1962 (2) CrLJ 805 : (1962) 32 Com Cas 699.

[9412] ● ***Forfeiture of money or proceed by means of offence.***—Forfeiture of money or property procured by means of an offence is not penalty or punishment within the meaning of Article 20(1). Article 20(1) cannot be invoked against an order of forfeiture under Section 13(3) of the Criminal Law Amendment Ordinance 38 of 1944, which provides for forfeiture of money or property procured by means of an offence upon conviction, though the acts which resulted in conviction were done before the Ordinance came into force. *State of West Bengal* v. *S.K. Ghosh*, AIR 1963 SC 255 : 1963 (1) CrLJ 252 : 1963 SCD 236 : (1963) 2 SCR 111.

[9413] ● ***Test to ascertain whether two offences same not identity of allegations but identity of ingredient of offence.***—Two decisions of this Court have construed the provisions of Article 20(2) of the Constitution in the context of the expression "same offence". In *Leo Roy Frey* v. *Supdt., District Jail, Amritsar*, AIR 1958 SC 119, proceedings were taken against certain persons in the first instance before the Customs Authorities under Section 167(8) of the Sea Customs Act and heavy personal penalties were imposed on them. Thereafter, they were charged for an offence under Section 120B of the Indian Penal Code. This Court held that an offence under Section 120B is not the same offence as that under the Sea Customs Act. This Court again considered the scope of the words "same offence" in *State of Bombay* v. *S.L. Apte*, AIR 1961 SC 578. There the respondents were both convicted and sentenced by the Magistrate under Section 409 of the Indian Penal Code and Section 105 of the Insurance Act. Dealing with the argument that the allegations of fact were the same, RAJAGOPALA AYYANGAR, J., rejecting the contention, observed on behalf of the Court :

"To operate as a bar the second prosecution and the consequential punishment thereunder, must be for 'the same offence'. The crucial requirement therefore for attracting the Article is that the offences are the same, *i.e.* they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of fact in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out".

This decision lays down that the test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offences. *Bhagwan Swarup* v. *State of Maharashtra*, AIR 1965 SC 682 : 1965(1) CrLJ 608 : (1964) 2 SCJ 771 : (1964) 2 SCR 378.

[9414] ● ***Motive not ingredient of offences.***—In the instant case, applying the test laid down by this Court, the two conspiracies are not the same offence; the Jupiter conspiracy came to an end when the funds were misappropriated. The Empire conspiracy was hatched subsequently, though its object had an intimate connection with the Jupiter, in that the fraud of the Empire was conceived and executed to cover up the fraud of the Jupiter. The two conspiracies are distinct offences. It cannot even be said that some of the ingredients of both the conspiracies are the same. The facts constituting the Jupiter conspiracy are not the ingredients of the offence of the Empire conspiracy, but only afford a motive for the latter offence. Motive is not an ingredient of an offence. The proof of motive helps a Court in coming to a correct conclusion when there is no direct evidence. Where there is a direct evidence for implicating an accused in an offence, the absence of proof of motive is not material. The ingredients of both the offences are totally different and they do not form the same offence within the meaning of Article 20(2) of the Constitution and, therefore, that Article has no relevance to the present case. *Bhagwan Swarup* v. *State of Maharashtra*, AIR 1965 SC 682 : 1965(1) CrLJ 608 : (1964) 2 SCJ 771 : (1964) 2 SCR 378.

[9415] ● *Provisions of Section 403, CrPC based upon general principles of autre fois acquit.*— Provisions of Section 403 Criminal Procedure Code (now Section 300) are based upon general principles of *autre fois acquit* recognised by the English Courts. The principle on which the right to plead *autre fois acquit* depends, is that a man may not be put twice in jeopardy for the same offence. This principle has now been incorporated in Article 20 of the Constitution. The defence of *autre fois acquit*, however, has no application where the accused person is not liable lawfully to be convicted at the first trial because the Court had no jurisdiction. From the language used in Section 403(1) of the Code it is clear that what can be successfully pleaded as a bar to a subsequent trial for the same offence or for an offence based on the same facts is that the accused had been (*a*) tried by a Court (*b*) of competent jurisdiction and (*c*) acquitted of the offence alleged to have been committed by him or an offence with which he might have been charged under Section 236 or for which he might have been convicted under Section 237 of the Code. The competence of a Court, however, depends not merely on the circumstance that under some law it is entitled to try a case falling in the particular category in which the offence alleged against the accused falls. In addition to this, taking cognisance of the offence is also material in this regard. Under the Code of Criminal Procedure a Court can take cognizance of an offence only if the conditions requisite for initiation of proceedings before it as set out in Part B of Chapter XV are fulfilled. If they are not fulfilled, the Court does not obtain jurisdiction to try the offence.

Where a Court comes to such a conclusion, albeit erroneously, it is difficult to appreciate how that Court can absolve the person arraigned before it completely of the offence alleged against him. Where a person has done something which is made punishable by law he is liable to face a trial and this liability cannot come to an end merely because the Court before which he was placed for trial forms an opinion that it has no jurisdiction to try him and that it has no jurisdiction to take cognisance of the offence alleged against him. Where, therefore, a Court says, though erroneously, that it was not competent to take cognisance of the offence it has no power to acquit that person of the offence. An order of acquittal made by it is in fact a nullity.

As regards the second contention it is necessary to point out that a Criminal Court is precluded from determining the case before it in which a charge has been framed otherwise than by making an order of acquittal or conviction only where the charge was framed by a Court competent to frame it and by a Court competent to try the case and make a valid order of acquittal or conviction. No doubt, here the charge was framed by Mr. Ganguly but on his own view he was not competent to take cognisance of an offence and therefore incompetent to frame a charge. For this reason the mere fact that the charge had been framed in this case does not help the appellant. Similarly, the provisions of Section 494 of the Code cannot be attracted to a case of this kind because that provision itself assumes the withdrawal by a Public Prosecutor of a charge competently made and before a Court competent to entertain the application for withdrawal.

In addition to the competence of the Court, Section 403 of the Code speaks of there having been a trial and the trial having ended in an acquittal. From what we have said above, it will be clear that the fact that all the witnesses for the prosecution as well as for the defence had been examined before Mr. Ganguly and the further fact that the appellant was also examined under Section 342 cannot in law be deemed to be a trial at all. For proceedings to amount to a trial they must be held before the Court which is in fact competent to hold them and which is not of opinion that it has no jurisdiction to hold them. It would also follow that the ultimate order made by it by whatever name it is characterised cannot in law operate as an acquittal order. In the result, the conviction of the appellant was held to be valid in law and the appeal was dismissed. *Mohd. Safi* v. *State of West Bengal*, AIR 1966 SC 69 : 1966 CrLJ 75 : (1965) 3 SCR 467.

[9416] ● *No compulsion for person accused of offence to enter witness box.*— A person accused of an offence may, if he chooses, not to appear as a witness in the proceedings under Sections 111 & 112 of the Sea Customs Act. But there is no compulsion on him to enter the witness-box. The necessity to enter the witness-box for substantiating his defence is not such compulsion as would attract the protection of Article 20(3). Even in a criminal trial, any person accused of an offence is a competent witness for the defence under Section 342-A, CrPC. (now Section 315), and may give evidence on oath in disproof of the charges made against him. It may be very necessary for the accused person to enter the witness-box for substantiating his defence but that is no reason for saying that the criminal trial compels him to be a witness against himself and is in violation of Article 20(3). Compulsion in the context of Article 20(3) must proceed from another person or authority. The accused is not compelled to be a witness if he voluntarily gives evidence in his defence. Different considerations may arise if he is summoned by the Customs Authorities under Section 108 to give evidence in the proceedings under Sections 111 & 112. *T.G. Gaokar* v. *R. N. Shukla*, AIR 1968 SC 1050 : 1968 CrLJ 1234 : (1968) 2 SCJ 727 : 1968 MPLJ 719 : 1968 MahLJ 703 : 70 BomLR 718.

[9417] ● *"Compelled testimony"—Meaning.*— Both the provisions cover the same area. The prohibitive speech of Article 20(3) goes back to the stage of police interrogation, not commencing in Court only. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. 'Compelled testimony' means evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, over-bearing and intimidatory methods and the like not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3).

Where a person, who acted as a carrier in a conspiracy to smuggle gold in India, admitted her role in the statements made to the Customs Officials investigating the case under the Sea Customs Act but, instead of being included in the array of accused and sent up for trial, was examined as a witness against her former associates, there could be no doubt that she is a competent witness. Being self-confessed criminal her evidence was accomplice evidence and, if subjected to scrutiny and usual checks for corroboration, must be held to be received with due caution. *L. Choraria* v. *State of Maharashtra*, AIR 1968 SC 938 : 1968 CrLJ 1124 : (1968) 1 SCA 682 : 1968 SCD 743 : (1968) 2 SCJ 589 : (1968) 2 SCR 624 : 70 BomLR 595 : 1968 MLJ (Cri) 614 : 16 Law Rep 473.

[9418] ● *Recording of conversation in bribery case by—Tape recorder.*—In a case of bribery, where the conversation was recorded by a tape recorder, the accused cannot claim the protection of Article 20(3). The fact that the tape recording was done without his knowledge is not by itself an objection to its admissibility in evidence. There was no element of duress, coercion or compulsion. His statements were not extracted from him in an oppressive manner or by force or against his wishes. However, the police practice of tapping telephone wires and setting up hidden microphones for the purpose of tape recording cannot be approved. *Yusuffalli* v. *State of Maharashtra*, AIR 1968 SC 147 : 1968 CrLJ 103 : (1968) 2 SCWR 934 : (1968) 3 SCR 720 : (1968) 1 SCJ 511 : 1968 SCD 347 : 1968 MahLJ 179 : 70 BomLR 76 : 1968 MPLJ 114 : 1968 ACrR 174 : 1968 AWR (HC) 268 : 1968 MLJ (Cri) 247 : 1968 MLW (Cri) 12 : 15 Law Rep 468.

[9419] ● *Guarantee against testimonial compulsion not restricted to statements made in witness box.*—The guarantee against testimonial compulsion under Article 20(3) is not restricted to statements made in the witness box. But in order to claim that guarantee by a person it has to be established that when he made the statement sought to be tendered in evidence against him, he was a person accused of an offence. Normally a person stands in the character of an accused when an FIR is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to commission of an offence before a Magistrate competent to try or send to another Magistrate for trying the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, which he is bound to do under Article 22(1) of the Constitution, for the purpose of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate. Hence, a person against whom an enquiry is made by the Customs Officer under the Sea Customs Act is not a person accused of any offence and the evidence, if any, collected by examining him under Section 171-A is not inadmissible.

Section 104(1) of the Customs Act, 1962 only prescribes the conditions in which the power of arrest may be exercised. The officer must have reason to believe that a person has been guilty of an offence punishable under Section 135; otherwise he cannot arrest such person. But by informing such person of the grounds of his arrest the Customs Officer does not formally accuse him with the commission of an offence. Even under the Act of 1962 a formal accusation can only be deemed to be made when a complaint is made before a Magistrate competent to try the person guilty of the infraction under Sections 132, 133, 134 and 135 of the Act. Any statement made under Sections 107 and 108 of the Customs Act by a person against whom the enquiry is made by a Customs Officer is not a statement made by a person accused of an offence. *Ramesh Chandra* v. *State of West Bengal*, AIR 1970 SC 940 : 1970 CrLJ 863 : (1969) 2 SCR 461 : (1970) 2 SCA 174 : 72 BomLR 787.

[9420] ● ***Sea Customs Authorities not Judicial Tribunal.***—As the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or a judicial tribunal, it cannot support a plea of double jeopardy. *H.H. Adwani* v. *State of Maharashtra*, AIR 1971 SC 44 : 1971 CrLJ 5 : (1969) 2 SCC 662 : (1970) 2 SCA 10 : (1970) 1 SCR 821 : (1970) 2 SCJ 192 : 1970 MLJ (Cri) 490 : 1971 MahLJ 359 : 73 BomLR 112.

[9421] ● ***Petitioner not to be compelled to be witness against himself.***—Where the petitioner was the General Manager of the United Commercial Bank and it was alleged that the petitioner was in charge of, or was responsible to, the United Commercial Bank Ltd. for the conduct of the business of that Bank and that he failed to prove in the course of his statement made under Section 19-F of the Exchange Act before the Deputy Director of Enforcement, that the contravention of booking a forward exchange contract took place without his knowledge or that he exercised all due diligence to prevent the aforesaid contravention, and an FIR was also registered in respect of the said subject-matter, the petitioner is a person accused of an offence within the meaning of Article 20(3). The only protection that Article gives to him is that he cannot be compelled to be a witness against himself. But it does not mean that he need not give information regarding matters which do not tend to incriminate him. The petitioner was, therefore, bound to appear before the Deputy Director, Enforcement Directorate. *R.B. Shah* v. *B. K. Gupta*, AIR 1973 SC 1196 : (1973) 1 SCC 696 : 1973 CrLJ 921.

[9422] ● ***Guarantee against testimonial compulsion.***—In order to claim the benefit of the guarantee against testimonial compulsion embodied in Article 20(3), it should be shown, firstly, that the person who made the statement was "accused of any offence" and secondly, that he made that statement under compulsion. It was well-settled that only a person against whom a formal accusation relating to the commission of an offence had been levelled which in the normal course might result in his prosecution, would fall within its ambit. In the instant case, the appellant was not a person "accused of any offence" under the Customs Act when his statement was recorded by the Customs Officer under Section 108. An accusation which would stamp him with the character of such a person was levelled only when the complaint was filed against him by the Assistant Collector of Customs complaining of the commission of offences under Sections 135 (a) and (b) of the Act. The ingredients of the offence under Section 124 of the Bombay Police Act were materially different from those of an offence under the Customs Act. Even in respect of that offence, the police did not register any case or enter any FIR which normally furnished a foundation for commencing a police investigation. They did not take any steps for prosecuting him under that Act but they informed the Customs Authority, who opened the packages, inspected the goods and on finding them contraband goods, seized them under a panchnama. The Customs Authorities called the appellant and his companion to the Customs House, took them into custody and after due compliance with the requirements of law, the Inspector of Customs questioned the appellant and recorded his statement under Section 108 of the Act. Hence it was manifest that at the time when the Customs Officer recorded it, the appellant was not formally "accused of any offence". The High Court was, therefore, right in holding that the appellant's statement in question was not hit by Article 20(3). *Veera Ibrahim* v. *State of Maharashtra*, AIR 1976

SC 1167 : (1976) 3 SCC 302 : 1976 SCC (Cri) 278 : 1976 CrLJ 860 : 1976 CrLR (SC) 165.

[9423] ● ***Compelled testimony—Meaning of.***—Compelled testimony in Article 20(3) means any statement even during police investigation and not merely in a Court. *Nandini Satpathy* v. *P. L. Dani*, AIR 1978 SC 1025 : (1978) 2 SCC 424 : 1978 SCC (Cri) 236 : 1978 CrLJ 968 : 1978 CrLR (SC) 195 : 1978 CrAppR (SC) 273.

[9424] ● ***Accused right to silence.***—Answers that in themselves support a conviction are confessions but answers which had a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20(3) if elicited by pressure from the mouth of the accused. An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter, it ceases to be a confession. Article 20(3) strikes at confessions and self-incriminations but leaves untouched other relevant facts. Merely because he fancied that by such answer he would incriminate himself he could not claim the privilege of silence. It must appeal to the Court that the implications of the question, in the setting in which it is asked, make it evident that a responsive answer or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The apprehension of incrimination from the answer sought must be substantial and real as distinguished from danger of remote possibilities or fanciful flow of inference. Two things need emphasis. The setting of the particular case, the context and the environment, that is, the totality of circumstances, must inform the perspective of the Court adjudging the incriminatory injury, and where reasonable doubt exists, the benefit must go in favour of the right to silence by a liberal construction of the Article. *Nandini Satpathy* v. *P. L. Dani*, AIR 1978 SC 1025 : (1978) 2 SCC 424 : 1978 SCC (Cri) 236 : 1978 CrLJ 968 : 1978 CrLR (SC) 195 : 1978 CrAppR (SC) 273.

[9425] ● ***Article 20(1)—Ex-post facto legislation.***—Article 20(1) deals with *ex post facto* laws though that expression has not been used in the Article. Though a sovereign legislature has power to legislate retrospectively, creation of an offence for an act which at the time of its commission was not an offence or imposition of a penalty greater than that which was under the law provided violates Article 20(1). All that Article 20(1) prohibits is *ex post facto* laws and is designed to prevent a person being punished for an act or omission which was considered innocent when done. It only prohibits the conviction of a person or his being subjected to a penalty under *ex post facto* laws. *G. P. Nayyar* v. *State (Delhi Administration)*, AIR 1979 SC 602 : (1979) 2 SCC 593 : 1979 SCC (Cri) 549 : 1979 CrLJ 587 : 1979 CrLR (SC) 74 : 1979 SCCrR 218 : (1979) 2 SCR 816 : 1978 SCWR 413 : 1979 LS (SC) 41 : 1979 CrAppR (SC) 88 : (1979) 1 ServLR 281 : 1978 ServLC 154.

[9426] ● ***Person "accused of an offence".***—Only a person against whom a formal accusation of the commission of an offence has been made can be a person "accused of an offence" within the meaning of Article 20(3). Such formal accusation might be specifically made against him in an FIR or a formal complaint or any other formal document or notice served on that person, which ordinarily resulted in his prosecution in Court. In the instant case no such formal accusation had been made against the appellant when his statements in question were recorded by the RPF Officer. *Balkishan* v. *State of Maharashtra*, AIR 1981 SC 379 : (1980) 4 SCC 600 : 1981 SCC (Cri) 62 : 1980 CrLJ 1424 : 1980 CrLR (SC) 588 : 1980 CrAppR (SC) 279 : 1980 SCCrR 421 : 1980 ACrC 300 : 1981 MahLR (SC) 22 : (1981) 1 APLJ (SC) 17 : 1980 BLT (Rep) 67 (SC) : 1980 BBCJ (SC) 131 : (1981) 1 SCR 175.

[9427] ● ***Confinement of death sentence prisoner in Jail.***—Confinement of death sentence-prisoner for sometimes in jail is no fresh punishment. Its object is to secure his availability for execution of sentence. No double jeopardy is involved in the process. *Triveniben* v. *State of Gujarat*, AIR 1989 SC 335 : (1989) 1 SCC 678 : 1989 SCC (Cri) 248 : 1990 CrLJ 1810 : (1989) 2 Crimes 391 : (1989) 1 Cr SC 604.

[9428] ● ***Police officials assaulting arresting and wrongly detaining CJM.***—Police officials assaulted, arrested and then wrongly detained Chief Judicial Magistrate and roped him by some criminal association. Supreme Court issued on them notice to show cause as to why contempt proceeding should not be drawn against them. Merely because of such notice they do not become accused of any offence. They cannot invoke Article 20(3), Constitution. *Delhi Judicial Service Association* v. *State of Gujarat*, AIR 1991 SC 2176 : (1991) 4 SCC 406 : 1991 CrLJ 3086 (SC) : (1991) 3 Crimes 232.

[9429] ● ***Guarantee against testimonial compulsion.***—Articles 20(3) declares that no person accused of any offence shall be compelled to be a witness against himself. It does not refer to the hypothetical person who may in the future be discovered to have been guilty of some offence. In order that the guarantee against testimonial compulsion incorporated in Article 20(3) may be claimed by a person, it has be established that when he made the statement in question, he was a person accused of an offence. *Phoolpandi* v. *Supdt. Central Excise,* AIR 1992 SC 1795 : (1992) 3 SCC 259 : 1992 CrLJ 2761 (SC).

[9430] ● ***Electricity—Disconnection—Prior hearing as to.***—Section 24 of the Indian Electricity Act, 1910 contemplates seven days' notice before disconnection. Section 24 does not apply to demand on detection of pilferage. It would apply to a case of regular supply made and prior demand for payment of electricity charges with a notice of seven days to be made and for failure to pay within the given time, after expiry of seven days, the appellant as a licensee would get the right to disconnect the supply of electrical energy. It would thus be seen that disconnection will be in the course of regular supply of electricity for non-payment of the usual bills but not to any case of demand after detection of pilferage.

The only question is whether the consumer is entitled to hearing before disconnection? In view of the conditions to which the respondents had agreed at the time of installation and also the *prima facie* conclusion reached by the authorities, it was not necessary to give further hearing to the respondents. The action taken by the appellant is not violative of Articles 20(1) and 14 of the Constitution and principles of natural justice. *Madhya Pradesh Electricity Board, Jabalpur* v. *Harsh Wood Products*, AIR 1996 SC 2258 (2260) : (1996) 4 SCC 522 : JT 1996 (5) SC 434.

[9431] ● ***Arrest.***—A person cannot be said to be under arrest merely because he is questioned by the police on suspicion, when there is nothing on record to suggest that he was compelled to make a confession the submission that compelling a person to be searched amounts to confession must be rejected. *State of Rajasthan* v. *Daulat Ram*, (2005) 7 SCC 36 : 2005 SCC (Cri) 1594 (1597) : 2005 CrLJ 4117.

[9432] ● ***Right against self-incrimination.***—See *Selvi* v. *State of Karnataka*, AIR 2010 SC 1974 : (2010) 7 SCC 261 (263).

9. ARTICLE 21

[9433] ● ***Protection against deprivation of right to liberty.***—(*Note:*—Article 21 confers upon every person, be he a citizen of India or a non-citizen, protection against deprivation of his right to liberty of person by any action taken by the State which is not in accordance with procedure established by law. This means that the detention of a person into custody by any Government or by any executive officer or authority must always be in accordance with and under the provisions of some law in force, and that if any detention is in contravention or non-observance of the provisions of any law relating to arrest and detention into custody, such detention will be held to be in violation of the right to personal liberty guaranteed under Article 21.

If a person is deprived of his personal liberty by the State, and if according to him such deprivation is unlawful, then whatever be the shape or form of such deprivation and whatever be the Government or authority under whose orders it is effected, the remedy against such deprivation lies in every case in an application for a Writ of *Habeas Corpus.*

The application can be made not only by the person detained but also by any person interested in him. The provisions of Indian law which relate to this right are Articles 32 and 226 of the Constitution and Section 491 of the Code of Criminal Procedure, and under these provisions the application may be made either to the Supreme Court, or to the High Court within whose territorial jurisdiction a person is unlawfully detained.

Whenever Article 21 is invoked, the question always is whether the detention in question is in contravention of any constitutional or statutory provision relating to arrest and detention. As a result, though in the cases which follow the provision of law which was set up as having been contravened was different in different cases, the ultimate test applied by the Court in determining whether the challenged detention was supportable or not was throughout the same, namely, whether the detention was according to "procedure established by law" within the meaning of Article 21. In the course of these decisions the Court has laid down the general principles relating to this subject which will be applicable in every case in which Article 21 is invoked.)

The question whether a deprivation of personal liberty in any case was lawful or unlawful is a matter which is to be considered in the light of Articles 21 and 22, and not under Article 19. If a person is detained in custody under a law which does not fall foul of Articles 21 and 22, he cannot challenge the legality of his detention on the ground of infringement of any right guaranteed under Article 19.

The words “procedure established by law” in Article 21 mean “procedure enacted by a valid law”. A law which does not violate or transgress any provision in the Constitution relating to fundamental rights is valid and constitutional. Therefore, if a person is detained in custody in accordance with the provisions of law which is valid by the above test, the order of detention is according to “procedure established by law” within the meaning of Article 21, and its validity cannot be challenged. *Gopalan A. K.* v. *State of Madras*, AIR 1950 SC 27 : 51 CrLJ 1383 : 1950 SCJ 174 : 1950 SCR 88 : (1950) 2 MLJ 42 : 63 MLW 638 : 1950 MWN 495.

[9434] ● ***Person when convicted and sentenced to imprisonment.***—Once a person is convicted of an offence and is sentenced to imprisonment by a trial Court, his only remedy against such imprisonment is to prefer an appeal to the appellate Court to which under the law an appeal from such conviction and sentence will ordinarily lie. The appeal will lie to the same Court of appeal whatever be the ground which the accused desires to urge against his conviction or sentence whether it is want of jurisdiction, or an illegality arising from contravention of some mandatory rule of procedure, or absence of some pre-requisite of cognisance. In other words, an order of conviction and sentence made by a trial Court will stand good in the eyes of law until it is set aside in appeal or revision, and whatever be the defect or illegality from which it might be suffering, it cannot be contended that detention in custody in execution of that order is not detention “according to procedure established by law” within the meaning of Article 21. It follows that it is not open to a person who is detained in prison in execution of a sentence of a trial Court to apply for a Writ of *Habeas Corpus* for obtaining his release from such imprisonment, and if he does so apply, such imprisonment being under the order of a criminal Court is a complete answer to such an application.

On the same principle, when an accused is convicted and sentenced to imprisonment under an order made by the High Court in appeal from a judgment or order of a trial Court, and for whatever reason he feels aggrieved by that order, his only remedy against it is an appeal to the Supreme Court to have it set aside, and the order stands good if it is not so set aside, whatever be its defect or illegality. It is not open to a person detained in prison under an order of the High Court to challenge the validity or legality of that order by an application under Article 32 for a Writ of *Habeas Corpus*. *Janardhan Reddy* v. *State of Hyderabad*, AIR 1951 SC 217 : 52 CrLJ 736 : 1951 SCJ 320 : 1951 SCR 344 : 1951 MWN (Cri) 189 (2) : 64 MLW 406 : 1951 ALJ (SC) 94 : 1951 MWN 613 (2).

[9435] ● ***Remand of accused into custody.***—Sections 167 and 344 of the Code of Criminal Procedure require that when an accused person is produced before a Magistrate for remand into custody, if the Magistrate considers it proper to adjourn the proceeding and remand the accused into custody until the next date of hearing, he shall make a written order of remand. If no such written order is made and there is nothing on the record to show that an order remanding the accused to custody was in fact made, the continued detention of the accused in custody after the date when the accused was produced before the Magistrate is illegal and otherwise than in accordance with ‘procedure established by law’ within the meaning of Article 21. The forms and rules of procedure relating to matters which concern the deprivation of a man’s personal liberty have to be strictly and scrupulously observed by those who are vested by law with the power in that behalf in the discharge of their official duties. If the detention of an accused person in custody is illegal by reason of the non-observance of a mandatory statutory provision, the detention is not according to ‘procedure established by law’ within the meaning of Article 21, and the accused concerned has the right to move the Supreme Court under Article 32, or to move the High Court under Article 226 or Section 491 of the Code, for a Writ in the nature of *Habeas Corpus*. *Ram Narayan Singh* v. *State of Delhi*, AIR 1953 SC 277 : 1953 CrLJ 1113 : 1953 SCA 399 : 1953 SCJ 326 : 1953 SCR 652 : 1953 AWR (Sup) 68 : 1953 MWN 647.

[9436] ● ***Crucial date of detention.***—In a *Habeas Corpus* proceeding the only question before the Court is whether at the date of the Return the detention was legal. If the detention is found to be suffering from any illegality on *that* date, the accused has the right to demand his release, it being immaterial that the detention was lawful at the time when the proceeding was instituted or at any other stage previous to the date of the Return. In other words, in *Habeas Corpus* proceedings the material date is the date of the Return, and no other. *Ram Narayan Singh* v. *State of Delhi*, AIR 1953 SC 277 : 1953 CrLJ 1113 : 1953 SCA 399 : 1953 SCJ 326 : 1953 SCR 652.

[9437] ● ***Principles relating to application of Articles 20, 22(1) and 22(2) of Constitution.***—As a result of the decisions of the Court in the below-mentioned cases, the following principles relating to the application of Articles 21, 22(1) and 22(2) are now well settled, namely:

(a) that Articles 22(1) and 22(2) apply only when the detention is in respect of an offence or an act of a criminal or a *quasi*-criminal nature, and not when it is in connection with a civil default, and

(b) that if an arrest or detention for a civil debt is in accordance with the procedure prescribed under the statute for the recovery of such debt, it is according to 'procedure established by law' within the meaning of Article 21, and its legality cannot be questioned on the ground of non-compliance with the requirements of Articles 22(1) and 22(2) as to production before and authority from a Magistrate.

If a statutory provision under which an arrest or detention is made in respect of any civil debt or revenue requires that there must be material before the detaining authority to show that the sale-proceeds of the property of the defaulting assessee were insufficient to satisfy the amount due from him, the case papers must disclose that such material was present, and if the Court before which the legality of such arrest or detention is challenged is satisfied that there was no such material, the action taken must be held to be otherwise than in accordance with 'procedure established by law' and the person concerned must be ordered to be released. *Collector of Malabar* v. *Erimmal Ibrahim Hajee*, AIR 1957 SC 688 : 1957 CrLJ 1030 : 1957 SCJ 640 : (1957) 32 ITR 124 : (1957) 2 MLJ (SC) 115 : (1957) 1 MLJ (Cri) 586 : 1957 KLT 1010 : (1957) 2 AWR (SC) 87.

[9438] ● ***Habeas Corpus—Object of.***—The whole object of a proceeding for a Writ of *Habeas Corpus* is to enable the Court to determine as expeditiously as is possible whether the fundamental right of a detained person to liberty of his person has been infringed by his detention by the State, and that very object would be defeated if the proceeding took long in its disposal. For this reason, it is essential that the proceeding be kept as simple and free of technicalities as is reasonably possible. *Ranjit Singh* v. *State of Pepsu*, AIR 1959 SC 843 : 1959 CrLJ 1124 : (1959) 2 SCA 552 : 1959 SCJ 905 : (1959) 2 AnWR (SC) 121 : 1959 ACrR 298 : (1959) 2 MLJ (SC) 121 : 1959 AWR (HC) 371 : 1959 MLJ (Cri) 618.

[9439] ● ***Return to writ of Habeas Corpus—Affidavit by detaining authority.***—The question whether in a *Habeas Corpus* proceeding an affidavit of the detaining authority is or is not required to be sent with the Return, depends on the facts and circumstances of each case, and there cannot be any hard and fast rule regarding this matter.

If the circumstances of the case are such that they do not require the determination of any question of fact, as when the detention is under the orders of an authority having plenary powers, or when it is under the orders of a Court, such affidavit is not necessary.

On the other hand, such an affidavit is called for, when the application for the Writ mentions facts, an inquiry into which is necessary for the purpose of determining whether the detention was justified, for example, (*a*) when the person detained says that he has done no wrong and he does not know why he has been detained, or (*b*) when he raises issues of fact which expressly challenge the legality of the action taken by the executive officers, or (*c*) when the facts stated in the petition are such that if they remain unrebutted or unexplained they would be sufficient for the issue of the Writ asked for. *Ranjit Singh* v. *State of Pepsu*, AIR 1959 SC 843 : 1959 CrLJ 1124 : (1959) 2 SCA 552 : 1959 SCJ 905 : 1959 MLJ (Cri) 618.

[9440] ● ***Expression "procedure established by law".***—The expression "procedure established by law" in Article 21 means procedure established by State enacted statute law. The validity of any enactment cannot be questioned on the ground of violation of principles of natural justice. *Ram Chandra Prasad* v. *State of Bihar*, AIR 1961 SC 1629 : 1961 (2) CrLJ 811 : 1961 AWR (HC) 721 : 1961 ACrR 409.

[9441] ● ***Convicts not denuded of all fundamental rights.***—Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possessed. The presence of the Special Police Force in the immediate vicinity of the jail can cause no interference with the personal liberty or the lawful pre-occupations of the petitioners. As regards the livewire mechanism fixed atop the jail walls, it is not a secret trap as all the prisoners are warned of its existence and a non-electrical barbed wire fenced the jail walls. Whatever be the nature and extent of the petitioners' fundamental rights to life and personal liberty, they have no fundamental freedom to escape from lawful custody. Therefore they cannot complain of the installation of the livewire mechanism with which they are likely to come into contact only if they attempt to escape from the prison. *D.B.N. Patnaik* v. *State of A.P.*, AIR 1974 SC 2092 : (1975) 3 SCC 185 : 1974 SCC (Cri) 803 : 1975 CrLJ 556 : 1974 SCD 931.

[9442] ● ***Court not competent to go into question of mala fide of detention order.***—It is not competent for any Court to go into question of *mala fides* of the order of detention or *ultra vires* character of the order of detention or that the order was not passed on the satisfaction of the detaining authority. *A.D.M., Jabalpur* v. *S. Shukla*, AIR 1976 SC 1207 : (1976) 2 SCC 521 : 1976 CrLJ 945 : 1976 CrLJ (SC) 303 : 1976 UJ (SC) 610.

[9443] ● ***Convicts not denuded of their fundamental rights.***—Convicts are not wholly denuded of their fundamental rights. The imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards. *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675 : (1978) 4 SCC 494 : 1978 CrLJ 1741.

[9444] ● ***Reasonableness postulates intelligent care.***—Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by 'law'. The last four words of Article 21 are the life of that human right. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice to the individual involved and society affected. *Babu Singh* v. *State of U.P.*, AIR 1978 SC 527 : (1978) 1 SCC 579 : 1978 SCC (Cri) 133 : 1978 CrLJ 651 : 1978 CrLR (SC) 86 : 1978 SCCrR 278 : 1978 CrAppR (SC) 90 : 1978 MLJ (Cri) 465 : 1978 MLW (Cri) 85 : 1978 ACrR 243.

[9445] ● ***Soft sentencing justice gross injustice.***—Soft sentencing justice was gross injustice where many innocents are the potential victims. While iatrogenic prison terms are bad because they dehumanize, it is functional failure and judicial pathology to hold out a benignly self-defeating non-sentence to deviants who endanger the moral and morale, the health and wealth of society. If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Article 142 r/w. Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice'. Court should forthwith furnish a free transcript of the judgment. In the event of any such copy being sent to the jail authorities for delivery to the prisoner, the official concerned should, with quick despatch, get it delivered to the prisoner and obtain written acknowledgment thereof from him. Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right should be made available by the Jail Administration. Where the prisoner is unable to engage a lawyer the Court should assign a competent counsel for his defence, provided the party does not object to that lawyer. The State should pay to the assigned counsel such sum as the Court might equitably fix. Those benign prescriptions operated by force of Article 21 (strengthened by Article 19(1)(b) r/w. sub-article (5)) from the lowest to the highest Court where deprivation of life and personal liberty is in substantial peril. *Madhav* v. *State of Maharashtra*, AIR 1978 SC 1548 : (1978) 3 SCC 544 : 1978 SCC (Cri) 468 : 1978 CrLJ 1678 : 1978 CrLR (SC) 362 : 1978 UJ (SC) 847.

[9446] ● ***Speedy trial part of fundamental right to life and liberty.***—Speedy trial is part of fundamental right to life and liberty.

Procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial is meant reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1360 : (1980) 1 SCC 81 : 1980 SCC (Cri) 23 : 1979 CrLJ 1036 : 1979 CrAppR (SC) 197 : (1979) 2 APLJ (SC) 40 : 1979 Pat LJR 419.

[9447] ● ***Continued detention of under trials not justified.***—Continued detention of under-trial prisoners cannot be justified when they have been in jail for a period longer than what they would have been sentenced to suffer if convicted. This discloses a shocking state of affairs and betrays complete lack of concern for human values and exposes the callousness of our legal and judicial system which can remain unmoved by such enormous misery and suffering resulting from totally unjustified deprivation of personal liberty. They were directed to be released forthwith as continuance of their detention is clearly illegal and in violation of their fundamental rights under Article 21. *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1377 : (1980) 1 SCC 108 : 1980 SCC (Cri) 50 : 1979 CrLJ 1052 : (1979) 3 SCR 760 : 1979 CrAppR (SC) 234.

[9448] ● ***Free legal service.***—Article 39-A also emphasises that free legal service is an inalienable element of 'reasonable, fair and just' procedure, for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The said right is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicity in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person in the circumstances of the case and the needs of the justice so required, provided, of course the accused person does not object to the provision of such lawyer. *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1369 : (1980) 1 SCC 98 : 1980 SCC (Cri) 40 : 1979 CrLJ 1045 : (1979) 3 SCR 532 : 1979 PatLJR 410.

[9449] ● ***Detention of under trial prisoner for more than sentence period—Illegal.***—Where the prisoners have already suffered incarceration for the maximum period for which they could have been sent to jail on conviction, there is absolutely no reason why they should be allowed to continue to remain in jail for a moment longer, since such continuance of detention would be clearly violative not only of human dignity but also of their fundamental right under Article 21 of the Constitution. They were directed to be released forthwith. *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1819 : (1980) 1 SCC 115 : 1980 SCC (Cri) 57 : 1979 CrLJ 1134 : 1979 UJ (SC) 728.

[9450] ● ***Prison reform constitutional compulsion.***—Prison reform is now a constitutional compulsion and its neglect may lead to drastic Court action. Protection of the prisoner within his rights is part of the office of Article 21. Technicalities and legal niceties are more an impediment to the Court entertaining even an informal communication as a proceeding for *habeas corpus* if the basic facts are found. Rights of prisoners and remedies for denial of these rights are indicated. *Sunil Batra* v. *Delhi Administration*, AIR 1980 SC 1579 : (1980) 3 SCC 488 : 1980 SCC (Cri) 777 : 1980 CrLJ 1099 : (1980) 2 SCR 557.

[9451] ● ***Under trial prisoners not to be kept in leg irons.***—Under-trial prisoners should not be kept in leg irons contrary to all prison regulations and in gross violation of the decisions of the Supreme Court. They should not be asked to work outside the jail walls as it would be in flagrant violation of prison regulations and contrary to the I.L.O. Conventions against forced labour. *Kadra Pahadiya* v. *State of Bihar*, AIR 1981 SC 939 : (1981) 3 SCC 671 : 1981 CrLJ 481 : 1981 CrLR (SC) 109 : 1981 BLJ 190 : 1981 BLJR 300.

[9452] ● ***Delayed trial not necessarily unfair trial.***—A delayed trial is not necessarily an unfair trial. If nothing is shown regarding circumstances entitling the Court to raise a presumption that accused had been prejudiced, there will be no justification for the appellate Court to quash the conviction on the ground of delayed trial only. Court is entitled to take into consideration whether the defendant was himself responsible for a part of the delay and whether he was prejudiced in the preparation of his defence by reason of the delay. *State of Maharashtra* v. *Champalal*, AIR 1981 SC 1675 : (1981) 3 SCC 610 : 1981 SCC (Cri) 762 : 1981 CrLJ 1273 : 1981 CrLR (SC) 496.

[9453] ● ***Right to free legal services.***—Right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. This constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. State Government cannot avoid this constitutional mandate by pleading financial or administrative inability. The Magistrate or Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. *Khatri* v. *State of Bihar*, AIR 1981 SC 928 : (1981) 1 SCC 627 &

635 : 1981 SCC (Cri) 228 & 235 : 1981 CrLJ 470 : 1981 CrLR (SC) 66 : 1981 UJ (SC) 72 : 1981 BLJ 180 : (1981) 2 SCR 408 : (1981) 2 SCJ 185 : 1981 MLJ (Cri) 519 : 1981 Sri LJ (SC) 13.

[9454] ● ***Writ petition under Article 32 of Constitution by under trials for enforcement of fundamental right on allegation that they were blinded by police officer.***—Writ petition was filed under Article 32 by certain under-trials for enforcement of their fundamental right under Article 21 on the allegation that they were blinded by the police officer either at the time of their arrest or subsequently, while in police custody. C.I.D. reports, files containing all correspondence and notings exchanged between Police Officials regarding the C.I.D. inquiry into the blindings and certain letters were called for by the Court. Production of the same is not barred either by Section 162 or Section 172, as the writ proceedings are neither an 'inquiry' nor a 'trial' for an offence nor the Supreme Court hearing the writ petitions a Criminal Court, nor are the petitioners or their agents accused persons. Khatri v. State of Bihar, AIR 1981 SC 1068 : (1981) 2 SCC 493 : 1981 SCC (Cri) 503 : 1981 CrLJ 597 : 1981 BBCJ (SC) 124 : 1981 BLJR 425 : (1981) 2 SCJ 12 : 1981 MLJ (Cri) 456.

[9455] ● ***Detaining authority bound to give opportunity to detenu to make representation.***—It is settled law that detaining authority is bound to give opportunity to the detenue to make representation against his detention and also to consider the same as early as possible and that any unreasonable delay in furnishing to the detenu copies of documents which form the basis of the grounds of detention amounted to denial to him of such opportunity. Such denial made the detention itself illegal. Documents were supplied to detenu 32 days after they were demanded in the instant case. Petitioner was ordered to be released forthwith. *Pritam Nath* v. *Union of India*, AIR 1981 SC 92 : (1980) 4 SCC 525 : 1981 SCC (Cri) 19 : 1980 CrLJ 1340 : 1980 CrApprR (SC) 415 : (1981) 1 SCJ 275 : (1981) 1 SCR 682 : 1981 NLJ (Cri) 211.

[9456] ● ***Section 14 of Official Secrets Act not deprive right of accused under CrPC to get copies of statements of witnesses, documents etc.***—Prosecution filed a petition before the Magistrate praying to hold the hearings in camera and also requesting the Magistrate not to allow accused to have access to, or be given copies of, statements of witnesses recorded by the Magistrate or those recorded earlier during police investigation. Magistrate ordered the defence lawyer to take copious notes of the said statements to enable him to cross-examine witnesses and directed the lawyer to produce his note book so that the Magistrate might examine if only summary of the evidence had been taken by the lawyer or the statements had been taken in extenso in which case it would amount to publication and therefore would be barred by Section 14 of the Act. Though the lawyer agreed to show his note book in the first instance, later claimed privilege under Section 126 of the Evidence Act. The Magistrate found himself helpless and proceeded with the inquiry. The prosecution filed a revision for quashing the order of the Magistrate in allowing the lawyer to cross-examine witnesses without impounding the notes taken by him. The High Court quashed the order holding that the statements of witnesses recorded by the Court or other documents could not be made available to the accused or his counsel nor could copies of the same be given to the accused.

A close and careful scrutiny of Section 14 of the Official Secrets Act would itself clearly show that the section does not contemplate the type of exclusion that the High Court thought. Though the offences in question are very serious offences, yet that by itself would not justify the legislature to pass an Act so as to deprive an accused of the valuable right to defend or, for that matter, to stifle the defence itself. The opening words of the section clearly reveal that the intention of the legislature is to give only an enabling additional power to the Court regarding holding the proceedings in camera. The words 'publication of any evidence' does not indicate that the accused should not be allowed access to the evidence recorded by the Court but they are merely made to highlight the ground for holding the proceedings in camera because if public were allowed to be present during the hearing the evidence recorded in their presence would amount to publication and it is in that sense alone that the word 'publication' had been used in Section 14. If the interpretation put by the High Court or by the appellant's counsel is accepted, then the provisions of Section 14 would have to be struck down as being violative of Articles 14 and 21 of the Constitution of India. Section 14, apart from providing that proceedings of the Court may be held in camera, does not in any way affect or override the provisions of the CrPC relating to enquiries or trials held thereunder. Section 14 does not in any way deprive the valuable rights of the accused to get copies of the statements recorded by the Magistrate or those recorded by the police or the documents obtained by the police during investigation as envisaged by the Criminal Rules 308 and 310 framed by the Calcutta High Court under the Code of Criminal Procedure and by various High

Courts nor does Section 14 in any way affect the right of the accused to get copies under Section 548, CrPC. There is absolutely no impropriety on the part of the Magistrate in not taking action against the defence lawyer for his refusal to show his register claiming privilege under Section 126 of the Evidence Act (that was the view of the High Court) and also no impropriety on the conduct of the lawyer in refusing to show the statement of witnesses recorded by the Court in extenso in order to prepare himself for an effective cross-examination of the witnesses. Hence the strictures passed by the High Court on the Magistrate as also on the defence lawyer are totally unwarranted. *Supdt. and Remembrancer of Legal Affairs, West Bengal* v. *S. Bhowmack,* AIR 1981 SC 917 : (1981) 2 SCC 109 : 1981 SCC (Cri) 342 : 1981 CrLJ 341 : 1981 CrLR (SC) 136 : (1981) 2 SCR 661.

[9457] ● ***Speedy trial fundamental right.***—Speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution. Any accused denied this right is entitled to approach the Supreme Court for the enforcement of such right and the Court in the discharge of its constitutional obligation has the power to give necessary directions to the State Governments and other appropriate authorities for securing this right to the accused. *Kadra Pahadiya* v. *State of Bihar*, AIR 1982 SC 1167 : (1983) 2 SCC 104 : (1982) 1 SCJ 320 : 1982 (2) APLJ (SC) 22.

[9458] ● ***Detention of prisoner.***—Detention of a prisoner was as a criminal lunatic. He became perfectly sane and fit for discharge about 16 years back. Superintendent of the jail sent the medical report to the State Government that the petitioner was fit for discharge. There was no warrant or justification in law to detain him any further. Government insisting on a surety before release, is not warranted. Petitioner was ordered to be released. *Sant Bir* v. *State of Bihar*, AIR 1982 SC 1470 : (1982) 3 SCC 131 : 1982 CrLJ 1933.

[9459] ● ***Period prescribed for submission of report by Advisory Board where expired.***—Where the period prescribed for submission of report by the Advisory Board expired. Further detention is invalid. *Ashok Kumar* v. *State of J & K*, AIR 1982 SC 978 : (1982) 1 SCC 174 : 1982 SCC (Cri) 128 : 1982 CrLJ 848 : 1982 CrAppR (SC) 7 : 1982 ChandCrC (SC) 35 : 1982 UJ (SC) 67 (2) : 1982 (2) Chand LR (Cri) 21 : 1982 ACrLJ 154 : 1982 IJR 164.

[9460] ● ***Composition of Court-Martial.***—*Army Rules, R. 40 & 187.*—Composition of Court-Martial. Word 'corps' does not mean 'army corps'. Restricted meaning as in Rule 187(3) has to be given.

Army Act (46 of 1950), Section 130, Army Rules, 1954, R. 44.—Constitution of Court-Martial. Requirement of asking the accused whether he objects to any officers of the Court is mandatory.

Army Rules, 1954, RR. 22 to 25 and 37.—Trial of Officer by Court-Martial. Compliance with Rr. 22 to 24 is not necessary unless there is request from the Officer. Rules are not violative of Article 21 of the Constitution.

Army Rules, 1954, R. 22 to 25 and 37.—Trial by Court-Martial. Prior inquiry by Court of Inquiry is not obligatory. Army Act (46 of 1950), Section 153. Punishment under the Act. No appeal or review is provided under the Act. It is a serious lacuna. Confirmation proceeding under Section 153 are not sufficient. *Prithi Pal Singh* v. *Union of India*, AIR 1982 SC 1413 : (1982) 3 SCC 140 : 1982 SCC (Cri) 642 : 1983 CrLJ 647 : 1982 CrLR (SC) 523 : 1982 UJ (SC) 695 : (1983) 1 SCR 393 : (1982) 2 Serv LJ 582 : (1983) 1 LabLN 9 : 1983 CrAppR (SC) 137 : (1983) 2 Chand LR (Cri) 287 : (1983) 1 SC 10 : (1983) 1 Serv LR 365.

[9461] ● ***Word "life" in Article 21 Constitution—Meaning.***—The word "life" in Article 21, Constitution means right to live with human dignity and the same does not merely connote continued drudgery. It takes within its fold "some of the finer graces of human civilization, which makes life worth living" and that the expanded concept of life would mean the "tradition, culture and heritage" of the concerned person. *Board of Trustees, Port of Bombay* v. *Dilip Kumar*, AIR 1983 SC 109 : (1983) 1 SCC 124. **TO THE SAME EFFECT :** (1) *Vikram Deb Singh* v. *State of Bihar*, AIR 1988 SC 1782 : 1988 Supp SCC 734; (2) *Ram Saran* v. *Union of India*, AIR 1989 SC 549 : 1989 Supp (1) SCC 251; (3) *P. Rathinam/ Nabhusan Patnaik* v. *Union of India,* AIR 1994 SC 1844 : (1994) 3 SCC 394 : (1994) 2 Crimes 228 (235) (SC).

[9462] ● ***Prolonged delay in execution of death sentence.***—(Per CHANDRACHUD, C.J. on behalf of the Bench of 3 Judges). A prisoner who had experienced living death for years on end is entitled to invoke the jurisdiction of the Supreme Court for examining the question whether, after all the agony and torment he had been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of Article 21 of the Constitution and to that extent the Supreme Court is in broad and respectful agreement with the learned brethren in *Vatheeswaran's* case in their visualisation of the meaning of that Article. The horizons of Article 21 are ever widening and the final word on its conspectus should never have been said. So long as life lasts, so long shall it be the duty and the endeavour of the Supreme Court to give to the provisions of the Constitution a meaning which would prevent human suffering and degradation. Therefore, Article 21 is as much relevant at the stage of execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter what the stage, should be fair, just and reasonable. It is well-established that a prisoner cannot be tortured or subjected to unfair or inhuman treatment. It is a logical extension of the self-same principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events made its execution harsh, unjust or unfair. Article 21 stood like a sentinel over human misery, degradation and oppression. Its voice is the voice of justice and fairplay. That voice can never be challenged on the ground that the time to heed to its imperatives is long since past in the story of a trial. It reverberated through all stages—the trial, the sentence, the incarceration and finally, the execution of the sentence. What is stated above delineated the broad area of agreement between the Bench of three Judges in this case and the two Judge Bench that decided *Vatheeswaran's* case. The narrow area wherein the present Bench felt constrained to differ from them and the reasons why would now be indicated with precision.

Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard and fast rule could be laid down as was done by the Bench in *Vatheeswaran's* case that "delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death". That period of two years purports to have been fixed in that case after making "all reasonable allowance for the time necessary for appeal and consideration of reprieve". It is impossible to agree with that part of the judgment. One has only to turn to the statistics of the disposal of cases in the High Court and the Supreme Court to appreciate that a period far exceeding two years is generally taken by those Courts together for the disposal of matters involving even the death sentence. Very often, four or five years elapsed between the imposition of death sentence by the Sessions Court and the disposal of the Special Leave Petition or an Appeal by the Supreme Court in that matter. That was apart from the time which the President or the Governor, as the case might be, took to consider petitions filed under Article 72 or Article 161 of the Constitution or the time which the Government took to dispose of application filed under Sections 432 and 433, CrPC. Therefore, the fixation of the time limit of two years does not seem to the Court to accord with the common experience of the time normally consumed by the litigative process and the proceedings before the executive.

Apart from the fact that the rule of two years runs in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities, no absolute or unqualified rule could be laid down that in every case in which there was a long delay in the execution of death sentence, the sentence should be substituted by the sentence of life imprisonment. There are several other factors which should be taken into account while considering the question as to whether the death sentence should be vacated. A convict is undoubtedly entitled to pursue all remedies lawfully open to him to get rid of the sentence of death imposed upon him and indeed, there is no one, be he blind, lame, starving or suffering from a terminal illness, who does not want to live. The Vinoba Bhaves, who undertook the "Prayopaveshana" do not belong to the world of ordinary mortals. Therefore, it is understandable that a convict sentenced to death would take recourse to every remedy which is available to him under the law to ask for the commutation of his sentence, even after the death sentence was finally confirmed by the Supreme Court by dismissing his Special Leave Petition or Appeal. But, it is, at least, relevant to consider whether the delay in the execution of the death sentence is attributable to the fact that he had resorted to a series of untenable proceedings which had the effect of defeating the ends of justice. It is not uncommon that a series of review petitions and writ petitions are filed in the Supreme Court to challenge judgments and orders which had assumed finality, without any seeming justification. Stay orders obtained in those proceedings and then, at the end of it all, came the argument that there had been prolonged delay in implementing the judgment or order. The Court called upon to vacate a death sentence on the ground of delay caused in executing that sentence should find why the delay was caused and who was responsible for it. If that is not done, the law laid down by the Supreme Court would become an object of ridicule by permitting a person to defeat it by resorting to frivolous proceedings in order to delay its implementation. And then, the rule of two years would become a handy tool for defeating justice. The death sentence should not, as far as possible, be imposed. But, in that rare and exceptional class of cases wherein that sentence is upheld by the Supreme Court, the judgment or order of the Supreme Court ought not to be allowed by applying any rule of thumb.

Finally, and that is no less important, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence was vacated, are matters which should enter into the verdict as to whether the sentence should be vacated for the reason that its execution was delayed. The substitution of the death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula, as a matter of "*quod errat demonstrandum*". *Sher Singh* v. *State of Punjab*, AIR 1983 SC 465 : (1983) 2 SCC 344 : 1983 SCC (Cri) 461 : 1983 SCC (Cri) 213 : 1983 CrLJ 803 : 1983 CrLR (SC) 247 : (1983) 1 Crimes 1017 : (1983) 1 SCJ 318 : (1983) 2 MLJ (SC) 46 : 1983 MLJ (Cri) 545 : 1983 (2) Chand LR (Cri) 491 : 1983 CrAppR (SC) 430.

[9463] ● ***Illegal detention after acquittal—Compensation.***—In a petition for *Habeas Corpus* for illegal detention of the petitioner after acquittal in a trial more than 14 years ago the Supreme Court can pass order for compensation even though he was released soon after filing of the writ. *Rudul Sah* v. *State of Bihar*, AIR 1983 SC 1086 : (1983) 4 SCC 141 : 1983 SCC (Cri) 798 : 1983 CrLJ 1644 : 1983 UJ (SC) 759 : 1983 Chand CrC (SC) 131 : 1983 CrAppR (SC) 373 : 1983 BLJ 684.

[9464] ● ***Insane prisoners declared sane.***—Insane prisoners were declared sane. Due to inaction of authorities to take steps to release them, the prisoners remained in jail for 20 to 37 years. They were directed to be released forthwith. *Veena Sethi* v. *State of Bihar*, AIR 1983 SC 339 : (1982) 2 SCC 583 : 1982 SCC (Cri) 511 : 1983 CrLJ 675 : 1982 CrLR (SC) 303 : 1982 UJ (SC) 543 : 1982 BLJ 616 : 1983 Pat LJR (SC) 1.

[9465] ● ***Substitution of death sentence to imprisonment for life.***—In this case the accused-petitioner who was a young man of 22 years of age was convicted for murder and sentenced to death. His conduct and behaviour in the jail which was evident from the report of the jail authorities was to the effect that there was nothing adverse against him during the period of his incarceration. He appeared to be genuinely repentant and he desired to atone for the grievous wrong that had been done by him. The repentence and desire appeared to be sincere. The sentence of death was hanging over his head for 2 years and 9 months.

An over-all view of all the circumstances of the present case appears to the Supreme Court to entitle the petitioner to invoke the protection of Article 21 of the Constitution and accordingly the sentence of death is quashed and in its place the sentence of imprisonment for life is substituted. *Javed Ahmed* v. *State of Maharashtra*, AIR 1985 SC 231 : (1985) 1 SCC 275 : 1984 SCC (Cri) 653 : 1984 CrLJ 1909.

[9466] ● ***Petitioner MLA prevented from attending Assembly Session—Compensation—Awarded of.***—The petitioner was an MLA of Jammu and Kashmir who incurred the wrath of the Government. They were bent upon preventing him from attending the Assembly Session which was to meet on 11-9-1985. On the opening day of the Budget Session which was 17-8-1985, he was suspended from the Assembly. The order of suspension was stayed by the High Court on 9-9-1985. On the intervening night of 9th, 10th, September, 1985, he was proceeding from Jammu to Srinagar, en route at 3-00 A.M. on the 10th, he was arrested and taken away by the Police. Efforts to trace him proved futile and hence his wife filed the present writ against the respondents to produce her husband before the Court, to declare his detention illegal and to set him at liberty. On 16-9-1985, the M.L.A. was released on bail by the Additional Sessions Judge. The petitioner then filed a supplementary affidavit that he was kept in Police lock up from 10th to 14th and that he was produced before a Magistrate for the first time only on the 14th.

The petitioner was detained from 3-00 A.M. on 10-9-1985 till he was produced before the Executive Magistrate on the 11th before the Sub-judge on the 14th. The two remand orders did not contain any statement that the petitioner was produced before either of them. The applications for remand also did not contain any statement that he was being produced before either of them. No affidavits of the Officer-in-charge of the police station or of the officer who arrested him was filed in the Supreme Court. At the hearing it was represented that their affidavits had been got ready but mislaid and the prayer for adjournment for filing them was refused. Non-production of the prisoner before the Magistrate on the 11th or before the Sub-judge on the 13th was certainly a gross violation of the petitioner's constitutional rights under Articles 21 & 22(2). If the personal liberty of an M.L.A. was to be played with in that fashion, one could only wonder what might happen to lesser mortals. Police officers who were the custodians of the law and order should have shown greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty was to protect and not to abduct. The two police officers, the one who arrested him and the one who obtained the orders of remand, were but minions in the lower rungs of the ladder. But the responsibility lay elsewhere and with the higher echelons of the Government of J. & K. There was no doubt that the constitutional rights of the petitioner were violated with impunity since he was not in detention. There was no need to make any order to set him at liberty, but suitably and adequately he should be compensated. The Supreme Court has a right to award monetary compensation by way of exemplary costs or otherwise. When a person came to the Supreme Court with the complaint that he had been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion might not be washed away or wished away by his being set free. In appropriate cases like the present one this Court has jurisdiction to compensate the victim by awarding suitable monetary compensation. The State of J&K is directed to pay a sum of Rs. 50, 000/-. *Bhim Singh* v. *State of J&K*, AIR 1986 SC 494 : (1985) 4 SCC 677 : 1986 SCC (Cri) 47 : 1986 CrLJ 192 : 1986 SCCrR 20 : 1985 Cur CrJ (SC) 516.

[9467] ● ***Personal liberty—Violation of.***—Where an M.L.A. was arrested and remand order of the arrested person was obtained but he was not produced before the Judicial Courts within the time allowed under law, there is gross violation of the constitutional rights of the person under Articles 21 and 22(2). Police Officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct. *Bhim Singh* v. *State of J&K.*, AIR 1986 SC 494 : (1985) 4 SCC 677 : 1986 SCC (Cri) 47 : 1986 CrLJ 192 : 1986 SCCrR 20 : 1985 Cur CrJ (SC) 516.

[9468] ● ***Legal aid—No application to be made.***—For the legal aid no application or choice is to be made or exercised by the accused. *Shri Sukh Das* v. *Union Territory of Andhra Pradesh,* AIR 1986 SC 991 : 1986 CrLJ 1084 : (1986) 2 Crimes 40 (SC).

[9469] ● ***Right to speedy trial.***—The constitutional position is now well settled that the right to speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Article 21 of the Constitution. Several questions would arise for consideration like was there delay? How long was the delay? Was the delay inevitable having regard to the nature of the case? Was any part of the delay caused by the wilfulness or the negligence of the prosecuting agency? Was there a likelihood of the accused being prejudiced in his defence? Irrespective of any likelihood of prejudice in the conduct of his defence, was the very length of the delay sufficiently prejudicial to the accused? The question whether the right to a speedy trial which formed part of the fundamental right to life and liberty guaranteed by Article 21 had been infringed was ultimately a question of fairness in the administration of criminal justice even as 'acting fairly' was of the essence of the principles of natural justice and a 'fair and reasonable procedure' was what was contemplated by the expression 'procedure established by law' in Article 21. In this case if the police officers had some justification for suspecting a conspiracy between the various accused, they would be well justified in suspecting ramifications of the conspiracy elsewhere in the country necessitating investigation into various parts of the country. If the investigating agency suspected a conspiracy to wage war, it was its bounden duty to search for evidence wherever it could be found and not content itself by reading the letters and examining the recipients of the letters. The letters were only items of evidence and not the totality of the evidence. The investigating agency could not, therefore, be blamed for the slow progress that they made in investigating a case of this nature where five persons were seen going towards the Indo-Nepal border in a jeep in an attempt to cross the border and when questioned by the border patrol their answers were not satisfactory, one of them was identified as a dismissed police officer wanted in connection with an order of detention under the National Security Act and incriminating documents were recovered from them with huge cash and they offered a bribe to be allowed to cross the border. Further, the accused did not make any serious protest about any delay until the filing of the present writ petitions. After the charge-sheet was filed, at least on two occasions the prosecuting agency expressed an anxiety to have the case disposed of as expeditiously as possible. Having regard to all the circumstances of the case, the delay in the investigation and in the trial of the case was held to be not so unfair as to warrant quashing of the proceedings on the ground of infringement of the right of the accused to a speedy trial, a part of their fundamental right under Article 21 of the Constitution. A direction that the trial should start soon and proceed from day to day was all that was called for in the present case. *Raghubir Singh* v. *State of Bihar*, AIR 1987 SC 149 : (1986) 4 SCC 481 : 1987 CrLJ 157.

[9470] ● ***Procedure established by law not unconstitutional.***—The procedure established by law in Article 21 is the procedure as on the day on which the Constitution was adopted and therefore it cannot be contended that by amending the CrPC the effect of the procedure established by law indicated in Article 21 could be taken away. The procedure must be fair and just as indicated clearly by the trend of decisions of this Court. Even expeditious trial has been considered to be a part of the guarantee under Article 21. At present the procedure established by law as indicated in Article 21 is as provided in Section 327 and unless on facts it is established that that procedure was prevented or was not permitted, it could not be said that merely because trial was held at a particular place it could be said to be a trial which was not open to public. Section 4 of the Prevention of Corruption Act, 1947 lays down a procedure established by law and hence it is not unconstitutional. *Kehar Singh* v. *State (Delhi Admn.)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1989 CrLJ 1 : (1988) 3 Crimes 209 : (1988) 15 DRJ 114 : (1988) CalCrLR (SC) 146 : (1988) 2 ACrLR 575 : 1988 BLJR 630.

[9471] ● ***Curtailment of personal liberty of anti-social and antinational elements.***—The law permits the personal liberty of antisocial and antinational elements being curtailed by procedure established by law. And Criminal Procedure Code is one of such law.

Successive bail applications rejected by High Court—if there is no change of circumstances, allowing bail on next bail application is illegal. Criminal Appl. No. 995 of 1989, dated 8-6-1989 (Bombay) Reversed. *State of Maharashtra* v. *Buddhikota Subba Rao*, AIR 1989 SC 2292 : 1989 Supp (2) SCC 605 : 1989 CrLJ 2317.

[9472] ● ***Article 21 of Constitution not attracted in case of trade or business.***—Article 21 of the Constitution is not attracted in case of trade or business either big or small. The right to carry on any trade or business and the concept of life and personal liberty within Article 21 are too remote to be connected together. *Sadan Singh* v. *New Delhi Municipal Committee*, AIR 1989 SC 1988 (1996, 1997) : (1989) 4 SCC 155 : JT 1989 SC 553 : 1990 UJ SC 187.

[9473] ● ***Death sentence exception rather than rule.***—As this Court is bound by the law laid down by this Court in the case of *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898, it is not possible to reconsider the constitutional validity of the statutory provisions in the I.P.C. providing for the sentence of death. Only six sections of the I.P.C., namely, Sections 120-B, 121, 132, 302, 307 and 396, enable the imposition of the sentence of death. The doctrine that the benefit of reasonable doubt should be given to the accused holds the field. Under the present criminal law the imposition of a death sentence is an exception (for which special reasons must be given) rather than the rule and statistics disclose that mere 29 persons were hanged when 85, 000 murders were committed during the period 1974 to 1978. Besides, Articles 21 and 134 of the Constitution specifically contemplate the existence of a death penalty. In the circumstances, the matter may lie where it does. *Kehar Singh* v. *Union of India*, AIR 1989 SC 653 : (1989) 1 SCC 204 : 1989 CrLJ 941 : (1989) 1 Crimes 238 : (1989) 37 DLT 171.

[9474] ● ***Appeal disposed of without hearing counsel.***—Where the Court appointed counsel but he did not appear during appeal hearing and appeal was disposed of without hearing him appeal is liable to be remanded to be heard in presence of both sides. *Jayendra Kumar* v. *State of Maharashtra*, AIR 1990 SC 1224 : 1990 CrLJ 1326 : 1990 Supp SCC 777.

[9475] ● ***Custodial death.***—A few suspects were arrested and brought to the police station and were subjected to torture in third degree method which entailed death of a suspect in police custody. Resort to third degree method by police officers resulting in death of the person in police custody, is an offence of a serious nature aggravated by the fact that it is committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise it will be taking a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency. The Supreme Court further held that custodial death calls for deterrent sentence. *Gauri Shankar Sharma* v. *State of Uttar Pradesh*, AIR 1990 SC 709 : 1990 Supp SCC 656.

[9476] ● *Inordinate delay in investigation.*—A lethargic and lackadaisical manner of investigation over a prolonged period makes an accused in a criminal proceedings to live every moment under extreme emotional and mental stress and strain and to remain always under a fear psychosis. Therefore, it is imperative that if investigation of a criminal proceeding staggers on with tardy pace due to the indolence or inefficiency of the investigating agency causing unreasonable and substantial delay resulting in grave prejudice or disadvantage to the accused, the Court as the protector of the right and personal liberty of the citizen will step in and resort to the drastic remedy of quashing further proceedings in such investigation. While so, there are offences of grave magnitude such as diabolical crimes of conspiracy or clandestine crimes committed by members of the underworld with their tentacles spread over various parts of the country or even abroad. The very nature of such offences would necessarily involve considerable time for unearthing the crimes and bringing the culprits to book. Therefore, it is not possible to formulate inflexible guidelines or rigid principles or uniform application for speedy investigation or to stipulate any arbitrary period of limitation within which investigation in a criminal case should be completed. *State of Andhra Pradesh* v. *P.V. Pavithran*, AIR 1990 SC 1266 : (1990) 2 SCC 340 : 1990 CrLJ 1306 : (1990) 2 Crimes 40 (SC).

[9477] ● *Free legal aid.*—Though Article 39A of the Constitution provides fundamental rights to equal just and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the Bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practising in the Court concerned, volunteer to defend such indigent accused as a part of their professional duty. If these remedial steps are taken and an honest and objective investigation is done, it will enhance a sense of confidence of the public in the investigating agency. *Kishore Chand* v. *State of H.P.*, AIR 1990 SC 2140 : (1991) 1 SCC 286 : 1990 CrLJ 2289.

[9478] ● *Duty of police to take proper care of person taken in custody.*—In this case the victim for a very brief time was in custody of a Hawaldar. There was a looting of Railway passengers by a crowd who beat up several persons including the one deceased, Mahesh Mahto who received serious injuries. The deceased had to be taken to the hospital for treatment. As no transport was available, the Hawaldar hired a rickshaw and tied the deceased in unconscious state with a rope by the footboard for being taken to hospital. There was negligence in timely providing proper medical treatment to the deceased due to which he could not be saved. The case was brought by the Supreme Court Legal Aid Committee under Article 32 of the Constitution on the basis of an information published in the Illustrated Weekly of India. After going through the affidavit and counter-affidavit, the Supreme Court observed it is the duty of the police to take proper care of a person taken into custody including providing of medical treatment in case of its need. The Court directed the compensation of Rs. 20,000/- to be paid by the State of Bihar to the legal representatives of the deceased. *Legal Aid Committee* v. *State of Bihar,* (1991) 3 SCC 482 : 1991 SCC (Cri) 639.

[9479] ● *Custodial death.*—Suman Behera aged 26 was arrested by an Asstt. Sub-Inspector of Police at 8.00 a.m. on an allegation of theft on 01.12.1987. Next day his dead body with multiple injuries were found on a railway track. This obviously was a custodial death. The matter came on the anvil of the Apex Court on a letter by Nilabati, the mother of Suman which letter their Lordships treated as a petition under Article 32, Constitution. The State of Orissa and its police officers, including Sarat Chandra Barik, Asstt. Sub-Inspector of Police and Constable No. 127, Chhabil Kujur of Police Outpost Jaraikela, Police Station Bisra were impleaded as respondents in this petition. The defence of the respondents was that Suman Behara managed to escape from police custody at about 3.00 a.m. on the night between the 1st and 2nd December, 1987 from the Police Outpost Jeraikela, where he was detained and guarded by Police Constable Chhabil Kujur; he could not be apprehended thereafter in spite of a search; and the dead body of Suman Behra was found on the railway track the next day with multiple injuries which indicated that he was run over by a passing train after he had escaped from police custody. In short, on the basis the allegation of custodial death was denied and consequently the respondents' responsibility for the unnatural death of Suman. The admitted facts are that Suman Behara was taken in police custody on 01.12.1987 at 8.00. a.m. and he was found dead the next day on the railway track near the Police Outpost Jeraikela, without being released from custody, and his death was unnatural caused by multiple injuries sustained by him. The burden is, therefore, clearly on the respondents to explain how Suman Behara sustained those injuries which caused his death. Unless a plausible explanation is given by the respondents, consistent with their innocence, the obvious inference will be that the fatal injuries were inflicted by the police officials. *Nilabati Behara* v. *State of Orissa*, AIR 1993 SC 1960 : (1993) 2 SCC 746 : 1993 CrLJ 2899 : (1993) 2 SCJ 487.

[9480] ● *Custodial death—Compensation—Quantum.*—The injuries on the person of Suman were examined by a medical expert who opined that the injuries were caused by hard and blunt substance; the injuries on the face and left temporal region were post-mortem while the rest were ante-mortem. The doctor excluded the possibility of the injuries resulting from dragging of the body by a running train and stated that all the ante-mortem injuries could be caused by lathi blows. It was further stated by the doctor that while all the injuries could not be caused in a train accident, it was possible to cause all the injuries by lathi blows. Thus, the medical evidence comprising the testimony of the doctor, who conducted the post-mortem, excludes the possibility of all the injuries to Suman Behara being caused in a train accident while indicating that all of them could result from the merciless beating given to him. This Court holds that it is a custodial death caused by the Respondent Police Officer.

Reimposes a compensation to the tune of Rs. 1,50,000/- to be paid by the Orissa Govt. to the mother of the victim. *Nilabati Behara* v. *State of Orissa*, AIR 1993 SC 1960 : (1993) 2 SCC 746 : 1993 CrLJ 2899 : (1993) 2 SCJ 487.

[9481] ● *Misappropriation of Public Fund—Extraordinary delay in filing charge-sheet.*—In a case delinquent was the Manager under the Bihar State Co-operative Marketing Union. On verification, it was found that fertilizer worth Rs. 1,15,000/- was short. The delinquent was suspended pending enquiry into the allegations on 2.7.1977. In the year 1978, he was dismissed from service and the provident fund and gratuity due to him was also forfeited. The delinquent crossed the age of superannuation even by 1989. The FIR in that behalf was issued on 10.12.1977. It is stated that he surrendered in Court in January, 1978 and was enlarged on bail. Be that as it may, the charge-sheet was filed on February 9, 1983 – after a lapse of more than five years. Thereafter, the prosecution evidence was adduced and charges framed by the Court on 25th April, 1989 – another six years. The charges were framed under Sections 408 and 428, IPC and Section 7 of the Essential Commodities Act. In view of this inordinate delay the Supreme Court quashed the proceeding. The Court observed : "It is true that the charges against the appellant relate to misappropriation of public funds. In such a case, we should take a more strict view as indicated in the Constitution Bench decision in *Abdul Rehman Antulay* v. *R.S. Nayak*, AIR 1992 SC 1701. But there are certain circumstances in this case which induce us to interfere in the matter. The most glaring one is that even though the FIR was issued on 10th December, 1977, the charge-sheet was filed only on 9th February, 1983, *i.e.* after a lapse of 5 years. No explanation is forthcoming for this extraordinary delay. May be, this being a case of misappropriation of public funds, the investigation may have taken a longer time but it cannot certainly take more than five years, having regard to the facts and circumstances of the case. Added to the said circumstances is the fact that even though there was no stay in this Special Leave Petition/ Criminal Appeal, the case has not progressed much as stated above. Moreover, the appellant has been dismissed from service on these very allegations. His provident fund and gratuity amounts have been forfeited and he has crossed the age of superannuation. Calling upon defence, after 16 years, in all the facts and circumstances of the case, is bound to cause prejudice to him. *Biswanath Prosad* v. *State of Bihar*, AIR 1993 SCW 3631 : 1994 Supp (3) SCC 97 : 1994 SCC (Cri) 1663 : 1994 CrLJ 242 (SC).

[9482] ● *Bribery case—Delayed proceedings.*—In a case involving offence of bribery no action was taken by prosecution for long six years after the raid being conducted. The public prosecutor consistently opined that there is no case against the delinquent. Sanctioning authority on his independent assessment refused to accord sanction. Later on he changed his view on asking by D.I.G., Police. Prosecution was pending for long 13 years. It was held to be a fit case for quashing the prosecution. *Ramananda Choudhury* v. *State of Bihar*, AIR 1994 SC 948 : 1994 CrLJ 1221 (SC).

[9483] ● *Delayed trial—Quashing of proceedings.*—In a case no charge was framed even ten years after filing of police report and eighteen years after the occurrence, the accused being in no way responsible for the delay. Quashing the proceeding, Supreme Court held that even apart from Article 21, Constitution of India, Courts have been cognizant of undue delays in criminal matters and wherever there was inordinate delay or where the proceedings were pending for too long and any further proceedings were deemed to be oppressive and unwarranted, they were put to an end by making appropriate orders. Whether the delay would result in infringement of right to fair trial would depend on the facts and circumstances of each case and no outer limit beyond which prosecution should be halted can be fixed. *Ganga Ram* v. *State of Rajasthan,* 1994 CrLJ 2125 (SC) : (1994) 2 Raj LW 367.

[9484] ● ***Speedy trial essential part of fundamental right to life and liberty.***—The concept of speedy trial is read into Article 21 as an essential part of the fundamental right of life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the state of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offences till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309, CrPC. *Kartar Singh* v. *State of Punjab,* (1994) 3 SCC 569 : 1994 CrLJ 3139 (SC) : JT 1994 (2) SC 423 : 1994 Supp (1) Scale 1 : 1994 (1) CCR 162 (SC).

[9485] ● ***Inhuman torture of innocent lady by police officers.***—One innocent lady after being taken into custody inhumanely tortured by police officers and these police officers stood trial for this torture. Delay in trial was occasioned mainly by delaying tactics of the delinquent police officers – held on the ground of inordinate delay such a trial cannot be quashed. [It is a case where Runu Guha Neogy, Inspector of Police was tried for torture on Archana Guha who was rendered crippled and handicapped]. The Supreme Court observed : "The facts of this case impel us to say how easy it has become today to delay the trial of criminal cases. An accused can stall the proceedings for decades together, if he has the means to do so. This Court expect the superior Courts to resist all such attempts. Unless a grave illegality is committed, the superior Courts should not interfere. They should allow the Court which is seized of the matter to go on with it. There is always an appellate Court to correct the errors. One should keep in mind the principle behind Section 465, CrPC. Any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by a superior Court unless such irregularity or infraction has caused irreparable prejudice to the party and requires to be corrected at the trial stage itself, because such frequent interference by superior Courts at the interlocutory stages tends to defeat the ends of Justice instead of serving those ends. It should not be that a man with enough means is able to keep the law at bay. That would mean the failure of the very system. *Santosh De* v. *Archana Guha,* (1994) 2 SCC 420 : 1994 SCC (Cri) 546 : 1995 CrLJ 2640 (SC) : JT 1994 (1) SC 413 : 1994 (1) Crimes 548.

[9486] ● ***Custodial death—Police atrocities.***—Haiklkandi (Assam) Bar Association brought to the attention of the Supreme Court about torture in Police Custody and consequential death of one Nurul Haq, the police attempt to bury the dead body of whom after a post-mortem examination without informing his family had been repeatedly foiled by the public. This Court treating it as writ petition under Article 32, Constitution directed the Director General of Police to investigate and report. The Director General caused an investigation by Superintendent of Police. The statement in the report was that Nurul Haq was a notorious docoit who was manhandled by the members of the public. The further police report that post-morterm report did not indicate any external injury over the dead body was factually incorrect. This Court called an explanation of the Superintendent of Police and he by an affidavit stated that the word "no" had been inadvertently added. Even the police have registered an offence under Section 302, I.P.C. against unknown persons. The story that the members of the public beat him raised doubts because in that case the wrath of the public would not have been towards the police and the Bar Association would not have taken up the cause. The medical examination report of 12.3.1993 was not forthcoming nor was the laboratory report on the viscera available. The fact that the deceased was beaten up is not in doubt. He had fractured a bone. In the circumstances if it is believed that he died of cardiac failure there can be no doubt that those who caused the injuries have committed grievous hurt. The possibility of the police having caused injuries cannot be ruled out altogether. Since the local police at the highest level has taken a stand that the assault on the deceased was by members of the public and not the police after the apprehension of the deceased it is futile to expect an independent and wholly objective investigation by the State police. Even otherwise, the people will have little confidence in the investigation no matter how honest and objective the investigation be. In this backdrop C.B.I. enquiry is directed. *Secretary, Hailakandi Bar, Association* v. *State of Assam,* 1995 Supp (3) SCC 736 : 1996 SCC (Cri) 90 : 1994 CrLJ 2197 (SC).

[9487] ● ***Handcuffing of under-trials.***—"We are satisfied that the petitioners are educated persons and selflessly devoting their service to the public cause. They are not the persons who have got tendency to escape from the jail custody. In fact, petitioners 1 and 2 even refused to come out on bail, but chose to continue in prison for a public cause. The offence for which they were tried and convicted under Section 186 of Indian Penal Code is only a bailable offence. Even assuming that they obstructed public servants in discharge of their public functions during the 'dharna' or raised any slogan inside or outside the Court, that would not be sufficient cause to handcuff them. Further, there was no reason for handcuffing them while taking them to Court from jail. On judicial order by a competent Court, that person comes within the judicial custody of the Court. Therefore, the taking of a person from a prison to the Court or back from Court to the prison by the escort party is only under the judicial orders of the Court. Therefore, even if extreme circumstances necessitate the escort party to bind the persons in fetters, the escort party should record the reasons for doing so in writing and the Court is to approve or disapprove the action of the escort party and issue necessary directions. It is most painful to note that the petitioners 1 and 2 who staged a 'dharna' for public cause and voluntarily submitted themselves for arrest and who had no tendency to escape had been subjected to humiliation by being handcuffed which act of the escort party is against all norms of decency and which is in utter violation of the principle underlying Article 21 of the Constitution of India. This Court in *Khedat Mazdoor Chetna* v. *State of Madhya Pradesh*, AIR 1995 SC 31 : 1994 (6) SCC 260 : 1994 SCC (Cri) 1643 : 1995 CrLJ 508 : JT 1994 (6) SC 60, has severely condemned the attitude of judicial Magistrate in not taking any action against handcuffing of undertrial prisoners who were fighting for unliftment of Adivasis. During the transit between prison house and Court house no undertrial prisoners can be put under handcuffs. It is directed that the judicial officers before whom the prisoner is produced to interrogate the prisoner, as a rule, whether he has been subjected to handcuffs or other 'irons' treatment and if he has been, the official concerned shall be asked to explain the action forthwith in the light of this judgment. *Citizens for Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1996 CrLJ 3247.

[9488] ● ***Speedy trial—Release of under trials languishing in Jail—Guidelines as to.***—The enforcement of the guidelines by the subordinate Courts functioning in different States should be the responsibility of the different High Courts to which they are subordinate. General orders for release of under-trials without reference to specific fact-situations in different cases may prove to be hazardous. While there can be no doubt under-trial prisoners should not languish in jails on account of refusal to enlarge them on bail for want of their capacity to furnish bail with monetary obligations, these are matters which have to be dealt with on case to case basis keeping in mind the guidelines laid down by this Court. Sympathy for the under-trials who are in jail for long terms on account of the pendency of cases has to be balanced having regard to the impact of crime, more particularly, serious crime, on society and these considerations have to be weighed having regard to the fact-situations in pending cases. While there can be no doubt that trials of those accused of crimes should be disposed of as early as possible, general orders in regard to judge-strength of subordinate judiciary in each State must be attended to, and its functioning overseen, by the High Court of the concerned State. *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, (1995) 5 SCC 326 : 1995 SCC (Cri) 913 : 1995 CrLJ 4020 (SC) : 1995 (3) Crimes 501 : 1995 (3) CCR 105 (SC).

[9489] ● ***Convict killed by co-accused in Jail.***—A convict in jail was killed by a co-convict in jail. It amounted to violation of Article 21, Constitution and the State Government was directed to pay compensation to the tune of Rs. 1,00, 000/- to the wife and children of the deceased. *Kewal Pati* v. *State of Uttar Pradesh*, (1995) 3 SCC 600 : 1995 SCC (Cri) 556 : 1995 CrLJ 2920 : 1995 (2) Crimes 304 : 1995 (3) CCR 1 (SC).

[9490] ● ***Abduction and elimination of seven prisoners by police party—Compensation.***—Police force abducted some persons and possibly assassinated them. The complaint about the assassination was not being conducted for a long time. The Supreme Court directed the State to which the police party belonged to pay Rs. 1,50,000/- to the legal representative of each person abducted. *Inder Singh* v. *State of Punjab*, AIR 1995 SC 1949 : (1995) 3 SCC 702 : 1995 SCC (Cri) 586 : 1995 CrLJ 3235 (SC) : JT 1995 (9) SC 627 : 1995 (3) CCR 30 (SC).

[9491] ● ***Speedy trial.***—Respondent when he himself contributes to the delay in disposal of trial, he cannot be permitted to take advantage of his own wrong and take shelter under "Speedy trial" plea to escape from prosecution. *Union of India* v. *Ashok Kumar Mitra*, AIR 1995 SC 1976 : (1995) 2 SCC 768 : 1995 SCC (Cri) 425 : 1995 CrLJ 3633 (SC) : (1995) 1 Crimes 852 (SC) : 1995 (2) CCR 2 (SC).

[9492] ● ***Delay in disposal of complaint—Quashing of complaint.***—There was delay in disposal of complaint case for 12 years–complainant not being responsible for delay and the question of delay was not agitated before the High Court. The Apex Court refused to quash the complaint. *G.N. Hedge* v. *S. Bangarappa*, (1995) 4 SCC 41 : 1995 SCC (Cri) 634 : 1995 CrLJ 2935 (SC) : JT 1995 (4) SC 124 : 1995 (2) Crimes 306 : 1995 (4) CCR 20 (SC).

[9493] ● ***Accused not permitted to take advantage of his own wrong.***—If the accused contributes to delay in disposal of trial, he cannot be permitted to take advantage of his own wrong and take shelter under "Speedy Trial" to escape from prosecution. *Union of India* v. *Ashok Kumar Mitra*, AIR 1995 SC 1976 : (1995) 2 SCC 768 : 1995 SCC (Cri) 425 : 1995 CrLJ 3633 (SC) : (1995) 1 Crimes 852 (SC) : 1995 (2) CCR 2 (SC).

[9494] ● ***Habeas corpus petition—Death of accused for non-production before Magistrate.***—The two sons and the husband of a lady who filed a *habeas corpus* petition to Court, were taken to police custody. Telegrams and letters were sent to various authorities complaining about illegal detention of them. The police who took them into custody on 27.4.1994 did not produce them before any Magistrate. It was only after the writ of *habeas corpus* was issued the husband was reported dead and the two sons were produced before a Magistrate. The Apex Court after expressing great concern for non-production of the accused earlier before a Magistrate directed enquiry about the death of the husband by Director General of Police, Punjab. *Haribans Kaur* v. *Union of India*, (1995) 1 SCC 623 : (1995) 1 Crimes 204 (SC).

[9495] ● ***Criminal appeal—Delay in disposal of.***—Although crime never dies nor there should be any sympathy for the criminal, yet human factors play an important role and reflect advertently or inadvertently in the decision making process. In this appeal there is a time lag of more than eighteen years from the date of incident and nearly fifteen years from the date of acquittal and its hearing. By any standard it is shocking. And this has been aggravated by still more shocking behaviour of the Government which shall be adverted to later. Speedy trial, early hearing and quick disposal are sine *qua non* of criminal jurisprudence. In some countries like England days are fixed statutorily for trial of cases. Keeping an accused in custody for a day more than it is necessary, is constitutionally impermissible and violative of human dignity, freedom of life and liberty. The overcrowded Court dockets, the phenomenal rise of public interest litigation, duty to ensure enforcement of fundamental rights undoubtedly keeps this Court under stress and strain. But that cannot be an excuse for keeping the sword of Damocles hanging on the accused for an indefinite period of time, it does not do any credit rather makes one sad. If the accused is not granted bail and serves out the sentence then the appeal is rendered academic for all practical purposes. And the right to establish innocence fades away in lack of enthusiasm and interest. If he is granted bail then long delay may give rise to humane considerations. Time heals the gravest scar and mitigates deepest injury suffered physically, mentally and emotionally. Therefore, if the Courts have been rendered helpless and the exasperating delay is threatening to eat away the system the Government may consider either to increase the strength to clear the backlog or devise some mechanism by which criminal appeals pending for more than reasonable time in higher Courts should stand disposed of. *State of Punjab* v. *Ajaib Singh*, (1995) 2 SCC 486 : 1995 SCC (Cri) 418 : 1995 CrLJ 1456 (SC) : JT 1995 (1) SC 433 : 1995 (1) CCR 83 (SC) : 1995 (2) Crimes 142 : 1995 (71) FLR 150.

[9496] ● ***Anticipatory bail—Not granted as of right.***—Anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21. *State of M.P.* v. *Ram Kishna Balothia*, AIR 1995 SC 1198 (1201) : (1995) 3 SCC 221 : 1995 SCC (Cri) 439 : 1995 CrLJ 2076.

[9497] ● ***Right to life.***—Right to life includes livelihood. *Consumer Education Society* v. *Union of India*, AIR 1995 SC 922.

[9498] ● ***Handcuffing of prisoners.***—As to handcuffing a prisoner the Supreme Court : "We declare, direct and lay down as a rule that handcuffs or other fetters shall not be forced on a prisoner—convicted or undertrial—while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to Court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to Court and back. Where the police or the jail authorities have well-grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous/desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner. In all the cases where a person arrested by police is produced before the Magistrate and remand—judicial or non-judicial custody—is given by the Magistrate the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistrate at the time of the grant of the remand. When the police arrests a person in execution of a warrant of arrest obtained from a Magistrate, the person so arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested. Where a person is arrested by the police without warrant the police officer concerned may if he is satisfied, on the basis of the guidelines given by us in para above, that it is necessary to handcuff such a person, he may do so till the time he is taken to the police station and thereafter his production before the Magistrate. Further use of fetters thereafter can only be under the orders of the Magistrate as already indicated. This Court direct all ranks of police and the prison authorities to meticulously obey the above mentioned directions. Any violation of any of the directions issued by us by any rank of police in the country or member of the jail establishment shall be summarily punishable under the Contempt of Courts Act apart from other penal consequences under law." *Citizens of Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1995 SCC (Cri) 600 : JT 1995 (4) SC 475.

[9499] ● ***Rape case—Compensation—Award of.***—In a case a male lecturer of a college and a lady student fell in love with each other. The accused having induced the victim to believe by false assurance that he would marry the victim developed sex relationship resulting in the victim being pregnant. On the plea that the parents of the accused would object and the marriage should be deferred till the accused gets a government job the marriage stood deferred. Eventually the accused entered in a fake marriage secretly before the God he worshipped and put vermilion on the parting of hair and on the forehead of the victim. The pregnancy was aborted. Again she conceived through the accused and in a Nursing home the pregnancy was terminated. In the Nursing home the accused named Bodhisatta Gautam in the consent letter for M.T.P. signed his name as Bikash Gautam. The victim complained alleging offences under Sections 312, 420, 493, 496 and 498-A, I.P.C. The accused failed to have the complaint quashed before High Court. The accused approached the Apex Court and the Court *suo motu* granted interim compensation to the victim under Article 21, Constitution in exercise of power under Article 32 as also under Article 142, Constitution of India. The jurisdiction enjoyed under Article 32, Constitution by the Supreme Court is very wide as the Court while considering a petition for enforcement of any of the fundamental rights guaranteed in Part III of the Constitution, can declare an Act to be *ultra vires* or beyond the competence of the legislature and has also the power to award compensation for the violation of the Fundamental Rights. *Bodhisatta Gautam* v. *Subhra Chakraborty*, AIR 1996 SC 922 : (1996) 1 SCC 490 : 1996 SCC (Cri) 133 : (1995) 4 Crimes 722 (SC).

[9500] ● ***Misappropriation of money— Sanction for prosecution.***—An Asstt. Godown Manager within a period of three months of his posting misappropriated a large sum of money in 1976 and earlier. A departmental enquiry commenced on December 12, 1979 and initially the prosecution was laid in 1985 without obtaining the sanction. The learned Magistrate discharged the respondent on the ground that the sanction as required under Section 197 of the Criminal Procedure Code, 1973 was not obtained. In 1991, the sanction was obtained and thereafter the prosecution was laid. The quashing of prosecution for delay is not interfered with. *Bihar State Food & Civil Corpn.* v. *Narendra Kumar*, (1996) 7 SCC 183 : 1996 SCC (Cri) 248 : JT 1995 (9) SC 293 : 1995 (6) Scale 733 : 1996 (1) CCR 63 (SC) : (1995) 4 Crimes 767 (SC).

[9501] ● ***Rape—Crime against woman.***—Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centrespreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world. Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects. It is said that present days' law relating to rape have their origin in 1736 in Britain, when Sir Mathew Hale in his Historia Placitorum Coronae or, in other words, "History of the Pleas of the Crown" presented common-law rape doctrines which were immediately noticed to be hostile to the interests of women as one of the requirements was to inform the jury during trial that rape charges were easy to bring but difficult to defend. Consequently, in a tide of law reforms, this requirement was removed. The rule of corroboration which was much stricter in a trial for the offence of rape than for other offences was also largely removed from law. *Bodhisatta Gautam* v. *Subhra Chakraborty*, AIR 1996 SC 922 : (1996) 1 SCC 490 : 1996 SCC (Cri) 133 : JT 1995 (9) SC 509 : (1995) 4 Crimes 722 (727) (SC) : 1996 (1) CCR 81 (SC).

[9502] ● ***Right to live includes right to livelihood.***—It is no doubt true that right to live includes right to livelihood. However, the appellant is not denied his right to livelihood. He is already a professional carrying on the profession of a medical practitioner. He wants to have a second string to his bow. He wants simultaneously to be permitted to practice law with a view to earn additional or more livelihood. So far as his aforesaid demand is concerned the impugned rule requires that unless he gives up that other practice and joins wholeheartedly the legal profession he cannot be permitted to enter the legal profession. That rule cannot be said to be laying down a procedure not established by law. On the contrary that procedure has been found to be well sustained under Article 19(1)(*g*) of the Constitution read with Article 19(6). Once that conclusion is reached the absolute requirement of Article 21 would be out of the way. Appellant cannot be said to have been deprived of his right to livelihood by pursuing two professions, contrary to any established procedure of law. Consequently the impugned rule cannot be faulted on the touchstone of Article 21. *Haniraj L. Chulani (Dr.)* v. *Bar Council of Maharashtra & Goa*, AIR 1996 SC 1708 (1719) : (1996) 3 SCC 342 : JT 1996 (4) SC 162.

[9503] ● ***Right to life and equality clause—Applicable to every person.***—We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human-being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus, the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, *e.g.*, the AAPSU, to threaten the chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those given such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the chakmas are denied rights, constitutional and statutory, to be considered for being registered as citizens of India. In view of the above, we allow this petition and direct the first and second respondents, by way of a *writ of mandamus*, as under: (1) the first respondent, the State of Arunachal Pradesh, shall ensure that the life and personal liberty of each and every chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out of the State by organised groups, such as the AAPSU, shall be repelled, if necessary, by requisitioning the service of Paramilitary or Police force, and if additional forces are considered necessary to carry out this direction, the first respondent will request the second respondent, the Union of India, to provide such additional force and the second respondent shall provide such additional force as is necessary to protect the lives and liberty of the chakmas; (2) except in accordance with law, the chakmas shall not be evicted from their homes and shall not be denied domestic life and comfort therein; (3) the quit notices and ultimatums issued by the AAPSU and any other group which tantamount to threats to the life and liberty of each and every chakma should be dealt with by the first respondent in accordance with law; (4) the application made for registration as citizen of India by the chakma or chakmas under Section 5 of the Citizenship Act, 1955, shall be entered in the register maintained for the purpose and shall be forwarded by the Collector or the DC who receives them under the relevant rule, with or without enquiry, as the case may be, to the Central Government for its consideration in accordance with law; even returned applications shall be called back or fresh ones shall be obtained from the concerned persons and shall be processed and forwarded to the Central Government for consideration; (5) while the application of any individual chakma is pending consideration, the first respondent shall not evict or remove the concerned person from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision in that behalf. *National Human Rights Commission* v. *State of Arunachal Pradesh*, AIR 1996 SC 1234 (1239) : (1996) 1 SCC 742 : JT 1996 (1) SC 163.

[9504] ● ***Directions by Supreme Court in respect of prosecution in criminal Courts for long time.***—It appears essential to issue appropriate directions to protect and effectuate the right to life and liberty of the citizens guaranteed by Article 21 of the Constitution. It is also necessary to ensure that these criminal prosecutions do not operate as engines of oppression. Accordingly, the following directions are made which shall be valid not only for the States Uttar Pradesh, Bihar and Delhi but for all the States and the Union Territories :

1. (a) Where the offences under IPC or any other law for the time being in force for which the accused are changed before any Criminal Court are punishable with imprisonment not exceeding three years with or without fine and if trials for such offences are pending for one year or more and the concerned accused have not been released on bail but are in Jail for a period of six months or more, the concerned Criminal Court shall release the accused on bail or on personal bond to be executed by the accused and subject to such conditions, if any, as may be found necessary, in the light of Section 437 of the CrPC.

(b) Where the offences under IPC or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding five years with or without fine, and if the trials for such offences are pending for two years or more and the concerned accused have not been released on bail but are in Jail for a period of six months or more, the concerned Criminal Court shall release the accused on bail or on personal bond to be executed by the accused and subject to the imposing of suitable conditions, if any, in the light of Section 437, CrPC.

(c) Where the offences under IPC or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with seven years or less, with or without fine, and if the trials for such offences are pending for two years or more and the concerned accused have not been released on bail but are in jail for a period of one year or more, the concerned Criminal Court shall release the accused on bail or on personal bond to be executed by the accused and subject to imposing of suitable conditions, if any, in the light of Section 437, CrPC.

2. (*a*) Where criminal proceedings are pending regarding traffic offences in any Criminal Court for more than two years on account of non-serving of summons to the accused or for any other reason whatsoever, the Court may discharge the accused and close the cases.

(*b*) Where the cases pending in Criminal Courts for more than two years under IPC or any other law for the time being in force are compoundable with permission of the Court and if in such case trial have still not commenced, the Criminal Court shall, after hearing the Public Prosecutor and other parties represented before it or their Advocates, discharge or acquit the accused, as the case may be, and close such cases.

(*c*) Where the cases pending in Criminal Courts under IPC or any other law for the time being in force pertain to offences which are non-cognizable and bailable and if such pendency is for more than two years and if in such cases trials have still not commenced, the Criminal Court shall discharge or acquit the accused, as the case may be, and close such cases.

(*d*) Where the cases pending in Criminal Courts under IPC or any other law for the time being in force are pending in connection with offences which are punishable with fine only and are not of recurring nature, and if such pendency is for more than one year and if in such cases trial have still not commenced, the Criminal Court shall discharge or acquit the accused, as the case may be, and close such cases.

(*e*) Where the cases pending in Criminal Courts under IPC or any other law for the time being in force are punishable with imprisonment up to one year, with or without fine, and if such pendency is for more than one year and if in such cases trials have still not commenced, the Criminal Courts shall discharge or acquit the accused, as the case may be, and close such cases.

(*f*) Where the cases pending in Criminal Courts under IPC or any other law for the time being in force are punishable with imprisonment up to three years, with or without fine, and if such pendency is for more than two years and if in such cases trials have still not commenced, the Criminal Court shall discharge or acquit the accused, as the case may be, and close such cases.

3. For the purpose of directions contained in clauses (1) and (2) above, the period of pendency of criminal cases shall be calculated from the date the accused are summoned to appear in the Court.

4. Directions (1) and (2) made hereinabove shall not apply to cases of offences involving (*a*) corruption, misappropriation of public funds, cheating, whether under the Indian Penal Code, Prevention of Corruption Act or any other statute; (*b*) smuggling, foreign exchange violation and offences under the Narcotics Drugs and Psychotropic Substances Act; (*c*) Essential Commodities Act, Food Adulteration Act, Acts dealing with environment or any other economic offences; (*d*) offences under Arms Act, Explosive Substances Act, Terrorists and Disruptive Activities Act; (*e*) offences relating to the Army, Navy and Air Force; (*f*) offences against public tranquillity; (*g*) offences relating to public servants; (*h*) offences relating to coins and Government stamp; (*i*) offences relating to election; (*j*) offences relating to giving false evidence and offences against public justice; (*k*) any other type of offences against the State; (*l*) offences under the Taxing enactments and (*m*) offences of defamation as defined in Section 499, IPC. *"Common Cause" a registered Society through its Director* v. *Union of India*, AIR 1996 SC 1619 (1620) : (1996) 4 SCC 33 : 1996 SCC (Cri) 589 : 1996 CrLJ 2380.

[9505] ● ***Right to free legal aid and speedy trial.***—The right of free legal aid and speedy trial are guaranteed fundamental rights under Article 21 of the Constitution........ Article 39-A mandates that the State shall provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The principles contained in Article 39-A are fundamental and cast a duty on the State to secure that the operation of the legal system promote justice, on the basis of equal opportunities and further mandates to provide free legal aid in any way by legislation or otherwise, so that justice is not denied to any citizen by reason of economic or other disabilities. The crucial words are (the obligation of the State) to provide free legal aid by suitable legislation or by schemes or in any other way, so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. *State of Maharashtra* v. *Manubhai Pragaji Vashi*, AIR 1996 SC 1 (9) : (1995) 5 SCC 730 : JT 1995 (6) SC 119.

[9506] ● ***Right to speedy trial.***—Right to Speedy Trial is guaranteed as a fundamental right under Article 21 of the Constitution. To give meaning to the right remedial measures such as : nominating Special Judges to exclusively try and decide within six months long pending cases of murder; immediate bail by the Court for accused charged with attempt to murder if case pending for more than two years and for accused charged with minor offences if in detention for more than one year may be ordered. *R.D. Upadhyay* v. *State of A. P.*, (1996) 3 SCC 422 : 1996 SCC (Cri) 519 : (1996) 1 Crimes 189 (SC) : 1996 (3) CCR 96 (SC).

[9507] ● ***Right to life does not include right to die.***—It is a matter of common experience that in many cases where the persons are accused of minor offences punishable not more than three years-or even less - with or without fine, the proceedings are kept pending for years together, if they are poor and helpless, they languish in jails for long periods either because there is no one to think of them. The very pendency of criminal proceedings for long period by itself operates an engine of oppression. Quite often, the private complainants institute these proceedings out of oblique motives. Even in case of offences punishable for seven years or less - with or without fine – the prosecutions are kept pending for years and years together in criminal Courts. In a majority of these cases, whether instituted by police or private complainants, the accused belong to poorer sections of the society, who are unable to afford competent legal advice. Instance have also come before Courts where the accused, who are in jail, are not brought to the Court on every date of hearing and for that reason also the cases undergo several adjournments. It appears essential to issue appropriate directions to protect and effectuate the right to life and liberty of the citizens guaranteed by Article 21 of the Constitution. Directions (1) and (2) made herein above shall not apply to cases of offences involving (a) corruption, misappropriation of public funds, cheating, whether under the Indian Penal Code, Prevention of Corruption Act or any other statute, (b) smuggling foreign exchange violation and offences under the Narcotics Drugs and Psychotropic Substances Act, (c) Essential Commodities Act, Food Adulteration Act, Acts dealing with Environment or any other economic offences, (d) offences under Arms Act, Explosive Substances Act, Terrorists and Disruptive Activities Act, (e) offences relating to the Army, Navy and Air Force, (f) offences against public tranquillity; (g) offences relating to public servants, (h) offences relating to coins and Government stamp, (i) offences relating to elections, (j) offences relating to giving false evidence and offences against public justice, (k) any other type of offences against the State (l) offences under the Taxing enactment and (m) offences of defamation as defined in Section 499, IPC. The criminal Courts shall try the offences mentioned in preceeding para on a priority basis—Common Cause, a registered society through its *Director* v. *Union of India,* AIR 1996 SC 1619 : (1996) 4 SCC 33 : 1996 CrLJ 2380 : (1996) 2 Crimes 114 (SC).

[9508] ● ***Right to life.***—When a man commits suicide he has to undertake certain positive overt act and the genesis of those acts cannot be traced to, or be included within the protection of the 'right of life' under Article 21. The significant aspect of 'sanctity of life' is also not to be overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right of life'. With respect and in all humility, we find no similarly in the nature of the other rights, such as the right to 'freedom of speech' *etc.* to provide a comparable basis to hold that the 'right to life' also includes the 'right to die'. To give meaning and content to the word 'life' in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The 'right to die', if any, is inherently inconsistent with the 'right to life' as is 'death' with 'life'. Section 306, IPC and Section 309, IPC are *intra vires* the Constitution. *Gian Kaur* v. *State of Punjab*, AIR 1996 SC 946 : (1996) 2 SCC 698 : 1996 SCC (Cri) 374 : 1996 CrLJ 1660 (SC) : JT 1996 (3) SC 339 : (1996) 1 Crimes 197 : 1996 (2) CCR 126 (SC) 8.

[9509] ● ***Custodial death one of worst crimes.***—Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scruplously protected. We cannot whisk away the problem of any form of torture or cruel, inhuman or degrading treatment would fall within`the inhibition of Article 21 of the constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the government become law breakers, it is bound to breed contempt for law and would encourage law lessness and every man would have the tendency to become law into himself thereby leading to an archanism. No civilized nation can permit that to happen. Does a citizen shed off his fundamental right to life. The moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic. No the precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by laws. The Supreme Court, therefore, considered it appropriate is to issue the requirements to be followed in all cases of arrest of detention till legal provisions are made in that behalf as preventive measures. *Ashok K Johri* v. *State of H.P.,* AIR 1997 SC 610 : (1997) 1 SCC 416 : 1997 CrLJ 743 (SC).

[9510] ● ***Protection of fundamental rights—Human rights of criminal vis-a-vis duties of Police.***—The police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers smugglers who have organised, gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot however, be worst than the disease itself. The freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the Courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The *latin maxim Salus populiest suprema lex* (the safety of the people is the supreme law) and *salus republicae est suprema lex* (safety of the state is the supreme law) co exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be right just and fair. Using any form of torture for extracting any kind of information would neither be right nor just nor fair and, therefore, would be impermissible being offensive of Article 21. Such a crime suspect must be interrogate indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot however, be tortured or subject to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge about his accomplices, weapons *etc.* His Constitutional right cannot be abridged except in the manner permitted by law though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism. That would be bad for the State, the community and above all for the Rule of Law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge. *Ashok K. Johari* v. *State of U.P.,* AIR 1997 SC 610 : (1997) 1 SCC 416 : 1997 CrLJ 743.

[9511] ● ***Death sentence—Mass murders.***—Sentence of life imprisonment to these six accused persons would be totally inadequate in the facts and circumstances of this case. The proved facts and this case unmistakably indicate that the present case squarely falls within the ambit of "rarest of rare" case. Five murders were committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner which would arouse intense and extreme indignation of the community. Award of lesser punishment to these six accused persons would disintegrate the rule of law upon which the edifice of Indian civilized society stands. *Shiv Ram* v. *State of U.P.,* AIR 1998 SC 49 : (1998) 1 SCC 149 : 1998 CrLJ 76 (88,89) (SC).

[9512] ● ***Fair trial—Public hearing in Court.***—It is settled that the requirement of a public hearing in a Court of law for a fair trial is subject to the need of proceeding being held *in camera* to the extent necessary in public interest and to avoid prejudice to the accused. The Apex Court consider it appropriate to mention these facts in view of the nature of these proceedings wherein innovations in procedure were required to be made from time to time to sub-serve the public interest, avoid any prejudice to the accused and to advance the cause of justice. The medium of "continuing *mandamus*", was a new tool forged because of the peculiar needs to this matter. *Vineet Narain* v. *Union of India*, AIR 1998 SC 889 : (1998) 1 SCC 226 : 1998 CrLJ 1208 (SC) : JT 1997 (10) SC 247 : 1997 (7) Scale 656 : 1997 (10) Supreme 476 : 1998 (1) Crimes 518 : 1998 (1) CCR 190.

[9513] ● ***Speedy justice—Fundamental right.***—To have speedy justice is a fundamental right which flows from Article 21 of the Constitution. Prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail. *Akhtari Bi* v. *State of M.P.*, AIR 2001 SC 1528 (1530) : (2001) 4 SCC 355 : 2001 SCC (Cri) 714 : 2001 CrLJ 1727 : 2001 CrLR (SC) 357 : 2001 CrAppR (SC) 213 : (2001) 2 Crimes 65.

[9514] ● ***Compensation—Killing of Sikhs in riots.***—It is the duty of the state to create a climate where members of the society belonging to different faiths, caste and creed live together and, therefore, the State has a duty to protect their life, liberty, dignity and worth of an individual which should not be jeopardised or endangered. If, in any circumstance the state is not able to do so, then it cannot escape the liability to pay compensation to the family of the person killed during riots as his or her life has been extinguished in clear violation of Article 21. *S.S. Ahluwalia* v. *Union of India*, AIR 2001 SC 1309 (1310) : (2001) 4 SCC 452.

[9515] ● ***Compensation to family during riots.***—The State is liable to pay compensation to the family of the Sikhs killed during riots in the wake of assassination of Smt. Indira Gandhi on October 3, 1984 as his or her life has been extinguished in clear violation of Article 21 of the Constitution. *S.S. Ahluwalia* v. *Union of India*, AIR 2001 SC 1309 : (2001) 4 SCC 452.

[9516] ● ***Rape case.***—The definition of rape in Section 375 cannot be enlarged so as to induce all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration finger/vaginal and finger/anal penetration and object/vaginal penetration, as it may violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. *Sakshi* v. *Union of India*, AIR 2004 SC 3566 : (2004) 5 SCC 518 : 2004 CrLJ 2881 (2892) : (2004) 3 Crimes 177.

[9517] ● ***Expression "personal liberty".***—The expression "*personal liberty*" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. *District Registrar and Collector* v. *Canara Bank*, AIR 2005 SC 186 : (2005) 1 SCC 496 (524) : 2005 CrLJ 143 : (2005) 1 Crimes 12.

[9518] ● ***Atrocities within precincts of police station.***—The atrocities within the precincts of police station are often left without much traces or any ocular or other direct evidence to prove as to who the offenders are. Disturbed by this situation the Law Commission in its 113th Report recommended amendments to the Indian Evidence Act, so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the Court may presume that the injury was caused by the police officer having the custody of that person during that period unless the police officer proves to the contrary. *Munshi Singh Gautam* v. *State of Madhya Pradesh*, AIR 2005 SC 402 : (2005) 9 SCC 631 : 2005 CrLJ 320 (323, 324) : (2004) 4 Crimes 294.

[9519] ● ***Provision when cannot be held arbitrary.***—A provision cannot be held to be unreasonable or arbitrary and therefore, unconstitutional, merely because the authority vested with the power may abuse his authority. *Ahmad Noormohamed Bharti* v. *State of Gujarat*, AIR 2005 SC 2115 : (2005) 3 SCC 667 : 2005 CrLJ 2157 (2160) : 2005 (2) Crimes 26.

[9520] ● ***Compensation against the State.***—It is thus now settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21 by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil Court. In enforcement of the private law remedy in tort, nor come in the way of the criminal Court ordering compensation under Section 357 of Code of Civil Procedure. *Sube Singh* v. *State of Haryana*, AIR 2006 SC 1288 : (2006) 3 SCC 658 : 2006 CrLJ 1242 (1254).

[9521] ● ***Fair trial—Meaning.***—The principles of *rule of law and due process* are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a *fair trial*, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind *viz.* whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2006 SC 1367 : (2006) 3 SCC 374 : 2006 CrLJ 1694 (1707, 1708).

[9522] ● ***No right to individual is absolute.***—While it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the Court has also to take into consideration other facts and circumstances, such as the interest of the society. *Rajesh Ranjan Yadav* v. *CBI*, AIR 2007 SC 451 : (2007) 1 SCC 25 : 2007 CrLJ 304 (306, 308) : 2007 (1) Crimes 25.

[9523] ● ***Statutory provision otherwise intra vires—Mere possibility of abuse of power could not make it objectionable.***—It's statutory provision is otherwise *intra vires*, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, *ultra vires* or unconstitutional. In such cases "action" and not the "section" may be valuable. If it is so, the Court upholding the provision of law, may still set aside the action, order or decision and grant appropriate relief to the person aggrieved. *Satish Kumar Batra* v. *State of Haryana*, AIR 2009 SC 2180 : (2009) 12 SCC 491 : 2009 CrLJ 2447.

[9524] ● ***Custodial death due to police torture.***—Rarely in cases of police torture or custodial death, there is any direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save the colleagues. *Dalbir Singh* v. *State of Uttar Pradesh*, AIR 2009 SC 1674 : 2009 (11) SCC 376 : 2009 (1) SCR 824 : 2009 (2) Scale 188 : 2009 (1) Supreme 739.

[9525] ● ***Custodial death.***—There is an inbuilt guarantee against torture of assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short the 'Code' deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20(3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is therefore difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. *Dalbir Singh* v. *State of Uttar Pradesh*, AIR 2009 SC 1674 : 2009 (11) SCC 376 : 2009 CrLJ 1543 : 2009 (1) SCR 824 : 2009 (2) Scale 188 : 2009 (1) Supreme 739.

[9526] ● ***Personal liberty—Meaning.***—Right of personal liberty being sacred and cherished right has an important role to play in life of every citizen. Life or personal liberty includes a right to live with human dignity. *Dalbir Singh* v. *State of Uttar Pradesh*, AIR 2009 SC 1674 : (2009) 11 SCC 376 : 2009 CrLJ 1543.

[9527] ● ***Personal liberty of accused and right of police to investigate.***—Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental cannon of criminal jurisprudence, *viz*, the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restrain, the more restraint on others to keep off from us, the more liberty we have. *Vaman Narain Ghiya* v. *State of Rajasthan*, AIR 2009 SC 1362 : 2009 (2) SCC 281 : 2009 CrLJ 1311 : 2008 (17) SCR 369 : 2008 (16) Scale 346 : 2009 (1) Supreme 478.

[9528] ● ***Investigation conducted by an officer who had no jurisdiction to do—Accused challenged illegal investigation.***—Where the investigation was conducted by an officer who had no jurisdiction to do so, the delay in trial could not be attributed to the accused merely because he successfully exercised his right to challenge an illegal investigation. *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822 : (2009) 3 SCC 355 : 2009 CrLJ 1731.

[9529] ● ***Speedy trial.***—Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except according to procedure established by law; that such procedure is not some semblance of a procedure but the procedure should be 'reasonable, fair and just'; and therefrom flows, without doubt, the right to speedy trial. It was also observed that no procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. The Court clarified the speedy trial means reasonably expeditious trial which is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822 : (2009) 3 SCC 355 : 2009 CrLJ 1731 : 2009 (2) Scale 22 : 2009 (1) Supreme 514 : 2009 (1) SCR 517.

[9530] ● ***Propositions as guidelines.***—Referring to a number of decisions of this Court and the American precedents on the Sixth Amendment of their Constitution, making the right to a speedy and public trial a constitutional guarantee, the Court formulated as many as eleven propositions with a note of caution that these were not exhaustive and were meant only to serve as guidelines. For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: (i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily; (ii) right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial appeal, revision and retrial; (iii) in every case where the speedy trial is alleged to have been infringed, the first question to be put and answered is—who is responsible for the delay; (iv) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the Court concerned, prevailing local conditions and so on—what is called, the systemic delays; (v) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case; (vi) ultimately, the Court has to balance and weigh several relevant factors—'balancing test' or balancing process'—and determine in each case whether the right to speedy trial has been denied; (vii) Ordinarily speaking, where the Court comes to a conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the Court feels that quashing of proceedings cannot be in the interest of justice, it is open to the Court to make appropriate orders, including fixing the period for completion of trial; (viii) it is neither advisable nor feasible to prescribe any outer time-limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the Court to weigh all the circumstances of a given case before pronouncing upon the complaint; (ix) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in the High Court must, however, be disposed of on a priority basis. *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822 : (2009) 3 SCC 355 : 2009 CrLJ 1731.

[9531] ● ***Right to fair investigation and fair trial.***—Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation *i.e.* to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. *Nirmal Singh Kahlon* v. *State of Punjab*, AIR 2009 (SC) 984 : 2009 (1) SCC 441 : 2009 CrLJ 958 : 2008 (14) SCR 1049.

[9532] ● ***Custodial death.***—The accused was arrested by Delhi Police from Gurgaon. When the van carrying the accused crossed Haryana—Delhi Border, the accused felt uneasiness and he was rushed to the nearest hospital where he was declared "brought dead". *Held*, the distance between the place of arrest and the hospital was 96 kms for which one and a half hour driving time was normal. It was alleged that the delay of one and half hour that the deceased was first taken to some place where he was tortured due to which he died. The allegation was not only false but preposterous. *Mohd. Yasin* v. *State (NCT) of Delhi*, (2009) 14 SCC 644 : 2009 CrLJ 4405.

[9533] ● ***No torture even criminal's bad character.***—Criminal, despite his bad character, cannot be tortured. *Mohd. Yasin* v. *State (NCT) of Delhi*, (2009) 14 SCC 644 : 2009 CrLJ 4405.

[9534] ● ***Speedy trial in riot cases.***—It is essential that in riot cases and cases involving communal factors the trials should be held expeditiously. Therefore, we request the Hon'ble Chief Justice of Gujarat High Court to designate Court(s) in each district where the trial of the concerned cases are to be held. The Designated Courts shall take up the cases in question. Taking into account the number of witnesses and the accused persons and the volumes of evidence, it is open to the High Court to designate more than one Court in a particular district. Needless to say that these cases shall be taken up by the Designated Court on a day-to day basis and efforts shall be made to complete the trial with utmost expedition. The SIT shall furnish periodic reports if there is any further inquiry/investigation. The State of Gujarat shall also file a status report regarding the constitution of the Courts in terms of the directions to be given by the Hon'ble Chief Justice of the High Court within three months. The matter shall be listed further as and when directed by this Court. *National Human Rights Commission* v. *State of Gujarat*, 2009 (6) SCC 767 : 2009 (2) Crimes 308 (SC).

[9535] ● ***No explanation for delaying the investigation.***—At least for the period from 7th December, 1990 till 28th February, 2007 there is no explanation whatsoever for the delay in investigation. Even the direction issued by the High Court seems to have had no effect on the prosecution and they slept over the matter for almost seventeen years. Nothing could be pointed out by the State, far from being established to show that the delay in investigation or trial was in any way attributable to the appellant. The prosecution has failed to show any exceptional circumstance which could possible be taken into consideration for condoning a callous and inordinate delay of more than two decades in investigations and the trial. The trial delay cannot, in any way, be said to be arising from any default on the part of the appellant. Thus, on facts in hand, in our opinion, the stated delay clearly violates the constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution. *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822 : (2009) 3 SCC 355 : 2009 CrLJ 1731.

[9536] ● ***Speedy trial.***—Where the right to speedy trial is alleged to have been infringed, the Court has to perform the balancing act upon taking into consideration all the attendant circumstances and determine in each case whether the right to speedy trial has been denied in a given case. *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822 : (2009) 3 SCC 355 : 2009 CrLJ 1731.

[9537] ● ***Speedy trial.***—Right of speedy trial includes—within to sweep preceding police investigation. *Vakil Prasad Singh* v. *State of Bihar*, AIR 2009 SC 1822 : (2009) 3 SCC 355 : 2009 CrLJ 1731.

[9538] ● ***Women Protection Home—lack of care.***—If the inmates of the protection home could flee away, as alleged, from the control of authority managing the home or if persons could enter the said home at the dead of night without detection or permission and could take away girls under the nose of the people protecting the home, lot of explanation would have to be given by the appropriate Government and the competent authority regarding their capabilities of offering proper care and protection to such girls and women. Probably it is for such reasons that today these care and protection homes are becoming homes for trafficking of girls and women. It appears that the State Government is totally oblivious of its responsibilities regarding implementation of social welfare programmes of providing secured homes to destitute women and also children in conflict with law.

Considering the gravity of the situation and the problem, we direct for conducting a proper and detailed inquiry into the whole episode and affair for we will like to be enlightened not only about the functioning, management and the security of Nari Suraksha Griha but also regarding where-abouts of the concerned girl and how she could go missing from the State home and as to who is responsible in helping the girl to flee away, if it is so and consequential actions taken by the police. We request the Hon'ble Chairman, Bihar Human Rights Commission to cause such an inquiry and then submit a report to us preferably within six weeks from the date of communication of the order. In addition the Chief Secretary, Government of Bihar is also directed to submit a report within the said period with respect to the maintenance and governance of the said protection home specifically indicating the security measures and the steps being taken up in that regard. The report should also indicate the reasons behind the inability of the police to trace out the missing girl and also the status of the investigation. He shall also inform through the report if any action is taken or contemplated against any of the erring officer or employee. *Chandrika Prasad Yadav* v. *State of Bihar*, AIR 2009 SC 1719 : 2009 (4) SCC 415 : 2009 (2) Supreme 113 : (2009) 1 Crimes 392.

10. ARTICLE 22

[9539] ● ***Arrest and detention in custody.***—It cannot be contended that the words "arrest" and "detention in custody" in Articles 22(1) and 22(2) have a meaning wide enough to include every kind of detention, irrespective of the nature or the purpose of the restraint. That such a wide construction cannot be accepted will be clear from the following considerations :

(a) The language of these Articles is borrowed from Sections 60 and 61 of the Code of Criminal Procedure which lay down the procedure which a police officer has to follow when he makes an arrest *without* a warrant, and not when he makes it *under* a warrant.

(b) The requirement in Article 22(2) that the arrested person must be produced before a Magistrate within 24 hours of his arrest necessarily means that the Article refers to arrest without a warrant and not under it.

(c) The requirement in Article 22(1) that the arrested persons shall be informed as soon as may be of the grounds of his arrest cannot possibly refer to an arrest under a warrant, because when a person is arrested under a warrant he is given a copy of the warrant and the warrant itself states the reasons for the arrest on its face.

For all these reasons it must be held that Articles 22(1) and 22(2) apply only to arrest and detention by a police officer or by some other executive officer which is without a warrant, and that the protection of these Articles does not extend against arrest and detention under a warrant issued by a Court or a Magistrate. *State of Punjab* v. *Ajaib Singh*, AIR 1953 SC 10 : 1953 CrLJ 180 : 1952 SCJ 664 : 1952 SCA 791 : 1953 SCR 254 : 1953 MWN 355 : ILR (1953) Punj 121.

[9540] ● ***Language of Articles 22(1) and 22(2) of Constitution extends only to detention in custody.***—The language of Articles 22(1) and 22(2) makes it clear that their operation extends only to detentions in custody which are for the commission of offences or acts or a criminal or *quasi*-criminal nature, or for the prevention of the likely commission of those offences or acts. These Articles do not include within their ambit each and every form of detention in custody, and do not apply when the detention is only for the purpose of putting into effect the provisions of a statute which is only of a civil nature. To hold otherwise would make a dead-letter of the provisions of a number of established civil statutes.

It follows that when any detention is only for the purpose of putting into effect the provisions of a civil statute, Articles 22(1) and 22(2) cannot come into play and it cannot be claimed that such detention is illegal or otherwise than in accordance with "procedure established by law" merely because the person detained was not produced before a Magistrate within 24 hours of his being taken into custody or because the authority of Magistrate was not obtained for continuing him in such detention beyond that period. If a detention purporting to be under the provisions of a civil statute is fully in accordance with the provisions of that statute as regards the manner of taking a person into custody and keeping him in detention, such detention is perfectly legal and in accordance with law, and it is not open to anyone to invoke the application of Articles 21, 22(1) and 22(2) for the purpose of challenging its validity. *State of Punjab* v. *Ajaib Singh*, AIR 1953 SC 10 : 1953 CrLJ 180 : 1953 SCR 254 : 1952 SCA 791 : 1952 SCJ 664.

[9541] ● ***Detention effected under Abducted Persons (Recovery and Restoration) Act.***—The Act under which detention was effected in the present case was the Abducted Persons (Recovery and Restoration) Act, 1949. It authorised police officers in certain States to take into custody any abducted person found in any place and hand him over to the officer-in-charge of the nearest refugee camp, and further it authorised the camp officer to detain the person so handed over to him in that camp until arrangements for the restoration of that person to his or her family were completed. In the exercise of the powers under this Act, a Muslim girl was taken into custody and was detained in a refugee camp. The legality of the detention was challenged under a petition for a Writ of *Habeas Corpus* on the ground that the detained person had not been produced before a Magistrate and his authority for such detention had not been obtained as required by Article 22(2), and that for this reason the detention was not in accordance with procedure established by law within the meaning of Article 21.

Applying the principles set out above the taking into custody and detention in the present case being for the purpose of carrying out the provisions of a statute of a civil nature, Articles 22(1) and 22(2) did not apply and it was not obligatory for the legality of such detention that the provisions of those Articles be complied with. The detention being in accordance with the provisions of the Act in question, it was in accordance with 'procedure established by law' within the meaning of Article 21 and was, therefore, not in violation of the right of personal liberty protected by that Article. Application for the Writ of *Habeas Corpus* was disallowed. *State of Punjab* v. *Ajaib Singh*, AIR 1953 SC 10 : 1953 CrLJ 180 : 1953 SCR 254 : 1952 SCA 791 : 1952 SCJ 791.

[9542] ● ***Detention in custody of Speaker of an Assembly without warrant of Magistrate.***—Detention in the custody of a Speaker of an Assembly without a warrant of a Magistrate is in contravention of the provisions of Articles 21 and 22(2).

The provisions of Article 22(2) of the Constitution are peremptory, and no person can be detained in custody beyond 24 hours of his arrest without the authority of a Magistrate. *Gunupati K. Reddy* v. *Nafisul Hasan*, AIR 1954 SC 636 : 1954 CrLJ 1704.

[9543] ● ***Articles 22(1) and 22(2) of Constitution not apply to person arrested under Preventive Detention Act.***—As provided in Article 22(3), the provisions of Articles 22(1) and 22(2) do not apply to any person who is arrested or detained under any law providing for preventive detention. Section 3(1)(*b*) of the Preventive Detention Act provides that with a view to making arrangement under the Foreigners Act, 1946, for the expulsion of any foreigner from India, he may be ordered to be detained in custody. Section 3(1)(*b*) being obviously a law providing for 'preventive detention', the provisions of Articles 22(1) and 22(2) will not, as laid down in Article 22(3), apply to it. It follows that if a detention of a foreigner is in accordance with the provisions of Articles 22(4) to 22(7) and the provisions of the Preventive Detention Act, it is detention according to 'procedure established by law' within the meaning of Article 21, and Article 21 cannot give any protection against such detention or against the ultimate expulsion of that foreigner under Section 3(2)(*c*) of the Foreigners Act. *Hans Muller of Nurenburg* v. *Supdt., Pres. Jail, Calcutta.*, AIR 1955 SC 367 : 1955 CrLJ 876 : 1955 SCA 487 : 1955 SCJ 324 : 1955 SCR 1284 : 1955 MWN 478 : 1955-1 MLJ (SC) 188.

[9544] ● ***Assessee when failing to pay arrears of—Income-Tax.***—Section 46(2) of the Income-tax Act, 1922, provides that when an assessee fails to pay arrears of income-tax falling due from him, his case papers may be forwarded to the Collector of Land Revenue who shall then proceed against the assessee for its recovery as if it were arrears of land revenue. Under the Bombay Land Revenue Code, the Collector has the powers to arrest and confine the assesse in civil jail, if the sale-proceeds of his property are insufficient to satisfy the amount which is to be recovered from him.

On the principles laid down by the Court in *State of Punjab* v. *Ajaib Singh*, AIR 1953 SC 10 : 1953 CrLJ 180, Articles 22(1) and 22(2) do not apply to such arrest and detention, and it cannot be contended that such arrest and detention are bad because the person so arrested and detained has not been produced before a Magistrate or because the authority has not been produced before a Magistrate or because the authority of a Magistrate has not been obtained for continuing him in such detention. In such a case the only question is whether the arrest and detention were in compliance with the provisions of the Land Revenue Code relating to arrest and confinement of defaulting persons. *Purshottam Govindji Halai* v. *B.M. Desai*, AIR 1956 SC 20 : 1956 CrLJ 129 : 1956 SCA 465 : 1956 SCJ 75 : 1955 (2) SCR 887 : 1955 (28) ITR 891 : 58 Bom LR 498 : 1956 ALT 1 : 1956 (1) MLJ (SC) 51.

[9545] ● ***No request made by accused to be defended by lawyer.***—In a case in which the accused contends that there had been a violation of the provisions of Article 22(1) because he was denied the opportunity to defend himself at the trial by a legal practitioner of his choice, the onus is on him to establish that he had actually asked for the permission of the Court in that behalf and that his request had been refused. In the absence of anything on the record to show that such request for representation by a legal practitioner of his choice had been made by the accused and had been rejected, the contention must be negatived. *Ram Sarup* v. *Union of India*, AIR 1965 SC 247 : 1965 (1) CrLJ 236 : 1964 SCD 661 : (1964) 2 SCJ 619 : (1965) 5 SCR 931 : 1964 Cur LJ (SC) 169 : 1964 MLJ (Cri) 626.

[9546] ● ***Person detained in jail in violation of Article 22(1) entitled to writ of habeas corpus.***—A person detained in jail in violation of Article 22(1) would be entitled to a writ of *habeas corpus* directing his release. The CrPC. contains analogous provisions in Sections 60 and 340 (Sections 56 and 303 and 315 of the new Code) which safeguards are made an integral part of fundamental rights under Article 22(2). Those who feel called upon to deprive other persons of liberty in the discharge of what they conceive to be their duty must, strictly and scrupulously, observe the forms and rules of law. Whenever that is not done the petitioner would be entitled to a writ of *habeas corpus* directing his release. Normally the question of *mala fide* will not be looked into in writ proceedings. Where the return filed after the *rule nisi* has been issued did not contain as to when and by whom the arrested person was informed of the grounds for his arrest, and it is not shown that he must have known the general nature of the offences for which he had been arrested, the constitutional requirement is not satisfied and is entitled to be released on that ground alone. In re, *Madhu Limaye*, AIR 1969 SC 1014 : (1969) 1 SCC 292 : 969 CrLJ 1440 : (1969) 2 SCA 326 : (1969) 2 SCJ 306 : (1969) 1 SCWR 470 : 1969 MLJ (Cri) 636 : 1969 PatLJR (SC) 40 A.

[9547] ● ***Representation made by counsel on instructions from detenu not considered by Govt..***—Representation made by the counsel on instructions from his client, namely, the detenu, was not considered by the Government at all. The High Court was in error in construing the representation made by the petitioner as being made not by him but by his counsel. It is manifest that the counsel had no personal matter and he was only advocating the cause of his client. In matters where the liberty of the subject is concerned and a highly cherished right is involved, the representations made by the detenu should be construed liberally and not technically so as to frustrate or defeat the concept of liberty engrained in Article 21. As the representation has not been considered at all by the Government which it was duty bound to consider, that by itself vitiates the order of detention. *Balchand Chorasia* v. *Union of India*, AIR 1978 SC 297 : (1978) 1 SCC 161 : 1978 SCC (Cri) 77 : 1978 CrLJ 159 : 1978 CrLR (SC) 11 (1) : (1978) SCCrR 77 (1) : 1978 UJ (SC) 118 : (1978) 1 SCJ 377 (1) : (1978) 2 SCR 401 : 1978 CrAppR (SC) 43 : 1978 ACrC 30 : (1978) Sim LC 213 : 1978 MLJ (Cri) 254 : 1978 Chand LR (Cri) (SC) 231.

[9548] ● ***Right of accused to consult lawyer.***—Accused has a right to consult his lawyer. As per Article 22(1) the right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the service of a lawyer shall be available for consultation to any accused person under circumstances of mere-custodial interrogations. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Over-reaching Article 20(3) and Section 161(2), CrPC, will be obviated by this requirement. If an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-incrimination secured in secrecy and by coercing the will, was the project. *Nandini Satpathy* v. *P.L. Dani*, AIR 1978 SC 1025 : (1978) 2 SCC 424 : 1978 SCC (Cri) 236 : 1978 CrLJ 968 : 1978 CrLR (SC) 195 : 1978 CrAppR (SC) 273.

[9549] ● ***Free legal service—Not provided.***—If free legal services are not provided to an accused who is in peril of losing his liberty and who is unable to defend himself through a lawyer by reason of his poverty or indigence in cases where the needs of justice so require, the trial itself may run the risk of being vitiated as contravening Article 21 and the Supreme Court has no doubt that every State Government would try to avoid such a possible eventuality. *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1377 : (1980) 1 SCC 108 : 1980 SCC (Cri) 50 : 1979 CrLJ 1052 : (1979) 3 SCR 760 : 1979 CrAppR (SC) 234.

[9550] ● ***Delay in considering representation of detenu.***—Delay of ten days in considering the representation of the detenue was wholly unexplained. Hence continued detention of the petitioner is violative of Article 22(5) and he is entitled to be released forthwith. *Narinder Singh* v. *Union of India*, AIR 1980 SC 945 : (1980) 2 SCC 357 : 1980 SCC (Cri) 455 : 1980 CrLJ 683 : 1980 CrLR (SC) 357 : 1980 UJ (SC) 505 : 1980 ACrC 250.

[9551] ● ***Supply of grounds to detenu without documents and materials.***—Grounds supplied to the detenu when he was arrested but without the documents and materials which were supplied four days later—Order is rendered void. Representation of the detenu was disposed of more than a month after it was sent. When no reasonable explanation for the delay is given it makes the continued detention void. *Virendra Singh* v. *State of Maharashtra*, AIR 1981 SC 1909 : (1981) 4 SCC 562 : 1981 CrLJ 1283 (4).

[9552] ● ***Non-supply of copies of material documents.***—By non-supply of copies of material documents referred to in the grounds of detention, the detenu was prevented from making an effective representation. Contention on behalf of the State was that copies were not supplied as the detenu was already aware of the contents of the documents. Detenu is entitled to be supplied with copies of all material documents instead of having to rely upon his memory. Detention is vitiated. *Mehrunissa* v. *State of Maharashtra*, AIR 1981 SC 1861 : (1981) 2 SCC 709 : 1981 SCC (Cri) 592 : 1981 CrLJ 1283 (1) : 1981 CrLR (SC) 528.

[9553] ● ***Non-supply of document and material pari passu grounds of detention.***—Documents and material were not supplied *pari passu* grounds of detention. Delay of more than a month in disposing of the representation is itself fatal to the order of detention. *Mehdi Mohamed Joudi* v. *State of Maharashtra*, AIR 1981 SC 1752 : (1981) 2 SCC 358 : 1981 SCC (Cri) 534 : 1981 CrLJ 1282 (2) : 1981 CrLR (SC) 519 (1).

[9554] ● ***Documents upon which detention based not supplied.***—Documents upon which grounds of detention were based were not supplied to the detenus along with the grounds of detention. Detenus were released. *Ana Carelina D'souza* v. *Union of India*, AIR 1981 SC 1620 : (1981) 3 SCC 493 : 1981 CrLJ 1277.

[9555] ● ***Right of accused to be supplied with lawyer by State : Mandamus—Issue of.***—The accused/petitioner who was being tried for murder before the Sessions Court sought the issuance of a writ in the nature of *Mandamus* and other appropriate writ or orders to ordain the Union of India to give financial assistance to him to engage a Counsel of his choice on a scale equivalent to, or commensurate with, the fees that were being paid to the Counsel appearing for the State.

The petition is virtually for the enforcement of the Directive Principle of State Policy enshrined in Article 39-A of the Constitution. There can be no doubt that the petitioner is not entitled to the grant of a writ of *Mandamus* for the enforcement of the said Directive Principle. As is clear from the terms of Article 39-A, the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid. The remedy of the petitioner, if any, lay by way of making an application before the concerned Judge under Section 304(1), CrPC, and not by a petition under Article 32.

Although in the earlier decisions the Supreme Court paid scant regard to the Directives on the ground that the Courts had little to do with them since they were not justiciable or enforceable, like the Fundamental Rights, the duty of the Court in relation to the Directives came to be emphasised in the later decisions which reached its culmination in *Kesavanand Bharathi* v. *Union of India*, AIR 1973 SC 1461 : (1973) 4 SCC 225, laying down certain broad propositions. One of those is that there is no disharmony between the Directives and the Fundamental Rights because they supplemented each other in aiming at the same goal of bringing about a social revolution and the establishment of welfare State, which is envisaged in the Preamble. The Courts, therefore, have a responsibility in so interpreting the Constitution as to ensure implementation of the Directives and to harmonize the social objective underlying the Directives with the individual rights. Primarily, the mandate in Article 39-A is addressed to the Legislature and the Executive but in so far as the Courts of Justice could indulge in some judicial law-making within the interstices of the Constitution or any Statute before them for construction, the Courts too are bound by that mandate. *Ranjan Dwivedi* v. *Union of India*, AIR 1983 SC 624 : (1983) 3 SCC 307 : 1983 SCC (Cri) 581 : 1983 CrLJ 1052 : 1983 CrLR (SC) 474 : (1983) 1 Crimes 1170 : 1983 PatLJR (SC) 101 : (1983) 2 SCWR 130 : 1983 IJR (Cri) 149.

[9556] ● ***Preventive detention—Grounds, if baseless.***—Where the allegation in the subsequent grounds for detention are factual inferences from the allegation in the earlier grounds, they cannot be said to be baseless grounds. Though speeches referred to in a ground for detention were made about one year prior to the order of the detention, as they have been mentioned as part of a continuous course of conduct of the detenu, brought out by the remaining grounds, they could not be considered to be so remote in point of time as to make it irrelevant. *Sonam Yongda* v. *State of Sikkim*, AIR 1986 SC 1736 : (1986) 3 SCC 594 : 1986 SCC(Cri) 341 : 1986 CrLJ 1606 : 1986 CrLR (SC) 344.

[9557] ● ***Solitary act of omission or commission be taken into consideration for passing order of detention.***—A solitary act of omission or commission can be taken into consideration for being subjectively satisfied, by the detaining authority to pass an order of detention if the reach, effect and potentiality of the act is such that is disturbs public tranquillity by creating terror and panic in the society or a considerable number of the people in a specified Locality where the act is alleged to have been committed. Thus it is the degree and extent of the reach of the act upon the society which is vital for considering the question whether a man has committed only a breach of law and order or has acted in a manner likely to cause disturbance to public order. *Subhash Bhandari* v. *District Magistrate, Lucknow*, AIR 1988 SC 74 : (1987) 4 SCC 685 : 1988 CrLJ 190.

[9558] ● ***Non-application of mind-Detenu already in Jail.***—The principle that emerges is that there must be awareness in the mind of the detaining authority that the detenu is in custody at the time of service of the order of detention on him and cogent relevant materials and fresh facts have been disclosed which necessitate the making of an order of detention. *Abdul Razak* v. *S. N. Sinha, Police Commissioner, Ahmedabad*, (1989) 2 SCC 222 : 1989 CrLJ 2303.

[9559] ● ***Preventive detention—Order while in Jail custody.***—Where the detention order read with its annexure indicated the detaining authority's awareness of the fact of detenu's jail custody at the time of the making of the detention order, however, there was no indication therein that the detaining authority considered it likely that the detenu could be released on bail and in fact, the contents of the order showed the satisfaction of the detaining in the bank dacoity including sharing of the booty by the detenu, the order of detention was clearly invalid since the same was made when the detenu was already in jail custody for the offence of bank dacoity with no prospect of his release. *N. Meera Rani* v. *Govt. of T. N.*, AIR 1989 SC 2027 : (1989) 4 SCC 418 : 1989 CrLJ 2190.

[9560] ● ***Detention order can be validly passed against person in custody.***—An order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities. *Dharmendra Sugan Chand* v. *Union of India*, AIR 1990 SC 1196 : (1990)1 SCC 746 : 1990 SCC (Cri) 24 : 1990 CrLJ 1232 : 1990 CrLR (SC) 214 : 1990 (1) Crimes 634 : 1990 (1) Scale 146 : 1990 (1) SCR 303.

[9561] ● ***Supervisory and appellate jurisdiction of Supreme Court.***—There is no room for the doubt that apex Court has wide power to interfere and correct the judgment and orders passed by any Court or tribunal in the country. In addition to the appellate power, the Court has special residuary power to entertain appeal against any order of any Court in the country. The plenary jurisdiction of this Court to grant leave and hear appeals against any order of a Court or tribunal, confers power of judicial superintendence over all the Courts and tribunals in the territory of India including subordinate Courts of Magistrate and District Judge. This Court has, therefore, supervisory jurisdiction over all Courts in India. *Delhi Judicial Service Association* v. *State of Gujarat*, AIR 1991 SC 2176 : (1991) 4 SCC 406 : 1991 CrLJ 3086.

[9562] ● *Right to make representation against detention order flows from constitutional guarantee.*—The right to make a representation against the detention order thus flows from the constitutional guarantee enshrined in Article 22(5) which casts an obligation on the authority to ensure that the detenu is afforded an earliest opportunity to exercise that right, if he so desires. The necessity of casting a dual obligation on the authority making the detention order is obviously to acquaint the detenu of what had weighed with the Detaining Authority for exercising the extraordinary powers of detention without trial conferred by Section 3(1) of the Act and to give the detenu an opportunity to point out any error in the exercise of that power so that the said authority gets an opportunity to undo the harm done by it, if at all, by correcting the error at the earliest point of time. Once it is realised that Article 22(5) confers a right of representation, the next question is to whom must the representation be made. The grounds of detention clearly inform the detenu that he can make a representation to the State Government, the Central Government as well as the Advisory Board. There can be no doubt that the representation must be made to the authority which has the power to rescind or revoke the decision, if need be. *Amir Sad Khan* v. *L. Hmingliana*, AIR 1991 SC 1983 : (1991) 4 SCC 39 : 1992 SCC (Cri) 946 : JT 1991 (3) SC 367 : 1991 (3) SCR 443 : 1992 (1) CCR 233 : 1991 (3) Crimes 275.

[9563] ● *Activities of detenu not merely prejudicial to maintenance of law and order but prejudicial to public order.*—It is the degree and extent of the reach of the objectionable activity upon the society which is vital for considering the question whether a man has committed only a breach of 'law and order' or has acted in a manner likely to cause disturbance to 'public order'. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of 'public order.' Whenever an order of detention is questioned, the Courts apply these tests to find out whether the objectionable activities upon which the order of detention is grounded fall under the classification of being prejudicial to 'public order' or belong to the category or being prejudicial only to 'law and order'. An order of detention under the Act would be valid if the activities of a detenu after 'public order' but would not be so where the same affect only the maintenance of 'law and order'. Facts of each case have, therefore, to be carefully scrutinised to test the validity of an order of detention. *Harpeet Kaur* v. *State of Maharashtra*, AIR 1992 SC 979 : (1992) 2 SCC 177 : 1992 CrLJ 769.

[9564] ● *Detenu already in Jail.*—Even in the case of a person in custody, a detention order can validly be passed if the authority passing the order is aware of the fact that he is actually is custody; if he has reason to believe on the basis of the reliable material that there is a possibility of his being released on bail and that on being so released, the detenu would in all probabilities indulge in prejudicial activities and if the authority passes an order after recording his satisfaction the same cannot be struck down. *Veeramani* v. *State of T.N.*, (1994) 2 SCC 337 : 1994 SCC (Cri) 482 : 1995 CrLJ 2644 : JT 1994 (1) SC 350 : (1994) 1 Crimes 617 (SC) : 1994 (1) Scale 363 : 1994 (2) CCR 286 (SC).

[9565] ● *Representation of detenu—Consideration of.*—A person detained under the Act made a representation against his detention which representation was forwarded to Advisory Board. State Government kept the representation pending awaiting decision of the Advisory Board. But after receipt of report of Advisory Board rejected it, held it is illegal. *Naval Shankar Ishwarlal Dave* v. *State of Gujarat*, AIR 1994 SC 1496 : 1993 Supp (3) SCC 754 : 1994 CrLJ 2170 (SC).

[9566] ● *Incidents directed against single individual not affecting public order.—A case under Gujarat Prevention of Anti-social Activities Act.*—The detenue was habitually indulging in criminal and anti social activities namely keeping fire arms, beating and assaulting innocent citizens in public. Different offences under different provisions of law were alleged to be committed. But all the incidents were connected or related against one individual only. These incidents cannot be said to be incidents affecting public order. These cannot have no adverse effect prejudicial to maintenance of public order disturbing even the temp of life or the peace and tranquillity of the locality. *Mustakmiya Jabbarmiya Shaikh* v. *M.M. Mehta, Commissioner of Police*, (1995) 3 SCC 237 : 1995 SCC (Cri) 454 : JT 1995 (4) SC 215 : (1995) 3 Crimes 18 (SC) : 1995 (2) Scale 376 : 1995 (4) CCR 89 (SC).

[9567] ● *Person detained be informed of his right to make representation.*—Where a detention order has been made under Section 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so result in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation. *Kamlesh Kumar Ishwardas Patel* v. *Union of India*, (1995) 4 SCC 51 : 1995 SCC (Cri) 643 : JT 1995 (3) SC 639 : (1995) 4 Crimes 484 (495) (SC) : 1995 (2) Scale 681.

[9568] ● ***Article 22 prescribes certain safeguards for protection of persons detained.***—The Constitution while permitting Parliament and the State Legislature to enact a law providing for preventive detention, prescribes certain safeguards in Article 22 for the protection of the persons so detained. One such protection is contained in sub-clause (a) of clause (4) of Article 22 which requires that no law providing for preventive detention shall authorise the detention of a person for a period longer than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for detention. The other safeguard is contained in clause (5) of Article 22. Article 22(5) imposes a dual obligation on the authority making the order of preventive detention: (i) to communicate to the person detained as soon as may be the grounds on which the order of detention has been made and; (ii) to afford the person detained the earlier opportunity of making a representation against the order of detention. Article 22(5) thus proceeds on the basis that the person detained has a right to make a representation against the order of detention and the aforementioned two obligations are imposed on the authority making the order of detention with a view to ensure that right of the person detained to make a representation is a real right and he is able to take steps for redress of a wrong which he thinks has been committed. Article 22(5) does not, however, indicate the authority to whom the representation is to be made. Since the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief, *i.e.*, the authority which can revoke the order of detention and set him at liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognised by Section 21 of the General Clauses Act, 1897 though it does not flow from it. It can, therefore, be said that Article 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition, such a representation can be made to any other authority who is empowered by law to revoke the order of detention. *Kamlesh Kumar Ishwardas Patel* v. *Union of India*, (1995) 4 SCC 51 : (1995)3 Crimes 26 (SC) : (1995) 4 Crimes 484 *on reference in* **TO THE SAME EFFECT :** (1) *Hansaben Jayantlal Shah* v. *Union of India*, 1994 (4) SCC 148 : 1994 SCC (Cri) 836 : 1994 (2) Scale 917 (2) : (1994) 2 Crimes 996 (SC).

[9569] ● ***Right of person detained to make representation.***—Article 22(5) must be construed to mean that the person detained has a right to make a representation against the order detention which can be made not only to the Advisory Board but also to the detaining authority, *i.e.*, the authority that has made the order of detention or the order for continuance of such detention, who is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries with it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation. *Kamlesh Kumar Ishwardas Patel* v. *Union of India*, (1995) 4 SCC 51 : 1995 SCC (Cri) 643 : JT 1995 (3) SC 639 : (1995) 4 Crimes 484 (495) (SC).

[9570] ● ***Detenu when not informed his right to make representation.***—When detenue was not informed of his constitutional right to make a representation to specified officer for reconsideration of his detention, the detention order is invalid. *Nutan J. Patel* v. *S.V. Prasad*, (1996) 2 SCC 315 : 1996 SCC (Cri) 269 : JT 1995 (8) SC 496 : 1995 (6) Scale 700 : 1996 (1) CCR 76 (SC) : (1995) 4 Crimes 767.

[9571] ● ***Supply of report of sponsoring authority to detenu not mandatory.***—Detention order under COFEPOSA was set aside by High Court on twin grounds namely (1) delays of 23 days in consideration of representation of detenu and (2) non-supply of the report of the sponsoring authority to detenu. Under Article 22(5), Constitution of India it is not mandatory that the report of the sponsoring authority should be supplied to the detenu. Delay was not fatal. This Court refuses to disturb the order since the period had already expired. *State of U.P.* v. *Shakeel Ahmed*, (1996) 1 SCC 337 : 1996 SCC (Cri) 108 : JT 1995 (8) SC 561 : 1995 (6) Scale 732 : (1995) 4 Crimes 782 (SC) : 1996 (1) CCR 55 (SC).

[9572] ● ***Right to make representation against preventive detention not constitutional right on ground of non-specification of authorities in Article 22(5) not correct.***—It is not correct to say that because of non-specification of authorities in Article 22(5) to whom representation is to be made that right to make representation against preventive detention is not Constitutional right. It will be seen that right to represent had been given not only by Article 22(5) of the Constitution but also by Section 8, Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980. The right provided in the said Act has therefore, to be treated as an extension of the constitutional right already available to a detenu under Article 22(5). The legislature has, in fact, given effect to the constitutional right by providing in Section 8 of the Act that the detenu shall have the right of making a representation to the appropriate Government. *Kundan Bhai, Dula Bhai Shaikh* v. *D.M., Ahemedabad*, AIR 1996 SC 2998 : (1996) 3 SCC 194 : 1996 SCC (Cri) 470 : 1996 CrLJ 1981 (SC) : JT 1996 (2) SC 532 : 1996 (1) CCR 199 (SC).

[9573] ● ***Fresh detention order punitive.***—In a case first detention order was passed on September, 1992 requiring the petitioner to be detained for a period of one year. He was detained on 18.1.1994 but after the said detention order was quashed, he was released on 23.11.1994. The petitioner had, by then, been in detention for a period of more than 10 months. The passing of the new detention order on 25.4.1995 only for a period of one month and twenty five days clearly shows that the intention was to see that the petitioner remained under preventive detention for a total period of one year. Which was a period in respect of which the first detention order had been passed. Fresh order of detention appears to be punitive in nature and has not been passed in order to prevent the petitioner from indulging in prejudicial activities in future. Where the detention takes the character of punitive rather than preventive action, the said order can be quashed. *Kimtilal Sethi* v. *Lt. Governor of N.C.T. of Delhi*, AIR 1996 SC 3341 : (1996) 4 SCC 464 : 1996 SCC (Cri) 680 : 1996 CrLJ 3195 : JT 1996 (5) SC 98 : (1996) 2 Crimes 225 (SC).

[9574] ● ***Directions on Jail reforms by Supreme Court.***—The Supreme Court gave the following directions on Jail reforms to the various authorities :—

(1) To take appropriate decision on the recommendations of the Law Commission of India made in its 78th Report on the subject 'Congestion of undertrial prisoners in jail' as contained in chapter 9 (Para 20-A).

(2) To apply mind to the suggestions of the Mulla Committee as contained in Chapter 20 of volume 1 of its Report relating to streamlining the remission system and premature release (parole), and then to do the needful (para 23).

(3) To consider the question of entrusting the duty of producing UTP's on remand dates to the prison staff (Para 27).

(4) To deliberate about enacting of new Prison Act to replace century old Indian Prison Act, 1894 (Para 31). We understand that the National Human Rights Commissions has prepared an outline of an All India statute, which may replace the old act; and some discussions at a national level conference also took place in 1995. We are of the view that all the States must try to amend their own enactments, if any, in harmony with the all India thinking in this regard.

(5) To examine the question of framing of a model new All India Jail Manual as indicated in Para 31.

(6) To reflect on the recommendations of Mulla Committee made in chapter 29 on the subject of giving proper medical facilities and maintaining appropriate hygienic conditions and to take needed steps (Para 35 and 36).

(7) To ponder about the need of complaint box in all the jails (Para 37).

(8) To think about introduction of liberalisation of communication facilities (Para 40).

(9) To take needful steps for streamlining of jail visits as indicated in Para 42.

(10) To initiate on the question of introduction of open air prisons at least in the District Headquarters of the country. *Rama Murthy*

v. *State of Karnataka*, AIR 1997 SC 1739 : 1997 (2) SCC 642 : 1997 CrLJ 1508.

[9575] ● ***Writ of Habeas Corpus for challenging legality constitutionality of preventive detention.***—True, it is not enough that there is a mere challenge and that challenge has to be upheld or negatived by the Court. When there is challenge to the legality of detention in writ of *habeas corpus* the challenge is in effect to the legality and validity of the grounds on which the order of detention is made. It is not that to challenge the legality and validity of the grounds on which order of detention is passed the detenu has to file a separate writ petition seeking a *writ of certiorari*. Once the detenu is released during pendency of his writ of *habeas corpus* by the detaining authority it cannot always be said that writ petition had become infructuous and that the grounds on which the order of detention becomes invalid. But then if the Court refuses or itself does not go into the merit of controversy in writ of *habeas corpus* when detenu is released the detenu on that account cannot be made to suffer holding that he did not successfully challenge his order of detention. *Competent Authority, Ahmedabad* v. *Amritlal Chandmal Jain*, AIR 1998 SC 2083 : (1998) 5 SCC 615 : 1998 CrLJ 2920 at 2923, 2924 (SC) : JT 1998 (3) SC 544 : 1998 (3) Scale 333 : 1998 (2) Crimes 316 : 1998 (5) SLT 19 : 1998 (2) CCR 276 (SC) : 1998 (2) JCC (SC) 30 : 1998 (4) Supreme 389.

[9576] ● ***Power under section 15 of A.P. Prevention of Dangerous Activities of Bootleggers Dacoits Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act is power to release detenu for any specific period.***—The power under Section 15 of Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 is the power of the Government to release a detenue for any specified period and such a prayer cannot held to be representation against the order of detention within the meaning of Art. 22 (5) of the Constitution. This being the legal position question of infraction of Article 22 (5) of the Constitution does not arise if the prayer of the detenu for being temporarily released, is not disposed of immediately and there is some delay in the disposal of the said prayer. Of course, such a prayer for being temporarily released, should be disposed of within a reasonable time but delay on the part of the authority in considering the prayer for temporary release under Section 15 of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 cannot be held to be an infraction of the constitutional right guaranteed to a detenu under Article 22 (5). *District Collector* v. *Shaik Hasmath Beebi*, AIR 2001 SC 1681 (1684) : (2001) 5 SCC 401 : 2001 SCC (Cri) 903 : 2001 CrLJ 2193 : JT 2001 (5) SC 67.

[9577] ● ***Detention order—Facts placed before detaining authority.***—If the facts placed before the detaining authority are proximate to each other and the last of the fact mentioned is proximate to the order of detention then the earlier incident cannot be treated as stale and the order cannot be set aside. *District Collector, Ananthapur* v. *Laxmanna*, AIR 2005 SC 2802 : (2005) 3 SCC 663 : 2005 CrLJ 2150 (2151) (SC) : (2005) 2 Crimes 31. **TO THE SAME EFFECT** : *The Collector and District Magistrate, W.G. District Elure AP* v. *Sandala Kandamma*, AIR 2005 SC 1165 : (2005) 3 SCC 666 : 2005 CrLJ 689 : 2005 (1) Crimes 95.

[9578] ● ***Writ petition by parents for modification of death sentence.***—Writ petition was filed by the parents of the convict for modification of the death sentence awarded to the convict. Review petition for the same relief had already been dismissed. It was held that the remedy lay in filing curative petition as laid down in. *Rupa A Hura* v. *Ashok Hura*, AIR 2002 SC 1771. **TO THE SAME EFFECT** : *Zakarus Lakra* v. *Union of India*, AIR 2005 SC 1560 : (2005) 3 SCC 161 : 2005 CrLJ 1716.

11. ARTICLE 24

[9579] ● ***Construction work hazardous employment.***—Construction work is Hazardous Employment. Child below the age of 14 cannot be allowed to be employed. *Labourers Working on Salal Hydro-Project* v. *State of J&K,* AIR 1984 SC 177 : (1983) 2 SCC 181 : 1983 LabIC 502 : (1983) 62 FJR 323 : (1983) 1 LabLJ 494 : 1983 SCC (Lab) 289 : (1983) 46 FacLR 453 : (1983) 2 LabLN 20 : 1983 UJ (SC) 582 : (1983) 2 SCWR 202 : 1983 LJR (Civ) 61 : 1983 BLTRep 247 (SC) : 1983 CrAppR (SC) 438.

12. ARTICLE 25

[9580] ● ***Conversion from one religion to another.***—Legislation prohibiting conversion by force or inducement to one's own religion falls within the purview of Entry 1 of List II of the 7th Schedule as they are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community. *Rev. Stainislaes* v. *State of M.P.*, AIR 1977 SC 908 : (1977) 1 SCC 677 : 1977 SCC (Cri) 147 : 1977 CrLJ 551 : (1977) 1 SCJ 478 : (1977) 2 SCR 611 : ILR (1977) Cut 431 : 1977 UJ (SC) 156 : 1977 BBCJ (SC) 136 : 1977 MLJ (Cri) 320 : 43 CutLT 382.

13. ARTICLE 25 AND 26

[9581] ● ***Right to religion not absolute right.***—The exercise of fundamental rights under Articles 25 and 26 is not an absolute right but must yield or give way to maintenance of public order. The principles are well settled and it is for the District Magistrate to exercise his powers in consonance with the provisions of Section 144 of the Code. The petition under Article 32 is wholly misconceived. *Ishtiaq Hussain* v. *State of U.P.*, AIR 1988 SC 93 : 1986 (Supp) SCC 531 : 1987 SCC (Cri) 157 : 1988 CrLJ 189 : 1987 CrLR (SC) 294 (1).

14. ARTICLE 31-B

[9582] ● ***Detenu's right to have constitutionality and validity of detention examined by Court.***—A law which provides for the exclusion from the Court's consideration of relevant documents and evidence relating to the detention of a person, and thus denies to the detenu his right to have the constitutionality and validity of the order of detention examined by the Court, is an infringement of the detenu's right under Articles 32 and 22(5). *Gopalan, A.K.* v. *State of Madras*, AIR 1950 SC 27 : 51 CrLJ 1383 : 1950 SCJ 174 : 1954 SCR 88 : (1950) 2 MLJ 42 : 63 MLW 638 : 1950 MWN 495.

[9583] ● ***Article 32 confers remedial fundamental right.***—Article 32 confers a remedial fundamental right. It is a guaranteed constitutional remedy for enforcement of the fundamental rights conferred by the Constitution, and its inclusion in Part III means that this remedial right is itself a fundamental right.

Under the Constitution a duty has been cast upon the Supreme Court to be the protector of the rights of the subject guaranteed in Part III, and consistently with its responsibility, it has no power to refuse to entertain an application seeking its protection against an alleged infringement by the State of any fundamental right of the petitioner.

The fact that the petitioner has an alternative remedy elsewhere under any law is no ground for refusing to entertain an application under Article 32, because that Article brooks no such option. The general rule of practice that when concurrent jurisdiction is vested in two Courts, the aggrieved party should first move the lower Court for the relief which he seeks, has no application to Article 32. *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 : 1951 CrLJ 1514 : 1950 SCJ 418 : 1950 SCR 594 : 1950 ALJ 485 : (1950) 2 MLJ 390 : 63 MLW 929 : 1950 MWN 435.

[9584] ● ***Fundamental right when infringed by State.***—Whenever a person's fundamental right under any Article in Part III of the Constitution has been infringed by the State, he has the right to invoke the protection of Article 32 and seek the appropriate remedy given under it. His right to have his grievance redressed by the Supreme Court by the issue of an appropriate writ against the State cannot be denied to him, and the State cannot be allowed to plead in defence the existence of an alternative legal remedy elsewhere. *Rashid Ahmad* v. *Municipal Board, Kairana*, AIR 1950 SC 163 : 1950 SCJ 124 : 1950 SCR 566 : 63 MLW 867 (2).

[9585] ● ***Writ of certiorari—When lie.***—A Writ of Certiorari can lie for the purpose of quashing a judicial order only and not an executive order. There are two conditions to the issue of this writ, namely (a) that the order must be judicial in character, and (b) it must be in excess of the statutory authority of the tribunal which made it.

The test for determining the character of an order is whether the authority or body which passed the order was or was not under a statutory obligation to act under a judicial procedure.

The essential elements of a judicial procedure are,

(a) an opportunity to the party concerned to show cause against the order and give evidence, and

(b) a decision on merits only after an inquiry in which the party concerned is given opportunity to lead his evidence.

If there is a statutory duty to arrive at a decision only after such inquiry under a judicial procedure, the order made is a judicial decision. On the other hand, if the decision is left by law to the subjective satisfaction of the executive authority without any such inquiry, the decision is only an executive decision.

Thus the question whether a decision is a judicial or an executive decision has to be determined from the manner in which that decision is required by statute to be made.

A *Writ of Certiorari* can lie only when the decision is statutorily required to be a judicial decision, and it is in excess of legal authority. If the decision is not required by statute to be a judicial decision, the question of excess of authority does not at all arise and the writ cannot lie. *Province of Bombay* v. *K.S. Advani*, AIR 1950 SC 222 : 1950 SCR 621 : 1950 SCJ 451 : 86 CLJ 330 : (1950) 2 MLJ 703 : 1950 MWN 802.

[9586] ● ***Writ of Mandamus—Issue of against Govt. when.***—On an application made under Article 32, if the Supreme Court finds that any law under which an executive authority has threatened to take action against the petitioner, is unconstitutional and void as being in contravention of a fundamental right vested in the petitioner, the Court can issue a *Writ of Mandamus* against the Government or the executive authority concerned prohibiting it from carrying out the proposed action against the petitioner. *Chintaman Rao* v. *State of M.P.*, AIR 1951 SC 118 : 1950 SCJ 571 : 1950 SCR 759 : 64 MLW 370 : 1951 ALJ (SC) 82 : ILR (1951) Hyd 221.

15. ARTICLES 32, 226

[9587] ● ***Article 32 guarantee remedial fundamental right.***—Article 32 guarantees a remedial fundamental right and confers the right to move the Supreme Court for the enforcement and protection of fundamental rights by the issue of appropriate writs or orders or directions.

Article 32 cannot be invoked for the sole purpose of deciding the competence of the Legislature under Article 246 and the Legislative Lists in Schedule 7 of the Constitution. That issue can be gone into by the Court only when the petitioner claims the violation of a fundamental right vested in *himself* by a particular piece of legislation.

Proceedings under Article 32 are not in the nature of a suit for declaration and cannot lie solely for the purpose of deciding the constitutionality of a law, when no infringement of a fundamental right vested in the petitioner is involved. In other words, the constitutional validity of law cannot be examined under a petition under Article 32 unless the law complained of, infringes directly some fundamental right of the petitioner. The reason for so holding is that Article 32 is meant only for granting a relief against an infringement by the State of a right of the subject, and if the petition does not ask for any such relief there is no occasion to examine the constitutionality of the law.

The right to move the Supreme Court under Article 32 is available not only to individuals but also to corporate bodies.

Articles 32 provides only a remedy against a violation of the rights vested in the petitioner *himself*. He cannot seek a remedy against a violation of the rights vested in another. The constitutionality of a law can be challenged only by the person directly hit by that law and a challenger cannot succeed merely because some one else has been hurt. Direct invasion by the State of the petitioner's own personal interest is the only justifiable basis for the invocation of Article 32. *Chiranjitlal Chowdhuri* v. *Union of India*, AIR 1951 SC 41 : 1951 SCJ 29 : 1950 SCR 869 : 64 MLW 47 : 1951 MWN 111 : 53 BomLR 499 : ILR (1951) Hyd 461.

[9588] ● ***Writ of Habeas Corpus not available against deprivation of personal liberty.***—A Writ of *Habeas Corpus* under Article 32 or Article 226 is not available against deprivation of personal liberty by reason of imprisonment under the sentence of a criminal Court. The proper remedy against an order of conviction and sentence is an appeal to an appellate Court of competent jurisdiction, and not an application for a Writ of *Habeas Corpus*. *Janardhan Reddy* v. *State of Hyderabad*, AIR 1951 SC 217 : 52 CrLJ 736 : 1951 SCJ 320 : 1951 SCR 344 : 1951 MWN (Cri) 189 (2) : 64 MLW 406 : 1951 ALJ (SC) 94 : 1951 MWN 613 (2).

[9589] ● ***Violation of rights of property by private individual—Remedy under ordinary law.***—The language structure and setting of the Articles relating to fundamental rights show that these Articles are intended as a protection against action taken by the State only. On a true construction of these Articles, the protection conferred by them is not available against wrongful actions of private individuals or even of corporate bodies. A person whose right to person or property is infringed by a private individual must seek his remedy under the ordinary law, and not by way of an application under Article 32. *Shamdasani, P.D.* v. *Central Bank of India Ltd.*, AIR 1952 SC 59 : 1952 SCA 36 : 1952 SCJ 29 : 1952 MWN 102 : 1952 (1) MLJ 423 : 65 MLW 357 : 1952 SCR 391 : 54 Pun LR 190 : 54 Bom LR 403.

[9590] ● ***Order when challenged as being unconstitutional.***—When an order is challenged as being unconstitutional, the relevant date in examining its validity is the date on which the petition under Article 32 or 226 is made. An earlier invalidity which has already been cured at that date is immaterial to the issue. *Naranjan Singh Nathawan* v. *State of Punjab*, AIR 1952 SC 106 : 1952 CrLJ 656 : 1952 SCJ 111 : 1952 SCR 395 : 1952 SCA 230 : 1952-1 MLJ 733.

[9591] ● *Writ under Article 226 when lies.*—A writ under Article 226 can lie only in those grave cases in which any Government or executive authority has acted without or in excess of jurisdiction, or has refused to exercise jurisdiction, or has acted irregularly in violation of a basic principle of natural justice, *and* such action has resulted in manifest injustice. But a writ cannot lie merely for the purpose of correcting a decision which is only erroneous on merits. *Veerappa Pillai* v. *Raman & Raman Ltd.*, AIR 1952 SC 192 : 1952 SCA 287 : 1952 SCJ 261 : 1952 SCR 583 : 54 Pun LR 210 : 1952 MWN 431 : 1952 (1) MLJ 806 : 65 MLW 620 : 90 CalLJ 194.

[9592] ● *Citizen not possessed of fundamental right.*—A citizen must be possessed of a fundamental right at the time when he makes an application under Article 32 before he can ask the Court to declare a law which is inconsistent with his alleged right to be void. If the right itself has been extinguished before that date, there is no relief to be claimed under Article 32.

Thus, Articles 19(1)(*f*) and 31(2) can be invoked, and relief under Article 32 can be claimed only by a person whose right to property is in existence, and if the right to property has been extinguished by virtue of a valid order made before 26th January, 1950, the petitioner can have no grievance against the State merely because the State takes possession of that property from him at a later date.

An order of allotment of a house by the Rent Controller which was made on a date previous to 26th January, 1950, cannot be impugned on the ground that it contravened Article 19(1)(*f*) or 31(2), if the order was perfectly valid on the date when it was made. *Nabhirajiah, D.K.* v. *State of Mysore*, AIR 1952 SC 339 : 1952 SCJ 490 : 1952 SCR 744 : 1952 SCA 598 : ILR (1953) Mys 142.

[9593] ● *Writ—Issue of under Article 32.*—A writ under Article 32 can be issued by the Supreme Court only for the enforcement of a fundamental right. On the other hand, a writ under Article 226 can be issued by a High Court not only for the enforcement of a fundamental right but also 'for any other purpose'. However, the concluding words of Article 226 have to be read in the context of what precedes them, and the existence of a right vested in the petitioner under any law is a condition precedent to the exercise of jurisdiction under that Article, and before a writ is issued, the Court must be satisfied that a legal right vested in the petitioner is affected by an order made or threatened to be made against him by the State. *State of Orissa* v. *Madan Gopal Rungta*, AIR 1952 SC 12 : 1951 SCJ 764 : 1952 SCR 28 : 1951 (2) MLJ 645 : 1952 MWN 13 : 18 Cut LT 45 : ILR (1951) Cut 637.

[9594] ● *Every order of administrative body not subject of writ of Certiorari or Mandamus.*—Every order of an administrative body cannot be the subject of a Writ of *Certiorari* or *Mandamus.* Proceedings under Article 226 are not in the nature of an appeal, and every erroneous decision cannot be sought to be rectified by a petition under that Article. There are limits on the power to issue a writ, and the power can be exercised only when the impugned order is (*a*) without jurisdiction or (*b*) in excess of jurisdiction or (*c*) is vitiated by an error or irregularity which is manifestly opposed to a basic principle of natural justice. In other words, a writ cannot lie if an order is within jurisdiction, even though it may be erroneous on merits. *Parry & Co. Ltd.* v. *Commercial Employees' Association*, AIR 1952 SC 179 : 1952 SCA 299 : 1952 SCJ 275 : 1952 SCR 519 : 65 MLW 491 : 1952 MWN 429 : 1952-1 MLJ 813 : 90 CalLJ 7.

[9595] ● *Material date in Habeas Corpus proceeding date of return.*—In a *Habeas Corpus* proceeding the material date is the date of the Return and the only question before the Court is whether on *that date* the detention was legal or illegal. If on the date of the Return the detention suffers from any illegality, the writ must be issued. The State cannot be allowed to contend that a Writ cannot lie merely because at the date when the proceedings were first instituted or at some later stage earlier to the date of the return, the detention was lawful as being under a legal order. *Ram Narayan Singh* v. *State of Delhi*, AIR 1953 SC 277 : 1953 CrLJ 1113 : 1953 SCA 399 : 1953 SCJ 326 : 1953 SCR 652 : 1953 AWR (Sup) 68 : 1953 MWN 647.

[9596] ● *Direct petition to Supreme Court without appeal from decision and Article 226.*—The Supreme Court will discourage the practice of direct approach to the Supreme Court by a petition under Article 32 in a matter which has been taken to the High Court under Article 226 and has been decided against the petitioner. The proper approach to the Supreme Court in such a case is by way of an appeal under Article 136 from the order of the High Court which has aggrieved the petitioner. *Gopalan, M.K.* v. *State of M.P.*, AIR 1954 SC 362 : 1954 CrLJ 1012 : 1954 SCA 557 : 1954 SCJ 534 : 1955 SCR 168 : (1954) 2 MLJ 76 : 1954 MWN 564 : 1954 AWR (HC) 392.

[9597] ● *Illegal seizure of goods by police authorities.*—Illegal seizure of goods by the

Police otherwise than under the provisions of the Criminal Procedure Code constitutes an infringement of the fundamental right to property guaranteed under Articles 19(1)(*f*) and 31, and the proper remedy against such seizure lies in an application for a *Writ of Mandamus* under Article 32 or Article 226. *Wazir Chand* v. *State of H.P.*, AIR 1954 SC 415 : 1954 CrLJ 1029 : 1954 SCJ 600 : 1954 SCA 1257 : 1955 SCR 408.

[9598] ● ***Power of High Court to interfere when.***—Normally, when the High Court is moved under Article 226, it will not disturb a finding of a Tribunal on any matter left to it by law. The High Court has the power to interfere only on the following grounds, namely,

(a) if a finding of fact is not based upon, or is contrary to, the evidence on record, or

(b) if the finding is arrived at under an error as to the meaning and scope of the law applicable to the case, or

(c) if the tribunal's conclusion is contrary to its own findings. *Liquidators of Pursa Ltd.* v. *Commissioner of I.T., Bihar*, AIR 1954 SC 253 : 1954 SCA 1242 : 1954 SCJ 294 : 1954 SCD 23 : 1954 SCR 767 : (1954) 25 ITR 265 : 33 Pat 237 : Madh BLJ 1954 (SCD) 23.

[9599] ● ***Difference between powers of Supreme Court under Article 32 and powers of High Court under Article 226.***—There is a difference in two important respects between the powers of the Supreme Court under Article 32 and the powers of the High Court under Article 226, namely,

(a) the scope of the remedy under Article 32 is narrower than that provided in Article 226, because Article 32 is confined to enforcement of fundamental rights only, while Article 226 embraces the power to issue an appropriate Writ 'for any other purpose' also.

(b) the right to get a relief under Article 32 is guaranteed under Article 32(1), whereas Article 226 does not carry a similar provision.

The result is that when the Writ prayed for under Article 226 is for the enforcement of a right other than a fundamental right, the High Court has the discretion to refuse to grant the Writ, if satisfied that the petitioner has an adequate and suitable remedy, under the Act itself. *Rashid, K.S. & Son* v. *I.T. Investigation Commission*, AIR 1954 SC 207 : 1954 SCA 264 : 1954 SCJ 264 : 1954 SCR 738 : (1954) 25 ITR 167.

[9600] ● ***Fundamental right when infringed.***—When a fundamental right is alleged to have been infringed, the existence of an alternative remedy under the impugned Act itself is no ground for refusing the protection afforded by Article 32. The petitioner has a right to demand of the Supreme Court the remedy which the Constitution gives him under that Article.

If a particular law requires a person to do a particular thing on pain of penal action for non-compliance with the requirements of that law, that person can straight way seek the remedy given by Article 32 and apply for a declaration that the law is bad as conflicting with his fundamental right, and obtain a Writ of *Mandamus* against the State prohibiting it from enforcing that law against him. He does not have to wait until the State has actually issued a notice against him threatening to enforce such penal provision. *Himmatlal H. Mehta* v. *State of M.P.*, AIR 1954 SC 403 : 1954 SCA 654 : 1954 SCJ 445 : 1954 SCR 1122 : 1954 (1) MLJ 690 : 67 MLW 629 : 1954 MWN 802.

[9601] ● ***Wide powers under Articles 32 and 226 on Supreme Court and High Courts to issue orders directors and writs.***—By Articles 32 and 226 wide powers are conferred on the Supreme Court as well as all the High Courts to issue orders, directions and writs for the enforcement of fundamental rights, and in the case of the High Courts, for other purposes as well.

The language of these Articles is very wide, and in view of their express provisions it is not necessary to look back into the early history or procedural technicalities relating to these writs in English law. The Court can issue appropriate orders in any matter, so long as it keeps to the board and fundamental principles in English law which regulate the exercise of this jurisdiction. *Basappa, T.C.* v. *T. Nagappa*, AIR 1954 SC 440 : 1954 SCA 620 : 1954 SCJ 695 : 1955 SCR 250 : 67 MLW 613 : ILR (1954) Mys 235.

[9602] ● ***Writ of Certiorari object of.***—The object of a *Writ of Certiorari* is to secure that an inferior Tribunal acts properly and within its jurisdiction. It gives to the person aggrieved a cheap, quick and effective remedy for the enforcement of his fundamental rights, and in the case of the High Courts, for any other purpose as well. *Basappa, T.C.* v. *T. Nagappa*, AIR 1954 SC 440 : 1954 SCA 620 : 1954 SCJ 695 : 1955 SCR 250.

[9603] ● ***Writ availability of only against judicial acts.***—The writ is available only against "judicial acts", which expression includes *quasi*-judicial functions exercised by executive or administrative bodies, and not against purely ministerial acts. Thus the writ can be issued when a body has the duty to act judicially, and yet it has acted in excess of its legal authority.

The control exercised through a *Writ of Certiorari* is exercised in a supervisory capacity, and not in an appellate capacity. Thus the Court cannot re-weigh the evidence on which the order of the inferior tribunal or body is based, and cannot interfere with its order, even though in the opinion of the Court it has failed in the correct appreciation of that evidence.

The supervisory control by a *Writ of Certiorari* can be exercised only under the following conditions, namely,

(i) that the tribunal has acted without jurisdiction or in excess of jurisdiction, or has refused to exercise the jurisdiction which it has, or

(ii) when the tribunal, though competent to hold an inquiry, has acted in manifest disregard of an essential rule of procedure or of a basic principle of natural justice.

Want of jurisdiction may arise in any of the following ways—

(i) from the nature of the subject-matter, or

(ii) from the absence of any preliminary set of circumstances which by law are made a condition precedent to assumption to jurisdiction, or

(iii) from some basic defect or disability to competency. *Basappa, T.C.* v. *T. Nagappa*, AIR 1954 SC 440 : 1954 SCA 620 : 1954 SCJ 695 : 1955 SCR 250.

[9604] ● *Writ of Certiorari does not lie for correcting error of law.*—A *Writ of Certiorari* will not lie for correcting every error of law. It can lie only for correcting an error which is manifest on the face of the record, that is, a patent error which is self-evident and about which there need be no argument and there cannot be two opinions. However, there is no precise rule for determining the nature of the error which can give rise to the writ, and there is an element of indefiniteness inherent in this question, so that it has to be left to the determination of the Court in each case as it arises. *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*, AIR 1955 SC 233 : 1955 SCA 105 : 1955 SCJ 267 : 1955 SCR 1104.

[9605] ● *Power to issue appropriate writs and orders.*—The power to issue appropriate writs and orders is conferred under Articles 32 and 226 in terms which are absolute and unqualified, and can be exercised against any tribunal or body within the Court's jurisdiction. *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*, AIR 1955 SC 233 : 1955 SCA 105 : 1955 SCJ 267 : 1955 SCR 1104 : 1955 NagLJ 1 : 1955 (1) MLJ (SC) 157 : 1955 MWN 449 : 1955 AWR 339 : 1955 AnLT (Civil) 350.

[9606] ● *Writ of Certiorari directed against record of decision.*—A *Writ of Certiorari* is an order directed against the record of a decision, and not against the tribunal itself, and the fact that the tribunal has become *functus officio* after the decision can have no effect on the jurisdiction of the Court to remove or *quash* the offending decision. The writ can be directed against the person who is legally in custody of the record at the time when the writ is issued. *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*, AIR 1955 SC 233 : 1955 SCA 105 : 1955 SCJ 267 : 1955 SCR 1104 : 1955 (1) MLJ (SC) 157 : 1955 MWN 449.

[9607] ● *Determination of question by State Govt.—Jurisdiction of High Court under Article 226 or of Supreme Court under Article 32 not impaired.*—When any Act expressly leaves a matter to the subjective satisfaction of the executive authority by using words such as "if the Government is satisfied" or "if the.......authority is satisfied" or "if the .... officer is satisfied", or by providing that the determination of the executive authority shall be "conclusive evidence" as to any matter, the effect of such a provision is that it is not open to the Court to subject the decision of the executive authority to objective tests, and the satisfaction is non-justiciable, with the result that the finding of the executive authority cannot be questioned in a Court of Law.

But even in such a case the jurisdiction of the Court under Article 32 or Article 226 is not altogether taken away, and the power remains in the Court to examine the question whether the provisions of the statute under which the action in question purports to be taken have been duly complied with, and whether the executive authority has duly discharged the obligations imposed upon it by that statute. *Lila Vati Bai* v. *State of Bombay*, AIR 1957 SC 521 : 1957 SCA 465 : 1957 SCJ 557 : 59 BomLR 934.

[9608] ● *Writ of Certiorari—Essential features of.*—The essential feature of a *Writ of Certiorari* is that the control which is exercised by the Court through such a writ over judicial and *quasi*-judicial tribunals or bodies in its supervisory capacity, and not as a Court of Appeal.

In granting the writ the High Court or the Supreme Court does not exercise the powers of an appellate Tribunal and does not review or reweigh the evidence, and does not substitute its own judgment for that of the inferior body. It is only when the impugned order is without jurisdiction of palpably erroneous that it can be demolished and put out of the way. *Sewpujanrai Indrasanrai Ltd.* v. *Collector of Customs*, AIR 1958 SC 845 : 1958 CrLJ 1355 : 1958 SCJ 1199 : 1958 MLJ (Cri) 929.

[9609] ● ***Chief Minister made party to petition—Serious allegations made against him.***—In the present case, a police officer of high rank, who was serving as a Commissioner of Police and was under suspension, while investigations and enquiries into several charges against him of grave offences were going on, made a petition to the Supreme Court under Article 32 wherein serious allegations were made against the Chief Minister of the State. Their Lordships held that the petition could not succeed as the procedure followed in these investigations was according to procedure established by law and was not violative of Article 14 or Article 31 as contended by the petitioner. For that part of the judgment, see this case.

In this case, serious allegations have been made against the Chief Minister. He was made a party respondent to the petition and had notice of the allegations made. The Chief Minister had himself made no affidavit in respect of the allegations made against him and affidavits in reply had been made only by the Chief Secretary and the Home Secretary to the Punjab Government.

One of the allegations in the petition was that in one of the criminal cases against the petitioner by one Sethi, the complainant had sent the complaint direct to the Chief Minister and that the Chief Minister had passed certain orders thereon. The original complaint was not produced before the Court on the ground that it could not be traced and only a carbon copy was produced. The petitioner alleged that the Chief Minister had passed certain orders thereon and that the original was not produced in order to conceal from the Court the orders which the Chief Minister had passed thereon. In the affidavit filed by the Home Secretary he was not in a position to say anything about the allegations made against the Chief Minister.

The facts as regards the other case in which one Dhingra was the complainant were as under. Admittedly a complaint was sent to the Chief Minister with a covering letter in which it was stated that the petitioner had already started tampering with the evidence. The Chief Minister wrote on this complaint—"Will Additional Inspector General please take immediate action in taking over papers from Government departments concerned. Please give a *prima facie* report". It was not clear why he ordered the seizure of papers even before a *prima facie* report was given in respect of an offence said to have been committed five years before the date of the complaint. Further, the order itself was not clear as it could either mean that he ordered the submission of a *prima facie* report, or that he merely directed that a report should be made if a *prima facie* case was made out.

These were all matters in which the Chief Minister alone was in a position to enlighten the Court. In view of the allegations made against him, he owed a duty to the Court to file an affidavit stating what the correct position was. It must be recognised that in such a case it may not be possible for a Chief Minister to remember the circumstances in which a document passed through his hands, but if that was so, it was easy for him to say so in the affidavit. On the other hand, if he remembered the circumstances, he could have refuted the allegations with equal ease.

This was a case in which the petitioner was obviously suffering from a sense of grievance that he had not had a fair deal, and it was not a case where the refutation of the allegations made by him could be left to the Secretaries and other officers, because they could only speak from the record and were not in a position to say why the Chief Minister had passed certain orders. Therefore, this was clearly a case which required an affidavit by the Chief Minister.

In executive as well as judicial administration, justice must not only be done, but it must appear that justice is being done. *Kapur, R.P.* v. *Sardar Pratap Singh Kairon*, AIR 1961 SC 1117 : 1961 (2) CrLJ 161 : 1961 (2) SCR 143.

[9610] ● ***Act of State executive when infringes liberty guaranteed under Constitution.***—When an act by the State executive infringes a liberty guaranteed under the Constitution, the remedy of the person injured lies under Article 32 of the Constitution. In such a case, it is entirely immaterial and irrelevant to consider whether or not the action taken, gives rise to an action under the civil law against the State. It is erroneous to assume that before the jurisdiction of the Supreme Court under Article 32 could be invoked, the applicant must either establish that he has no other remedy, adequate or otherwise, or that he must exhaust such remedies as the law affords, and can approach the Supreme Court only when he has not obtained proper redress. Once it is proved to the satisfaction of the Court that by any action taken by a State executive the fundamental right of the petitioner has been infringed, under Article 32 it is not only the right of Supreme Court, but it is its duty, to give to the petitioner the required relief by passing appropriate orders in that behalf. *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : 1963 (2) CrLJ 329 : 1963 ALJ 711.

[9611] ● ***High Court when dealing with writ petition under Article 226 against order of customs authorities.***—When the High Court is dealing with a writ petition under Article 226 against the order of a Customs Authority, it is not sitting in appeal over the decision of that authority, and the correctness of the conclusion reached by that authority as regards the appreciation of the Items in the Hand-book of Import Trade Control or in the Indian Tariff Act which is referred to in those Items is not a matter which falls within the writ jurisdiction of the High Court. Where there is no procedural irregularity of any kind which would invalidate the order, and the order of the Customs Collector passed in the exercise of his powers under the Sea Customs Act shows by its very contents that the requirements of the Act as regards investigation and hearing to the party have been duly fulfilled, it would not be open to the High Court in the exercise of its writ jurisdiction to interfere with the order made merely on its own appreciation of the facts on which the order has been made. *Girdharilal Bansilal* v. *Union of India*, AIR 1964 SC 1519 : 1964 (2) CrLJ 461 : 1964 CurLJ (SC) 194 : 66 PunLR 1091.

[9612] ● ***Writ petition—Competency of under Article 32.***—Although the respondents did not urge that writ petition was not competent under Article 32, the Court observed as follows :

Before we part with this petition, we ought to add that respondents did not urge before us that the writ petition was not competent under Article 32 and that the proper remedy available to the petitioner was a petition under Article 226 of the Constitution to the Punjab High Court; that is presumably because the respondents were anxious to have a decision from this Court on the question about the validity of the impugned Article in the regulation in question. We would, therefore, make it clear that our decision in the present writ should not be taken to mean that we have held that a petition like the present one, is competent under Article 32 of the Constitution. *Gurdev Singh Sidhu* v. *State of Punjab*, (1964) 2 CrLJ 481.

[9613] ● ***No member of executive can interfere with liberty of subject.***—No member of the executive can interfere with the liberty of the subject except on condition that he can support the legality of his action before the Court of justice. *State of Bihar* v. *Kameshwar Prasad Verma*, AIR 1965 SC 575 : 1965 (1) CrLJ 494 : 1962 SCD 851 : (1963) 2 SCJ 89 : (1963) 2 SCR 183 : (1962) 2 Ker LR 192 : 1962 BLJR 798 : 1963 MLJ (Cri) 315 : 1963 ACrR 262 : 1963 AWR (HC) 534.

[9614] ● ***Habeas Corpus petition—Legality of detention.***—It is well settled that in dealing with a petition for *habeas corpus* the Court has to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of the hearing. In the instant case the applications were made to this Court after the orders dated March 4, 1965, had been passed. It is, therefore, unnecessary to consider the validity of the detention orders made on December 29, 1964, for those orders were no longer in force and the petitioners were detained by orders passed on March 4, 1965. We shall, therefore, consider only the grounds urged against the validity of the orders passed on March 4, 1965.

Before we leave these cases, we would like to refer to the inordinate delay that took place between the making of the petitions to jail authorities and their reaching this Court. The petitions were made on March 15, 1965, but they reached this Court on April 12, 1965, exactly four weeks later. We consider that ordinarily one week is enough for any such petition to reach this Court from any part of India. We also consider that it is the duty of the jail authorities to send such petitions directly and at once to this Court and indeed to the High Courts where they are addressed to them. We trust that there will be no such lapse again in the future. *A.K. Gopalan* v. *Government of India*, AIR 1966 SC 816 : (1966) 1 SCJ 440 : (1966) 2 SCR 579 : (1966) 59 ITR 711 : (1966) 1 ITJ 377.

[9615] ● ***Writ of Habeas—Issuance of.***—The present petition was filed in this Court under Article 32 of the Constitution on May 12, 1966 for issue of a writ of *Habeas Corpus* against the respondents directing them to set him at liberty on the ground that the provisions of the Foreigners Act were invalid.

Unlike in England, in India the person detained can file original petition for enforcement of his fundamental right to liberty before the Court other than the High Court, namely this Court. The order of the High Court in the said writ is not *res judicata* as held by the English and American Courts, either because it is not a judgment or because the principle of *res judicata* is not applicable to a fundamentally lawless order. If the doctrine of *res judicata* is attracted to an application for a writ of *habeas corpus*, there is no reason why the principle of constructive *res judicata* cannot also govern the said application, for the rule of constructive *res judicata* is only a part of the general principles of the law of *res judicata,* and if that be applied the scope of the liberty of an individual will be considerably narrowed. The present case illustrates the position. Before the High Court the petitioner did not question the constitutional validity of the President's order made under Article 359 of the Constitution. If the doctrine of constructive *res judicata* be applied, this Court, though enjoined by the Constitution to protect the right of a person illegality detained, will become powerless to do so. That would be whittling down the wide sweep of the constitutional protection.

Order 35, Rule 3 of the Supreme Court Rules provides that a petition for a writ of *habeas corpus* under Article 32 shall state whether the petitioner has moved the High Court concerned for similar relief and if so, with what result. This rule is a statutory safeguard against an abusive use of a petition for the issue of the writ of *habeas corpus* under Article 32. The previous dismissal of a petition for a writ of *habeas corpus* by a High Court is one of the matters which this Court may take into consideration at the preliminary hearing of the writ petition under Article 32 in forming the opinion whether a *prima facie* case for granting the petition is made out, and if on a consideration of all the materials the Court comes to the conclusion that a *prima facie* case is not made out, the Court may refuse to issue a *rule nisi* under O.35, R. 4. *Ghulam Sarnar* v. *Union of India*, AIR 1967 SC 1335 : 1967 CrLJ 1204 : (1967) 1 SCA 246 : (1967) 2 SCR 271.

[9616] ● ***Writ of Certiorari—Invocation of.—*** *Constitution of India, Article 226 and Assam Forest Regulation (7 of 1891), Sections 62 and 3(5).*—One of the grounds on which the jurisdiction of the High Court on *Certiorari* may be invoked, is an error of law apparent on the face of the record and not every error either of law or fact, which can be corrected by a superior Court, in exercise of its statutory powers as a Court of appeal or revision. If the Revenue Board has not exceeded its jurisdiction under the law or committed an error apparent on the face of the record, the High Court is not justified in quashing the appellate order of the Board under Article 226 of the Constitution. *Biswabahan Das* v. *Gopen Chandra Hazarika*, AIR 1967 SC 895 : 1967 CrLJ 828 : (1967) 1 SCWR 198 : (1967) 1 SCR 447 : (1967) 2 SCJ 454 : (1967) MLJ (Cri) 754.

[9617] ● ***Supreme Court not to issue writ of—Mandamus to control exercise of discretion by Custom officer.***—Where the Customs Officer has a discretion to stay the proceedings under Section 111 & 112 during the pendency of the trial in the Criminal Court and be refused to stay the proceedings in his discretion and his action is not shown to be *mala fide* or arbitrary, the Supreme Court will not issue a *mandamus* to control the exercise of his discretion. *T.G. Gaokar* v. *R.N. Shukla*, AIR 1968 SC 1050 : 1968 CrLJ 1234 : (1968) 2 SCJ 727 : 1968 MPLJ 719 : 1968 Mah LJ 703 : 70 Bom LR 718.

[9618] ● ***No period of limitation prescribed for filing complaint when.***—Where no period of limitation is prescribed for filing a complaint, a Court cannot throw it out on the sole ground of delay. *Asstt. Customs Collector, Bombay* v. *L.R. Melwani*, AIR 1970 SC 962 : 1970 CrLJ 885 : (1969) 2 SCR 438 : 1969 SCD 274 : (1970) 2 SCJ 299 : 1970 MLJ (Cri) 599 : 72 Bom LR 782.

[9619] ● ***Foreigner entering India illegally—His detention for purpose of deportation not illegal.***—Its scope has grown to achieve its purpose of protecting individuals against the erosion of the right to be free from wrongful restraint on their rightful liberty. But when the petitioner has no right to move about freely in the country without a proper legal sanction, the restraint exercised on him for expelling him from the country cannot be construed to amount to his custody being illegal so as to require that his immediate relief should be directed. The constitutional protection against the illegal deprivation of personal liberty construed in a practical way cannot entitle non-citizens to remain in India contrary to the provisions of the law governing foreigners. *Anwar* v. *State of J. & K.*, AIR 1971 SC 337 : (1971) 3 SCC 104 : 1970 UJ (SC) 702 : (1971) 1 SCA 519 : (1971) 1 SCJ 502 : (1971) 1 SCR 637.

[9620] ● ***Preventive detention order where challenged as mala fide—Supreme Court not to go into merits.***—Where in a petition under Article 32 of the Constitution the detention of the petitioner is challenged, the Supreme Court cannot go into the merits whether the facts stated in the affidavits filed on behalf of the State are correct or not but it can be seen whether on those facts no charge of *mala fides* can be made out. *Mohd. Sabir* v. *State of J&K*, AIR 1971 SC 1713 : (1972) 4 SCC 558 : 1971 CrLJ 1271 : 1971 SCD 843 : 1971 UJ (SC) 710 : (1971) 2 Civ ApJ (SC) 127 : 1971 LabIC 1108 : 1971 ServLR 888.

[9621] ● ***Habeas Corpus proceedings—For issue of writ Court to consider legality of***

detention.—In *habeas corpus* proceedings the Court has to consider the legality of the detention on the date of hearing. If on the date of hearing it cannot be said that the detention is contrary to law and the aggrieved party has been wrongfully deprived of his personal liberty, a writ of *habeas corpus* cannot issue. *Talib Hussain* v. *State of J&K*, AIR 1971 SC 62 : (1971) 3 SCC 118 : 1970 UJ (SC) 709.

[9622] ● ***CrPC not applicable to—Tribal areas in Assam and Manipur.***—The CrPC does not apply to tribal areas in Assam and Manipur by reason of the VI Schedule to the Constitution. Only its spirit applies. Hence when an accused is arrested on a charge of two or more offences he need not be produced in connection with each offence on each occasion before a Magistrate for remand. *Saptawna* v. *State of Assam*, AIR 1971 SC 813 : 1971 CrLJ 679 : 1971 UJ (SC) 341.

[9623] ● ***In habeas corpus proceedings Court to have regard to legality or otherwise of detention.***—In proceedings for a writ of *habeas corpus*, the Supreme Court does not as a general rule go into controversial matters. Such a writ is not granted where a person is committed to jail custody by a competent Court by an order which *prima facie* does not appear to be without jurisdiction or wholly illegal. Further the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings. A *fortiori* the Court would not be concerned with a date prior to the intimation of the proceedings for a writ of *habeas corpus*. *B.R. Rao* v. *State of Orissa*, AIR 1971 SC 2197 : (1972) 3 SCC 495 : 1971 SCD 918 : 1971 UJ (SC) 767 : 1971 CivAppR (SC) 464 : 37 CutLT 1064.

[9624] ● ***Under-trial not produced before Magistrate within 24 hours of arrest.***—In the case of an under-trial prisoner the question that he is entitled to be released as he was not produced before a Magistrate within 24 hours of his arrest does not arise.

Where an accused is illegally detained, the detention becomes lawful when subsequently he is arrested and produced before a Magistrate.

In the case of an under-trial prisoner, the fact that he was arrested in only one case does not make any difference. *Saptawna* v. *State of Assam*, AIR 1971 SC 813 : 1971 CrLJ 679 : 1971 UJ (SC) 341.

[9625] ● ***Detention under MISA—Habeas Corpus—Successive petitions.***—Where in a case of detention under the MISA, in the counter affidavit filed by the Government it was averred that the detenu appeared also to have applied to the Calcutta High Court for a writ of *habeas corpus* which was still pending there but the detenu in his writ petition to the Supreme Court stated that he had not applied to the Calcutta High Court and both sides were unable to give any further details or information in that connection, the Supreme Court held that it would not advance the cause of justice to decline to dispose of the petition under Article 32 or to postpone the hearing and await the decision of the Calcutta High Court. *Madan Mohan* v. *State of West Bengal*, AIR 1972 SC 2400 : (1972) 2 SCC 534.

[9626] ● ***Habeas Corpus—New plea.***—Where additional grounds were raised which were not in the writ petition, the Supreme Court allowed them to be raised since it was a *habeas corpus* petition, and was made by the petitioner from jail. *Nagendra Nath* v. *State of West Bengal*, AIR 1972 SC 665 : (1972) 1 SCC 498 : 1972 CrLJ 482 : (1972) 1 SCJ 464 : (1972) 1 SCJ 547.

[9627] ● ***Railway Board falls within definition of State.***—The Railway Board falls within the definition of "State" as given in Article 12 of the Constitution. The administrative act or order of the Railway Board can be challenged under Article 14. *Railway Board* v. *Observer Publications*, AIR 1972 SC 1792 : (1972) 2 SCC 266 : 1972 SCC (Cri) 669 : 1973 CrLJ 458.

[9628] ● ***Habeas Corpus—Delay in completion of investigation.***—No writ of *habeas corpus* or any other relief can be granted to a person who was arrested in 6 cases, 3 of which related to dacoity, one to dacoity with murder and two cases related to murder and rioting and his remedy is to apply for bail to the appropriate Court or the superior Court because of the delay in the completion of the investigation or delay in the trial of his case. *B. Mondal* v. *State of West Bengal*, AIR 1972 SC 1852 : (1972) 3 SCC 891 : 1972 CrLJ 1175.

[9629] ● ***Supreme Court on hearing of rule nisi can examine legality of detention.***—The Supreme Court can examine the legality of the detention on the hearing of the *rule nisi* without requiring that the person detained be brought before the Court, and if the detention is found unlawful, order him to be released forthwith. Order 47, Rule 1, empowers the Court, for sufficient cause shown, to dispense with the requirement of Order 35, Rule 4, of producing the body of the person detained on the day fixed for the hearing of the *rule nisi*, and the Court may direct in an appropriate case that the body of the person detained need not be produced. The same is the effect of Order 47, Rule 6. Where such a direction is given, the Supreme Court would hear the *rule nisi* without the person detained being brought before it and, as provided in Order 35, Rule 5, pass an order that the person detained be set at liberty and if cause is shown and allowed, discharge the *rule nisi*.

Though the right to move the Supreme Court under Article 32(1) for the enforcement of fundamental rights under Part III is itself a fundamental right, there is no obligation on the Supreme Court to give any particular kind of remedy to the petitioner. *K. Sanyal* v. *Distt. Magistrate, Darjeeling*, AIR 1973 SC 2684 : (1973) 2 SCC 674 : 1973 CrLJ 1818.

[9630] ● ***Supreme Court cannot go into evidence in support of charge against Army Officer.***—The Supreme Court cannot go into the evidence in support of the charges against an Army Officer in a petition filed under Article 32. It can only consider whether any fundamental rights of the petitioner have been violated and the only Article relevant is Article 21 of the Constitution. *Harish Uppal* v. *Union of India*, AIR 1973 SC 258 : 1973 CrLJ 274.

[9631] ● ***Writ of Habeas Corpus.***—Where the petitioner has been released during the pendency of a writ of *habeas corpus,* the questions raised on his behalf become academic and the petition also becomes infructuous, resulting in the dismissal of the petition as infructuous. *Mohit Chandra* v. *Distt. Magistrate, Calcutta*, AIR 1974 SC 2287 : (1972) 3 SCC 773 : 1972 SCC (Cri) 841 : 1974 CrLJ 1315.

[9632] ● ***Proclamation of emergency valid political issue.***—The question whether there was no real emergency and yet the proclamation remained unretracted with consequential peril to fundamental rights, is a political issue and not justiciable and the appeal should be to the polls and not to the Courts. Academic exercises in constitutional law are not for Courts but Jurists. *Bhut Nath* v. *State of West Bengal*, AIR 1974 SC 806 : (1974) 1 SCC 645 : 1974 SCC (Cri) 300 : 1974 CrLJ 690.

[9633] ● ***Habeas Corpus petition—Rule nisi issued.***—In a petition for a writ of *habeas corpus*, the earliest date with reference to which the legality of the detention is to be considered is the date of filing of the application for such writ. Therefore any defect prior to that date in the legality of the detention cannot affect the subsequent detention if it is legally on the date of the petition.

It is competent to the Court to dispense with the production of the body of the person detained while issuing *rule nisi*, and the *rule nisi* could be had without requiring the body of the person detained to be brought before the Court.

Where a person is committed to jail custody by a competent Court by an order which *prima facie* does not appear to be without jurisdiction or wholly illegal, a writ of *habeas corpus* cannot be granted. *Kanu Sanyal* v. *Dt. Magistrate, Darjeeling*, AIR 1974 SC 510 : (1974) 4 SCC 141 : 1974 SCC (Cri) 280 : 1974 CrLJ 465.

[9634] ● ***Court cannot release detenu by taking into account period of remission.***—A person sentenced to transportation for life may be detained in prison for life. The Supreme Court cannot interfere on the mere ground that if the period of remission claimed by him is taken into account, he is entitled to be released. It is for the Government to decide whether he should be given any remissions and whether he should be released earlier. *Smbha Ji* v. *State of Maharashtra*, AIR 1974 SC 147 : (1974) 1 SCC 196 : 1974 SCC (Cri) 102 : 1974 CrLJ 302 : 1974 MLJ (Cri) 359 : (1974) 2 SCJ 1.

[9635] ● ***Subjective satisfaction of detaining authority.***—The Supreme Court in Writ proceedings cannot go into the question whether or not the petitioner was concerned in the dacoities. The statute has left this matter to the subjective satisfaction of the detaining authority. *Ghetu Sheikh* v. *State of West Bengal*, AIR 1975 SC 982 : (1975) 1 SCC 334 : 1975 SCC (Cri) 170 : 1975 CrLJ 795.

[9636] ● ***Habeas Corpus petition—Maintainability.***—In a case of detention, the petitioner has to show the violation of either Article 21 or 22 of the Constitution. Personal liberty of the citizen which the law so sedulously and carefully protects can also be taken away by the procedure established by law when it is used to jeopardise public good and not merely private interests. The Supreme Court cannot order a release from detention upon a *Habeas Corpus* petition, until it is satisfied that the petitioner's detention is really unwarranted by law. In such a petition, what has to be considered by the Court is whether the detention is *prima facie* legal or not, and not whether the detaining authorities have wrongly or rightly reached a satisfaction on every question of fact. *Ram Bali* v. *State of West Bengal*, AIR 1975 SC 623 : (1975) 4 SCC 47 : 1975 SCC (Cri) 321 : 1975 CrLJ 592.

[9637] ● *Question of fact—Whether Master Plan specified particular use of building as distinguished from land.*—In these appeals, the common question involved was whether the High Court was right in taking upon itself the task of holding on the interpretation of and on reading the Master Plan that it had not specified any use of the building as distinguished from land.

The said question is largely a question of fact in each case whether the Master Plan has specified a particular use of a particular building and whether a person prosecuted has incurred the penal liability under Section 29(2) of the Development Act for the alleged violation of Section 14 of the Act. It may be that the determination of the question as to whether the Master Plan has specified a particular use of a particular building would largely depend upon the interpretation and reading of the Master Plan. But to arrive at a correct conclusion various other facts and circumstances will have to be taken into consideration. It is neither expedient nor possible for the High Court or the Supreme Court to arrive at a definite conclusion one way or the other on the reading and interpretation of the Master Plan alone. It is primarily and essentially within the domain of the Criminal Court where the prosecutions are pending to arrive at its own conclusion on appreciation of the entire evidence placed before it. The persons prosecuted would undoubtedly have adequate opportunity of defending themselves and to show that the ingredients which are necessary to be proved and established by the prosecution have not been so proved or established. The appeals were allowed directing the prosecution against the accused respondents to be proceeded with. *Delhi Development Authority* v. *Lila D. Bhagat*, AIR 1975 SC 495 : (1975) 1 SCC 410 : 1975 SCC (Cri) 151 : 1975 CrLJ 435 : (1975) 1 SCWR 122.

[9638] ● *Presidential order—No locus standi to mere writ petition—Challenging legality of detention under MISA.*—In view of the Presidential Order dated 27-6-1975, no person has any *locus standi* to move any writ petition under Article 226 before a High Court for *Habeas Corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Maintenance of Internal Security Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous considerations. *A.D.M., Jabalpur* v. *S. Shukla*, AIR 1976 SC 1207 : (1976) 2 SCC 521 : 1976 CrLJ 945 : 1976 CrLR (SC) 303 : 1976 UJ (SC) 610.

[9639] ● *Practice by higher officers of State Govt. to utilize lower ones to provide alibi for their own want.*—The higher officers of the State Government should cease to utilise the lower ones to provide an *alibi* for their own want of care and the legal adviser for the Government will display greater competence and attention in drafting affidavits. *Mohd. Ibrahim* v. *B.R. Rao*, AIR 1976 SC 1822 : (1976) 2 SCC 33 : 1976 SCC (Cri) 233 : 1976 CrLJ 1385 : (1976) 2 SCJ 456 : 1976 CrAppR (SC) 91 : 1976 Chand LR (SC) Cr 58 : (1976) 2 APLJ (SC) 46.

[9640] ● *Writ petition filed after delay of four year.*—Where the writ petition was filed after a gross delay of four years for which there is no satisfactory explanation, the High Court was justified in dismissing it summarily. *Lachhman Dass* v. *Union of India*, AIR 1977 SC 1979 : (1977) 2 SCC 584 : 1977 CrLJ 1574 : 1977 CrLR (SC) 247 : 1977 SCC (Lab) 309 : 1977 SCCrR 218 : 1977 UJ (SC) 355.

[9641] ● *Mustard Oil (Price Control) Order 1977—Validity.*—In these writ petitions, a common question of the validity of an order, *viz.*, the Mustard Oil (Price Control) Order, 1977, was raised.

On a plain reading of Article 3(b) the protective umbrella of the IX Schedule took in its ever-widening wings only the Acts and Regulations specified therein, but not Orders and Notifications issued under those Acts and Regulations. It is no answer to say that though the particular law, as for example a Control Order, is not specified in the IX Schedule, the parent Act under which the Order was issued was specified in that Schedule. The Essential Commodities Act is placed in the IX Schedule and its validity could not be attacked on the ground of its unconstitutionality. But there is no justification for extending the protection of that immunity to an Order passed under Section 3 of the Act like the Mustard Oil (Price Control) Order. It is therefore, open to the petitioners to invoke the writ jurisdiction of the Supreme Court for determination of the question whether the provisions of the Order violated Articles 14, 19(1)(f) and (g) of the Constitution. The said Order cannot be held to offend Article 14 on ground that the impugned Order treats the entire country as one unit regardless of regional variations relating to factors like the cost of procurement of raw material and freight. There is no reliable data to support the view that dealers in different regions could be said to be so differently situated in the context of and in relation to the purpose for which the Price Control Order is issued that one common price for dealers all over the country can reasonably be described as discriminatory as against some of them. Fixation of different prices for different regions would frustrate the very object of the exercise, that an essential commodity should be made available to the consumer at a fair price. In the ultimate analysis, the mechanics of price fixation has necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of operators, the processual basis of price fixation has to be accepted in the generality of cases as valid. The said Order is also not violative of rights of the parties under Article 19(1)(f) & (g) of the Constitution. In the first place, it is impossible to determine in the writ petitions the accuracy of the petitioners' case that they purchased Mustard seed from month to month and from week to week as the crushing of the seed progressed. The circumstance that the petitioners might have to suffer a loss over a short period immediately following upon the promulgation of the Price Control Order would not render the Order constitutionally invalid. The Parliament having entrusted the fixation of prices to the expert judgment of the Government, it would be wrong for the Supreme Court to examine each and every minute detail pertaining to the Governmental decisions. The impugned Order is therefore, valid. *Prag Ice & Oil mills* v. *Union of India,* AIR 1978 SC 1296 : (1978) 3 SCC 459 : 1978 CrLJ 1281 : 1978 CrLR (SC) 120 : (1978) 3 SCR 293.

[9642] ● ***Prison justice—Intervention by Supreme Court.***—The Supreme Court is entitled to intervene when constitutional rights or statutory prescriptions are transgressed to the injury of the prisoner but would decline where lesser matters of institutional order and management, though irksome to some, are alone involved. Imprisonment does not spell farewell to fundamental rights although, by a realistic re-appraisal, Courts would refuse to recognise the full panoply of Part III of the Constitution enjoyed by a free citizen. Where a prison practice or internal instruction places harsh restrictions on jail life, breaching guaranteed rights, the Court directly comes in. Every prison sentence is a conditioned deprivation of life and liberty, with civilized norms built in and unlimited trauma interdicted. In that sense, judicial policing of prison practices is implied in the sentencing power. The criminal judiciary has thus a duty to guardian their sentences and visit prisons when necessary. Many of them do not know or exercise this obligation. The penological goals which may be regarded as reasonable justification for restricting the right to move freely within the confines of a pententiary are now well settled. If prisoners has title of Articles 19, 21 and 14, rights subject to the limitation indicate, there should be some correlation between deprivation of freedom and the legitimate functions of a correctional system. Compassion wherever possible and cruelty only where inevitable is the art of correctional confinement. When prison policy advanced such a valid goal, the Court would not intervene officiously. The Court was reluctant to intervene in the day-to-day operation of the State penal system; but undue harshness and avoidable tantrums, under the guise of discipline and security, gained no immunity from Court writs. The reason was, prisoners retained all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the right enjoyed by prisoners under Articles 14, 19 and 21, though limited, were not static and would rise to human heights when challenging situations arose. *Charles Sobraj* v. *Supdt., Central Jail, New Delhi*, AIR 1978 SC 1514 : (1978) 4 SCC 104 : 1978 SCC (Cri) 5421 : 978 CrLJ 1534 : 1978 SCCrR 416.

[9643] ● ***Jurisdiction of High Court—Ambit of.***—The High Court in exercise of the extraordinary jurisdiction commits a grave error by making observations on seriously disputed questions of facts taking its cue from affidavits which in such a situation would hardly provide any reliable material. High Court was clearly in error in giving the direction virtually amounting to a *mandamus* to close the case before the investigation is complete.

Matter brought to the High Court did not call for investigation into the *mala fides* of the Superintendent, Railway Police, at the stage when investigation was to be taken over by another officer and the conclusion reached by the Superintendent, Railway Police, and his subordinate investigating officer to file the charge-sheet was not acted upon. Hence, aspersions cast on the character of the Superintendent and allegations of *mala fides* made against him virtually accepted by the High Court in entirety are utterly irrelevant and the same are expunged. Judgment of the Patna High Court was reversed. *State of Bihar* v. *J.A.C. Saldanna*, AIR 1980 SC 326 : (1980) 1 SCC 554 : 1980 SCC (Cri) 272 : 1980 CrLJ 98 : 1980 CrLR (SC) 17 : (1980) 1 SCJ 406 : (1980) 2 SCR 16 : 1979 CrAppR (SC) 404 : 1980 BLJR 18 : 1980 BLJ 80 : 1980 MLJ (Cri) 382.

[9644] ● ***Habeas Corpus—Earlier petition dismissed.***—In detention under COFEPOSA, Writ of *habeas corpus* to release the detenu was filed. Identical writ petition on almost same grounds was rejected earlier after a full-dressed debate. Present petition seeks for a virtual review of the earlier judgment. Instead of filing a petition for review, present independent writ petition has been filed. One ground is that some of the grounds, particularly the one relating to representation by a counsel before the Advisory Board, is awaiting decision by the Constitution Bench in other cases and therefore the present writ petition may also be heard by a Constitution Bench. It was open to the petitioner to seek review of judgment of this Court or file another writ petition as may be advised if the view of the Supreme Court is later found to be wrong in the light for the decision of the Constitution Bench. Another question raised is about the vires of the COFEPOSA, argument being that its inclusion in the Ninth Schedule of the Constitution offends the basic structure of the Constitution. The petitioner having deliberately not chosen to raise the question in the earlier petition, the Supreme Court will not be justified in admitting this writ petition. *Kavita* v. *State of Maharashtra*, AIR 1981 SC 2084 : (1981) 4 SCC 145 : 1981 CrLJ 1703.

[9645] ● ***Petition for habeas corpus—Subsequent petition to challenge preventive detention—Not barred by constructive res judicata.***—Application of the doctrine of constructive *res judicata* is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of *habeas corpus* under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief. *Lallubhai Jogibhai* v. *Union of India*, AIR 1981 SC 728 : (1981) 2 SCC 427 : 1981 SCC (Cri) 463 : 1981 CrLJ 288 : 1981 CrLR (SC) 99 : 1981 CrAppR (SC) 130 : 1981 Chand CrC (SC) 60 : (1981) 2 SCJ 37 : 1981 ACrC 162 : (1981) 2 SCR 352 : 1981 MLJ (Cri) 350.

[9646] ● ***Constructive res judicata—Doctrine—Applicability of to writ proceedings.***—The High Court decides the petition of the detenu under Article 226 which is a discretionary jurisdiction whereas the jurisdiction to grant relief in a petition under Article 32 filed in the Supreme Court is guaranteed by the Constitution and once the Court finds that there has been a violation of Article 22(5) of the Constitution, then it has no discretion in the matter but is bound to grant the relief to the detenu by setting aside the order of detention. Doctrine of *res judicata* or principles of finality of judgment cannot be allowed to whittle down or override the express constitutional mandate to the Supreme Court enshrined in Article 32 of the Constitution. *Kirit Kumar* v. *Union of India*, AIR 1981 SC 1621 : (1981) 2 SCC 436 : 1981 SCC (Cri) 471 : 1981 CrLJ 1267 : 1981 CrLR (SC) 263 : (1981) 2 SCR 718 : (1981) 22 Guj LR 1067.

[9647] ● ***Prison torture not beyond reach of Supreme Court.***—When police and prison torture is escalating in our human rights era, Courts owe a duty to society not to ignore such a dangerous reality. A Court sentence does not deprive the prisoner of his fundamental rights. A 'lifer' making a bitter complaint with facts and figures, of the terror and horror, physical and psychic, let loose on him and other jail-mates by a crypto-criminal combination of senior officials and superior prisoners, the Supreme Court instead of directly making a detailed investigation into the charges and the defences, directed a judicial enquiry by the District & Sessions Judge of Delhi who is a member of the Board of Visitors. *Rakesh* v. *B.L. Vig. Supdt., Central Jail, New Delhi*, AIR 1981 SC 1767 : 1980 Supp SCC 183 : 1980 SCC (Cri) 834 : 1981 CrLJ 1438 : 1980 CrLR (SC) 757 : (1980) 18 DLT 159 : (1980) 3 SCR 629.

[9648] ● ***Dismissal of earlier writ petition for habeas corpus.***—Dismissal of earlier writ petition for *habeas corpus* will not operate as a bar to the maintainability of another for that purpose. *Sunil Dutt* v. *Union of India*, AIR 1982 SC 53 : (1982) 3 SCC 405 : 1982 CrLJ 193.

[9649] ● ***Nature and scope of proceedings under Article 226.***—Nature and scope of proceeding under Article 226. FIR did not disclose commission of a cognizable offence. High Court was justified in quashing investigation. *State of West Bengal* v. *Swapan Kumar*, AIR 1982 SC 949 : (1982) 1 SCC 561 : 1982 SCC (Cri) 283 : 1982 CrLJ 819 : 1982 (1) ComLJ 217 : 1982 ACrLJ 108 : (1982) 1 SCJ 251 : 1982 MLJ (Cri) 359 : 1982 IJR 108.

[9650] ● ***Habeas corpus petition by blinded prisoners.***—In a *habeas corpus* petition by blinded prisoners the Jail Superintendent was ordered by the Supreme Court to file affidavit in the case. On that very day the petitioner (Jail Superintendent) was suspended by the Government. Miscellaneous petition filed by him to quash the suspension order on the ground that it was passed *mala fide* to prevent him from filing affidavit is maintainable. *Anil Yadav* v. *State of Bihar*, AIR 1982 SC 1008 : (1982) 2 SCC 195 : 1982 CrLJ 982 : 1982 CrLR (SC) 152 : 1982 SCC (Lab) 194 : 1982 SCCrR 285 : 1982 UJ (SC) 301 : 1982 BLJR 287 : 1982 BLJ 425.

[9651] ● ***Multiple murder case.***—*Articles 32 & 72, Penal Code, Sections 53 & 302 and Criminal Procedure Code, Sections 368, 434.*—In a multiple murder case the accused was convicted and sentenced to death by common judgment. Death penalty was commuted to life imprisonment for one accused. Co-accused also is entitled to commutation. But as his mercy petition to the President was dismissed, the Supreme Court felt that petitioner's sentence also should be commuted to life imprisonment and as such recommended to the President to exercise his powers under Article 72. Duty of Prison Authorities prior to actual execution of death sentence of a prisoner is indicated. *Harbans Singh* v. *State of U.P.*, AIR 1982 SC 849 : (1982) 2 SCC 101 : 1982 SCC (Cri) 361 : 1982 CrLJ 795 : 1982 CrLR (SC) 71 : 1982 SCCrR 192, 198 : 1982 UJ (SC) 181 : 1982 CrAppR (SC) 88 : 1982 Chand LR (Cri) 719 : 1982 ACrLJ 157 : (1982) 1 SCJ 340 : 1982 MLJ (Cri) 409 : 1982 IJR 157.

[9652] ● ***Custody of minor child—Paramount consideration.***—Where custody of a minor child was with the father, the mother's petition for custody of the child was dismissed by the High Court on the ground that the custody of the father is not illegal. Order was set aside as improper, holding paramount consideration in such cases is the welfare of the minor and not the legal rights of either party. *Veena Kapoor* v. *Varinder Kumar*, AIR 1982 SC 792 : (1981) 3 SCC 92 : 1981 SCC (Cri) 650 : 1982 CrLJ 580 : 1982 CrLR (SC) 11 (2) : (1982) 1 SCJ 202 : 1982 MLJ (Cri) 336 : 1982 Bihar CrC (SC) 114 : (1982) 1 APLJ (SC) 19 : 1982 (UP) CrC (SC) 114 : (1982) ACrC 205.

[9653] ● ***Permissible to protect person from illegal and vexatious prosecution by grant of appropriate writ.***—In an appropriate case, it may be, rather is, permissible to protect a person from illegal and vexatious prosecution by grant of an appropriate writ or in exercise of inherent or revisional powers of the High Court. But where the matter was a question of fact and it was neither expedient nor possible for the High Court or the Supreme Court to arrive at a definite conclusion one way or the other, it was primarily and essentially within the domain of the Criminal Court where the prosecutions were pending to arrive at its own conclusion on appreciation of the entire evidence placed before it. *Munna* v. *State of U.P.*, AIR 1982 SC 806 : (1982) 1 SCC 445 : 1982 SCC (Cri) 269 : 1982 CrLJ 620 : 1982 ACrC 157 : 1982 MLJ (Cri) 351 : 1982 UJ (SC) 143 : 1982 ACrLJ 59 : 1982 AWC 295 : 1982 ACrR 190 : (1982) 1 SCJ 225 : 1982 IJR (Cri) SC 59 : 1982 (2) Chand LR (Cri) SC 555.

[9654] ● ***Seizure of foodgrains.***—In Writ Petitions against seizure of foodgrains, question whether seizure was for any contravention of any Order issued under Section 3 of the Essential Commodities Act, is to be determined by the Additional District Magistrate. When facts are controverted, the petitioners have no right to relief under Article 32. Transaction has still to be proved. Supreme Court cannot act on documents. *Bishamber Dayal Chandra Mohan* v. *State of U.P.*, AIR 1982 SC 33 : (1982) 1 SCC 39 : 1982 SCC (Cri) 53 : 1982 CrLR (SC) 99 : 1982 ACrLJ (SC) 67 : 1982 CrAppR (SC) 9 : 1982 EFR 183 : (1982) 1 SCR 1137 : 1982 IJR 67 : 1982 UJ (SC) 802.

[9655] ● ***Mandamus against Govt.***—Each of the petitioners was aged below 20 years at the date of the commission of offence. Superintendent of Jail recommended their release on completion of 10 years imprisonment inclusive of remissions. There was no sufficient reason for not releasing them. *Mandamus* was issued for release forthwith.

Petitioner was over 20 years of age at the date of commission of offence and has undergone a total imprisonment of 19 years, 3 months and 16 days inclusive of remissions. Unexpired period of imprisonment was hardly 8 months and 14 days. Ground for non-release was that the report of Probation Officer was awaited. Petitioner was directed to be released on bail.

Premature release of two petitioners was deferred by the Sentence Revising Board as certain reports from the Police Department and from the Probation Officer had not been received. Since both of them underwent total imprisonment of over 17 years and 16 years inclusive of remissions respectively, respondents were directed to consider their cases and dispose of the same within one month.

Petitioner underwent a total imprisonment of 14 years, 3 months and 28 days inclusive of remissions. His case for premature release was deferred for want of requisite information without indicating what it was. Police report, Probation Officer's report as well as Jail Superintendent's report were favourable to him and his conduct in jail was certified to be good. His release forthwith was ordered. *Shriniwas* v. *Delhi Administration*, AIR 1982 SC 1391 : (1982) 3 SCC 209 : (1982) CrAppR (SC) 312.

[9656] ● ***Detention under preventive detention law—Duty of Court under Articles 32, 226 and 136.***—The High Court under Article 226 and the Supreme Court under Article 32 or under Article 136 was not sit on appeal on the orders of preventive detention. The normal law is that when an isolated offence or offences was or were committed, the offender would be prosecuted. But, if there be a law of preventive detention empowering the authority to detain a particular offender in order to disable him to repeat his offences, it could do so, but it would be obligatory on the part of the detaining authority to formally comply with the provisions of Article 22(5) of the Constitution. The High Court and the Supreme Court have to see whether the formalities enjoined by the said Article had been complied with by the detaining authority, and if they were complied with, the Court could not examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detained the detenu under the Preventive Detention Act, for, that is the function of an appellate Court. *Hemlata* v. *State of Maharashtra*, AIR 1982 SC 8 : (1981) 4 SCC 647 : 1982 SCC (Cri) 16 : 1982 CrLJ 150 : 1981 CrLR (SC) 644 : 1982 SCCrR 256 : 1982 (2) Bom CR 218 : (1982) 1 SCR 1028.

[9657] ● ***Power of President to commute death sentence.***—Power of the President to commute death sentence. Necessity of justification to exercise that power is to be judged from case to case. *Kuljit Singh* v. *Lt. Governor of Delhi*, AIR 1982 SC 774 : (1982) 1 SCC 417 : 1982 SCC (Cri) 234 : 1982 CrLJ 624 : 1982 CrLR (SC) 59 : 1982 MLJ (Cri) 327 : (1982) 1 SCJ 188 : 1982 UJ (SC) 176 : 1982 BBCJ (SC) 101 : 1982 ACrLJ (SC) 65 : 1982 CrAppR (SC) 101 : 1982 IJR 65.

[9658] ● ***Petition to expunge remarks.***—A petition was filed to expunge remarks passed in criminal appeals filed by others in the Supreme Court and the High Court. Petitioner was not party to the said proceedings. Supreme Court directed not to consider the observation, if any, made in regard to the petitioner in the said judgments, in any proceedings, civil or criminal, in any trial Court or appellate Court against the petitioner. However, relief for damages and compensation for all losses, humiliation cannot be granted to the petitioner in a petition under Article 32. *Jiwan Mal Kochar* v. *Union of India*, AIR 1983 SC 1107 : (1984) 1 SCC 200 : 1983 CrLR (SC) 453 : 1983 LabIC 1295 : 1983 CrAppR (SC) 419 : (1983) 2 Crimes 587 (1983) 2 ServLR 452 : (1983) 2 LabLN 688.

[9659] ● ***Foreign national undergoing lifer.***—Where foreign national was undergoing lifer and suffering from cancer in secondary stage and advised chemotherapy, application for permission to go to home country, was allowed and permission to go for one year granted on humanitarian grounds subject to filing of undertaking and security from her parents. *Marie Andre Leclerc* v. *State (Delhi Administration)*, AIR 1983 SC 1092 : (1983) 2 SCC 443 : 1983 CrLJ 1445 : (1983) 2 Crimes 590.

[9660] ● ***Death sentence—Execution.***—Hanging convict by rope as provided under Section 354(5), CrPC is not concluded in *Bachan Singh's* case. Petition questioning validity is maintainable. Section 354(5) challenged on ground of violation of Article 21. Court has jurisdiction to go into question of validity of method. Method of hanging does not violate provision contained in Article 21. *Deena* v. *Union of India*, AIR 1983 SC 1155 : (1983) 4 SCC 645 : 1983 CrLJ 1602.

[9661] ● ***Writ petition seeking declaration that conviction of petitioner illegal.***—In a Writ petition seeking declaration that conviction of the petitioner by the High Court is illegal and where the Supreme Court earlier declined to interfere in a special leave petition, a Writ petition is not maintainable. *Jharia* v. *State of Rajasthan*, AIR 1983 SC 1090 : (1983) 4 SCC 7 : 1983 SCC (Cri) 757 : 1983 CrLJ 1647 : 1983 CrLR (SC) 438 : (1983) 2 Crimes 591 : 1983 UJ (SC) 895.

[9662] ● ***Pronouncing final order without reasoned judgment.***—Opportunity was taken to point out that serious difficulties would arise on account of the practice increasingly adopted by the High Court of pronouncing the final order without a reasoned judgment. It is desirable that the final order which the High Court intend to pass should not be announced until a reasoned judgment is ready for pronouncement. Suppose, for example, that a final order without a reasoned judgment is announced by the High Court that a house should be demolished, or that the custody of a child should be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional, or, as in the instant case, that a detenu be released from detention. If the object of passing such orders is to ensure speedy compliance with them, the object is more often defeated by the aggrieved party filing a special leave petition in the Supreme Court against the order passed by the High Court. That places the Supreme Court in a predicament because, without the benefit of the reasoning of the High Court, it is difficult for the Supreme Court to allow the bare order to be implemented. The result inevitably is that the operation of the order passed by the High Court has to be stayed pending delivery of the reasoned judgment. It may be thought that such orders are passed by the Supreme Court and therefore there was no reason why the High Courts should not do the same. It might be pointed out that the orders passed by the

Supreme Court were final and no appeal lay against them. The Supreme Court was the final Court in the hierarchy of our Courts. Besides, orders without a reasoned judgment were passed by the Supreme Court very rarely, under exceptional circumstances. Orders passed by the High Court were subject to the appellate jurisdiction of the Supreme Court under Article 136 of the Constitution and other provisions of the concerned statutes. These observations were thought necessary to be made in order that a practice which was not very desirable and which achieved no useful purpose might not grow out of its present infancy. *State of Punjab* v. *Jagdev Singh,* AIR 1984 SC 444 : (1984) 1 SCC 596 : 1984 CrLJ 177 (SC).

[9663] ● ***Writ of habeas corpus—Investigation of facts before issue of writ.***—In this petition filed for a writ of *habeas corpus*, it was established that C. Daniel and C. Paul were taken to Phungrei Camp by officers and jawans of 21st Sikh Regiment on 10-3-1982 and that they never left the army camp as canvassed on behalf of the respondents on 11-3-1982.

It was obligatory upon the respondents, therefore, to produce the said persons and to explain their whereabouts, more so because respondents claimed the power to arrest and question anyone under the provisions of the Armed Forces (Special Powers) Act, 1958. It was contended for the respondents that once the respondents had adopted a position that the two persons had come to the army camp at the request of the army authority, but left that place on their own in company of their friends, a writ of *habeas corpus* could not be issued, and the respondents could not be called upon to file a return to the writ. When the petition for a writ of *habeas corpus* under Article 32 of the Constitution was moved before the Court, ordinarily the Court would not issue *ex parte* a writ of *habeas corpus* unless the urgency of the situation so demanded or issuing of a notice of motion was likely to result in defeat of justice. Further, the Court would be reluctant to issue a writ of *habeas corpus ex parte* where the fact of detention might be controverted and it might become necessary to investigate the facts. The normal practice was that when a petition for a writ of *habeas corpus* was moved, the Court would direct a notice to be served upon the respondents with a view to affording the respondents to file evidence in reply. If the facts alleged in the petition were controverted by the respondents appearing in response to the notice by filing its evidence, the Court would proceed to investigate the facts to determine whether there was substance in the petition for a writ of *habeas corpus*. If on investigation of facts, the Court rejected the contention of the respondents and was satisfied that the respondents were responsible for unauthorised and illegal detention of the person or persons in respect of whom the writ was sought, the Court would issue a writ of *habeas corpus* which would make it obligatory for the respondents to file a return. Accordingly, the petition was allowed directing the issue of a writ of *habeas corpus* to respondents 1, 2 and 4 commanding them to produce the two persons before the Supreme Court on 12-12-1983 and file the return. *Sebastian M. Hongray* v. *Union of India*, AIR 1984 SC 571 : (1984) 1 SCC 339 : 1984 CrLJ 289.

[9664] ● ***Detention of several devotees and pilgrims including children rounded up in army action in Golden Temple.***—*Articles 32 and 22.*—Several devotees and pilgrims including children rounded up in the Army action in the Golden Temple were detained in jails along with the convicts. No reasons for their detention were forwarded. All of them were directed to be released. *Kamaladevi* v. *State of Punjab*, AIR 1984 SC 1895 : (1985) 1 SCC 41 : 1985 CrLJ 356.

[9665] ● ***Issue of general writ of mandamus—Desirability.***—This writ petition was filed by two public-spirited organisations though their courageous convenor and secretary respectively. The question raised in this petition was whether the Government could ask the police not to enter a place of worship, even if criminals were reported to be hiding or harboured therein.

It is impossible and undesirable for any Court to issue a general writ of *mandamus* to the effect that whenever a criminal was suspected to have taken shelter in a place of worship, the police should enter that place, regardless of the overall situation of law and order. Speaking generally, Courts cannot enforce law and order by issuing general directions without reference to specific instances. The Government has to assess, in the context of the prevailing conditions, the impact of the steps taken to enforce law and order. And, it is the executive which has to take a policy decision as regards the steps to be taken in a given situation, after taking into account the demands of the prevailing situation. While enforcing law and order the executive cannot be oblivious of the possibility that while solving one problem of law and order, others more acute than the one sought to be solved might arise. That is always valid and relevant consideration. *Hindustani Andolan* v. *State of Punjab*, AIR 1984 SC 582 : (1984) 1 SCC 204 : 1983 SCC (Cri) 926 : 1984 CrLJ 299

1984 CrLR (SC) 46 : 1984 ACrR 51 : 1984 AcrC 1.

[9666] ● *Writ challenging validity of order and judgment passed by Supreme Court as nullity or otherwise incorrect.*—In the present case, the writ petition was filed challenging the validity of the order and judgment passed by the Supreme Court as nullity or otherwise incorrect.

Held : The writ petition could not be entertained and was accordingly dismissed. But that dismissal would not prejudice the right of the petitioner to approach the Supreme Court with an appropriate review petition or to file any other application which he might be entitled in law to file. *Abdul Rahman Antulay* v. *Union of India*, AIR 1984 SC 1358 : 1984 CrLJ 1152 : 1984 CrLR (SC) 236 : 1984 CrAppR (SC) 205 : 1984 CurCrJ (SC) 224.

[9667] ● *Public interest litigation—Not adversary litigation.*—Where the petitioner, a social worker, started a public interest litigation, it is not an adversary litigation and the petitioner cannot be looked upon as an adversary. Every State should extend to her every assistance she needs during her visit to jails, children's homes, remand homes, observation homes, borstal schools and all institutions connected with housing of delinquent or destitute children. The information which she collects by visiting those institutions in different States is intended to place before the Supreme Court and utilised in the case and not intended for publication otherwise. *Sheela Barse* v. *Union of India*, AIR 1986 SC 1773 : (1986) 3 SCC 596 & 632 : 1986 SCC (Cri) 337 : 1986 CrLJ 1736.

[9668] ● *Counsel for party not making full submission on all aspects arising in petition.*—Where the counsel for the party advanced arguments in respect of one aspect and did not make full submission on all aspects arising in the petition and the Supreme Court considered it and dismissed the petition, the subsequent allegation by the counsel that if the Court had indicated to him that his submissions on that aspect did not find favour with the Court he would have proceeded to argue the case on the other points, is not proper. *Poonam Lata* v. *M.L. Wadhawan*, AIR 1987 SC 2098 : (1987) 4 SCC 48 : 1987 SCC (Cri) 685 : 1987 CrLJ 1924 : (1987) 3 Crimes 209 : (1987) 14 ECC 17.

[9669] ● *Habeas Corpus—Minor child Custody of.*—In this Writ Petition, the petitioner was citizen of the U.S.A. residing in the State of Michigan. The 1st respondent was her husband. He was an Indian citizen but settled down in the U.S. having secured employment there. A male child was born to the couple. As differences arose between the two spouses, the petitioner along with her son took up separate residence in a women's shelter. She filed a petition for divorce against the 1st respondent in the Circuit Court and the same was decreed. By the same decree, it was directed that the petitioner should have the care, custody and control of the minor child of the parties until he reached the age of 18 years on until further orders of that Court. The first respondent was given visitation rights by the decree. Taking advantage of the weekened visitation rights, the 1st respondent picked up the child from his school and secretly left for India, without intimating the Court or the petitioner. He sold away all his immovable properties immediately before leaving for India and posted a letter of resignation from his job at the Airport. After coming to know that the minor child was not returned to the day care centre by the 1st respondent, the petitioner moved the Court which issued a warrant and a Federal Warrant of arrest but they could not be executed in the U.S. as the 1st respondent had already come over to India. After frantic efforts, the petitioner filed this petition for issue of a writ of *habeas corpus* directing the respondents to produce in Court her minor child, whom she had brought up for more than 7 years. In response to the notice issued by the Supreme Court, the 1st respondent produced the child in Court and filed a counter-affidavit contending that he had not deliberately done anything wrong in bringing the child to India and that the minor child was well settled in India and that it would be in the interest of the child that he should be allowed to reside with him in India as per the child's desire. The conduct of the first respondent in taking the child from the custody of the person to whom it has been entrusted by the Court was undoubtedly most reprehensible.

Whenever a question arises before a Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. The Court found the minor to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. The petitioner who is the mother of the child is full for genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper up-bringing. The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of origin in the U.S.A. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child to some school in Pune. The conduct of the father is not such as to inspire confidence in the Court that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present. The American Court is the proper Court to decide the issue of custody, and as it is the duty of Courts in all countries to see that a parent doing wrong by removing children out of their country does not gain any advantage by his or her wrong doing. *Elizabeth Dinshaw* v. *Arvand M. Dinshaw*, AIR 1987 SC 3 : (1987) 1 SCC 42 : 1987 SCC (Cri) 13 : (1987) 1 SCJ 134 : 1987 CrLR (SC) 117 : JT 1986 SC 795 : (1987) 1 Crimes 71 : 1987 CrAppR (SC) 52 : 1987 CurCrJ (SC) 136 : (1987) 3 (1) IJ Rep 1 : (1986) 4 Supreme 487.

[9670] ● ***Habeas corpus petition—Against detention order—Duty of Court.***—The High Court should realise that there is no particular virtue in quashing an order of detention, for, in a given case, a detention order may be fully justified and absolutely necessary for the protection of the society. The approach has to be an objective approach taking into account all the relevant circumstances and considerations in order to strike a balance between the need to protect the community on the one hand and the need to preserve the liberty of a citizen. Decision of the High Court reported in 1985 ALJ 1126 was reversed. *State of U.P.* v. *Hari Singh*, AIR 1987 SC 2080 : 1987 Supp SCC 190 : 1987 CrLJ 1923 : JT 1987 (2) SC 709.

[9671] ● ***Woman kept in illegal confinement against her wishes.***—Where a woman complained of having been kept in illegal confinement against her wishes before the Supreme Court but her application was placed before the Court 2½ months after its receipt in the Registry, the Supreme Court deprecated the said practice and directed the person against whom that complaint was made to produce the said woman before the Additional Chief Judicial Magistrate and ordered an enquiry by him into the matter and to report to the Supreme Court. *Nilima Priyadarshina* v. *State of Bihar*, AIR 1987 SC 2021 : 1988 CrLJ 197 : JT 1987 (3) SC 6 : 1987 Pat LJR (SC) 31 : 1987 Cal CrLR (SC) 92 : 1987 East CrC 808 : 1987 BLJ 893.

[9672] ● ***Judgment result of bias or want of impartiality nullity.***—It is the essence of the judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirement of natural justice, is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "*coram non judice*". As to the tests of the likelihood of bias, what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "am I biased?"; but to look at the mind of the party before him. *Ranjit Thakur* v. *Union of India*, AIR 1987 SC 2386 : (1987) 4 SCC 611 : 1988 CrLJ 158 : JT 1987 (5) SC 93 : (1987) 3 IJRep 658 : 1987 PatLJR (SC) 79.

[9673] ● ***Accused detention in Jail continuing for 8 years.***—Where the petitioner was remanded to custody in connection with the offences under Sections 147, 148, 323 and 324, IPC, but thereafter he was tried and acquitted in two sessions cases and was directed to be released, and the petitioner had been in jail for more than 8 years, he was directed to be released forthwith on the ground that even if he were to be convicted for the alleged offences, he would have in the meanwhile served out the sentence. *Ram Dass Ram* v. *State of Bihar*, AIR 1987 SC 1333 : 1987 Supp SCC 143 : 1987 SCC (Cri) 669 : 1987 CrLJ 1055 : JT 1987 (1) SC 303.

[9674] ● ***Hand cuffing of accused arrested in criminal case.***—Where it was alleged that an Advocate practicing in Delhi was handcuffed contrary to law while being taken to the Court after he had been arrested on the charge of a criminal offence it was urged that the Union Government and the Delhi Administration had not issued necessary instructions to the police authorities in that behalf, in accordance with the judgment of this Court in *Prem Shankar Shukla* v. *Delhi Administration,* AIR 1980 SC 1535, the Supreme Court directed the Union of India to frame rules or guidelines as regards the circumstances in which handcuffing of the accused should be resorted to in conformity with that judgment and to circulate them among all the State Governments and the Governments of Union Territories. *Aeltemesh Rein* v. *Union of India*, AIR 1988 SC 1768 : (1988) 4 SCC 54 : 1988 CrLJ 1809 : JT 1988 (3) SC 275 : (1988) 3 SCJ 195 : (1988) 3 Crimes 513 : (1988) 17 Reports 460 : (1988) 2 CurCC 625.

[9675] ● ***Public interest litigation withdrawal of.***—The miscellaneous petition for leave to withdraw the main public interest litigation is filed under circumstances which can only be characterised as somewhat unfortunate. The person who initiated public interest litigation claimed that she who brought that litigation was entitled, as of right, to withdraw the proceedings from the Court and also asserted that the Court could not refuse leave for withdrawal, and further claimed that not only that leave for withdrawal could not be refused but also that the main petition could not be continued by any other citizen or organisation on the ground that the proceedings were the result of a "voluntary action of a citizen" and that, as a corollary, the proceedings could be continued except with the applicants participation, she made unfounded allegations that the Court had become dysfunctional and that the finial disposal of the main petition was not expeditiously done.

Acknowledging any such status of a *dominus litis* to a person who brings a public interest litigation will render the proceedings in public interest litigations vulnerable to and susceptible of a new dimension which might, in conceivable cases, be used by persons for personal ends, resulting in prejudice to the public weal.

In a public interest litigation, unlike traditional dispute–resolution–mechanism, there is no determination or adjudication of individual rights. While in the ordinary conventional adjudications the party–structure is merely *bi–polar* and the controversy pertains to the determination of the legal consequences of past events and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings cut across and transcend these traditional forms and inhibitions. The compulsions for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher in an egalitarian social order and a welfare State. Effective solutions to the problems peculiar to this transformation are not available in the traditional judicial system. The proceedings in a public interest litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation of the right, constitutional or statutory, of sizable segments of the society, which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert and quite often not even aware of those rights. The technique of public interest litigation serves to provide an effective remedy to enforce these group rights and interests. In order that these public causes are brought before the Court, the procedural techniques judicially innovated specially for the public interest action recognises the concomitant need to lower the *locus standi* thresholds, so as to enable public-minded citizen or social-action-groups to act as conduits between these classes of persons and the forum for the assertion and enforcement of their rights. The dispute is not comparable to one between private parties with the result there is no recognition of the status of a *dominus litis* for any individual or group of individuals to determine the course or destination of the proceedings, except the extent recognised and permitted by the Court. The "rights" of those who bring the action on behalf of the others must necessarily be subordinate to the "interests" of those for whose benefit the action is brought. The grievance in a public interest action, generally speaking, is about the content and conduct of governmental action in relation to the constitutional or statutory rights of segments of society and in certain circumstances the conduct of Government policies. Necessarily, both the party structure and the matters in controversy are sprawling and amorphous, to be defined and adjusted or readjusted, as the case may be, *ad hoc*, according as the exigencies of the emerging situations. The proceedings do not partake of predetermined private law litigation models but are exogenously determined by variations of the theme.

Again, the relief to be granted looks to the future and is generally corrective rather than compensatory which, sometimes, it also is. The pattern of relief need not necessarily be derived logically from the rights asserted or found. More importantly, the Court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for the organisation of the proceedings, moulding of the relief and this is important also supervising the implementation thereof. The Court is entitled to, and often does seek, the assistance of expert-panels, Commissioners, Advisory-committees, Amici, *etc.* This wide range of the responsibilities necessarily implies correspondingly higher measure of control over the parties, the subject-matter and the procedure. Indeed as the relief is positive and implies affirmative action the decisions are not "one-shot" determinations but have on-going implications. Remedy is both imposed, negotiated or *quasi*-negotiated.

Therefore, what corresponds to the stage of final disposal in an ordinary litigation is only a stage in the proceedings. There is no formal, declared termination of the proceedings. The lowering of *locus standi* threshold does not involve the recognition or creation of any vested rights on the part of those who initiate, the proceedings analogous to *dominus litis*. *Sheela Barse* v. *Union of India*, AIR 1988 SC 2211 : (1988) 4 SCC 226 : JT 1988 (3) SC 765 : (1988) 18 Reports 1.

[9676] ● *Public interest litigation—Permission for use information collected during visits to Jail.*—In public interest litigation, permission cannot be granted to the applicant in the proceedings for using the information collected by her during her visits to jails and other custodial institutions pursuant to the Court's order during the pendency of the proceedings as the information was gathered for purposes of the case and pursuant to the directions of this Court. *Sheela Barse* v. *Union of India*, AIR 1988 SC 2211 : (1988) 4 SCC 226 : JT 1988 (3) SC 765 : (1988) 18 Reports 1.

[9677] ● *Mandus—Enforcement of statute or provision therein.*—It is not open to the Supreme Court to issue a writ in the nature of *mandamus* directing the Central Government to bring Section 30 of the Act into force. But a writ in the nature of *mandamus* to the Central Government can be issued to consider whether the time for bringing Section 30 of the Act into force has arrived or not. Every discretionary power vested in the Executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. It cannot be allowed to leave the matter to lie over without applying its mind to the said question even though the power under Section 30 of the Act is discretionary, having regard to the fact that more than a quarter of a century has elapsed from the date on which the Act received the assent of the President of India. *Aeltemesh Rein* v. *Union of India*, AIR 1988 SC 1768 : (1988) 4 SCC 54 : 1988 CrLJ 1809 : JT 1988 (3) SC 275 : (1988) 3 SCJ 195 : (1988) 3 Crimes 513 : (1988) 17 Reports 460 : (1988) 2 CrCC 625.

[9678] ● *Habeas Corpus—Petition registered on basis of letter written by girl.*—In this case, the Court received a letter purporting to be from the petitioner containing certain statements and alleging that she was being detained against her will by her parents. It was registered as a writ petition and the Court directed the father of the girl to produce her before the Additional Chief Judicial Magistrate, Jamshedpur and directed him to ascertain the true facts from her on the question whether she was being detained against her wishes (*vide* AIR 1987 SC 2021). When the case came before the Court thereafter, the petitioner's counsel stated that, that letter was a forgery and that none of the statements made therein had any foundation in truth. On enquiry, the Special Police Establishment reported that the letter in question was a forgery committed by the S.I. of Police and another person and recommended their prosecution under Sections 120-B, 465, 466 and 500, IPC. The Court thought it fit to close the proceedings on considering the facts and circumstances of the case and perusing the written submissions filed by both the parties, observing that it was an unfortunate case which brought unnecessary suffering and embarrassment but ordering the S.I. to pay Rs. 2,000/- as costs of this proceeding to the petitioner. *Nilima* v. *State of Bihar*, AIR 1989 SC 490 : 1989 Supp (1) SCC 336.

[9679] ● *Writ petition for review of what are described as encounters by Police.*—The facts mentioned in the three writ petitions call for a comprehensive review of what has been described as "encounters", and in conditions of disturbed law and order of the magnitude reflected in these writ petitions this Court cannot preclude the possibility of personal enmities being settled and other motives being satisfied by the recourse to the use of force under the guise of maintaining law and order. There is the imperative requirement of ensuring that the guardians of law and order do in fact observe the Code of discipline, expected of them and that they function strictly as the protectors of innocent citizens. As the matters properly fall within the domain of the State Governments, they should be petitioned in the first instance. The Supreme Court was, therefore, inclined to provide an opportunity to the petitioners to petition the State Governments concerned in the first instance for the relief sought in these writ petitions and they were given 4 weeks time to do so and the writ petitions were kept pending with liberty to the parties to file further affidavits setting forth the fact of the filing of representations and of the nature of the response of the State Governments concerned and includeing such other facts as may be considered necessary for the effective disposal of these writ petitions. *Chaitanya Kalbagh* v. *State of U.P.*, AIR 1989 SC 1452 : (1989) 2 SCC 314 : 1989 CrLJ 1465.

[9680] ● *Relief to delinquent children detained in Jail.*—The Supreme Court directed that the District Judges of the entire country excepting the State of Jammu & Kashmir to furnish the particulars of under-trial and convicted children found in regular jails within their respective jurisdiction as the Juvenile Justice Act, 1986, has come into force from 2-10-1987, subsequent to several orders and directions made from time to time earlier by that Court, and while making reports shall also indicate whether rules have been framed and whether such rules are already in force for carrying out the purposes of the Act. It also directed that if such rules have not been framed in any State under Section 62 of the Act, such State or States should frame the same on or before 7-4-1989 and to bring them into force without any further delay thereafter. It also appointed a committee to make a draft scheme with a view to working out the modality and to make overseeing convenient the provisions of the Act. *S.C. Legal Aid Committee* v. *Union of India*, AIR 1989 SC 1278 : (1989) 2 SCC 325 : 1989 CrLJ 1126.

[9681] ● ***Habeas corpus—Custody of minor.***—The appellant applied to the High Court of Punjab and Haryana for a writ of *habeas corpus* alleging that her minor son was being detained by respondents 1 to 3. The High Court summarily dismissed the petition by adding that R-1 shall be entitled to receive the interest accruing on the Fixed Deposit Receipts in the name of the minor child Vaibhav Datta as long as the minor child is in his legal custody. R-1 is the husband and R-2 is his wife, R-3 is their daughter. Poonam, the appellant and Amar Jyothi Datta (deceased son of R-1 and R-2) are the parents of Vaibhav (son). The appellant's allegation was that she was thrown out of the family house about 6 months after the death of her husband when disputes arose between the two parties over the entitlement to the money payable upon Amar Jyoti's death. Under the orders of this Court, respondents shifted over to Modi Nagar and are prepared to stay there. Vaibhav has been put into a local school at Modi Nagar where the appellant is a teacher. The Court directed that Vaibhav shall continue to study in the said school and neither party would be permitted to withdraw him without the permission of the Court. Vaibhav shall live with his mother but during every week-end (that is Saturday and Sunday) R-1 shall be entitled to take him from the appellant and keep him in the company of the respondents at his residence for the whole of Saturday until 6-00 P.M. on Sunday following and return the child to the mother by 6-00 P.M. on Sunday so that the mother takes over the child and makes him ready for going to school next morning. Parties are directed to consider the interest of the child as paramount and do nothing which would be adverse to its interest or affect it physically or mentally in any manner. R-1 has been receiving the interest and the money is already in deposit under orders of the High Court. The amount shall remain in deposit as at present and the interest shall be payable to the appellant and R-1 in equal shares till a competent Court varies the same. *Poonam Datta* v. *Krishnalal Datta*, AIR 1989 SC 401 : 1989 Supp (1) SCC 587.

[9682] ● ***Writ of Habeas Corpus not substitute for enforcement of right to liberty.***—The right of an individual is either a mere reflex right—the reflex of a legal obligation existing towards this individual, or a private right in the technical sense - the legal power bestowed upon an individual to bring about by legal action the enforcement of the fulfillment of an obligation existing toward him, that is, the legal power. From the above analysis it is clear that in the instant case the appellant's fundamental right to liberty is the reflex of a legal obligation of the rest of the society, including the State, and it is the appellant's legal power bestowed upon him to bring about by a legal action the enforcement of the fulfillment of that obligation existing towards him. Denial of the legal action would, therefore, amount to denial of his right of enforcement of his right to liberty. A petition for a writ of *habeas corpus* would not be a substitute for this enforcement. Resort to Article 226, Constitution after the personal liberty is already violated is different from the pre-violation protection. Post-violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of *habeas corpus* is a post-violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. The question may arise what precisely may amount to threat or imminence of violation. Law surely cannot take action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the Court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the Court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the Court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of *habeas corpus*? In the instant case when the writ petition was pending in Court and the appellant's right to personal liberty happened to be violated by taking him into custody in preventive detention, though he was released after four days but could be taken into custody again, would it be proper for the Court to reject the earlier writ petition and tell him that his petition has become infructuous and he had no alternative but to surrender and then petition for a writ of *habeas corpus*? The difference of the two situations, as we have seen, have different legal significance. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and restoration of the right. *S.M.D. Kiran Pasha* v. *Govt. of A.P.*, (1990) 1 SCC 328 : (1989) 3 Crimes 759 (SC).

[9683] ● ***Public interest litigation—Duty of High Court.***—In the High Court of M.P., a petition styled as public interest litigation was filed. According to the petitioner, he and his wife were Sevadars in a Gurudwara situate at Ratangarh in the district of Mandsaur. His grievance was that there was an oil mill near the Gurudwara in which, for all outward purposes, edible oils were manufactured, but people there were engaged more in clandestine business of smuggling and selling opium, heroin, brown sugar, poppy hush and the like and the authorities were not taking any care to see that such activities were stopped. Rather they were said to be hands in glove with the oil mill owners. It was, therefore, prayed that a direction be issued to whomsoever it may concern, to stop this clandestine business and smuggling and instead, to direct the Union Government to make arrangements for export of these costly items in order to conserve foreign exchange so that the country's finances which were more or less in a shattered state, may, to a great extent, be revived. Howsoever absurd the prayer might be and whatever be the intention of the petitioner in filing this petition, one thing was quite clear that he was obsessed with great and lofty ideals. Therefore, for whatever worth it was, in order to satisfy his vanity, High Court directed to whomsoever it might concern, that smuggling and underground dealings in such dangerous articles as mentioned above, should be stopped and the sooner the better for the country. All those officers who were said or alleged to be (more imaginary than real) with those carrying on these nefarious activities be sacked and the entire administrative machinery of the country be overhauled by recruiting only conscientious and devoted people like the petitioner so that the already suffering masses of the nation are no longer made to so suffer. Such an order should not have been passed, for, it is not likely to be implemented. *Giani Devender Singh* v. *Union of India*, AIR 1995 SC 1847 : (1995) 1 SCC 391 : JT 1995 (1) SC 263 : (1995) 1 Crimes 298 (SC) : 1995 (1) UJ 425.

[9684] ● ***Premature release of convict.***—A lady was convicted for an offence of murder and sentenced to undergo imprisonment for life. Admittedly, she was convicted on June 2, 1984 for an offence committed on September 24, 1983. She has been in custody from September 17, 1983. An application was filed in the High Court for her premature release. In the impugned order, the High Court was directed the release of the respondent on the ground that the State had not filed the counter-affidavit in spite of that fact that the case was adjourned on more than three occasions. The question was whether the High Court has jurisdiction under Article 226 or under Section 482 of the Code of Criminal Procedure, 1973 (for short, the "Code") to release the prisoner. Setting aside the order of the High Court, apex Court held : "Section 433 of the Code empowers the Government, in an appropriate case, without the consent of the person sentenced, to commute the sentence and to prematurely release the convict. Clause (b) thereof provides for a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or fine. Indisputably, she did not even complete 14 years which is a minimum mandatory sentence required to be served under the Code. At best the Court, in an appropriate case, where the prisoner has served the mandatory minimum sentence, may only direct the appropriate Government to consider the commutation of the sentence as prematurely release a particular convict. The Court can do no further. The Government would consider such direction based upon the conduct of the prisoner and other relevant circumstances and act upon it. High Court had committed grave error of law in directing release of the convict on the lapse on the part of the appellant-State in filing the counter-affidavit. *Union Territory of Chandigarh* v. *Charanjit Kaur*, (1996) 7 SCC 492 : (1996) SCC (Cri) 484 : JT 1996 (3) SC 30 : (1996) Crimes 173 (SC) : 1996 (1) CCR 170 (SC).

[9685] ● ***Application for extension of time to complete investigation—Jurisdiction of High Court.***—It is not correct to suggest that the jurisdiction of the High Court while hearing the matter on the application for extension of time to complete the investigation is limited only to the question of time to be granted and does not extend also to examine the manner in which the investigation is being conducted, Similarly there is no merit in the contention that it is only the Chief Justice of the High Court and not also the Bench constituted by the Chief Justice to hear the matter which has the authority to go into these question. *Union of India* v. *Sushil Kumar Modi*, AIR 1997 SC 314 : (1996) 6 SCC 500 : 1997 CrLJ 358 : JT 1996 (10) SC 23.

[9686] ● ***Public hearing in Court.***—The requirement of a public hearing in a Court of law for a fair trial is subject to the need of proceedings being held *in camera* to the extent necessary in public interest and to avoid prejudice to the accused. It became necessary to prevent reversion to inertia of the agencies in such matters. *Vineet Narain* v. *Union of India,* AIR 1998 SC 889 : (1998) 1 SCC 226 : 1998 CrLJ 1208 (SC) : 1998 (1) SLT 518.

[9687] ● *Single directive—Applicability.*—The single directive is applicable only to certain persons about the specified level who are described as decision making officers. In cases where accusation of such officers is of illegal gratification, obviously level or status of official would be irrelevant, such cases are outside of scope of single Directive. *Vineet Narain* v. *Union of India*, AIR 1998 SC 889 : (1998) 1 SCC 226 : 1998 CrLJ 1208 (SC) : 1998 (1) SLT 518.

[9688] ● *Issuance of mandamus directing agencies to proper duties.*—Merely issuing a *mandamus* directing the agencies to perform their duties would be futile, therefore it was decided to direct the CBI to complete for investigations expeditiously keeping the Court informed of progress. *Vineet Narain* v. *Union of India*, AIR 1998 SC 889 : (1998) 1 SCC 226 : 1998 CrLJ 1208 (SC) : 1998 (1) SLT 518

[9689] ● *Power to issue directions—Guidelines to fill void in absence of suitable legislation.*—There are ample powers conferred by Article 32 read with Article 142 of the Constitution to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps into cover the gap or the executive discharges its role. It is in the discharge of this duty that the IRC was constituted by the Government of India with a view to obtain its recommendations after an indepth study of the problem in order to implement them by suitable executive directions till proper legislation is enacted. *Vineet Narain* v. *Union of India*, AIR 1998 SC 889 : (1998) 1 SCC 226 : 1998 CrLJ 1208 at 1233 (SC) : JT 1997 (10) SC 247 : 1997 (7) Scale 656 : (1998) 1 SLT 518 : 1997 (10) Supreme 476 : 1998 (1) Crimes 12.

[9690] ● *Issuance of mandamus directing agencies to perform duties futile.*—Merely issuing a *mandamus* directing the agencies to perform their task would be futile and, therefore, it was decided to issue directions from time to time and keep the matter pending requiring the agencies to report the progress of investigation so that monitoring by the Court could ensure continuance of the investigation. It was, therefore, decided to direct the CBI and other agencies to complete the investigation expeditiously, keeping the Court informed from time to time of the progress of the investigation so that the Court retained *seisin* of the matter till the investigation was completed and the charge-sheets were filed in the competent Court for being dealt with, thereafter, in accordance with law. *Vineet Narian* v. *Union of India*, AIR 1998 SC 889 : (1998) 1 SCC 226 : 1998 CrLJ 1208 (1215) (SC) : JT 1997 (10) SC 247 : 1997 (7) Scale 656 : (1998) 1 SLT 518 : 1997 (10) Supreme 476 : 1998 (1) Crimes 12 (SC) : 1998 (1) CCR 190 (SC).

[9691] ● *Administrative Control of High Court vests in Chief Justice.*—Rule 54 of the Rajasthan High Court Rules, 1952 shows that the administrative control of the High Court vests in the Chief Justice of the High Court alone and that it is his prerogative to distribute business of the High Court both judicial and administrative. He alone, has the right and power to decide how the Benches of the High Court are to be constituted; which Judge is to sit alone and which cases he can and is required to hear as also as to which Judges shall constitute a Division Bench and what work those Benches shall do. In other words the Judges of the High Court can sit alone or in Division Benches and do such work only as may be allotted to them by an order of or in accordance with the directions of the Chief Justice. That necessarily means that it is not within the competence or domain of any Single or Division Bench of the Court to give any direction to the Registry in that behalf which will run contrary to the directions of the Chief Justice. Therefore, in the scheme of things judicial discipline demands that in the event a single Judge or a Division Bench considers that a particular case requires to be listed before it for valid reasons, it should direct the Registry to obtain appropriate orders from the Chief Justice. The puisne Judges are not expected to entertain any request from the Advocates of the parties for listing of case which does not strictly fall within the determined roster. In such cases, it is appropriate to direct the counsel to make a mention before the Chief Justice and obtain appropriate order. This is essential for smooth functioning of the Court. Though, on the judicial side the Chief Justice is only the first amongst the equals, on the administrative aside in the matter of constitution of Benches and making of roster he alone is vested with the necessary powers. *State of Rajasthan* v. *Prakash Chand,* AIR 1998 SC 1344 : (1981) 1 SCC 1 : 1998 CrLJ 2012 at 2017 (SC).

[9692] ● *Direction sought to seize records in criminal complaint pending in lower Court.*—Where a complaint filed in the *ex facie* an act of fraud of a fictitious person, and an abuse of the process of Court, every and any action taken pursuant to the said complaint gets vitiated, all actions taken thereon including the issuance of bailable warrants is liable to be declared *ab initio* void and would be set aside. *Vijay Shekhar* v. *Union of India*, AIR 2004 SC 3976 : (2004) 4 SCC 666 : 2004 CrLJ 3857 (3859) : (2004) 3 Crimes 33.

[9693] ● *Alternative remedy.*—Availability of alternative remedy does not oust the jurisdiction of Court under Article 32 of the Constitution. *Mohammed Ishaq* v. *S. Kazam Pasha*, (2009) 12 SCC 748 : 2009 CrLJ 3063.

[9694] ● *Custodial death—Compensation.*—Grant of compensation on account of custodial death, before deciding issue of custodial death was held not permissible. *Dalbir Singh* v. *State of Uttar Pradesh*, AIR 2009 SC 1674 : (2009) 11 SCC 376 : 2009 CrLJ 1543.

[9695] ● *Power to grant pardon.*—The power of the President and Governor to grant pardon under Article 72 and 161 of the Constitution though couched in imperative terms, has nevertheless to be exercised on the advice of executive authority. It is the Government, which in effect, that power. *Jagdish* v. *State of Madhya Pradesh*, (2009) 9 SCC 495 : 2009 (4) Crimes 72 (SC).

[9696] ● *Power of President and Governor to grant pardon.*—The power of President and Governor under Article 72 and 161 is not immune from judicial review. *Mohammed Ishaq* v. *S. Kazam Pasha*, (2009) 12 SCC 748 : 2009 CrLJ 3063 : 2009 (3) Crimes 96 (SC).

16. ARTICLE 39

[9697] ● *Juvenile Court setting up of.*—The State Governments must set up Juvenile Courts in each district and they must appoint suitably trained special cadre of Magistrates for dealing with cases against children. Where a complaint is filed or FIR is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than 7 years, the investigation shall be completed within a period of two months from the date of filing of the complaint or lodging of the FIR and if the investigation is not completed within that time, the case against the child must be treated as closed. If a charge-sheet is filed within 3 months in the case of such an offence, the case must be filed and disposed of within a further period of 6 months at the most inclusive of the time taken up in committal proceedings, if any. It is desirable to have a uniform Children Act throughout India instead of State Acts. *Sheela Barse* v. *Union of India*, AIR 1986 SC 1773 : (1986) 3 SCC 596 & 632 : 1986 SCC (Cri) 337 : 1986 CrLJ 1736 : JT 1986 SC 53 & 186.

17. ARTICLE 42

[9698] ● *Jail reform—Improvement of living conditions in Jail.*—Though the amenities like providing reading material, facilities for playing games, supply of musical instruments and a radio network, *etc.*, ought to receive priority in our constitutional scheme, their denial may not necessarily constitute an encroachment on the right guaranteed by Article 21 of the Constitution. The Supreme Court can only say that the directive principle contained in Article 42 may benevolently be extended to living conditions in jails. There are subtle forms of punishments to which convicts and under-trial prisoners are sometimes subjected but it must be realised that these barbarous relics of a bygone era offend against the letter and spirit of the Constitution. *D.B.M. Patnaiak* v. *State of A.P.*, AIR 1974 SC 2092 : (1975) 3 SCC 185 : 1974 SCC (Cri) 803 : 1975 CrLJ 556 : 1974 SCD 931.

18. ARTICLE 51

[9699] ● *Information law reception and residence of alien.*—This proposition is so well-grounded in International Law that every country has adopted the passport system, which document certifies nationality and entry into any State is only possible with the concurrence of that State. Again a State exercises territorial supremacy over persons in its territory, whether its own subjects or aliens, and can make laws for regulating the entry, residence and eviction of aliens. *R. Monterio* v. *State of Goa*, AIR 1970 SC 329 : 1970 CrLJ 499 : (1970) 1 SCA 75 : (1970) 1 SCR 87.

19. ARTICLE 72

[9700] ● *Govt. whether formulated standard guidelines for exercise of Constitution power under Article 72.*—The question raised "whether Government of India has formulated any uniform standard or guidelines by which the exercise of the constitutional power under Article 72 is intended to be or is in fact governed", is of far-reaching importance, particularly from the point of view of persons sentenced to death in respect of whom the President is specially empowered to exercise his power by clause (c) of Article 72 (1) and question must be examined with care. Death sentence imposed upon any person whatsoever whose petition under Article 72 or Article 161 has been rejected by the President or the Governor is stayed until the disposal of this Writ Petition. *Kuljeet Singh* v. *Lt. Governor, Delhi*, AIR 1981 SC 2239 : (1982) 1 SCC 11.

[9701] ● ***Petition for reprieve under Sections 432 and 433, CrPC—Disposal of.***—The Government of India and the State Governments should dispose of petitions filed under Articles 72 and 161 of the Constitution or under Sections 432 and 433 of the CrPC expeditiously, A self-imposed rule should be followed by the executive authorities rigorously, that every such petition should be disposed of within a period of 3 months from the date on which it was received. Long and interminable delays in the disposal of those petitions were a serious hurdle in the dispensation of justice and indeed, such delays tended to shake the confidence of the people in the very system of justice. Undoubtedly, the executive had the power, in appropriate cases, to act under the aforesaid provisions but, all exercise of power was pre-conditioned by the duty to be fair and quick. Delay defeats justice. *Sher Singh* v. *State of Punjab*, AIR 1983 SC 465 : (1983) 2 SCC 344 : 1983 SCC (Cri) 461 : 1983 CrLJ 803 : 1983 CrLR (SC) 247 : (1983) 1 Crimes 1017 : 1983 SCCrR 213 : (1983) 1 SCJ 318 : (1983) 2 MLJ (SC) 46 : 1983 MLJ (Cri) 545 : 1983 (2) ChandLR (Cri) 491 : 1983 CrAppR (SC) 430.

[9702] ● ***President's power to grant pardon.***—It is urged that in order to prevent an arbitrary exercise of power under Article 72 this Court should draw up a set of guidelines for regulating the exercise of the power. There is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case-law, and specific guidelines need not be spelt out. Indeed, it may not be possible to lay down any precise clearly defined and sufficiently channalised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme. *Kehar Singh* v. *Union of India*, AIR 1989 SC 653 : (1989) 1 SCC 204 : 1989 CrLJ 941 : (1989) 1 Crimes 238 : (1989) 37 DLT 171.

[9703] ● ***Convict seeking relief under Article 72—Has no right to insist on oral hearing before President.***—A person condemned to death has no right to insist on an oral hearing from the President on his petition invoking the powers under Article 72. The proceeding before the President is of an executive character, and when the petitioner files his petition it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting an oral argument. The manner or consideration of the petition lies within the discretion of the President, and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the issues, which he considers pertinent, and he may, if he considers it will assist him in treating with the petition, give an oral hearing to the parties. The matter lies entirely within his discretion. *Kehar Singh* v. *Union of India*, AIR 1989 SC 653 : (1989) 1 SCC 204 : 1989 CrLJ 941 : (1989) 1 Crimes 238 : (1989) 37 DLT 171.

[9704] ● ***Order of President under Article 72 not subjected to judicial review.***—The order of the President under Article 72 cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram* v. *Union of India*, AIR 1980 SC 2147. The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the Court. The power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved in this case of asking for the reason for the President's order. The Courts are the constitutional instrumentalities to go into the scope of Article 72 and no attempt can be made to analyse the exercise of the power under Article 72 or the merits. The question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the Court by way of judicial review. *Kehar Singh* v. *Union of India*, AIR 1989 SC 653 : (1989) 1 SCC 204 : 1989 CrLJ 941 : (1989) 1 Crimes 238 : (1989) 37 DLT 171.

[9705] ● ***President can while exercising power under Article 72 go into merits of case.***—It is open to the President in the exercise of the power vested in him by Article 72 to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which it is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. The legal effect of a pardon is wholly different from a judicial suppression of the original sentence. It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. The President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by the Supreme Court. *Kehar Singh* v. *Union of India*, AIR 1989 SC 653 : (1989) 1 SCC 204 : 1989 CrLJ 941 : (1989) 1 Crimes 238 : (1989) 37 DLT 171.

[9706] ● ***Power to grant pardon part of constitutional scheme.***—All power belongs to the people and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order under the Constitution of India. To any civilised society, there can be no attributes more important than the life and personal liberty of its members as seen from Article 21. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and recourse, either under express constitutional provision or through Legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. The power to pardon is a part of the constitutional scheme, and it should be so treated in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. The power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1), must act in accordance with such advice. *Kehar Singh* v. *Union of India*, AIR 1989 SC 653 : (1989) 1 SCC 204 : 1989 CrLJ 941 : (1989) 1 Crimes 238 : (1989) 37 DLT 171.

20. ARTICLES 77, 166

[9707] ● ***Order made by Deputy Secretary on behalf of President—Cannot be questioned.***—The interpretation of Articles 77 and 166 of the Constitution is no longer open to any argument in view of a series of decisions of the Supreme Court. The legal position shortly stated, is thus :

(1) Articles 77 and 166 are only directory and not mandatory. Strict compliance with the provision is not essential to the validity of the order issued. What has to be seen is whether the substance of the requirements of these Articles is there.

(2) Even when the order issued is not in strict compliance with the provisions, of Article 77 or 166, it can be established by evidence aliunde that the order was made by the appropriate authority applying his mind to the relevant facts of the case.

(3) If an order is issued in the name of the President or the Governor, and is duly authenticated in the manner prescribed in the Rules made under Article 77 or 166, as the case may be, there is an irrebuttable presumption that the order was made by the appropriate authority.

(4) Any non-compliance with the provisions of the rule as to authentication does not invalidate the order. The only effect is that the presumption as to the order being made by the appropriate authority cannot be drawn, but even in such a case, it can be proved by other evidence that as a matter of fact the order was made by the appropriate authority.

In the present case, it was established that under the rules made under Article 77(2) power had been conferred on the Deputy Secretary to accord sanction on behalf of the President, and that the order was made by him in the exercise of the power delegated to him under the rules. That being so, the validity of the sanction given could not be questioned. *Barsay, Major E.G.* v. *State of Bombay*, AIR 1961 SC 1762 : 1961 (2) CrLJ 828.

21. ARTICLE 105

[9708] ● ***Parliament of India not Court of record.***—Article 105(2) of the Constitution does not state that the member of Parliament who is not liable to civil or criminal proceedings in a Court of law is liable to the same civil or criminal proceedings in Parliament. Parliament in India is not a Court of Record. It may not exercise judicial powers or entertain judicial proceedings. The alleged bribe takers except 'A', who are entitled to the immunity conferred by Article 105(2) of the Constitution are not liable to be tried in the Lok Sabha for the offences set out in the charges against them or any other charges, but the Lok Sabha may proceed against them for breach of privileges or contempt. There is, therefore, no question of two for a coming to different conclusions in respect of the same charges. *P.V. Narsimha Rao* v. *State*, AIR 1998 SC 2120 : (1998) 4 SCC 626 : 1998 CrLJ 2930 at 2994, 2995 (SC).

[9709] ● ***Expression "in respect of" preceding words "anything said or any vote given in" Article 105(2)—Meaning of.***—The expression "in respect of" precedes the words "anything said or any vote given" in Article 105(2) of the Constitution. The words "anything said or any vote given" can only mean speech that has already been made or a vote that has already been given. The immunity from liability, therefore, comes into play only if a speech has been made or vote has been given. When there is a prior agreement whereunder a Member of Parliament has received an illegal consideration in order to exercise his right to speak or to give his vote in a particular manner on a matter coming up for consideration before the House Tax there can be two possible situations. There may be an agreement whereunder a Member accepts illegal gratification and agrees not to speak in Parliament or not to give his vote in Parliament. *P.V. Narsimha Rao* v. *State*, AIR 1998 SC 2120 : (1998) 4 SCC 626 : 1998 CrLJ 2930 at 2956, 2957 (SC).

22. ARTICLE 124

[9710] ● ***Judges committing errors in judgment.***—Even if a judge is said to have committed errors, even gross error, in his judgment, that does not amount to 'misbehaviour' within the meaning of the article. *C.K. Daphtary* v. *O.P. Gupta*, AIR 1971 SC 1132 : 1971 CrLJ 844 : (1971) 2 SCCrR 483.

23. ARTICLE 129

[9711] ● ***Advocates of Supreme Court including President of Supreme Court Bar Association entitled to notice of Supreme Court contempt of Court.***—Even assuming that a judgment of the Supreme Court Judge contained numerous errors, there is no excuse whatsoever for imputing dishonesty to the Judge.

If a judgment is criticised as containing errors and coupled with it dishonesty is alleged, the Court hearing the contempt petition cannot act as an appellate Court. If evidence were to be allowed to justify allegations amounting to contempt of Court, it would tend to encourage disappointed litigants to avenge their defeat by abusing the Judge.

The Advocates of the Supreme Court, includeing the President of the Supreme Court Bar Association, are perfectly entitled to bring to the notice of the Supreme Court any contempt of that Court. *C.K. Daphtary* v. *O.P. Gupta*, AIR 1971 SC 1132 : (1971) 1 SCC 626 : 1971 CrLJ 844 : (1971) 2 SCCrR 483.

[9712] ● ***Charge against contemner when clear.***—If on the facts alleged in the petition the charge against the contemner is clear and simple, a formal charge need not be drawn up by the petitioner or the Court. *C.K. Daphtary* v. *O.P. Gupta*, AIR 1971 SC 1132 : 1971 CrLJ 844 : (1971) 2 SCCrR 483.

[9713] ● ***Enhancing sentence at instance of private complainant.***—Where a new point sought to attack the sanction granted for the prosecution the Supreme Court does not normally interfere with the discretion exercised by the High Court on the question of sentence even though the same has been enhanced but where the trial Court has exercised its discretion on proper consideration of the material on record and its order cannot be described to be either contrary to recognised principle or otherwise having caused failure of justice and further when the State does not consider that the ends of justice require enhancement of the sentence but the High Court interferes at the instance of a private complainant the Supreme Court would be fully justified in considering for itself the propriety of the sentence as enhanced by the High Court. *Ram Narain* v. *State of U.P.*, AIR 1971 SC 757 : (1970) 3 SCC 439 : 1971 CrLJ 649 : 1971 UJ (SC) 117 : 1971 AWR (HC) 371.

[9714] ● ***Jurisdictional point can be raised for first time before Supreme Court.***—Where a new point sought to attack the sanction granted for the prosecution, though it had not been raised in either of the two Courts below, since it went to the root of the case being a jurisdiction point, the Supreme Court considered it just and proper to allow it to be raised. *R.J. Singh* v. *State of Delhi*, AIR 1971 SC 1552 : (1970) 3 SCC 451 : (1971) SCCrR 310 : 1970 UJ (SC) 885.

[9715] ● ***Special leave to appeal—Grant of.—*** *Article 136 and Supreme Court Rules (1966), O. 16, R. 3.*—The Article and the Rule are wide enough in their language to empower the Supreme Court to grant special leave to the Deputy Chief Controller of Imports and Exports (the original complainant duly authorised by the statute) to appeal to the Supreme Court and prosecute the same, even though the Public Prosecutor and not the Deputy Chief Controller had applied to the High Court for the necessary certificate. *Dy. Chief Controller* v. *K.T. Kosalram*, AIR 1971 SC 1283 : (1970) 3 SCC 82 : 1971 CrLJ 1081 : (1971) 2 SCCrR 364 : 1971 SCD 99 : 1971 CrAppR (SC) 53.

[9716] ● ***Power of High Court to punish for contempt of itself.***—Articles 129 and 215 preserve all the powers of the Supreme Court and the High Court, respectively, as a Court of record which includes the power to punish the contempt of itself. There are no curbs on the power of the High Court to punish for contempt of itself except those contained in the Contempt of Courts Act. Articles 129 and 215 do not define as to what constitutes contempt of Court. Parliament has, by virtue of the aforesaid entries in List I and List III of the Seventh Schedule, power to define and limit the powers of the Courts in punishing contempt of Court and to regulate their procedure in relation thereto. Indeed, that is what is stated in the Preamble of the Act of 1971. *Board of Revenue, U.P.* v. *Vinay Chandra*, AIR 1981 SC 723 : (1981) 1 SCC 436 : 1981 SCC (Cri) 175 : 1981 CrLJ 283 : 1981 CrLR (SC) 72 : 1981 CurLJ (Cri) 73 : 1981 ACrR 69 : 1981 CrAppR (SC) 86 : 1981 ACrC 75 : (1981) 1 SCJ 415 : 1981 AWC 98 : (1981) 2 SCR 331 : 1981 MLJ (Cri) 281.

[9717] ● ***Supreme Court—Powers of case triable by Special Judge—Supreme Court not competent to issue direction transferring it to High Court Judge.***—The question is whether the case of the appellant which is triable under 1952 Act only by a Special Judge appointed under Section 6 of the said Act could be transferred to the High Court for trial by itself or by this Court to the High Court for trial by it. Sections 406 and 407, CrPC deal with the powers of this Court and that of the High Court respectively to transfer cases and appeals. Section 7(1) of the Act creates a condition which is *sine qua non* for the trial of offences under Section 6(1) of the said Act. The said offences shall be triable by *Special Judges only, notwithstanding anything contained in the CrPC or any other law.* Indeed conferment of the exclusive jurisdiction of the Special Judge is recognised by the Judgment of this Court in *A. R. Antulay* v. *R. S. Nayak,* AIR 1984 SC 718 : (1984) 2 SCC 500 : 1984 CrLJ 647. In spite of this, while giving directions in the other matter, that is, *R. S. Nayak* v. *A. R.. Antulay*, AIR 1984 SC 684 : (1984) 2 SCC 183 : 1984 CrLJ 613, this Court directed transfer to the High Court of Bombay the cases pending before the Special Judge. But while dealing with the matter of directions and giving the impugned directions, this Court did not keep in mind the exclusiveness of the jurisdiction of the Special Courts to try the offences enumerated in Section 6. It is obvious that if a case could be transferred under Section 406 of the Code from a Special Judge it could only be transferred to another Special Judge or a Court of superior jurisdiction but subordinate to the High Court. No such Court exists. Under this section the power of transfer can only be from one Special Judge to another Special Judge. In AIR 1984 SC 684 this Court did not refer either to Section 406 or 407 of the Code. A defect of jurisdiction, whether it is pecuniary of territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority to pass any decree, and such a defect cannot be cured even by consent of parties. Applying the ratio to the facts of the present controversy, and bearing in mind Sections 6(1) and 7(1) of the Act, the order of this Court transferring the cases to the High Court on 16-2-1984 was not authorised by law. This Court by its directions could not confer jurisdiction on the High Court of Bombay to try any case when it did not possess such jurisdiction under the scheme of the 1952 Act. The superior Court can always correct its own error brought to its notice either by way of petition or *ex debito justitiae.* It is, therefore, manifest that the appellant has not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of Article 21 of the Constitution and also of Articles 14 and 19. This Court is not debarred from re-opening this question and giving proper directions and correcting the error in the present appeal, when the said directions dated 16-2-1984 were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant guaranteed by Articles 14 and 21 of the Constitution. The directions were issued without observing the principle of *audi alteram partem.* This Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution, if the Court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal rights of the petitioner. The appropriate order would be to recall the directions contained in the order dated 16-2-1984. The appellant has also a right under Article 14 regarding equality before the law and equal protection of law which has been violated. He has also a right not to be singled out for special treatment by a Special Court created for him alone. This right is implicit in the right to equality.

Article 134(1)(b) cannot be construed to mean where power to withdraw is restricted, it can be widened by virtue of that Article. Where by a specific law of a specific statute the power is given for trial by the Special Judge only and transfer can be from one such Judge to another Special Judge there is no warrant to suggest that the High Court has power to transfer such a case from a Judge under Section 6 of the 1952 Act to itself. The trial even if a person holding public office though to be made speedily must be done in accordance with the procedure established thereon.

We proclaim and pronounce that no man is above the law, but at the same time reiterate and declare that no man can be denied his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law and not in derogation of it. The basic fundamentals of administration of justice are simple. No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. If a man has been wronged, so long as it lies within the human machinery of administration of justice that wrong must be remedied. Purity of public life is one of the cardinal principles which must be upheld as a matter of public policy. Allegations of legal infractions and criminal infractions must be investigated in accordance with law and procedure established under the Constitution. Even if he has been wronged, if he is allowed to be left in doubt that could cause more serious damage to the appellant. Public confidence in public administration should not be eroded any further. One wrong cannot be remedied by another wrong.

In the aforesaid view of the matter the appeal is allowed; all proceedings in this matter subsequent to the directions of this Court on 16-2-1984 (reported in AIR 1984 SC 684) as indicated before are set aside and quashed. The trial shall proceed in accordance with law, that is to say, under the Act of 1952. *A.R. Antulay* v. *R.S. Nayak*, AIR 1988 SC 1531 : (1988) 2 SCC 602 : 1988 SCC (Cri) 372 : 1988 CrLJ 1661 : 1988 CrLR (SC) 366 : JT 1988 (2) SC 325.

[9718] ● ***Wide power of Supreme Court to correct judgment of any Court or tribunal.***—There is no room for the doubt that apex Court has wide power to interfere and correct the judgment and orders passed by any Court or tribunal in the country. In addition to the appellate power, the Court has special residuary power to entertain appeal against any order of any Court in the country. The plenary jurisdiction of this Court to grant leave and hear appeals against any order of a Court or tribunal, confers power of judicial superintendence over all the Courts and tribunals in the territory of India including subordinate Courts of Magistrate and District Judge. This Court has, therefore, supervisory jurisdiction over all Courts in India. *Delhi Judicial Service Association* v. *State of Gujarat*, AIR 1991 SC 2176 : AIR SCW 2419 : (1991) 4 SCC 406 : 1991 CrLJ 3086.

[9719] ● ***Supreme Court a Court of record.***—Article 129 provides that the Supreme Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. Article 215 contains similar provision in respect of High Court. Both the Supreme Court as well as High Courts are Courts of record having powers to punish for contempt including the power to punish for contempt of itself. *All India Judicial Service Association* v. *State of Gujarat*, AIR 1991 SC 2176 : (1991) 4 SCC 406 : 1991 CrLJ 3086. **TO THE SAME EFFECT :** (1) In re *Vinay Chandra Mishra,* AIR 1995 SC 2348 : (1995) 2 SCC 584 : 1995 CrLJ 3994 (SC) : (1995) 2 Crimes 381 (395) (SC).

[9720] ● ***Supreme Court not only highest Court of record but charged with duties and responsibilities of correcting lower Court and tribunals.***—The Supreme Court is not only the highest Court of record, but under various provisions of the Constitution is also charged with the duties and responsibilities of correcting the lower Courts and tribunals and of protecting them from those whose misconduct tends to prevent the due performance of their duties. The latter functions and powers of this Court are independent of Article 129 of the Constitution. When therefore, Article 129 vests this Court with the powers of the Court of record including the power to punish for contempt of itself, it vests such powers in this Court in its capacity as the highest Court of record and also as a Court charged with the appellate and superintending powers over the lower Courts and tribunals as detailed in the Constitution. To discharge its obligations as the custodian of the administration of justice in the country and as the highest Court imbused with supervisory and appellate jurisdiction over all the lower Courts and tribunals, it is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour and for that purpose all the Courts and tribunals are protected while discharging their legitimate duties. To discharge this obligation, this Court to take cognisance of the deviation from the path of justice in the tribunals of the land, and also of attempts to cause such deviations and obstruct the course of justice. To hold otherwise would mean that although this Court is charged with the duties and responsibilities enumerated in the Constitution, it is not equipped with the power to discharge them. *Re Vinay Chandra Mishra*, AIR 1995 SC 2348 : (1995) 2 SCC 584 : 1995 CrLJ 3994 : (1995) 2 Crimes 381.

[9721] ● *Inherent power of Supreme Court unaffected even after codification of contempt law.*—The Supreme Court being a Court of Record under Article 129 and having wide power of judicial supervision over all the Courts in the country, must possess and exercise similar jurisdiction and power as the High Courts had prior to contempt Legislation in 1926. Inherent powers of a superior Court of Record have remained unaffected even after codification of Contempt Law. *Re Vinay Chandra Mishra*, AIR 1995 SC 2348 : (1995) 2 SCC 584 : 1995 CrLJ 3994 : (1995) 2 Crimes 381 (396).

[9722] ● *Contempt Jurisdiction.*—While dealing with an application for contempt, the Court is really concerned with the question whether the earlier decision, which has received its finality, had been complied with or not. It would not be permissible for a Court to examine the correctness of the earlier decision which had not been assailed and to take the different view than what was taken in the earlier decision. *State of Bihar* v. *Rajendra Singh*, AIR 2004 SC 4419 : (2007) 15 SCC 688 : 2004 CrLJ 4187 (4188).

[9723] ● *Contempt—Rightness or wrongness of order cannot be urged in contempt proceedings.*—If any party concerned is aggrieved by the order which in its opinion is wrong or against rules or its implementation is neither practicable nor feasible, it should always either approach to the Court that passed the order to invoke jurisdiction of the Appellate Court. Rightness or wrongness of the order cannot be urged in contempt proceedings. Right or wrong, the order has to be obeyed. Flouting an order of the Court would render the party liable for contempt. While dealing with an application for contempt the Court cannot traverse beyond the order, non-compliance of which is alleged. In other words, it cannot say what should not have done or what should have been done. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. *State of Bihar* v. *Rajendra Singh*, AIR 2004 SC 4419 : (2007) 15 SCC 688 : 2004 CrLJ 4187 (4188, 4189).

[9724] ● *Contempt jurisdiction.*—The Court exercising contempt jurisdiction cannot take upon itself power to decide the original proceedings in a manner not dealt with by the Court passing the judgment or order. *State of Bihar* v. *Rajendra Singh*, AIR 2004 SC 4419 : (2007) 15 SCC 688 : 2004 CrLJ 4187 (4188); *Union of India* v. *Devassy P.V.*, AIR 2006 SC 613 : (2006) 1 SCC 613 : 2006 CrLJ 971 (972) (SC).

[9725] ● *Right of freedom of media.*—The right of freedom of media is exercised responsibly. It is for media itself and other concerned to consider as to how to achieve it. *Rajendra Soil* v. *M.P. High Court, Bar Association*, AIR 2005 SC 2473 : (2005) 6 SCC 109 : 2005 CrLJ 2585 (2594) : 2005 (2) Crimes 230.

[9726] ● *Contempt of Supreme Court—Old and complicated matter.*—It is clear that inspite of the fact that the petitioners' seniority was finally decided by the judgment in *Parmanand Lal's* case and the petitioners' claims were also accepted by the various Courts which verdicts had become final, yet the respondent has moved on the basis of later judgment of this Court dated 26.4.2000 interpreting it in its own manner. The interpretation which has been put forward by the Government is that the advantage of the judgment was available only to those employees who were parties to that particular petition.

It is nowhere asserted by the respondent that the rights of the petitioners were not finally crystallized by the orders of the Tribunal and/or

Courts. Indeed that could not be the position as otherwise the petitioners could not have been put above S/Shri Belani, Biradar and Kulkarni. It may be that the seniority of the applicants was restored and was placed at the same place in the earlier seniority-list, however, that by itself cannot be a proper implementation since the seniority of S/Shri Belani, Biradar and Kulkarni was not only improved but they were rendered senior to all the applicants which was not the position earlier. It is, therefore, clear that the order of this Court dated 28.9.2006 has been clearly breached. The so-called interpretation put forth by the respondent is wholly incorrect. We would have ordinarily taken a very strict view of this obvious breach committed. However, considering that the matter is very old and is also a complicated one, there can be a scope for misunderstanding of the order of this Court. We, therefore leave it at that. We are not impressed at all by the contention of the learned counsel appearing on behalf of the respondent that since the respondent has passed the orders disposing of the representations of the petitioners, the only way left or the petitioners was to challenge the same by way of an independent Original Application before the Tribunal. It is more than a decade that the petitioners are fighting for their rights. Their rights had already been crystallized by various orders passed by the Tribunals and the Courts which fact is not denied by the respondent. On the top of it, the petitioners were again required to come before this Court by way of an Interim Application being IA No. 16 and that has resulted in denial of the fruits of the orders which were passed in their favour by the Tribunals and the Courts. Under such circumstances, to push them again to file Original Application challenging the obviously erroneous orders passed by the respondent disposing of the representations of the petitioners would be a travesty of justice. We, therefore, direct that the respondents shall rearrange the seniority in terms of the principles laid down in *Parmanand Lal's* case restoring their earlier position and shall not put any employee over and above the present petitioners on the basis of the seniority in service in the entry year, more particularly S/Shri Belani, Biradar and Kulkarni shall not be put over and above the petitioners herein. This shall be done within 8 weeks from the date of this judgment. *Promotee Telecom Engineers Forum* v. *D.S. Mathur*, (2008) 11 SCC 579 : 2008 CrLJ 2999 : 2008 (5) SCR 442.

[9727] ● *Power of Supreme Court to punish contempt of Court.*—Apart from power of conferred on it under contempt of Court Act, the Supreme Court has inherent power under Article 129 of the Constitution for contempt of itself. *Leila David* v. *State of Maharashtra*, AIR 2009 SC 3272.

24. ARTICLES 132, 134, 135 AND 136

[9728] ● *Special leave to appeal—Criminal appeal.*—Under the Constitution, the Supreme Court has been made a final Court of criminal appeal only in a limited class of cases specified in clauses (*a*) and (*b*) of Article 134(1). This clearly means that except in these two classes of cases, an appeal to the Supreme Court will not lie as a matter of right, whatever be the nature of the judgment or final order of the High Court from which the appeal to the Supreme Court is sought. *Pritam Singh* v. *State*, AIR 1950 SC 169 : 1951 CrLJ 1270 : 1950 SCR 453 : 63 MLW 875 : 1950 MWN 605.

[9729] ● *Retrial of case.*—In this case, the accused was charged and convicted of the offence of murder. When the accused was examined under Section 342, CrPC (now Section 313, CrPC, 1973) in the trial Court, the Sessions Judge failed to put to him questions relating to material aspects of the prosecution case, and as a result, the accused was denied the opportunity of explaining the circumstances appearing in the evidence against him. On appeal the High Court rejected the plea of prejudice and confirmed the conviction.

The case is a fit one of interference in the exercise of the powers under Article 136. The serious error in procedure has occasioned a grave prejudice to the accused by depriving him of the opportunity of meeting the case against him, and the High Court has erred in rejecting his plea of prejudice. Conviction is set aside and the case is sent back for a re-trial. *Tara Singh* v. *State*, AIR 1951 SC 441 : 52 CrLJ 1491 : 1951 SCJ 518 : 1951 SCR 729 : 1951 (2) MLJ 291 : 1951 MWN 757 : 1951 MWN (Cri) 225 : 1951 ALJ 640 : 64 MLW 996.

[9730] ● *Interference with concurrent finding of fact.*—Ordinarily, the Supreme Court will not interfere with a concurrent finding of fact. But when the finding omits to notice an important circumstance which clearly refutes the finding and which swings the balance the other way, it is the duty of the Court not to let that finding stand.

The accused in this case was charged with the offence of murder. The prosecution case was that at the time of the incident he was wearing a coat bearing minute stains of blood which had been recovered from his house. This coat had two buttons. One prosecution witness had clearly remembered that at the time when he had seen the accused shortly after the incident, he was wearing a coat having only one button, and another witness was definite that the accused was *not* wearing a coat at that time. Under these circumstances, the concurrent finding that the blood-stained coat recovered from the house of the accused was worn by him at the time of the offence was put aside in considering the facts proved against the accused. *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159 : 1952 CrLJ 839 : 1952 SCA 474 : 1952 SCJ 201 : 1952 SCR 526 : 1952 MWN 402 : 1952 (1) MLJ 754 : 1952 MWN (Cri) 106 : 1952 AWR (Supp) 64.

[9731] ● ***New point of fact.***—When a question of fact has not been raised before the lower Courts and it is set up for the first time in the appeal before the Supreme Court, the Court will not allow it to be raised if inquiry into that question requires the Court to go into evidence which is not on the record. *Rameshwar Bhartia* v. *State of Assam*, AIR 1952 SC 405 : 1953 CrLJ 163 : 1952 SCJ 559 : 1953 SCA 42 : 1953 SCR 126 : 1953 (1) MLJ 17 : 1953 AWR (Supp) 1 : ILR (1953) 5 Ass 1 : 1953 MWN 343.

[9732] ● ***Reasons for certificate of fitness.***—If there is no High Court in any State and the Judicial Commissioner sitting alone exercises all the powers of the High Court under the Code as the ultimate appellate authority, the confirmation proceeding under Chapter 27 of the Code has to be heard and disposed of by him sitting alone. In such a case, if the Judicial Commissioner confirms the sentence of death, the mere fact that the decision is not a decision of a Bench of at least two Judges is not an adequate ground in itself for certifying the case as a fit one for appeal to the Supreme Court, because such a certificate amounts to converting the Supreme Court into a final Court of appeal or confirmation. *Kalawati* v. *State of H.P.*, AIR 1953 SC 131 : 1953 CrLJ 668 : 1953 SCA 660 : 1953 SCJ 144 : 1953 SCR 546 : 1953 MWN 219 : 1953 AWR (Supp) 52.

[9733] ● ***Appeal against single Judge of High Court.***—The terms of Article 132 make it clear that an appeal to the Supreme Court is allowed from *any* judgment or final order of a High Court, and that such right of appeal exists irrespective of the number of judges by whom such judgment or final order was passed.

In *S. Kuppuswami Rao* v. *King*, 1947 FCR 180, it was held that an order rejecting an objection to the validity of a prosecution on the ground of want of sanction was not a 'final order'. The Explanation to Article 132 was expressly designed to supersede this decision, and to secure that issues going to the root of a case are speedily determined by obtaining thereon a decision of the Supreme Court. The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that a right of appeal of the widest amplitude is allowed in cases involving questions of law relating to the interpretation of the Constitution.

Provided that the requisite certificate of the High Court is given, an appeal to the Supreme Court under Article 132 will lie from any final order of the High Court, even if it be of a single Judge, and even when it decides a preliminary issue which, if decided in favour of the accused, would dispose of the case finally. *Election Commission, India* v. *Saka Venkata Subba Rao*, AIR 1953 SC 210 : 1953 SCA 203 : 1953 SCJ 293 : 1953 SCR 1144 : 1953 (1) MLJ 702 : 1954 MWN 427.

[9734] ● ***Grounds of appeal.***—In an appeal to the Supreme Court on a certificate given by the High Court under Article 132(1), the appellant is permitted to challenge the legality or the propriety of the order appealed against only on the constitutional question as to which the certificate of the High Court has been given. He is not entitled in such an appeal to raise any question relating to the merits of the case or to urge any point which turns on the appreciation of the evidence in the case, unless the Supreme Court gives him leave to do so. No doubt, the Court has the power under Article 132(3) to grant leave to the appellant to urge 'any other ground' in such an appeal, but such leave will be given only in most exceptional circumstances in which the Court is satisfied that a grave injustice would otherwise occur.

In the present case, at the close of the arguments on the constitutional question on which the appeal had been allowed, which were rejected by the Court, counsel appearing on behalf of one of the accused who had appealed against their conviction craves leave to bring to the notice of the Court a matter which, according to him had resulted in a grave miscarriage of justice. The facts on which the prayer was based were as under. Several accused in the case were charged and convicted of offences under the Essential Supplies Act, 1946, for an attempt to export to Pakistan bags of Indian cloth without a permit, by smuggling them through a customs barrier in a truck. The question was whether the accused was present at the scene of occurrence at the time when the smuggling was attempted. When the accused was examined in the trial Court under Section 342, CrPC a specific question had been put to him on this point, and he had categorically stated that he was not present there at that time. There was thus nothing on the record to warrant the belief that the accused had admitted his presence at the customs barrier, and yet in arriving at the decision against the accused both the Courts had assumed in their judgments that he had made such an admission, and had commented on his inability to give any reasonable explanation of this alleged presence.

On these facts, the Court accepted the prayer made by the counsel, and after observing that the main function of the Supreme Court in an appeal before it is to see that the accused gets a fair trial on proper evidence, it allowed the appeal even though the constitutional issue on which it had been filed was decided against the appellants, and after setting aside the judgments of the High Court as well as the trial Court, it remitted the case to the Sessions Court with the direction that it may be heard afresh on the evidence on record after excluding from consideration the supposed admission of the accused which had only been imagined in those judgments. *Darshan Singh* v. *State of Punjab*, AIR 1953 SC 83 : 1953 CrLJ 525 : 1953 SCA 856 : 1953 SCJ 48 : 1953 SCR 319 : 1953 (1) MLJ 220 : 19 CutLT 419 : ILR (1953) Punj 639.

[9735] ● ***Verdict of jury—Setting aside of.***—In an appeal from an order of conviction, if the Supreme Court is satisfied that the verdict of the jury was erroneous as a result of grave misdirections, three alternative courses are open to the Court for the purpose of undoing the mischief that has happened :

(1) it may order a re-trial of the accused, which is the simplest course, or

(2) it may remit the case to the High Court with a direction that it should consider the merits of the case in the light of the Supreme Court's decision and say whether there has been a failure of justice as a result of those misdirections, or

(3) it may itself examine the merits of the case and decide for itself whether there has been a failure of justice in the case.

In such a situation, the question for consideration is which of these three courses would be best for undoing the mischief that has been done and which of them would be most conducive to the ends of justice. In the present case, the Court adopted the last course with a view to avoid undue harassment to the accused, and after examining the merits of the case, it came to the conclusion that a grave failure of justice had occurred in the case and an innocent man had been convicted of a serious offence on an erroneous verdict which was the consequence of grave misdirections given to the jury. The appeal was allowed, the conviction was set aside, and the accused was acquitted. *Mushtak Hussein* v. *State of Bombay*, AIR 1953 SC 282 : 1953 CrLJ 1127 : 1953 SCA 1014 : 1953 SCJ 338 : 1953 SCR 809 : 1953 AWR (Supp) 72 : 55 Bom LR 529 : 19 Cut LT 507 : 1954 MWN 247.

[9736] ● ***Retrial when to be ordered.***—In an appeal against an order of conviction, if the Supreme Court is satisfied that in substance the trial has not been fair and proper, ordinarily the Court will remand the same case for a re-trial. However, it is not bound to do so in every such case.

In the instant case, the Court was of the view that the prosecution evidence did not reach the requisite standard of proof and suffered from serious infirmities, and that the accused had been under suspense over his sentence of death for over a year. Under these circumstances, the Court set aside the conviction, and instead of directing a retrial, it set the accused at liberty. *Mohinder Singh* v. *State*, AIR 1953 SC 415 : 1953 CrLJ 1761 : 1950 SCR 821.

[9737] ● ***Supreme Court when sets aside conviction in criminal appeal.***—When in a criminal appeal the Supreme Court sets aside a conviction on the ground of gross irregularities at the trial, the question still remains what orders to pass, that is, whether to acquit the accused or to order a re-trial, and the Court has to select the alternative which will be more conducive to the ends of justice, looking to all the circumstances in the case.

In a case in which the order of re-trial would involve the taking of evidence as to events which occurred years ago, and the accused has been in prison for years after his conviction by the trial Court, an order of re-trial would be unfair to the accused and would not be conducive to the ends of justice. The only course open to the Court in such a situation is to acquit the accused and set him at liberty. *Habeeb Mohammad* v. *State of Hyderabad*, AIR 1954 SC 51 : 1954 CrLJ 338 : 1953 SCJ 678 : 1954 SCA 514 : 1954 SCR 475 : 1954 MWN 233.

[9738] ● ***Special Leave to appeal—New point.***—The normal rule of the Supreme Court is that it will not consider the merits of a new point which was neither raised before the High Court during the hearing of the appeal there, nor was raised even at the time when the appellant applied to the Supreme Court for leave to appeal under Article 136. *Nawab Singh* v. *State of U.P.*, AIR 1954 SC 278 : 1954 CrLJ 738.

[9739] ● ***Interference by Supreme Court with administration order of High Court when.***—The Supreme Court can interfere with an administrative order of the High Court only when the order is in conflict with a fundamental right vested in the petitioner, or with an obligation imposed under any statute, or if there has been a violation of a canon of natural justice. In the present case the Supreme Court refused to interfere with an order of the High Court, made in the exercise of its discretionary jurisdiction, refusing to the petitioner enrollment on the roll of advocates practising before the High Court. *Babul Chandra Mitra* v. *The Hon'ble Chief Justice and other Judges of the Patna High Court*, AIR 1954 SC 524 : 1954 SCA 395 : 33 Pat 553.

[9740] ● ***Power of Supreme Court to grant special leave to appeal.***—Article 136 is worded in the widest possible terms. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals against any kind of judgment or order made in any cause or matter. The powers given by this Article can be exercised irrespective of specific provisions for appeal contained in any law. However, these powers are in the nature of special and residuary powers, and being exercisable outside the purview of ordinary law, they must be exercised only in cases in which the requirements of justice demand interference by the Supreme Court.

The overriding powers vested in the Supreme Court under Article 136 cannot be cut down or abridged even by express legislation, and in this sense, these powers are even wider than the powers of the Judicial Committee of the Privy Council which could be taken away or curtailed by a law made by Parliament. *Durga Shankar Mehta* v. *Thakur Raghuraj Singh*, AIR 1954 SC 520 : 1955 SCA 501 : 1954 SCJ 723 : 1955 SCR 267 : 1954 (2) MLJ 385.

[9741] ● ***Certificate of fitness for appeal—Exercise of discretion.***—The Supreme Court has general powers of judicial superintendence over all the Courts in the country. It is the ultimate interpreter and guardian of the Constitution, and has the duty to see that its provisions are faithfully observed by every Court.

Under Article 134(1)(*c*), the only condition of the issue of a certificate that the case is a fit one for appeal to the Supreme Court is the discretion of the High Court. But the discretion is a judicial discretion and it must be judicially exercised along the well established lines which govern the matter. Further, the certificate must show on the face of it that the discretion conferred was invoked and exercised.

If the discretion has been exercised on proper and well established lines, then, as in all questions where an exercise of discretion is involved, there can be no interference by the Supreme Court except on very strong grounds. But if, on the face of the order, it is apparent that the High Court has misdirected itself, (*a*) either by holding that its discretion is fettered, when it is not, or (*b*) by holding that in a particular circumstance it has none, then in such a case, the Supreme Court will not be bound by the certificate given by the High Court, and it will decide for itself whether to allow the appeal or not. *Nar Singh* v. *State of U.P.*, AIR 1954 SC 457 : 1954 CrLJ 1167 : 1954 SCA 642 : 1954 SCJ 570 : 1955 SCR 238 : 1954 (2) MLJ 122.

[9742] ● ***"Case"—Meaning.***—In the present case, out of 24 persons originally tried under Section 302/149 Penal Code, only three were ultimately convicted by the High Court. By a curious mistake, the name of one *N* who was intended to be acquitted was included among the three convicted accused instead of that of one *B*. When this mistake was later realised, the High Court communicated this fact to the State Government, and the Government remitted the sentence passed on *N* and directed his release. Thereafter, *N* and the two other accused who had been convicted applied to the High Court for a certificate under Article 134(1)(*c*). The High Court granted the certificates to all three of them. As regards *N*, it rightly considered that despite the remission of his sentence, if his conviction on a charge like that of murder stood undisturbed, the stigma might affect him adversely in the future. However, as regards the other two, there was nothing in their cases to warrant the issue of the certificates to them, but what the High Court thought was that by the word 'case' in clause (*c*) of Article 134(1) what was contemplated was the appeal as a whole, and that once a certificate was decided to be given, the High Court was bound to give it to all the accused whose conviction was confirmed in such appeal. The view of the High Court is clearly wrong. The word 'case' as used in Article 134(1)(*c*) means the case of each individual accused, and not the proceeding in appeal as a whole, and for the purpose of the certificate under that Article, the appeal of each accused to the High Court forms a separate 'case'. Therefore, even when a certificate under Article 134(1)(*c*) has been properly granted to any one or more of the several accused who have been convicted, the remaining accused do not acquire a right merely on that account to have their 'cases' also to be considered by the Supreme Court in appeal. In other words, the application for a certificate under this Article made by each accused has to be considered on its own merits, and the grant of a certificate to any accused would be proper only when the High Court is of opinion that his individual 'case' is a fit one for appeal to the Supreme Court. In the present case, the High Court has misdirected itself about the law in this matter, and has not exercised the discretion vested in it under Article 134(1)(*c*) in respect of the two convicted accused other than *N*, therefore, it is a fit case for interference by the Supreme Court in the exercise of its general powers of judicial superintendence. Under the circumstances, their case has to be treated as one under Article 136 for special leave. Regarded from that angle, in view of the evidence on record, the case was not a proper one for special leave. Their appeal was, therefore, held to have failed and was accordingly dismissed. *Nar Singh* v. *State of U.P.*, AIR 1954 SC 457 : 1954 CrLJ 1167 : 1954 SCA 642 : 1954 SCJ 570 : 1955 SCR 238 : (1954) ALJ 438 : 1954 (2) MLJ 122 : 1954 AWR 457 : 1954 MWN 741.

[9743-44] ● ***Acquittal by High Court.***—Article 134 of the Constitution permits an appeal to the Supreme Court as of right only from any judgment or final order of a High Court in a criminal proceeding if the High Court has on appeal reversed an order of acquittal of an accused person and has sentenced him to death. It does not provide for an appeal as of right from a judgment or final order of a High Court in a criminal proceeding if the High Court has on appeal reversed an order of conviction of an accused person and has ordered his acquittal.

In other words, there is no provision in the Constitution corresponding to Section 417 (now Section 378), CrPC and an order of the High Court in appeal under which an accused person is acquitted is final and binding on the State, subject, however, to the overriding powers vested in the Supreme Court by Article 136 of the Constitution.

[*Note:*—This means that in the matter of an appeal to the Supreme Court from an order of the High Court made in a criminal proceeding, the law is the same whether the appeal sought is by the State or by the accused person and such appeal can lie only when the High Court certifies under Article 134(1)(*c*) that the case is a fit one for such appeal, or when the Supreme Court grants the special leave for such appeal under Article 136.] *State Government of M.P.* v. *Ramkrishna G. Limsey*, AIR 1954 SC 20 : 1954 CrLJ 244.

[9745] ● ***Application for leave to appeal—Delay in disposal of.***—An application to the High Court for a certificate under Article 134(1)(*c*) that the case is a fit one for appeal to the Supreme Court must be disposed of with despatch. The accused is entitled to know the fate of his application within a reasonable time, and must not be left under a state of suspense longer than is necessary. This is particularly so when the sentence which is hanging over the head of the accused is a sentence of death.

Whatever the state of arrears, there is absolutely no justification for an inordinate delay of nearly two years in the disposal of such an application.

But even under this view, such delay is not a proper consideration for interference with a sentence of death awarded by the High Court. It is only a good ground for an application to the President under Article 72 for commutation of the sentence. *Bissu Mahgoo* v. *State of U.P.*, AIR 1954 SC 714 : 1954 CrLJ 1796.

[9746] ● ***Circumstances under which Supreme Court not interfere.***—In a criminal appeal under Article 136, the Supreme Court will not interfere with the decision appealed against merely on the ground (*a*) that there has occurred in the proceeding some error or irregularity which is only technical and has not occasioned any failure of justice, or (*b*) that it is possible to take a view of the evidence in the case which is different from that of the Courts below. An illegality or irregularity in procedure will be a good ground for interference with the decision appealed against only when it is of such a nature that a failure of justice or a denial to the accused of a fair trial may either be presumed to have been occasioned thereby, or such failure or denial is shown to have in fact been occasioned.

Applying this principle, it was held in the present case that a refusal to give to the accused an opportunity to produce and examine defence witnesses at his trial is an illegality which is fatal to the proceeding, and if on appeal the High Court has rejected his plea or prejudice and has confirmed his conviction, it is a fit case for interference. *Habeeb Mohammad* v. *State of Hyderabad*, AIR 1954 SC 51 : 1954 CrLJ 338 : 1954 SCA 514 : 1953 SCJ 678 : 1954 SCR 475 : 1954 MWN 233.

[9747] ● ***Burden of proof.***—If substantial and grave injustice has been done to an accused by reason of his conviction even though he has reasonably discharged a burden of proof regarding a particular fact which is laid upon him by particular statute, the case must be held to be a fit one for interference in an appeal by special leave.

In the present case, the accused was convicted under Section 7 of the Essential Supplies (TP) Act, even though he had discharged the burden of proof under Section 15 of the Act regarding the holding of an export permit, by producing the permit and showing by the cross-examination of the prosecution witnesses that what he had exported were goods which fell within the description of the article mentioned in the permit. Conviction of the accused under these circumstances had caused grave and substantial injustice, and the case is a fit one for interference. The conviction was set aside and the accused was acquitted. *Shrinivas Pannalal Chokhani* v. *State of M.P.*, AIR 1954 SC 23 : 1954 CrLJ 253.

[9748] ● *Contempt proceedings against senior members of Bar—Refusal to accept apologies.—* In the present case, the High Court had taken out contempt proceedings against two senior members of its Bar, and having refused to accept their apologies had passed sentences of fine against them. The contemners moved the Supreme Court by special leave under Article 136. The Court considered that it was a fit case for interference even though the matter related entirely to a *discretionary power* of the High Court. The unqualified apologies given were accepted, a warning was given, and the sentences of fine were set aside. *Shareef, M.Y.* v. *Hon'ble Judges of High Court of Nagpur*, AIR 1955 SC 19 : 1955 CrLJ 133 : 1955 SCJ 54 : 1955 SCA 205.

[9749] ● *Remand of case back for retrial.—* The Supreme Court will not remand a case back for re-trial merely because the trial Judge has omitted to do his duty and has failed in the observance of a mandatory rule or procedure. The Court will not keep a person charged with an offence punishable with death under indefinite suspense because a Judge has failed to do his duty. Justice is not one-sided, and while it is incumbent to see that the guilty do not escape, it is even more necessary to see that persons accused of crime are not kept under indefinite suspense. Just as an accused is not permitted to repair before the Supreme Court the gaps in his defence which he ought to have made good in the trial Court, the State cannot be permitted to repair the effects of its bungling. A broad rule must apply to all cases, and the scales of justice must be kept on an even balance between the State and the subject. The Supreme Court will ordinarily not order a re-trial except in clear cases where the error is purely technical. In the present case, the order of the High Court confirming a conviction is set aside, on the ground that the trial Judge had failed to put to the accused questions as to the most material part of the prosecution case relating to the confession of the accused and had thus denied to him an opportunity of explaining the circumstances appearing against him. The case cannot be remanded for a fresh trial and the accused is acquitted. *Machander Pandurang* v. *State of Hyderabad*, AIR 1955 SC 792 : 1955 CrLJ 1644 : 1956 SCA 12 : 1955 (2) SCR 524 : ILR (1955) Hyd 807 : 1956 SCJ 34 : 1956 (1) MLJ (SC) 25 : 1956 AWR (Supp) 14 : 1956 ALJ 76 : 1956 MWN 190 : 58 Pun LR 163 : 1956 BLJR 93.

[9750] ● *Supreme Court in appeal by special leave refusing to allow respondent to reopen finding of fact.—* In an appeal by special leave under Article 136 the Supreme Court will refuse to allow the *respondent* to reopen a finding of fact decided against him by the High Court, in the same manner in which such permission is refused to the appellant. *Bhikaji Keshao Joshi* v. *Brijlal N. Biyani*, AIR 1955 SC 610 : 1955 SCA 999 : 1955 SCJ 658 : 1955 (2) SCR 428 : 1955 (2) MLJ (SC) 154 : 1955 MWN 991 : 10 EleLR 357.

[9751] ● *Special leave not granted to advance criticism.—* In an appeal by special leave under Article 136, the Supreme Court will not permit the appellant to advance criticisms of the judgment of the trial Court which were not advanced before the High Court in appeal, particularly, when these criticisms relate only to the question of appreciation of evidence. *Gurbakhsh Singh* v. *State of Punjab*, AIR 1955 SC 320 : 1955 CrLJ 869.

[9752] ● *Merely saying—Leave to appeal is, granted to words end of judgment not compliance.—* The decision of the Supreme Court in *Nar Singh* v. *State of U.P.*, AIR 1954 SC 457, lays down the following three propositions regarding the certificate for leave to appeal granted under Article 134;

(1) the mere grant of a certificate by the High Court does not prevent the Supreme Court from determining whether the certificate was rightly granted and whether the condition prerequisite to the grant is satisfied;

(2) the condition is that the High Court must exercise a judicial discretion along the well established lines governing the exercised of a judicial discretion; and

(3) where the discretion is properly exercised, the Supreme Court will not interfere except on very strong grounds.

Under Article 134(1)(*c*), an appeal shall lie to the Supreme Court if the High Court "certifies" that the case is fit for such appeal. Now the word "certifies" is a strong word and indicates that the Court must bring its mind to bear on the question, and the reasons for the order must be apparent on the face of the order, showing exactly what are the *questions of outstanding difficulty or importance* which demand a decision from the Supreme Court.

It is not enough to say "leave to appeal is granted". Merely to say that is tantamount to saying that the High Court has the power to usurp the functions of the Supreme Court under Article 136 and to allow *any* case to be opened up in appeal, even though Article 134(1)(*c*) is meant to provide only for extraordinary cases involving important questions of law.

In the absence of any indication as to the question proposed to be settled by the appeal under this certificate, it is impossible for the Supreme Court to gather what are the questions of outstanding importance which are required to be settled, and a certificate issued without any such indications in the order is an exercise of discretion which is mechanical and not judicial, and the appeal cannot be regarded as properly certified, and cannot be accepted as an appeal under Article 134(1)(*c*).

Further, a certificate cannot be granted under Article 134(1)(*c*) merely because the High Court is in doubt about the *facts*. If there is any doubt in the mind of the Court about facts, it is the Court's duty to give the advantage of that doubt to the accused and acquit him. The Court cannot convict the accused and then issue a certificate because it cannot make up its mind about the facts.

Even when the Supreme Court holds that a leave to appeal granted by the High Court under Article 134(1)(*c*) has not been properly granted and an appeal under that article does not lie, the Court has a discretion to decide whether it is a fit case for the exercise of the powers under Article 136 and to treat the appeal as allowed by special leave under that Article. *Baladin* v. *State of U.P.*, AIR 1956 SC 181 : 1956 CrLJ 345.

[9753] ● ***Certificate of fitness for appeal where granted.***—The grant of a certificate under Article 134(1)(*c*) is not a matter of course, and the discretion vested in it must be exercised by the High Court judicially and along lines which have now been quite well established. There in no justification for certifying the case as being a fit one for appeal to the Supreme Court, if the case does not involve any question or principle of law which needs to be resolved by a decision of the Supreme Court. The word 'certifies' in this Article has a clear meaning. It requires that when giving the leave to appeal to the Supreme Court, the High Court must first determine the issue of law which in its opinion is needed to be settled by the Supreme Court, and that such question must be clearly set out in its order. If in the opinion of the High Court the case does not involve any such question of law, then, however difficult the questions of fact in that case might be, such difficulty about facts alone cannot justify the grant of a leave. *Sunder Singh* v. *State of U.P.*, AIR 1956 SC 411 : 1956 CrLJ 801.

[9754] ● ***Certificate for leave to appeal not granted when no question of law involved.***—In a criminal appeal to the High Court, if it entertains any doubt about the guilt of the accused on the facts established in the case, it is bound in law to give the benefit of that doubt to the accused and acquit him. However, complicated the questions of fact in any case might be, if after considering those facts any doubt about the guilt of the accused lingers in the mind of the High Court, it would clearly be an error to convict the accused in spite of such doubt and then to certify the case as being a fit one for appeal. On the other hand, if the High Court finds that the guilt of the accused has been established beyond any reasonable doubt by evidence which is quite reliable and sufficient, and it convicts him on that evidence, then also an appeal to the Supreme Court on facts is not called for. Thus, in either case, when no question of law is involved in an appeal decided by the High Court, it is not open to it to give a certificate under Article 134(1)(*c*) merely on questions of fact. *Sunder Singh* v. *State of U.P.*, AIR 1956 SC 411 : 1956 CrLJ 801.

[9755] ● ***Certificate under Article 134(1)(c) not justified—Duty of Supreme Court.***—When an appeal to the Supreme Court is filed on a certificate given by a High Court under Article 134(1)(*c*), even when the Supreme Court comes to the conclusion that the certificate does not satisfy the requirements of that Article or that the discretion vested in the High Court under it has been wrongly exercised, that in itself does not necessarily mean the end of the appeal. In such a case, it is open to the appellant to request the Court to allow the appeal in the exercise of its powers under Article 136(1), and if the Court considers that the case is of such a nature that if the special leave to appeal under Article 136 had been applied for it would have granted such leave, it has the power to treat the appeal as being one under Article 136 and admit it for hearing. *Sunder Singh* v. *State of U.P.*, AIR 1956 SC 411 : 1956 CrLJ 801.

[9756] ● *More question of facts when involved.*—When the question involved in a case in one purely of fact, the High Court has no jurisdiction to grant a certificate under Article 134(1)(*c*). The Supreme Court is not a final Court of criminal appeal on fact, and whatever reasons the High Court may have, it is not justified in passing on to the Supreme Court mere questions of fact for further consideration, thus converting the Supreme Court into a Court of Appeal on facts. No doubt the Supreme Court possesses the power to interfere even on a pure question of fact, and it would exercise that power in a proper case,

(a) if there has been a gross miscarriage of justice, or

(b) if there has been a departure from legal procedure which vitiates the whole trial, or

(c) if the findings of fact of the Courts below are such as to be shocking to judicial conscience.

But under the Constitution, the Supreme Court alone can so intervene in the exercise of its special and overriding powers under Article 136, and a High Court has no power to arrogate that function to itself when purporting to act under Article 134(1)(*c*), by passing on to the Supreme Court a matter which involves only questions of pure fact. *Haripada Dey* v. *State of West Bengal*, AIR 1956 SC 757 : 1956 SCA 1078 : 1956 SCJ 701 : 1956 SCR 639 : 1956 (2) MLJ (SC) 65.

[9757] ● *Supreme Court—When rejects certificate given by High Court.*—If at the hearing of the application for a certificate under Article 134(1)(*c*) the attention of the High Court is drawn to certain facts to which its attention was not drawn when the appeal was heard, and it considers that those facts would have affected its judgment if they had been noticed in time, but it finds itself helpless to redress the grievance, the proper course for the High Court to adopt in such a case is to refuse to grant the certificate under Article 134(1)(*c*) and to direct the aggrieved party to approach the Supreme Court to invoke its special jurisdiction under Article 136.

In such a case, if, instead of referring the aggrieved party to the Supreme Court, the High Court gives a certificate under Article 134(1)(*c*) on a question of pure fact, its direction under that Article must be held to have been wrongly exercised. Such a certificate has no force at all and it is of no avail to the party to which it has been given, and does not give him any right to insist upon his appeal being heard by the Supreme Court.

However, even when the Supreme Court rejects the certificate given by the High Court, it has the discretion to treat the appeal as being one by special leave under Article 136 though it may be purely on facts; but the Court will do so only in a case which is fit for the exercise of such discretion. *Haripada Dey* v. *State of West Bengal*, AIR 1956 SC 757 : 1956 SCA 1078 : 1956 SCJ 701 : 1956 SCR 639 : 1956 (2) MLJ (SC) 65.

[9758] ● *Failure of accused to lead evidence.*—In the present case, the prosecution had proved its case beyond any doubt by the evidence of witnesses who were quite reliable, and the accused had not led any defence evidence. The accused was convicted, and on appeal the High Court confirmed the conviction. Thereafter, when the petition for leave to appeal to the Supreme Court was filed in the High Court, the accused produced certain documents which pointed to his innocence. The High Court thereupon granted the certificate under Article 134(1)(*c*) although it itself said in its order that "the question involved was one of fact only'. The accused himself is to be blamed for the *lacuna* in the defence arising from his not having adduced the evidence which would have demolished the case against him. Under these circumstances the certificate has been wrongly given, and such certificate has no force at all. Further, the findings in the present case are perfectly justified by the evidence produced by the prosecution, and there has not occurred any miscarriage of justice or any departure from legal procedure. Therefore, this is not a fit case for interference under Article 136(1). The application for leave to treat the appeal as one under that Article is rejected, and the appeal is dismissed. *Haripada Dey* v. *State of West Bengal*, AIR 1956 SC 757 : 1956 SCA 1078 : 1956 SCJ 701 : 1956 SCR 639 : 1957 ALT 202 : 1956 (2) MLJ (SC) 65 : 1956 AWR (Supp) 141 : 1957 BLJR 23 : 1957 ALJ 70.

[9759] ● *Appreciation of evidence.*—When the Courts below have carefully examined the evidence of the eye-witnesses directly incriminating the accused and have accepted that evidence as being true and reliable, the Supreme Court will not, in an appeal by special leave against the judgment of the High Court confirming the conviction of the accused, allow the appellant to go behind the concurrent findings of the Courts below on questions of fact, unless there are some special circumstances which justify such a course. *Chhutanni* v. *State of U.P.*, AIR 1956 SC 407 : 1956 CrLJ 797.

[9760] ● *Finding of fact interference by Supreme Court.*—The Supreme Court will not ordinarily interfere with the findings of fact of the Courts below. However, if a clear question of law arises on the findings arrived at by the High Court, and the appellant contends that the conclusion of the High Court was erroneous, the Supreme Court will exercise its power of interference. *Ram Shankar Singh* v. *State of U.P.*, AIR 1956 SC 441 : 1956 CrLJ 822.

[9761] ● ***Interference by Supreme Court.***—Ordinarily, if there are no special circumstances in the case, the Supreme Court will not interfere with the order of conviction which is founded on concurrent findings of the Courts below. However, in a fit case it will do so if there are some features in the case which make it unsafe to uphold the conclusion of guilt. *Santa Singh* v. *State of Punjab*, AIR 1956 SC 526 : 1956 CrLJ 930. **To the same effect** : (1) *Gurbaksh Singh* v. *State of Punjab*, AIR 1955 SC 320 : 1955 CrLJ 869; (2) *Ram Narain* v. *State of Punjab*, AIR 1955 SC 322 : 1955 CrLJ 871; (3) *Khacheru Singh* v. *State of U.P.*, AIR 1956 SC 546 : 1956 CrLJ 950; (4) *Nathu* v. *State of U.P.*, AIR 1956 SC 26 : 1956 CrLJ 152; (5) *Niranjan Singh* v. *State of U.P.*, AIR 1957 SC 142 : 1957 CrLJ 294 : 1957 SCA 75 : 1957 SCJ 69 : 1956 SCR 734 : 1957 ALJ 233 : ILR (1956) 2 All 745 : 1957 (1) MLJ (Cri) 1 : 1957 AWR (HC) 258; (6) *Ram Chandra* v. *State of U.P.*, AIR 1957 SC 381 : 1957 CrLJ 559; (7) *Mobarik Ali Ahmed* v. *State of Bombay*, AIR 1957 SC 857 : 1957 CrLJ 1346 : 1958 SCJ 111 : 1958 MLJ (Cri) 42 : 1958 AWR (HC) 112; (8) *Om Prakash* v. *State of U.P.*, AIR 1960 SC 409 : 1960 CrLJ 514; (9) *L. Choraria* v. *State of Maharashtra*, AIR 1968 SC 938 : 1968 CrLJ 1124 : (1968) 1 SCA 682 : 1968 SCD 743 : (1968) 2 SCJ 589 : (1968) 2 SCR 624 : 70 Bom LR 595 : 1968 MLJ (Cri) 614 : 16 Law Rep 473; (10) *P. Uka Naran* v. *K. Karsan*, AIR 1971 SC 759 : 1971 CrLJ 651 : 1971 UJ (SC) 528 : (1971) 2 SCCrR 452; (11) *Janak Singh* v. *State of U.P.*, AIR 1972 SC 1853 : 1972 CrLJ 1177; (12) *Ramlagan Singh* v. *State of Bihar*, AIR 1972 SC 2593 : 1973 CrLJ 44; (13) *Ram Prasad* v. *State of U.P.*, AIR 1973 SC 2673 : 1973 CrLJ 1807; (14) *Govind Lal* v. *State of U.P.*, AIR 1973 SC 1415 : (1973) 2 SCC 91 : 1973 CrLJ 1126; (15) *Guli Chand* v. *State of Rajasthan*, AIR 1974 SC 276 : (1974) 3 SCC 698 : 1974 SCC (Cri) 222 : 1974 CrLJ 331; (16) *Nanak Chand* v. *State of H.P.*, AIR 1974 SC 765 : (1974) 4 SCC 218 : 1974 SCC (Cri) 387 : 1974 CrLJ 660; (17) *Dadarao* v. *State of Maharashtra*, AIR 1974 SC 388 : (1974) 3 SCC 630 : 1974 SCC (Cri) 120 : 1974 CrLJ 447; (18) *Pratap Misra* v. *State of Orissa*, AIR 1977 SC 1307 : (1977) 3 SCC 41 : 1977 SCC (Cri) 447 : 1977 CrLJ 817 : 1977 CrLR (SC) 233 : 1977 SCCrR 258 : 1977 CrAppR (SC) 164 : 1977 Cur LJ (Cri) 102; (19) *Bhoginbhai Hngibhai* v. *State of Gujarat*, AIR 1983 SC 753 : (1983) 3 SCC 217 : 1983 SCC (Cri) 728 : 1983 CrLJ 1096 : 1983 CrLR (SC) 396 : (1983) 2 Crimes 232; (20) *Sharad* v. *State of Maharashtra*, AIR 1984 SC 1622 : (1984) 4 SCC 116 : 1984 CrLJ 1738 : (1984) 2 Crimes 235; (21) *Kannan* v. *State of Tamil Nadu*, AIR 1989 SC 396 : 1989 CrLJ 825.

[9762] ● ***High Court not having jurisdiction to direct Registrar to file complaint.***—In the present case, the High Court had, in an appeal under Section 476-B, CrPC, made the complaint applied for. On appeal against the order of the High Court, the Supreme Court came to the conclusion that the High Court was not the Court of Appeal contemplated under Section 476-B read with Section 195(3) of the Code, and that hence it did not have the jurisdiction to make the order directing its Registrar to file the complaint applied for. What the High Court should have done was to send the case back to the District Judge who alone had the jurisdiction to make the complaint applied for, for disposal of the matter according to law. Under these circumstances, the Supreme Court has the duty to interfere in the exercise of its overriding powers under Article 136 and set right the position by itself doing what the High Court should have done in revision. The application for the making of a complaint under Section 476-B is accordingly remitted to the District Judge for being dealt with according to law. *Kuldip Singh* v. *State of Punjab*, AIR 1956 SC 391 : 1956 CrLJ 781 : 1956 SCJ 387 : 1956 SCR 125 : 1956 SCA 809 : ILR (1956) Punj 1075 : 58 PunLR 595.

[9763] ● ***Appeal against order of conviction when dismissed by Supreme Court.***—Even when an appeal against an order of conviction is dismissed by the Supreme Court, the Court may, in a fit case, allow the appeal to the limited extent of the sentence, and may direct that the sentences imposed by the High Court for different offences of which the accused has been convicted shall run concurrently, and not consecutively. *Mathew, K. C.* v. *State of Trav. Cochin*, AIR 1956 SC 241 : 1956 CrLJ 444 : 1956 SCJ 213 : 1956 SCA 175 : 1955 2 SCR 1057 : 1956 AWR (Supp) 34 : 1956 (1) MLJ (SC) 130 : 1956 KerLT 355 : 1956 ALT 506.

[9764] ● ***Leave to appeal—Condonation of delay in filing.***—If a petition for leave to appeal to the Supreme Court is not made within the time limited by the rules of this Court, and if the only ground urged in support of the application for condonation of the delay is that the applicants were large in number and the collection of money from this large number occasioned the delay, the Court will not consider it a sufficient ground for condoning the delay. *Banarasi Das* v. *State of U.P.*, AIR 1956 SC 520 : 1956 SCA 702 : 1956 SCJ 529 : 1956 SCR 357 : 1956 ALJ 517 : 1956 BLJR 511 : 1956 AWR (SC) 421.

[9765] ● ***Appeal, interference in.***—It must be emphasised that when, under the law, the decision as to whether or not a particular action should be taken is a matter which is primarily for the Court which hears the application, the discretion exercised by the Court in that matter is not to be lightly interfered with in appeal, even when it is competent to the appellate Court to do so.

This is even more so in a case in which the Legislature does not provide for an appeal. In such a case it is preposterous to invite the Supreme Court in an appeal by special leave under Article 136 to interfere with such a discretionary order. *Virendra Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : 1956 SCA 410 : 1956 SCJ 138 : ILR (1956) Punj 163 : 1955 (2) SCR 1013 : 58 PunLR 583.

[9766] ● ***Death result of gun-shot wounds.***—In an appeal to the Supreme Court, the appellant cannot be allowed for the first time a ground of fact which was not raised at the trial and as to which no questions were put to the prosecution witnesses in their cross-examination. The appellant in the present case was not allowed to urge that the injuries to the deceased were not gun-shot wounds but were incised wounds, since at the trial no such question had been put to the doctor in his cross-examination, though in his examination-in-chief he had said that in his opinion the death was the result of gun-shot wounds. *Abdul Sattar* v. *State of Mysore*, AIR 1956 SC 168 : 1956 CrLJ 334.

[9767] ● ***Omission to take objection in grounds of appeal.***—If an objection to any illegality or irregularity in procedure which may have occurred in the course of the trial has not been taken in the appeal before the High Court, and the plea of prejudice on that score is sought to be raised for the first time before the Supreme Court, the Court, will ordinarily not allow the appellant to do so, because in such a case it would be legitimate to infer that in fact no prejudice has been occasioned by the defect in procedure and that the plea is only an after-thought. It is only in those rare cases in which the likelihood of prejudice is patent on the very face of the record that an objection against an irregularity could be allowed to be urged even though it has been raised for the first time before the Supreme Court. *Mathew, K.G.* v. *State of Trav. Cochin*, AIR 1956 SC 241 : 1956 CrLJ 444 : 1956 SCJ 213 : 1956 SCA 175 : 1955 (2) SCR 1057 : 1956 AWR (Supp) 34 : 1956 (1) MLJ (SC) 130 : 1956 KerLT 355 : 1956 ALT 506.

[9768] ● ***Objection as to prejudice.***—Even when it is shown that an irregularity has occurred in the trial of a case, the Supreme Court will be slow to entertain the question of prejudice when details are not furnished. Further, the fact that objection has not been taken at an early stage of the case will be taken into account. If the plea of prejudice has not been taken either before the High Court or in the petition for leave filed in the Supreme Court, the Court will decline to allow the question to be raised at the hearing of the appeal. *Sukha* v. *State of Rajasthan*, AIR 1956 SC 513 : 1956 CrLJ 923 : 1956 SCA 781 : 1956 SCJ 503 : 1956 SCR 288 : 1956 ALT 583 : 1956 AWR (Supp) 83.

[9769] ● ***Question of prejudice raised for first time.***—No doubt a serious *lacuna* in procedure has occurred in the case as a result of inadequate compliance with the requirements of Section 342, but an argument of this kind, which would necessitate a re-trial if it were accepted, must be urged at the regular appeal in the High Court, and it had not been raised at all at that stage. In such circumstances, the question of prejudice cannot be entertained by the Supreme Court when raised for the first time in the appeal before it. *Moseb Kaka Chowdhry* v. *State of West Bengal*, AIR 1956 SC 536 : 1956 CrLJ 940 : 1956 SCA 754 : 1956 SCR 372 : 1956 SCJ 533 : 1956 ALJ 567 : 1956 BLJR 545 : 1956 (2) MLJ (SC) 33 : 1956 AWR (Supp) 102 : 69 MLW 997.

[9770] ● ***High Court when confirms order of conviction.***—When the High Court confirms in appeal an order of conviction, it is only fair to the accused that its judgment should give clear reasons for its conclusion that the accused is guilty. If the judgment of the High Court does not give the reasons for its finding and thus shows that it has not applied its mind to the circumstances of the case, it is a fit case for interference by the Supreme Court. In such a case, it will ordinarily remand the case back to the High Court for disposal according to law. However, it is not bound to do so in every case, and if the Court is satisfied that the delay involved in such a course will entail suspense and hardship to the accused who are under the sentence of death, the Court may itself proceed to hear and dispose of the appeal on its merits on facts. *Jumman* v. *State of Punjab*, AIR 1957 SC 469 : 1957 CrLJ 586.

[9771] ● *Special appeal—Exercise of power under Article 227.*—If the High Court is moved for the exercise of its powers under Article 226 or 227, and refuses to do so, it is open to the applicant to move the Supreme Court, by way of an appeal under Article 136, and thereupon it is open to the Supreme Court to exercise in a fit case the power given to the High Court under Articles 226 and 227. *Baldeo Singh* v. *State of Bihar*, AIR 1957 SC 612 : 1957 CrLJ 998 : 1957 SCJ 535 : (1957) MLJ (Cri) 485 : ILR 36 Pat 746.

[9772] ● *New plea.*—When a question on a point of law or fact has not been raised before the High Court, or even in the petition for special leave to appeal under Article 136, the appellant cannot be permitted to raise it for the first time at the hearing of the appeal. Appellant in the present case was not permitted to urge that there had been a misjoinder of charges at the trial because the point was not urged in the High Court, and was not referred to in the petition for special leave. *Mangal Singh* v. *State of M.B.*, AIR 1957 SC 199 : 1957 CrLJ 325.

[9773] ● *New plea—Question of law.*—Even when a fresh point is raised for the first time before the Supreme Court, the Court may allow it to be urged, if it is one purely of law.

Even the *respondent* may be allowed to urge a new point of law for the purpose of supporting the judgment of the High Court from which the appeal by special leave has been allowed. *State of Bihar* v. *Ram Naresh Pandey*, AIR 1957 SC 389 : 1957 CrLJ 567 : 1957 SCA 350 : 1957 SCR 279 : 1957 SCJ 336 : ILR 36 Pat 513 : 1957 BLJR 406 : 1957 (1) MLJ (Cri) 247 : 1957 MPC 420 : 1957 AWR (HC) 430 : 1957 ALJ 609.

[9774] ● *Appreciation of evidence.*—Believing or disbelieving a witness is essentially a matter for the Courts of fact, and in an appeal by special leave the Supreme Court will not ordinarily interfere with their discretion. *Brij Bhukhan* v. *State of U.P.*, AIR 1957 SC 474 : 1957 CrLJ 591.

[9775] ● *Certificate granted by High Court when defective.*—Even when the certificate granted by the High Court is defective by reason of the grounds on which it is granted not having been properly stated, the Supreme Court may treat the appeal as being one by special leave under Article 136, if the circumstances of the case are of such a nature that such leave would have been granted by it if the appellant had applied for it. *Pershadi* v. *State of U.P.*, AIR 1957 SC 199 : 1957 CrLJ 325.

[9776] ● *Certificate of fitness—Duty of Supreme Court.*—In the present case, when the petition for leave to appeal was filed in the High Court, it was brought to its notice that certain documents which were on the record had not been referred to at all by either side at the time of the hearing of the appeal, and as a result, though they were material, they had not been considered in the judgment. On this ground the High Court certified that the case was a fit one for appeal to the Supreme Court, though no substantial question of law was involved in the case. Following the decision of the Court in *Haripada Dey* v. *State of West Bengal*, AIR 1956 SC 757, and the earlier decisions of the Court referred to in that judgment, it is held that the certificate given by the High Court does not satisfy the requirements of Article 134(1)(*c*). But even so, the Court has to consider whether the circumstances of the case are such a nature that a special leave to appeal under Article 136 would have been granted if the appellant has approached the Court by a petition in that behalf. After considering the facts in the case, the leave is granted, and the appeal has been heard on merits.

Article 136 of the Constitution does not confer on any party to a criminal proceeding a right of appeal from the decision of the High Court; it only confers a discretionary power on the Supreme Court to interfere in suitable cases. It is implicit in the very nature of such a discretionary power that it cannot be exhaustively defined, but Article 136 cannot be so construed as to confer a right on a party where he has none under the law.

The practice of the Privy Council and that followed by the Supreme Court is not to interfere on questions of fact except in exceptional cases, when the finding of the High Court is such, (*a*) that 'it shocks the conscience of the Court', or (*b*) that 'by disregard to the forms of legal process, or by some violation of the principles of natural justice, or otherwise, a substantial and grave injustice has been done'. *Khushal Rao* v. *State of Bombay*, AIR 1958 SC 22 : 1958 CrLJ 106 : 1958 SCJ 198 : 1958 SCR 552 : 1957 MPC 813 : 1958 AWR (HC) 38 : 1958 ALJ 91 : 1958 ACrR 43.

[9777] ● *Question of sanction stage when it should be raised.*—When the question as to the requirement of a sanction under Section 196-A or Section 197 of the Criminal Procedure Code has not been urged before the trial Court, or even before the High Court in appeal, it is not open to the appellant to raise it for the first time in an appeal to the Supreme Court, because the omission as to a requisite sanction is a question of fact like any other question of fact and the

Supreme Court will not allow the question of fact to be raised for the first time before itself. *Kanta Prashad* v. *Delhi Administration*, AIR 1958 SC 350 : 1958 CrLJ 698 : 1958 SCR 1218 : 1958 SCJ 668 : 1958 MLJ (Cri) 508 : (1958) 2 AnWR (SC) 113 : 1958 AWR (HC) 588 : 1958 MLJ (SC) 113 : 60 Pun LR 583 : 1958 ACrR 387.

[9778] ● ***Irregularity in investigation—Omission to raise objection at proper stage.***—Even when an irregularity is shown to have occurred in the course of the investigation of the case or at the trial, if an objection on that ground has not been taken at a sufficiently early stage, the fact will be taken into account. In such a case, the effect of the omission to raise the objection at the proper stage is that it will be assumed that the irregularity has in fact not occasioned any prejudice to the accused and that the plea of prejudice is only an after-thought.

In the present case, the Supreme Court refused to allow the question of prejudice on the score of an investigation having been conducted by an incompetent police officer to be agitated in the appeal before it, for the reason that the point had not been raised either in the trial Court or in the appeal before the High Court. *Din Dayal Sharma* v. *State of U.P.*, AIR 1959 SC 831 : 1959 CrLJ 1120 : 1959 SCJ 922 : 1959 ALJ 470 : 1959 MLJ (Cri) 599 : 1959 ACrR 319 : 1959 AWR (HC) 403.

[9779] ● ***High Court disagreeing with trial Court's finding.***—In a case in which the High Court disagrees with the findings of fact of the trial Judge, and, on its own estimate of the evidence in the case, reverses his order of acquittal, no doubt, the finding on which the conviction is based are not concurrent findings, but merely on that account it is not open to the appellant to urge in his appeal to the Supreme Court that he is entitled to question the findings of the High Court.

In such a case, the Supreme Court will examine the evidence only for the purpose of seeing whether the judgment of the High Court is in accordance with the principles laid down by the Court in the matter of dealing with appeals against acquittals. If the Supreme Court finds that the High Court has given very good reasons for accepting the evidence of the prosecution witnesses and rejecting the explanation of the accused, and that the view taken by the High Court is the only view which could be reasonably taken in the case, then, the Supreme Court will not ordinarily go behind the findings of the High Court. These findings are certainly not concurrent findings, none the less, they are findings on questions of fact. *Narayandas Bhagwandas* v. *State of West Bengal*, AIR 1959 SC 1118 : 1959 CrLJ 1368 : (1959) 2 SCA 268.

[9780] ● ***Supreme Court not to enter into elaborate examination of evidence.***—Ordinarily, the Supreme Court is not required to enter into an elaborate examination of the evidence, and it is not its practice to re-examine the findings of fact reached by the High Courts, particularly in a case where there is concurrence of opinion between the two Courts below. The present case, however, was an unusual one. The accused was charged and convicted of the offence of murder by poisoning, and on appeal, the High Court had confirmed the conviction. There was no direct evidence that the accused had administered a poison, and in fact no poison had been detected in the system of the deceased in the medical or toxicological examination. The case against the accused was thus entirely based on circumstantial evidence, relating to various items of the conduct of the accused, in connection with the deceased while she was alive, the disposal of her body after her death, and the disposal of her property both before and after her death. The inference of his guilt had been drawn by both the Courts below on an examination of a mass of evidence as a result of which a number of subsidiary findings had been arrived at as regards the various items of the conduct of the accused. On behalf of the accused, a variety of arguments were addressed to the Supreme Court whereby the evidence against the accused was sought to be explained away on hypotheses suggesting his innocence, and these arguments covered both the factual as well as the medical aspects of the case. In view of all these circumstances of an extraordinary nature, the Supreme Court considered that in this case a close examination once again of the whole evidence on record was necessary, in order that it could satisfy itself whether each conclusion on the separate aspects of the case arrived at by the Courts below, was supported by evidence and was just and proper, and also in order that the Court may be in a position to say what were the facts found by the Court on which its own decision was rested. The Court, therefore, departed in this case from its normal practice of refusing to re-examine the findings of fact on which the conclusions of the High Court are based, and decided to re-examine the entire evidence in the case. *Anant Chintaman Lagu* v. *State of Bombay*, AIR 1960 SC 500 : 1960 CrLJ 682 : (1960) 2 SCA 62 : 1960 SCJ 779 : (1960) 2 SCR 460 : 1960 MLJ (Cri) 493 : 62 Bom LR 371.

[9781] ● ***Supreme Court competent to pass same order which High Court competent to***

pass.—In the exercise of its powers under Article 136, the Supreme Court is competent to pass the same orders which the High Court is, by the Code of Criminal Procedure, competent to pass. The sentence of death passed by the Sessions Court cannot be executed, under the Code, unless it has been confirmed by the High Court. Since the sentence passed in the instant case had not been confirmed by the High Court, the Supreme Court can pass the same order of confirmation of sentence in the exercise of its powers under Article 136. Accordingly, the sentence of death was confirmed. *State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : 1960 CrLJ 1504.

[9782] ● ***New plea—Complaint filing revision against acquittal.***—In an application in revision to the High Court against an order of acquittal made by a complainant, if the accused/respondent feels that the revision proceeding is illegal or irregular by reason of some contravention of a provision in the Criminal Procedure Code, a contention on that ground must be raised at the hearing of that proceeding before the High Court itself, so as to afford to the High Court the opportunity to consider such question of law on its merits and to rectify the defect in procedure, if necessary, in an appropriate manner. If the accused/respondent has failed to raise such objection at the proper stage which is before the High Court itself, and the High Court has made an order in the exercise of its powers of revision setting aside the acquittal and remanding the case back to the trial Court by special leave against that order, the accused cannot be allowed to raise for the first time the point as to the revisional jurisdiction of the High Court. *Madanraj* v. *Jalamchand Lodha*, AIR 1960 SC 744 : 1960 CrLJ 1151.

[9783] ● ***No proof as to controlled price.***—The conviction of the accused in this case was for the sale of cement at a price higher than the price fixed under a Cement Control Order. It was contended that the conviction was bad because no legal proof had been produced to show what the controlled price fixed under the Order was, and on the facts on record the Supreme Court accepted this contention. It was, however, urged on behalf of the State that this point had not been taken up in any of the Courts below and hence according to the normal practice of the Court, it should not be allowed to be raised for the first time in the appeal before the Court. *Salekh Chand* v. *State of U.P.*, AIR 1960 SC 283 : 1960 CrLJ 423.

[9784] ● ***New plea—Raising of for first time.***—Even though the point has been raised for the first time before the Court, as it has to be established that the appellant had sold the cement over a controlled price, conviction cannot be upheld unless there is legal proof as to what the controlled price was. Hence, it would be the duty of the Court to allow the point to be taken even at the late stage. *Salekh Chand* v. *State of U.P.*, AIR 1960 SC 283 : 1960 CrLJ 423.

[9785] ● ***New points raised when point of law.***—Even when the new points raised in the appeal are points of law, the Supreme Court will be reluctant to permit them to be raised for the first time at the hearing of the appeal in the Supreme Court, if they have not been raised by the appellant in the High Court and have not been urged in the petition for leave to appeal. *Rehman Shagoo* v. *State of Jammu and Kashmir*, AIR 1960 SC 1 : 1960 CrLJ 126 : 1960 SCJ 172 : (1960) 1 SCR 680.

[9786] ● ***Order of acquittal made by Magistrate when bad.***—In an appeal under Article 136, if the Supreme Court is satisfied that an order of acquittal made by the trial Magistrate was wrong and that the correct order which should have been made was an order of discharge, and that on an application in revision made by the aggrieved complainant in the case, the High Court has failed to make the necessary order rectifying the error, it is a fit case for interference by the Supreme Court. In such a case, the Court will do what the High Court could and should have done, and will make the proper order rectifying the error committed by the trial Magistrate. *Abdul Rehman Mohamed Yusuf* v. *Mahomed Haji Ahmad Agbotwala*, AIR 1960 SC 82 : 1960 CrLJ 158 : 1960 SCJ 87 : (1960) 1 SCR 749 : 1960 NLJ 209 : 1960 MPLJ 513 : 1960 ACrR 76 : 26 Cut LT 181 : 62 Bom LR 143 : 1960 MLJ (Cri) 32.

[9787] ● ***Death Sentence Confirmation—By Supreme Court.***—In the exercise of its power under Article 136, the Supreme Court can confirm a sentence of death passed by the Sessions Court, when it sets aside the order of the High Court reversing the order of the Sessions Court and acquitting the accused, and witness the order of conviction passed by the Sessions Court. *State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : 1960 CrLJ 1504 : (1960) 2 SCA 371 : 1960 ALJ 733 : 1960 AWR (HC) 568 : (1960) ACrR 361.

[9788] ● ***Application for custody of minor daughter.***—Even when the matter under consideration is one of discretion which, under the law has been vested in the High Court, the Supreme Court will interfere in the exercise of its powers under Article 136, if it is satisfied that such discretion has not been judicially exercised, that the judgment of the High Court does not disclose any acceptable reason for its view, and that its order is clearly wrong and unsustainable. In the present case, the High Court had been moved on an application made under Section 491, CrPC for a writ of *Habeas Corpus* and an order against the respondent directing her to hand over to the applicant the custody of her child. The High Court rejected the application, and the applicant appealed to the Supreme Court by special leave. The High Court has refused to exercise its jurisdiction under Section 491 without assigning any acceptable reasons for doing so. The order of the High Court is set aside, and the matter is sent back, with a direction to the respondent to produce the child before the High Court forthwith for being made over to the applicant. *Gohar Begum* v. *Suggi*, AIR 1960 SC 93 : 1960 CrLJ 164 : 1960 SCJ 31 : (1960) 1 SCR 597 : 1960 ACrR 69 : 1960 Nag LJ 10 : 1960 AWR (HC) 52 : 62 Bom LR 54 : 1969 MLJ (Cri) 1 : 1960 MPLJ 10.

[9789] ● ***Appeal by special leave against order of High Court.***—In an appeal by special leave against an order of the High Court in a matter which is within the inherent jurisdiction of the High Court, the question is not whether the Supreme Court would have come to the same conclusion if it were itself dealing with the matter in the exercise of inherent powers. What the Supreme Court has to decide is only whether the judgment under appeal is erroneous in law, so as to call for the Court's interference under Article 136.

In the present case, the High Court had refused to exercise its inherent power under Section 561-A, CrPC to quash a criminal proceeding at an interlocutory stage. On appeal under Article 136, the Supreme Court held that the order of the High Court could not be said to be erroneous in law, and hence it was not a fit case for interference. The appeal was dismissed. *Kapur R.P.* v. *State of Punjab,* AIR 1960 SC 866 : 1960 CrLJ 1239 : (1961) 1 SCJ 59 : (1960) 3 SCR 388 : 1961 MLJ (Cri) 21 : ILR (1960) 2 Punj 456 : 1961 AWR (HC) 49 : 1961 ACrR 12.

[9790] ● ***Supreme Court not interfere with interlocutory orders.***—The practice of the Supreme Court generally is that it will not interfere with interlocutory orders in the exercise of its powers under Article 136. In its very nature, an order of the High Court remanding a case for retrial does not finally decide the points in the case and it is essentially of an interlocutory character. The Supreme Court will refuse to depart from its usual practice, and will not interfere with an order of remand made by the High Court except for strong reasons.

In the instant case, the accused was charged under Section 380, Penal Code. The charge was that he had a khata with the complainant, that he had taken a loan of about Rs. 15,000, that he had kept with the complainant his jewels as a security against the loan, and that when he visited the complainant's place of business he had taken away those jewels. After the removal was discovered, the accused executed a document in which he admitted that he had taken away the jewels without the complainant's knowledge. At his trial the accused contended that the document had been executed by him under coercion, but this contention was rejected and the Magistrate had found that he had in fact removed the jewels. He, however, held that it could not be said that the jewels were in the possession of the complainant within the meaning of Section 378 and so the offence of theft had not been proved. He acquitted the accused on this ground. The complainant moved the High Court in revision against the order of acquittal, and the High Court held that the view of the Magistrate was unsustainable having regard to the facts which he himself had found. In the interest of justice, it set aside the order of acquittal and remanded the case back for disposal in accordance with law. The accused appealed to the Supreme Court by special leave against this order. In these circumstances, there is no reason to depart from the normal practice of the Supreme Court not to interfere with interlocutory orders. The appeal is dismissed. *Madanraj* v. *Jalamchand Lodha*, AIR 1960 SC 744 : 1960 CrLJ 1151.

[9791] ● ***Power of Supreme Court to review correctness of order of lower Court.***—When deciding an appeal under Article 136, the Supreme Court has the power to review the correctness of any order made by any lower Court at any intermediate stage of the proceeding, whether it be an order of the trial Court or an order made by the High Court in revision. There is no rule that the accused must appeal against every order made against him at an intermediate stage of the proceeding, on the penalty that if he does not do so he forfeits for ever the benefit of consideration by the Supreme Court of the question whether the order in question was legal and proper. If the Supreme Court finds that an order made by the High Court at an intermediate stage of the proceeding was erroneous, the Court has the power to review the matter before it and to give the appellant the benefit of its decision, even though he may not have appealed against the order made by the High Court at the intermediate stage. In such a case, the respondent State cannot be allowed to contend that the order of the High Court not having been appealed from had become final and binding, whether it was right or wrong, nor can it be accepted that the existence of the order, even when it is held to be erroneous, must impede the Supreme Court from giving to the appellant the benefit of its decision. *Ghose N. R.* v. *State of W.B.*, AIR 1960 SC 239 : 1960 CrLJ 289 : 1960 SCJ 532 : (1960) 2 SCR 58 : 1960 MLJ (Cri) 428 : 1960 AWR (HC) 265 : 1960 ACrR 185.

[9792] ● ***New point.***—A suggestion was made on behalf of the accused Chokhani that he might have shown the same amount both in the cash statement and in the journal statement. No such case, however, was raised in the Courts below or made in the appellant's statement of case. Hence, new plea was not allowed. *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821 : 1962 (2) CrLJ 805 : (1962) 32 Com Cas 699.

[9793] ● ***New plea as to invalidity of sanction.***—When a plea as to the invalidity of the sanction given under Section 197, CrPC, on a particular ground has not been raised at any stage before that trial Court when the sanction order was passed, or before the High Court, and the State has had no opportunity of leading evidence to meet the point raised, the plea cannot be allowed to be raised for the first time before the Supreme Court. *Chari, R.R.* v. *State of U.P.*, AIR 1962 SC 1573 : 1962 (2) CrLJ 510 : 1962 ACrR 403 : 1962 AWR (HC) 732.

[9794] ● ***Supreme Court in appeals under Article 134(1)(a) to assess afresh whole evidence on record.***—In appeals falling under Article 134(1)(a), the Supreme Court must assesses afresh the value of the whole evidence on record. In such appeals, the practice of the Court in appeals by special leave under Article 136 will not be followed. The principle of non-interference with the concurrent findings of fact of the Courts below save when special circumstances exist, which is applied to appeal under Article 136, cannot apply to appeals preferred under Article 134(1)(a). *Tarachand Damu Sutar* v. *State of Maharashtra*, AIR 1962 SC 130 : 1962 (1) CrLJ 196 : (1962) 2 SCR 775 : 63 Bom LR 74 : 1962 ACrR 103 : 1962 AWR (HC) 135. (per HIDAYATULLAH and RAGHUBAR DAYAL, JJ.)

[9795] ● (*Note* :—In effect, this means that in appeals falling under Article 134(1)(a), which are appeals as of right, and not with special leave, the Supreme Court will constitute itself as a second Court of appeal on facts, and will review the whole evidence on record for itself, whatever be the findings of fact of the Court below.) *Tarachand Damu Sutar* v. *State of Maharashtra*, AIR 1962 SC 130 : 1962 (1) CrLJ 196 : (1962) 2 SCR 775 : 63 Bom LR 74 : 1962 ACrR 103 : 1962 AWR (HC) 135. (per HIDAYATULLAH and RAGHUBAR DAYAL, JJ.)

[9796] ● ***Question whether respondent submitted to jurisdiction of Magistrate—Question mixed question of law and fact.***—The question whether the respondent to an application under Section 488, CrPC had submitted to the jurisdiction of the Magistrate before whom the application was made is a mixed question of fact and law. If the question has not been raised in the Courts below, the Supreme Court will not ordinarily allow such question to be raised for the first time in the appeal before it unless there are any exceptional circumstances which justify a departure from the normal practice of the Court. *Jagir Kaur* v. *Jaswant Singh*, AIR 1963 SC 1521 : 1963 (2) CrLJ 413 : 1963 SCD 896 : (1963) 1 SCA 166.

[9797] ● ***New point—Question as prejudice due to non-compliance with Section 342, CrPC.***—The question whether prejudice had been caused to the accused by reason of non-compliance with the requirements of Section 342, CrPC., is a question of fact and it cannot be allowed to be raised for the first time in the appeal under Article 136, if it has not been raised before the trial Court or the High Court. *Radha Kishan* v. *State of U.P.*, AIR 1963 SC 822 : 1963 (1) CrLJ 809 : 1963 ALJ 397 : 1963 BLJR 353 : (1963) 2 Lab LJ 667 : 1963 AWR (HC) 304 : 1963 ACrR 156.

[9798] ● ***Certificate of fitness—Mere delay in pronouncing judgment.***—Under Article 134(1)(*c*), the High Court should not grant the certificate for appeal on such slender grounds. If the accused against whom the order of conviction is passed by the High Court has any real grievance on the ground that some of the important questions of fact raised in the appeal had not at all been dealt with in the judgment of the High Court, it was open to him to apply to the Supreme Court under Article 136, but such a ground is not a fit one for the grant of a certificate under Article 134(1)(*c*). Further, a mere ground of delay in giving a judgment is not a fit one for appeal to the Supreme Court even if it is felt by the High Court that the delay might have led to omission to consider some question of fact. It is not open to the High Court to give certificate of fitness under Article 134(1)(*c*) merely because in its opinion the judgment of the High Court delivered by another Bench suffers from an error in regard to certain facts. *Achut Adhicary* v. *State of West Bengal*, AIR 1963 SC 1039 : 1963 (2) CrLJ 59 : (1963) 2 SCJ 92 : (1963) 2 SCR 47 : (1963) 2 SCA 210 : 1962 BLJR 983 : 65 Pun LR 171 : 1963 MLJ (Cri) 317 : 1962 (2) Ker LR 188 : 1962 SCD 763 : 1962 AWR (HC) 714.

[9799] ● ***Circumstantial evidence—Appreciation of.***—In an appeal under Article 136, ordinarily the Supreme Court does not re-assess the evidence and re-examine the findings of fact reached by the Courts below particularly where there are concurrent findings by both the Courts below.

But where the appeal is from an order of conviction based solely on circumstantial evidence, and the question is whether the circumstances which are established are sufficient to lead to the irresistible conclusion that the accused is guilty and whether the conviction of the accused which is based solely on those circumstances is justified, the Court may in a case consider it expedient to examine the whole evidence for itself in order to satisfy itself as to whether the conviction is rightly based. *Raghav Prapanna Tripathi* v. *State of U.P.*, AIR 1963 SC 74 : 1963 (1) CrLJ 70.

[9800] ● ***New point.***—When a point raised before the Supreme Court is not a pure question of law but requires for its decision investigation of facts, it will not be allowed to be raised for the first time before the Supreme Court, if it has not been raised in the trial Court or even in the appeal to the High Court. A plea that sanction for prosecution under Section 196A, CrPC was given by the authority concerned without considering all the relevant facts and without following the procedure prescribed by law is not a pure question of law because it involves investigation of facts leading up to the sanction. *Tulsi Ram* v. *State of U.P.*, AIR 1963 SC 666 : 1963 (1) CrLJ 623 : (1963) 2 SCJ 274 : 1963 MLJ (Cri) 434 : ILR (1963) 1 All 840.

[9801] ● ***Custom Officer acting under Section 167 Sea Customs Act not Tribunal.***—A Customs Officer exercising his powers under Section 167 of the Sea Customs Act is not a "Tribunal". But the Central Board of Revenue and the Central Government exercising their appellate and revisional powers under Sections 190 and 191 of the Act are "Tribunals" within the meaning of Article 136(1), and appeal under Article 136 lies for the orders made by these Authorities in the exercise of their powers under the said sections. *Indo-China Steam Navigation Co. Ltd.* v. *Additional Collector of Customs, Calcutta*, AIR 1964 SC 1140 : 1964 (2) CrLJ 234 : (1964) 34 Com Cas 435.

[9802] ● ***Jurisdiction of High Court in cases of professional misconduct.***—The jurisdiction exercised by the High Court in cases of professional misconduct by legal practitioners is neither "civil" nor "criminal" as these expressions are used in Articles 133 and 134 of the Constitution. In one aspect it is a jurisdiction over an officer of the Court who owes a duty to the Court, apart from his duty to his client. In another aspect, it is a statutory power and duty vested in the High Court under Section 10 of the Bar Councils Act. The purpose of the Act is to ensure that the highest standards of professional rectitude are maintained, so that the Bar can render its expert service to the public in general and the litigants in particular and thus discharge its main function of co-operating with the judiciary in the administration of justice according to law.

This delicate and responsible task is vested by a statute in the High Court and therefore the primary responsibility of discharging it rests with the High Court. Consequently, the Supreme Court is most reluctant to interfere with the orders of the High Court in this field, and will interfere only in exceptional cases where some question of principle is involved or where it is satisfied that any violation of the principles of natural justice has been taken place or that there has been a miscarriage of justice. Where, however, none of these factors are present, it is not the practice of the Court to permit the canvassing of the evidence on the record either for re-appraising it or to determine whether it should be accepted or not. In appeals under Article 136 from the orders made by the High Court in the exercise of its powers under the Bar Councils Act, findings of the High Court on questions of fact are not open before the Supreme Court and the Court would only consider whether on the facts found, the charge of professional misconduct is established. Such is the limited nature of the jurisdiction of the Supreme Court in appeals under Article 136 challenging the correctness of the findings of the High Court in matters under the Bar Councils Act and the principles which it would observe in dealing with them. *Ratnam, P.J.* v. *D. Kanikaram*, AIR 1964 SC 244 : 1964 (1) CrLJ 146 : 1964 SCD 136 : (1964) 1 ALT 121.

[9803] ● ***Appeals from sentence of fine does not abate.***—Appeals under Article 136 from sentences of fine must be permitted to be continued by the legal representatives of the deceased appellant. The same principles on which appeals under the Code of Criminal Procedure from sentences of fine are allowed to be continued under Section 431 of the Code, apply equally to appeals to the Supreme Court, and if they can be continued when arising under the Code, there is no reason why they should not be allowed to be continued when arising under the Constitution. In *Pranab Kumar Mitra* v. *State of West Bengal*, AIR 1959 SC 144, the Court has held that a revision petition from a sentence of fine can be continued after the death of the petitioner by his legal heirs. The principle on which this decision is based is that the sentence of fine affects the property of the deceased in the hands of his legal representatives. That being the principle, it is just and proper to allow also an appeal to continue but even there the sentence affects the property of the deceased in the hands of his heirs. However, the position is different where the sentence is of imprisonment, and not of fine, Such a sentence becomes infructuous on the death of the accused. The sentence does not affect the property of the deceased in the hands of his heirs. The sentence is entirely personal in its effect, and on the death of the person on whom the sentence was passed, there is nothing more left to be done about it. In such a case, the legal representatives of the deceased are not entitled to continue the appeal after his death. *Bondada Gajapathi Rao* v. *State of Andhra Pradesh*, AIR 1964 SC 1645 : 1964 CrLJ 598.

[9804] ● ***Charge not invalid—No objection taken.***—Where the accused has not raised any objection to the charge framed against him either before the trial Court or before the High Court on the ground that the charge was defective and that he was misled in his defence as a result of the error or irregularity in the charge, the Supreme Court will not allow the objection to be raised for the first time in the appeal under Article 136, even though there is substance in the contention that the charge as framed was lacking in the particulars required to be stated in the charge. *Ram Sagar Pandit* v. *State of Bihar*, 1964 (1) CrLJ 65 : (1963) 2 SCR 652 : (1963) 2 SCJ 565.

[9805] ● ***Plea of mala fide against Govt.***—The plea of *mala fides* against the Government must always be made in the pleadings before the High Court or the trial Court. The plea cannot be heard if it has been raised for the first time in the application for special leave under Article 136. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 1120 : 1964 (2) CrLJ 217 : (1964) 2 SCA 739 : 1964 SCD 201 : 1964 Cur LJ (SC) 1.

[9806] ● ***Appeal in habeas corpus matter.***—Generally speaking, where the detenu whose appeal before the Supreme Court in a *habeas corpus* matter has been admitted is released by the Government before the appeal comes up for hearing, no useful purpose would be served by the Court deciding the appeal. However, the position is different where the earlier order of detention which was the subject-matter of the appeal has been withdrawn by the Government on the ground of a technical defect and a fresh order of detention is passed at the same time, and the detenu is immediately re-arrested under the fresh order of detention after his release from detention under the withdrawn earlier order. In such a case, the interests of justice demand that the point at issue in the pending appeal should be decided because in substance the same detention continues and the points of law raised in the pending appeal against earlier order of detention will apply equally to the fresh order of detention. There is nothing to preclude the Supreme Court from deciding an appeal before it on the merits even though the order from which the appeal has arisen has been revoked by the Government, though ordinarily it would not do so, if it appears to it that it would be in the interests of justice to decide the points raised in the appeal, or that they are points of law of general importance and are likely to arise in many other similar cases. *Godavari Sugar Mills Ltd.* v. *S.B. Kamble*, AIR 1964 SC 1128 : (1964) 2 CrLJ 222.

[9807] ● ***High Court ordering complaint to be filed against appellants.***—In an appeal against the order of the High Court directing its Registrar to make a complaint under Section 476, CrPC against a person for his prosecution for offences under Sections 193, 199 and 211 of the Penal Code, the Supreme Court will ordinarily do no more than examine whether the High Court has fairly considered the facts to reach the conclusion—

(a) that *prima facie* there is a good reason to launch the prosecution,

(b) that there is a reasonable prospect of conviction, and

(c) that it is expedient in the interest of justice to order a prosecution.

If the Supreme Court is satisfied that the High Court has fairly and correctly viewed the case from this angle, it would not ordinarily interfere with the order made by the High Court. *Hari Das* v. *State of West Bengal*, AIR 1964 SC 1773 : 1964 (2) CrLJ 737.

[9808] ● ***Presumption of regularity in respect of official and judicial acts.***—A question whether there has or has not been compliance with the requirements of a statutory provision in the proceeding taken under any Act by the High Court is entirely a question of fact, and if the objection has not been raised at any stage of the proceeding before the High Court, the objection will not be allowed to be raised for the first time before the Supreme Court. Official and Judicial acts must be presumed to be regularly done, unless the question about their regularity has been raised at the proper stage. *Ratnam P.J.* v. *D. Kanikaram*, AIR 1964 SC 244 : 1964 (1) CrLJ 146 : 1964 SCD 136 : (1964) 1 ALT 121.

[9809] ● ***Interference in appeal—Ordinarily Supreme Court will not.***—It cannot be overlooked that six of the accused are women. From the circumstances of the case, it appears that they had not taken any active part in the occurrence and that they had come to the field along with their men folk, partly to save their fields from being taken possession of and partly to save their men folk. The Courts below had not taken any notice of these circumstances. In the peculiar circumstances of the case interference with the sentence passed is called for, in the interests of justice.

The sentence is reduced to the period of 2 years and 9 months already under-gone, in respect of the six women, and two of the male accused who are 70 years of age in consideration of their old age. *Matri* v. *State of Punjab*, AIR 1964 SC 986 : 1964 (2) CrLJ 57 : 1964 SCD 557.

[9810] ● ***Conviction by High Court—Supreme Court jurisdiction to interfere.***—Principles governing the scope of the jurisdiction of the Supreme Court in appeals under Article 136 against the order of the High Court setting aside the order of acquittal passed by the trial Court and convicting the accused. The Supreme Court will not interfere with the findings of fact reached by the High Court, if it has followed the principles governing the proper approach by the High Court in such appeals laid down by the Supreme Court and has carefully considered the entire evidence in arriving at its findings, and the case is not one of an exceptional nature which calls for interfere in the interest of justice. *Nihal Singh* v. *State of Punjab*, AIR 1965 SC 26 : 1965 (1) CrLJ 105 : 1964 SCD 853 : (1965) 1 SCJ 160 : 1965 MLJ (Cri) 65.

[9811] ● ***Question of law or fact not raised before High Court.***—It may be conceded that if a question of fact or a question of law which plainly arises on the record is relevant and material, and it can be argued without any further evidence being taken, then, if that point was urged before the trial Court and was rejected by it, it may, in a proper case, be permissible to the appellant before the Supreme Court to ask the Court to consider that point in the appeal under Article 136, even though it was not urged before the High Court and so there is no decision on that point in the judgment of the High Court. In a criminal proceeding of the character where sentences of death are imposed on the appellants, it would not be proper to refuse to consider a relevant and material plea of fact or law only on the ground that it was not urged before the High Court. Even where the appellant is not entitled as a matter of right, to obtain a decision on that point from the Supreme Court because it was not urged before the High Court, there is no hard and fast rule prohibiting the raising of such a plea in appeals under Article 136, and in view of the gravity of the sentence of death, the Court would, in a fit case, allow the appellant to raise such a plea. *Masatti* v. *State of U.P.*, AIR 1965 SC 202 : 1965 (1) CrLJ 226 : 1964 SCD 980 : (1965) 1 SCJ 605 : (1964) 8 SCR 133 : 1965 MLJ (Cri) 312.

[9812] ● ***No proof that Govt. sanctioned lodging of complaint.***—It was urged for the appellant that there was no proof that the Government had sanctioned the lodging of the complaint. We did not allow this point to be urged. The said point had not been taken in the Courts below and was not even taken in the petition for special leave. What was urged in the petition for special leave was that one of the questions of law which arose in the case for consideration was whether the charge framed was the one for which the sanction was granted or the requisite complaint was filed. That question was very much different from the question whether the Government did grant the sanction or whether the granting of the sanction by the Government had been duly proved in the case. *Sahib Singh Mehra* v. *State of U.P.*, AIR 1965 SC 1451 : 1965 (2) CrLJ 434 : 1965 SCD 600 : (1965) 1 SCWR 571.

[9813] ● ***Certificate of fitness—Discretion of High Court when to be exercised.***—There is no doubt whatever that sub-clause (*c*) of Article 134 does not confer an unlimited jurisdiction on the High Courts. The power gives a discretion, but discretion must always be exercised on some judicial principles. A similar clause in Article 133, which allows appeals in civil cases, has been consistently interpreted as including only those cases which involve a question of general public importance. That test need not necessarily be applied to a criminal case but it is clear that mere questions of fact should not be referred for decision. The Constitution does not contemplate a criminal jurisdiction for this Court except in those two cases covered by clauses (*a*) and (*b*) which provide for appeals as of right. The High Court, before it certifies the case, must be satisfied that it involves some substantial question of law or principle. In a criminal appeal, the High Court can consider the case on law and fact and if the High Court entertains doubt about the guilt of the accused or the sufficiency of the evidence, it can always give the benefit to the accused there and then. It is not necessary that the High Court should first convict him and then grant him a certificate so that this Court, if it thought fit, reverses the decision. It is thus obvious that only a case involving something more than mere appreciation of evidence is contemplated by the Constitution for the grant of a certificate. What that may be, will depend on the circumstances of the case but the High Court should be slow to certify cases. The High Court should not overlook that there is a further remedy by way of special leave which may be involved in cases where the certificate is refused. *Babu* v. *State of U.P.*, AIR 1965 SC 1467 : 1965 (2) CrLJ 539 : (1965) 1 SCWR 936 : (1965) 2 SCA 296 : 1965 SCD 1075 : 1966 BLJR 61 : 1966 ALJ 44.

[9814] ● ***High Court setting aside conviction.***—The true legal position is that if an accused person is convicted by the trial Court and on appeal to the High Court, his conviction is set aside, the State is entitled to apply to the High Court for a certificate under Article 134(1)(*c*). Such an application cannot be rejected *in limine* on the ground that it is incompetent; it has to be entertained and considered and decided on merits. *State of U.P.* v. *R.B. Agarwal*, AIR 1966 SC 1135 : 1966 CrLJ 815 : (1966) 2 SCA 202 : 1966 SCD 770 : (1966) 2 SCJ 673 : 1966 ALJ 628 : 1966 BLJR 656 : 1966 AWR (HC) 483 : 1966 ACrR 300 : 1966 MLJ (Cri) 695.

[9815] ● ***New plea that money to accused not entrusted in his capacity as clerk.***—The new plea, that moneys were not entrusted to the accused in his capacity as a clerk or as part of his duties, not being raised in the High Court and being dependent on evidence, cannot be raised before the Supreme Court. *Madan Lal* v. *State of Punjab*, AIR 1967 SC 1590 : 1967 CrLJ 1401 : 1967 SCD 1036 : (1967) 2 SCWR 587 : 1967 AWR (HC) 817 : 1967 ACrR 523 : 69 Pun LR 846.

[9816] ● ***Finality of judgment or order—Test.***—Where a Magistrate ordered the filing of the complaint against the appellant, the parties to that controversy were the State and the appellant and the controversy between them was whether the appellant had committed the offence charged against him in that complaint. The appeal filed by the appellant before the Sessions Judge was against that order, the controversy therein being whether the Magistrate was justified in filing it. Thus the two controversies were distinct though the parties were the same. When the Sessions Judge held that the complaint was justified in respect of the offence under Section 205, read with Section 114, IPC, and was not justified in respect of the other offences, his judgment in the absence of a revision by the State against it finally disposed of that part of the controversy, that is, that the complaint in respect of offences under Sections 467 and 468 r/w Section 114, was not justified. When the appellant filed a revision in respect of the complaint for the remaining offence under Section 205 r/w Section 114, the High Court dismissed that revision. That order of dismissal disposed of that controversy between the parties and the proceeding regarding that question as to whether the complaint in that regard was justified or not was finally decided. The order passed by the High Court was a final order within the meaning of Article 134(1)(*c*). As the question being one of fact only and there being no substantial question of law or principle, the High Court was not competent to certify the case under Article 134(1)(*c*) and the appeal was dismissed. *Mohan Lal* v. *State of Gujarat*, AIR 1968 SC 733 : 1968 CrLJ 876 : (1968) 1 SCWR 640 : (1968) 1 SCA 502 : 1968 SCD 699 : (1968) 2 SCR 685 : (1968) 2 SCJ 548 : 1968 MLJ (Cri) 583 : 1968 MLW (Cri) 102 : 17 Law Rep 47 : 9 Guj LR 536.

[9817] ● ***High Court accepting evidence of prosecution despite discrepancies.***—Where the High Court accepted the prosecution evidence despite certain discrepancies, the Supreme Court declined to interfere. *Karnesh Kumar* v. *State of U.P.*, AIR 1968 SC 1402 : 1968 CrLJ 1655 : 1968 SCD 1097 : (1968) 2 SCWR 817.

[9818] ● ***Plea that respondents not exhausted alternative remedies.***—*Article 136 and Bombay Police Act, 1951, Section 56.*—Where the High Court, in the exercise of its jurisdiction under Articles 226 and 227, has not chosen to reject the applications filed by the respondents, on the ground that they had not exhausted their remedy of appeal under Section 60 of the Bombay Police Act, the Supreme Court does not interfere with the order of the High Court entertaining the writ petitions. *State of Gujarat* v. *Mehbub Khan*, AIR 1968 SC 1468 : 1969 CrLJ 26 : (1968) 2 SCA 541 : 1968-3 SCR 746 : 1969 SCD 134 : (1969) 1 SCJ 195 : 1969 MLJ (Cri) 130 : 10 Guj LR 188 : (1968) 2 UmNP 495.

[9819] ● ***New point—Point not taken either in Trial Court or High Court.***—Where it was argued on behalf of the appellants that the rough notes of the statements given by one of them to the Customs Officers had been destroyed and that the defence was thereby prejudiced, the Supreme Court held that the Counsel ought not to be allowed to raise that new point for the first time in that Court, not having taken the same in the Courts below. *Hussain Umar* v. *Dalipsinhji*, AIR 1970 SC 45 : 1970 CrLJ 9 : (1970) 1 SCJ 149 : 1970 SCD 58 : 1970 SCCrR 76 : (1970) 1 SCR 130 : 1970 MLJ (Cri) 68 : 72 Bom LR 774.

[9820] ● ***Food Inspector's authority to file complaint.***—The accused cannot be permitted to question the authority of the Food Inspector to file the complaint on behalf of the local authority for the first time in the Supreme Court. Official acts must be deemed to have been done according to law. If the accused had challenged the authority of the Food Inspector to file the complaint, the trial Court would have gone into that question. *Bhian Singh* v. *Sahrampur Municipality*, AIR 1970 SC 318 : 1970 CrLJ 492 : 1970 SCCrR 251 : (1970) 1 SCA 349 : (1970) 1 SCJ 238 : (1970) 1 SCR 736 : 1970 MLJ (Cri) 113 : 1970 MLW (Cri) 42.

[9821] ● ***Supreme Court declining to accept certificate under Article 134(1)(1) can apply appellant to apply under Article 136.***—The right to appeal to the Supreme Court is regulated by Article 134. The power under Article 134(1)(*c*) conferred on the High Court discretion which is to be exercised on judicial principles. That jurisdiction is not that of an ordinary Court of criminal appeal. It is manifest that before granting a certificate under sub-clause (*c*) the High Court must be satisfied that it involves some substantial question of law or principle. The certificate itself should give an indication what substantial question of law or principle is involved in the appeal to bring it within the scope of Article 134(1)(*c*). Where the Court has found that the certificate is not in compliance with the requirement of Article 134 (1)(*c*), it has declined to accept the certificate. There are instances where, however, the Supreme Court after declining to accept the certificate has allowed the appellant to apply under Article 136 in proper cases. *State of Assam* v. *Abdul Noor*, AIR 1970 SC 1365 : 1970 CrLJ 1264 : 1970 SCD 358 : 1970 ACrR 353 : 72 Pun LR 585 : AssLR 1970 (SC) 47.

[9822] ● ***Word "certify" postulates exercise of judicial discretion by High Court.***—The word "certify" in clause (*c*) of Article 134 (1) postulates exercise of judicial discretion by the High Court and the certificate should ordinarily show on the face of it that the direction was invoked and properly exercised. The Supreme Court should be in a position to know that the High Court has not acted mechanically but has applied its mind. A certificate under this clause is impermissible on questions of fact and when a case does not disclose a substantial question of law or principle, then the certificate granted by the High Court is liable to be revoked by the Supreme Court, though such *prima facie* non-disclosure would not by itself automatically invalidate the certificate. Where the certificate vaguely states that several questions of law are involved and no substantial question of law was made out at the bar, the certificate was clearly misconceived. *Sushil Kumar* v. *Joy Shankar*, AIR 1971 SC 1543 : 1970 SCCrR 328 : (1970) 2 SCJ 461 : (1970) 2 SCR 770 : 1970 MLJ (Cri) 723.

[9823] ● ***Supreme Court in criminal appeal not review evidence afresh.***—The Supreme Court does not review the evidence afresh in a criminal case unless it is shown that the High Court had failed to take into consideration any material piece of evidence or had approached the case from a wholly wrong point of view. *Bankey Lal* v. *State of U.P.*, AIR 1971 SC 2233 : (1970) 1 SCC 504 : 1971 CrLJ 1540 : 1971 SCD 400 : 1971 UJ (SC) 330 : 1971 CivAppR (SC) 239.

[9824] ● ***Findings of facts based on appreciation of evidence.***—Findings of facts based on appreciation of evidence cannot be challenged before the Supreme Court. *Babulal* v. *State of Bihar*, AIR 1971 SC 1277 : (1971) 1 SCC 767 : 1971 CrLJ 1075 : 1971 UJ (SC) 500 : 1971 CrAppR (SC) 445 : 1971 ACrR 437 : 1971 AWR (HC) 575.

[9825] ● ***Interferes by Supreme Court with sentence when.***—The Supreme Court interferes with sentence only when it is established that it is harsh or unjust in the facts and circumstances of the case. Sometimes consideration of age has also occasioned interference, and in sentences of fine in cases of violation of statutory offence. *Surta* v. *State of Haryana*, AIR 1971 SC 803 : (1971) 3 SCC 180 : 1971 CrLJ 668 : 1971 UJ (SC) 305.

[9826] ● ***Question of principle when settled by Supreme Court.***—If the question of principle has been settled by the Supreme Court, the application of the principle to the facts of a particular case does not make the question a fit one for the Supreme Court within Article 134 (1) (*c*) of the Constitution. *State of Kerala* v. *R.E. D'Souza*, AIR 1971 SC 832 : (1971) 1 SCC 533 : 1971 CrLJ 689 : (1971) 2 SCCrR 257 : 1971 UJ (SC) 363 : 1971 KLT 262 : 22 Fac LR 178 : (1971) 1 Lab LJ 307 : 1971 Lab IC 719 : 39 FJR 65.

[9827] ● ***View of High Court found not to be sustainable.***—Where the view of the High Court is not sustainable on the statutory language and on the Import Control Policy, the Supreme Court is entitled to convert an acquittal into conviction where the respondents were fully aware of the said policy and were guilty of malpractices and of abuse of the import licence with the object of making money. *Dy. Chief Controller* v. *K.T. Kosalram*, AIR 1971 SC 1283 : (1971) 1 SCC 767 : 1971 CrLJ 1081 : (1971) 2 SCCrR 364 : 1971 SCD 99 : 1971 CrAppR (SC) 53.

[9828] ● *Habeas corpus—Non-production of Jail record.*—Where in a writ of *habeas corpus*, the jail record regarding the dates on which the detenu was said to have been produced before the Magistrate for the purpose of the hearing of the remand applications was not produced despite the High Court calling for its production, no prejudice had been caused to the detenu since the jail record could not have proved anything more than what the jail Superintendent's report proved. Hence, the Supreme Court cannot interfere with the detention order. *Gauri Shankar* v. *State of Bihar*, AIR 1972 SC 711 : (1972) 1 SCC 564 : 1972 CrLJ 505 : 1972 SCD 240 : 1972 PatLJR 252.

[9829] ● *Onus to establish alibi on accused.*—*Article 136 and Evidence Act, Section 103.*—The onus to establish *alibi* is on the accused and if there is no cogent ground for disagreeing with the High Court that the said onus has not been discharged on the evidence on record, the Supreme Court will not interfere. *Chandrika Prasad* v. *State of Bihar*, AIR 1972 SC 109 : 1972 CrLJ 22 : (1972) 4 SCC 140 : (1972) 1 SCJ 492 : 1972 MLJ (Cri) 271.

[9830] ● *Supreme Court not interfere with enhancement sentence by High Court.*—*Article 136 and CrPC, Section 386/Section 423(1-A) of the old Code.*—Where the High Court enhanced the sentence under its powers under Section 423(1-A) with reference to the facts and circumstances of the case, it cannot be said to suffer from any infirmity or lack of appreciation of facts. It cannot also be said that the High Court was not justified in observing that the sentence passed by the trial Court was lenient in the circumstances of the case. It would be wrong to interfere with the sentence passed by the High Court unless supported by rules and principles in the administration of justice. The Supreme Court will interfere with sentence only when it is established that the sentence is harsh or unjust in the facts and circumstances of the case or in view of the age or in cases of violation of statutory offences. *Nabi Bux* v. *State of M.P.*, AIR 1972 SC 495 : 1972 CrLJ 300 : (1972) 1 SCC 7 : 1972 JabLJ 152 : 1972 MPLJ 308 : 1972 MahLJ 233 : 1972 MPWR 513.

[9831] ● *Question of sentence matter of discretion.*—Though it is true that the question of sentence is a matter of discretion and when the discretion has been properly exercised along accepted judicial lines, an appellate Court should not interfere to the detriment of an accused person except for very strong reason which must be disclosed on the face of the judgment. If a substantial punishment has been given for the offence of which a person is found guilty, after taking due regard to all the relevant circumstances, normally there should be no interference by an appellate Court. On the other hand, interference will be justified when the sentence is manifestly inadequate or unduly lenient in the particular circumstances of a case. It will also be justified when the failure to impose a proper sentence may result in miscarriage of justice. *K. Moideen* v. *State of Kerala*, AIR 1973 SC 467 : (1973) 3 SCC 469 : 1973 CrLJ 671 : 1973 SCD 69.

[9832] ● *Sentence—Interference by Supreme Court.*—Ordinarily the Supreme Court does not interfere on a question of sentence but where the High Court and the Courts below awarded the sentence by taking into account inadmissible evidence when no previous conviction was shown, the Supreme Court reduced the sentence. *Nathusingh* v. *State of H.P.*, AIR 1973 SC 2783 : (1974) 3 SCC 584 : 1974 SCC (Cri) 62 : 1974 CrLJ 11.

[9833] ● *Death sentence—Reduction of.*—Apart from the question of what sentence should have been imposed by the trial Court, it is open to this Court under Article 136 to see what sentence permissible under the law would meet the ends of justice when this Court is called upon to consider that question. Assuming the trial Court was justified in imposing the capital sentence on the appellant as he was clearly on terms of improper intimacy with the deceased and was perhaps overcome by a sense of jealousy or indignation of what he thought was unfaithfulness on the part of the deceased, the long lapse of time since the imposition of the capital sentence by the trial Court and the consideration of the question of sentence by this Court, constituted a relevant ground for reducing the sentence to life imprisonment. *N. Sreeramulu* v. *State of A.P.*, AIR 1973 SC 2551 : (1974) 3 SCC 314 : 1973 SCC (Cri) 940 : 1973 CrLJ 1775 : 1973 SCD 549.

[9834] ● *Appeal by special—Leave—New point.*—Where a point regarding the applicability of Section 218, IPC, was not canvassed at the trial

Court or in the High Court and it requires elucidation of facts, the same cannot be allowed at the stage of appeal to the Supreme Court. *Sathi Prasad* v. *State of U.P.*, AIR 1973 SC 448 : (1972) 3 SCC 613 : 1972 SCC (Cri) 659 : 1973 CrLJ 344.

[9835] ● ***Scope of—Appeal by special leave limited.***—While granting special leave for appeal the scope of the appeal was limited to the question whether the Probation of Offenders Act applied to the case after considering the whole case. Where the counsel for the appellant contended that the offence for which he was convicted was not made out, the Supreme Court held that it was not open to reconsideration on a point which was open at the time of the argument on the special leave application and the order passed at the time of admission of the application was final and not open to reconsideration and the scope of the appeal should be confined within the limitation specified in the order granting special leave. *Jagdev Singh* v. *State of Punjab*, AIR 1973 SC 2427 : (1974) 3 SCC 412 : 1973 CrLJ 1614.

[9836] ● ***Summary dismissal of—Appeal by High Court—Propriety.***—Where the appeal in the High Court did raise points which were not only arguable but are also substantial requiring critical scrutiny and serious appraisal and evaluation of the prosecution evidence and the circumstance of the case, in view of the lengthy judgment of the trial Court, the importance of the opinion of the High Court on arguable points requiring consideration by that Court when questions of fact or law are open to challenge by the appellant, cannot be over-emphasised. *Rajendrapaul* v. *State of Maharashtra*, AIR 1973 SC 1180 : (1973) 4 SCC 31 : 1973 SCC (Cri) 672 : 1973 CrLJ 1171 : 1973 Cur LJ 410.

[9837] ● ***Appeal when raises questions of fact and law.***—Where in an appeal to the High Court raises questions of fact and law which cannot be said to be unsubstantial or not arguable, the High Court should not dismiss the appeal summarily by the solitary word "dismissed", but should make a speaking order indicating its reasons for repelling the contentions raised by the appellant in support of the appeal in that Court, for the reasons for dismissal would have been of valuable assistance to the Supreme Court in finally disposing of the appeal on its merits. *K.K. Jain* v. *State of Maharashtra*, AIR 1973 SC 243 : (1973) 3 SCC 299 : 1973 CrLJ 284 : 1972 SCD 1077.

[9838] ● ***New plea involving question of fact.***—The argument that the Food Inspector took the sample without calling any panch witnesses is one which involves questions of fact and the Supreme Court cannot allow the same to be raised before it for the first time. *Chittaranjan Das* v. *State of Orissa*, AIR 1973 SC 2708 : (1974) 3 SCC 383 : 1973 CrLJ 1835.

[9839] ● ***New plea.***—Where the point raised for the first time in the Supreme Court is a pure question of law, not involving any further investigation of fact, the Supreme Court permitted it to be raised before it. The question was whether the prosecution against the appellant under Section 29 of the Police Act was barred by limitation under Section 42 of the Act. The Court held that it was barred by limitation. *Pritam Singh* v. *State of Haryana*, AIR 1973 SC 1354 : (1971) 1 SCC 653 : 1971 SCC (Cri) 282 : 1973 CrLJ 1152 : 1971 SCD 529 : (1971) 3 SCR 971 : 1972 MLW (Cri) 273.

[9840] ● ***Constitutional validity of statutory provision—New point.***—Where the question challenging the constitutional validity of a statutory provision is raised in the Supreme Court for the first time, it can be allowed to be raised being a pure question of law. *Santokh Singh* v. *Delhi Administration*, AIR 1973 SC 1091 : (1973) 1 SCC 659 : 1973 CrLJ 846.

[9841] ● ***Certificate of fitness for appeal.***—The word "certify" in the Article is a strong word postulating the exercise of judicial discretion in determining if the question requiring decision by the Supreme Court involves a matter of principle or a substantial question of law of great general importance. Such certificate should not be given as a matter of course on the mere ground that the impugned decision is considered to be erroneous. It is not to be granted so as to convert the Supreme Court into an ordinary Court of further appeal. *State of Bihar* v. *Bhagirath*, AIR 1973 SC 2198 : (1973) 2 SCC 257 : 1973 CrLJ 1184 : 1973 SCD 425.

[9842] ● ***Appreciation of evidence by Courts below—Interference.***—The Supreme Court normally does not interfere with the appraisement of evidence of the trial Court and the High Court, but that would not prevent the Supreme Court from interfering if it is found on scrutiny of the evidence that it suffers from glaring infirmities. Where the appeal to the Supreme Court was not under Article 136 but under Section 2 (*a*) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 28 of 1970, it was, therefore, only proper that the evidence should be appraised by the Supreme Court with respect to all the accused persons, in order to avoid conflict in the conclusions. *Apren Joseph* v. *State of*

Kerala, AIR 1973 SC 1 : (1973) 3 SCC 114 : 1973 CrLJ 185 : (1972) 2 SCWR 734 : 1972 SCD 1143.

[9843] ● ***Appeal against acquittal.***—In an appeal against acquittal by special leave under Article 136, the Supreme Court has, no doubt, powers to interfere with findings of fact, no distinction being made between judgments of acquittal and conviction. The Supreme Court will not ordinarily interfere with the appreciation of evidence or on findings of fact unless the High Court has acted perversely or otherwise improperly or there has been a grave miscarriage of justice, or where it is found that grave injustice has been done by the High Court on plainly untenable grounds or the view taken by it is clearly unreasonable on the evidence on record. *State of U.P.* v. *Iftakhar Khan*, AIR 1973 SC 863 : (1973) 1 SCC 512 : 1973 CrLJ 636.

[9844] ● ***Conclusion of High Court final when.***—The conclusions of the High Court are final unless some serious defect in its appraisal of evidence or failure of justice or grave injustice is pointed out. *Ranbir* v. *State of Punjab*, AIR 1973 SC 1409 : (1973) 2 SCC 444 : 1973 CrLJ 1120.

[9845] ● ***Criminal jurisdiction scope.***—As a normal rule the Supreme Court does not proceed to review the evidence in criminal appeals under the Article, despite its apparent broad phraseology, unless there is some serious legal defect or a grave irregularity is committed by the Court below in reading the evidence and such illegality or irregularity has resulted in miscarriage of justice. The defects in the trial or irregularity of procedure attracting the Supreme Court's power of interference under this Article may, *inter alia*, relate to misreading of evidence or pertain to illegal or erroneous admission or exclusion of evidence, but such defects or errors must cause failure of justice. A mere technical defect or error of inconsequential nature does not call for interference. *Liyakat Mian* v. *State of Bihar*, AIR 1973 SC 807 : (1973) 4 SCC 39 : 1973 CrLJ 584 : (1973) 1 SCWR 287.

[9846] ● ***Appeal by Special leave by State Govt. against order of acquittal.***—The *locus standi* of State Governments to file appeals in the Supreme Court against judgments or orders rendered in criminal matters, particularly those commenced otherwise than on private complaints, has been recognised over the years and for valid reasons. They have, therefore, a vital stake in criminal matters which explains why all public prosecutions are initiated in the name of the Government. If the State Government is a contesting party to a matter disposed of by the High Court and if it is aggrieved by the judgment or order of the High Court, it is entitled under Article 136 (1) to ask for special leave of the Supreme Court to appeal from the decision of the High Court, though no party is entitled to obtain leave as a matter of right. *State of U.P.* v. *Ram Swarup*, AIR 1974 SC 1570 : (1974) 4 SCC 764 : 1974 SCC (Cri) 674 : 1974 CrLJ 1035.

[9847] ● ***Supreme Court when re-appraise evidence.***—Where the prosecution story is fiction-like and the judgments of the lower Courts failed even to refer to the mutually destructive statements of the PWs. on crucial points and the defence evidence was summarily rejected, the Supreme Court interfered. *Kaur Sain* v. *State of Punjab*, AIR 1974 SC 329 : (1974) 3 SCC 649 : 1974 SCC (Cri) 179 : 1974 CrLJ 358.

[9848] ● ***Appeal against acquittal—Interference by Supreme Court.***—As a self-made rule of practice, the Supreme Court does not interfere with the findings of fact reached by the High Court, unless exceptional and grave circumstances exist, or forms of legal process have been disregarded or otherwise there has been a gross miscarriage of justice. *State of U.P.* v. *J.N. Gupta*, AIR 1974 SC 753 : (1974) 4 SCC 471 : 1974 SCC (Cri) 507 : 1974 CrLJ 625 : 1974 SCD 467. **TO THE SAME EFFECT :** (1) *Raghuvir Singh* v. *State of Haryana*, AIR 1974 SC 1516 : (1974) 4 SCC 560 : 1974 SCC (Cri) 596 : 1974 CrLJ 1062; (2) *State of Punjab* v. *Sucha Singh*, AIR 1974 SC 343 : (1974) 3 SCC 484 : 1974 SCC (Cri) 1079 : 1974 CrLJ 364 : 1973 SCD 948 : 76 Pun LR 313; (3) *Gian Singh* v. *State of Punjab*, AIR 1974 SC 1024 : (1974) 4 SCC 305 : 1974 SCC (Cri) 406 : 1974 CrLJ 789; (4) *Bhoori Singh* v. *State of Punjab*, AIR 1974 SC 1256 : (1974) 4 SCC 754 : 1974 SCC (Cri) 664 : 1974 CrLJ 929; (5) *Irlapati Subbaya* v. *P.P., A.P.*, AIR 1974 SC 836 : (1974) 4 SCC 293 : 1974 SCC (Cri) 455 : 1974 CrLJ 706; (6) *Balkrishna* v. *State of W.B.*, AIR 1974 SC 120 : (1974) 3 SCC 567 : 1974 SCC (Cri) 45 : 1974 CrLJ 280 : 1974 SCD 89 : 1974 MLJ (Cri) 267; (7) *Amritsar Municipality* v. *Hazara Singh*, AIR 1975 SC 1087 : (1975) 1 SCC 794 : 1975 SCC (Cri) 354 : 1975 CrLJ 928 : 1975 MLW (Cri) 76 : 1975 KLT 275.

[9849] ● ***Supreme Court could impose sentence.***—This Court is entitled to impose a sentence which the High Court by inadvertence did not pass for the particular offence. *Sawal Das* v. *State of Bihar*, AIR 1974 SC 2276 : (1975) 3 SCC 156 : 1974 SCC (Cri) 780 : 1974 CrLJ 1306.

[9850] ● ***Concurrent findings of fact.****—Articles 132, 134, 135, 136.*—Normally, the Supreme Court would not interfere with the concurrent finding of facts recorded by the Courts below. The evidence revealed that the currency note was not recovered from the person of the appellant that the Dy. S.P. did not actually see the passing of the note from the complainant to the accused, but it was produced by the panch witness after the Dy. S. P. had finished the search, saying that the accused threw it on the ground. The offer of bribe was made, according to the prosecution at two places. Evidence about the first offer consisted of the statements of the complainant and another panch witness but the latter turned hostile. Complaints against the present complainant about his overcharging the customers on the sale of stamps, he being a stamp-vendor, were being investigated into by the appellant, a police constable, at that time. So he should be having grudge against the appellant. There was thus no independent reliable corroboration of the statements of the complainant and another as regards the first offer. In that background, there should be unimpeachable evidence as to the passing of the currency note from the complainant to the appellant. The circumstances narrated above, cast doubt on that story. As there was no corroboration of the evidence of the trap witnesses (complainant and the panch witness), the appellant is given the benefit of doubt and appeal is allowed. *Darshan Lal* v. *Delhi Administration*, AIR 1974 SC 218 : (1974) 3 SCC 595 : 1974 SCC (Cri) 73 : 1974 CrLJ 307 : (1974) 2 SCJ 236.

[9851] ● ***Power of Supreme Court—Interference with sentence.***—What is the proper sentence to impose is a matter primarily for the trial Court to decide. Where the Magistrate exercised the discretion judicially and the sentence has been confirmed by the Sessions Court and the High Court, the Supreme Court has no justification for interfering therewith. Further the sample of *Elaichi Dana* was found insect-infested and fell within the definition contained in Section 2(i)(*f*) of the Act and therefore the first clause of the proviso to Section 16 of the Act, under which the Court can impose a sentence less than the minimum prescribed has no application. The second clause of the proviso has also no application as the offence fell under Section 16(1)(*a*)(i) and not under Section 16(1)(*a*)(ii) of the Act. *Vijay Kumar* v. *State of Punjab*, AIR 1974 SC 687 : (1974) 3 SCC 769 : 1974 SCC (Cri) 245 : 1974 CrLJ 615 : 1974 CurLJ 125.

[9852] ● ***Appeal by special leave—Appreciation of evidence.***—Normally the Supreme Court does not, in an appeal by special leave, go afresh into the question of the credibility of witnesses and reappraise the evidence. But where the High Court had made only a general reference to the evidence of the eye-witnesses and observed, that all the witnesses for the prosecution inspired full confidence and there was hardly any discussion of their evidence worth the name, especially when the High Court was dealing with not only the appeal filed by the appellants but also a reference under Section 374 of the Code (Section 366 (1) of the new Code), for confirming the death sentence, it was essential for the High Court to have re-appraised the evidence in the case and come to an independent conclusion as to the guilt of the accused. Ordinarily in a criminal appeal, it is not necessary for the Court to examine the entire record for the purpose of arriving at an independent conclusion and can dismiss the appeal against conviction if the Court felt that there was no sufficient ground for interference after examining the various grounds urged before it. Hence, the Supreme Court interfered and set aside the conviction. *Charan Singh* v. *State of Punjab*, AIR 1975 SC 246 : (1975) 3 SCC 39 : 1974 SCC (Cri) 735 : 1974 CrLJ 1253.

[9853] ● ***Confirmation of death sentence.***—The Supreme Court will interfere with the finding of the High Court in a case of confirmation of death sentence if the High Court failed to take the assistance of the opinion of the trial Judge. *Charan Singh* v. *State of Punjab*, AIR 1975 SC 246 : (1975) 3 SCC 39 : 1974 SCC (Cri) 735 : 1974 CrLJ 1253 : (1975) 1 SCR 561.

[9854] ● ***Acquittal converted into conviction.***—No certificate of the High Court under that Article is required for an appeal where an acquittal has been converted into a conviction under Section 302/34, IPC, and a sentence of life imprisonment imposed upon an accused person. The appeal in such a case lies as a matter of right to the Supreme Court under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. *R.K Pandey* v. *State of M.P.*, AIR 1975 SC 1026 : (1975) 3 SCC 815 : 1975 SCC (Cri) 225 : 1975 CrLJ 870.

[9855] ● ***Appeal against conviction—Murder.***—It is true that lapse of a long period between the award of death penalty and hearing of the appeal by the Supreme Court is a factor which in the context of a particular case, may, in conjunction with other circumstances, justify the commutation of the capital sentence by the Court. But this is not an absolute rule justifying interference with the discretion of the trial Court in the matter of sentence in every case. Similarly, that the execution of the death sentence will render extinct the immediate progeny and will throw the family of the condemned prisoner orphaned and resourceless on the scrap heap of society, are matters extraneous to the judicial computer. Nevertheless these are compassionate matters which can be and will be considered by the Executive Government while exercising its powers of clemency. *Shanker* v. *State of U.P.*, AIR 1975 SC 757 : (1975) 3 SCC 851 : 1975 SCC (Cri) 270 : 1975 CrLJ 634.

[9856] ● ***Supreme Court does not normally reappraise or review evidence.***—It is well settled that while hearing an appeal under Article 136 of the Constitution the Supreme Court will normally not enter into reappraisal or the review of evidence unless the trial Court or the High Court is shown to have committed an error of law or procedure and the conclusions arrived at are perverse. The Court may interfere where on proved facts wrong inference of law is shown to have been drawn. *Dab Chand* v. *Delhi Administration*, AIR 1975 SC 1960 : (1975) 4 SCC 649 : 1975 CrlJ 1732. **TO THE SAME EFFECT** : *Dalbir Kaur* v. *State of Punjab*, AIR 1977 SC 472 : (1976) 4 SCC 158 : 1977 CrLJ 273; *Ramanbhai Naranbhai Patel* v. *State of Gujarat*, 2000 SCC (Cri) 113 (118) : 1999 CrLJ 5013 : 2000 CrLJR (SC) 138; *Rasha Mohan Singh* v. *State of Uttar Pradesh*, AIR 2006 SC 951 : (2006) 2 SCC 450 : 2006 CrLJ 1121 (1124).

[9857] ● ***Summary rejection of appeal.***—The power of summary rejection of a criminal first appeal under Section 421 should be exercised only when the Court is satisfied on perusal of the judgment and the record that there is absolutely no reasonable possibility of his success for the reasons mentioned in the order. Where there are arguable points, the High Court should give its grounds and reasons in support of its decision to reject summarily on some absolutely clinching ground. The law having been declared by the Supreme Court, it is the duty of the Bombay High Court to act in accordance with Article 141 of the Constitution and to apply it by giving proper reasons to justify whatever be its view. The order of the High Court rejecting the appeal summarily is set aside. *M.S.I. Hussain* v. *State of Maharashtra*, AIR 1976 SC 1992 : (1976) 3 SCC 548 : 1976 SCC (Cri) 459 : 1976 CrLJ 1546 : 1976 SCCrR 40 : (1976) 1 SCWR 28 : (1976) 2 SCR 687 : 1976 UJ (SC) 32 : (1976) 1 APLJ (SC) 7 : 1976 CrLR (SC) 22 : 1975 CrAppR (SC) 57 : 1976 ACrC 176.

[9858] ● ***Interference with findings on question of fact.***—The Supreme Court does not interfere with the findings on questions of fact on the strength of minor discrepancies which only indicate that the witnesses were not tutored. The fact that the apparent motive was too flimsy is no reply to the unshaken testimony of credible and natural eye-witnesses who had no motive whatsoever to implicate the accused falsely. *Faquira* v. *State of U.P.*, AIR 1976 SC 915 : 1976 SCC (Cri) 151 : 1976 CrLJ 677 : 1976 CrLR (SC) 23 : 1976 SCCrR 35 : 1976 UJ (SC) 86 : 1976 CrAppR (SC) 28.

[9859] ● ***Appeal by special leave against concurrent finding of conviction.***—In an appeal by special leave against a concurrent finding of conviction, the Supreme Court interfered and set aside the conviction as on a review of the evidence on record it was noticed that out of various items of misappropriation to the tune of Rs. 5,000/- alleged, the trial Court found an item of Rs. 50/- alone was proved and that too it was based on the tainted evidence of a solitary witness to whom the alleged misappropriated sum had been paid with a contemporaneous entry in the cash register coupled with the signature of the BDO the same day who was responsible for checking the entries, and further the trial Court itself disbelieved the evidence of the BDO in regard to some other charges against the appellant. *Mohd. Aslam* v. *State of U.P.*, AIR 1976 SC 2529 : (1976) 4 SCC 283 : 1976 CrLJ 1993 : 1976 CrLR (SC) 476 : 1976 SCCrR 591.

[9860] ● ***Interference with findings of fact in appeal by special leave.***—Ordinarily the Supreme Court does not interfere with findings of fact but where the errors of logic as well as law appear to be gross and to have occasioned a miscarriage of justice, the Supreme Court will be constrained to interfere. *State of A.P.* v. *B. Prakasa Rao*, AIR 1976 SC 1845 : (1976) 3 SCC 301 : 1976 SCC (Cri) 395 : 1976 CrLJ 1387 : 1976 CrLR (SC) 334 : 1976 SCCrR 320 : 1976 CrAppR (SC) 292 : (1975) 2 APLJ (SC) 31.

[9861] ● ***Practice not to release person sentenced to life imprisonment.***—Where the Supreme Court is not in a position to hear the appeal in a case under Section 302, IPC within a reasonable time, the Court should ordinarily release the appellant on bail in cases where special leave has been granted to him to appeal against his conviction and sentence. *Kashmira Singh* v. *State of Punjab*, AIR 1977 SC 2147 : (1977) 4 SCC 291 : 1977 SCC (Cri) 559 : 1977 CrLJ 1746 : 1977 CrLR (SC) 411 : 1977 SCCrR 365 : 1977 UJ (SC) 593 : 1977 CrAppR (SC) 312 : 1977 BBCJ (SC) 230 : 1977 ChandLR (Cri) 262 (SC) : (1977) 79 PunLR 679 : 1977 AWC 675 : 1977 PunLJ (Cri)

299 : 1977 ACrR 412 : ILR (1977) 2 Kant 1212 : 1977 CurLJ (Cri) 224 : (1977) 3 ALR 525.

[9862] ● ***Certificate under Article 134(1)(c) unnecessary when.***—*Article 134(1)(c) and Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, Section 2.*—A certificate is not necessary under Article 134(1)(c) of the Constitution if the appellants have a right of appeal under Section 2 of the Act. *Kishore Singh* v. *State of M.P.*, AIR 1977 SC 2267 : 1977 CrLJ 1937 : 1977 CrLR (SC) 436 : 1977 SCCrR 412 : 1977 UJ (SC) 688 : 1977 CrAppR (SC) 363.

[9863] ● ***Acquittal set aside by High Court—Accused convicted under Section 302, IPC.***—When two Courts come to different conclusions on the same evidence, the Supreme Court has to go through the entire evidence carefully in order to see whether the appreciation of the evidence by the Sessions Judge was so unreasonable and unrealistic as to entitle the High Court to interfere with the same. *Rajendra Prasad* v. *State of Bihar*, AIR 1977 SC 1059 : (1977) 2 SCC 205 : 1977 SCC (Cri) 308 : 1977 CrLJ 613 : 1977 CrLR (SC) 164 : 1977 SCCrR 163 : (1977) 2 SCJ 104 : (1977) 3 SCR 68 : 1977 UJ (SC) 276 : 1977 CrAppR (SC) 123 : 1977 MLJ (Cri) 449 : 1977 PatLJR 377 : 1977 ACrC 181 : 1977 ChandLR (Cri) SC 218.

[9864] ● ***Supreme Court where disagree with conclusion of lower Courts.***—Where the Supreme Court disagrees with the conclusion of the lower Courts that a particular witness was an eye-witness to the occurrence and where there is no other evidence, the conviction cannot be sustained. *C. Singh* v. *State of Haryana*, AIR 1977 SC 386 : (1976) 1 SCC 879 : 1976 SCC (Cri) 215 : 1977 CrLJ 243 : 1975 CrLR (SC) 463 : 1975 SCCrR 468 : 1975 CrAppR (SC) 306 : 1975 BBCJ 730 : 1976 Chand LR (Cri) (SC) 66 : 1975 UJ (SC) 576 : 1975 CurLJ 577 : (1975) 2 CrLT 487 : 1975 ACrC 282.

[9865] ● ***Interference with sentence when justified.***—The imposition of sentence is always a matter of discretion and unless the Supreme Court finds that the discretion has been exercised arbitrarily or capriciously or on unsound principles or that the Session Court or the High Court has not taken into account any relevant factors in imposing the sentence, the Supreme Court would not be justified in reducing the sentence, merely because it feels that a lesser sentence might well have been imposed. *Surendra* v. *State of U.P.*, AIR 1977 SC 709 : (1976) 4 SCC 232 : 1976 SCC (Cri) 565 : 1977 CrLJ 351 : 1977 CrLR (SC) 56 : 1977 UJ (SC) 60(1).

[9866] ● ***Leave granted only on question of sentence.***—Where special leave was granted by the Supreme Court limited to the question as to the nature of the offence, the appellants cannot be permitted to go behind the findings of fact reached by the High Court as it is only on the basis of those findings that it would be open to the appellants to argue that the offence committed by them is not one under Section 302 or Section 302, r/w. Section 149, IPC, but a lesser offence. On facts also, the Supreme Court held that there was no reason to interfere with the conviction and sentence recorded by the High Court. *Ram Sarup* v. *State of Haryana*, AIR 1977 SC 1792 : (1977) 4 SCC 762 : 1977 SCC (Cri) 30 : 1977 CrLJ 1439 : 1977 CrLR (SC) 89.

[9867] ● ***Appeal by special leave—Criminal matter—Interference.***—The Supreme Court will not interfere where the High Court applied its mind in setting aside the order of the Magistrate discharging the accused and directed his commitment to the Court of Session. *M. R. Dhavan* v. *Pratab Bhanu*, AIR 1978 SC 1011 : (1978) 2 SCC 184 : 1978 SCC (Cri) 186 : 1978 CrLJ 769 : 1978 CrLR (SC) 163 : (1978) 3 SCR 488 : (1978) 2 SCWR 39 : 1978 UJ (SC) 308 : 1978 CrAppR (SC) 179 : 1978 ACrC 144 : (1978) 5 CrLT 302 : 1978 CurLJ (Cri) 185 : (1978) 80 PunLR (D) 213.

[9868] ● ***Special leave to appeal granted in exceptional circumstances.***—Special leave to appeal can be granted only in very exceptional circumstances. A question of law of general public importance or a decision which shocks the conscience of the Court are some of the prime requisites for the grant of special leave. *Madhav* v. *State of Maharashtra*, AIR 1978 SC 1548 : (1978) 3 SCC 544 : 1978 SCC (Cri) 468 : 1978 CrLJ 1678 : 1978 CrLR (SC) 362 : 1978 UJ (SC) 847.

[9869] ● ***Appeal under Supreme Court (Enlargement of criminal appellate jurisdiction)—Power of Supreme Court Act.***— *Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act (28 of 1970), Section 2(a).*—By virtue of the powers conferred by the said section, the accused, who has been acquitted by the trial Court, but, on appeal by the State, convicted and sentenced by the High Court, as specified in the section, is entitled, as of right, to appeal to the Supreme Court. As a Court of appeal the Supreme Court has got to go into all the questions of fact and law and decide the case on its merits. After a right of appeal has been provided under the said section, the question, whether the High Court interfered on sufficient ground or not, will not be material, as the Supreme Court has to decide the case on its own merits. *Bhajan Singh* v. *State of Punjab*, AIR 1978 SC 1759 : (1978) 4 SCC 77 : 1978 SCC (Cri) 515 : 1979 CrLJ 7 : 1978 SCCrR 391 : (1979) 1 SCR 527 : 1978 CrAppR (SC) 330 : 1978 UJ (SC) 737 : 1978 CrLR (SC) 508.

[9870] ● ***Appreciation of evidence by Supreme Court.***—*Article 136 and Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1971).*—Undoubtedly, in respect of those accused who were convicted for an offence under Section 302/34, IPC, there was an appeal to the Supreme Court as of right, but in appeals by special leave ordinarily the Supreme Court did not undertake to reappreciate evidence. However, in a situation where the Sessions Judge rejected the entire prosecution evidence as unworthy of belief, and the High Court implicitly relied on almost the entire evidence, the Supreme Court could not escape the duty to examine the evidence for the purpose of ascertaining whether there had been any such error of law or fact as to vitiate the findings in the impugned judgment. *Muthu Naicker* v. *State of T.N.*, AIR 1978 SC 1647 : (1978) 4 SCC 385 : 1978 CrLJ 1713 : 1978 CrLR (SC) 378.

[9871] ● ***Rejection of application of bail.***—In an appeal by special leave against an order rejecting application of bail, the State cannot be allowed to rely on any new material which was not available to the High Court and which came into existence after the High Court gave its judgment. It would be unfair to the accused to make use of that material without giving him an adequate opportunity to meet it. That will entail a fairly long adjournment which may frustrate the very object of the proceedings initiated by the State. Besides, though in appropriate cases the Court has the power to take additional evidence, that power has to be exercised sparingly particularly in appeals brought under Article 136. The new development could, if the prosecution is so advised, be brought to the attention of the High Court for obtaining suitable relief. *Delhi Administration.* v. *Sanjay Gandhi*, AIR 1978 SC 961 : (1978) 2 SCC 411 : 1978 SCC (Cri) 223 : 1978 CrLJ 952 : 1978 SCCrR 252 : (1978) 2 SCJ 159 : (1978) 2 SCWR 175 : 1978 UJ (SC) 534 : 1978 CrAppR (SC) 186 : 1978 CrLR (SC) 309 : 1978 MLJ (Cri) 500.

[9872] ● ***Power of Supreme Court to interfere.***—The impugned order of the High Court was passed merely giving effect to a recent decision of the Supreme Court as to the admissibility of certain statements. The order of the High Court may be wrong or even without jurisdiction. But there can be no doubt that it has passed a correct and just order which is in consonance with the decision of this Court in *State of Orissa* v. *Ram Chandra Aggarwal*, AIR 1979 SC 87 : 1979 CrLJ 33, and is calculated to promote the ends of justice. The Supreme Court, therefore, even if the order is wrong, would in exercise of its discrectionary special leave jurisdiction refrain from interfering with the order of the High Court. *State of Rajasthan* v. *Gurucharandas*, AIR 1979 SC 1895 : (1980) 1 SCC 250 : 1979 CrLJ 1416 : 1979 UJ (SC) 887 : 1979 CrAppR (SC) 303 : 1979 CrLR (SC) 655 : 1979 CurLJ (Cri) 234 : 1979 WLN 521.

[9873] ● ***Appeal on grant of special leave.***—In an appeal on grant of special leave under Article 136 it is not necessary to deal with all the submissions. *Dalip Singh* v. *State of Punjab*, AIR 1979 SC 1173 : (1979) 4 SCC 332 : 1979 SCC (Cri) 968 : 1979 CrLJ 700 : 1979 CrLR (SC) 81 : 1979 UJ (SC) 334.

[9874] ● ***Appeal by special leave against acquittal—Scope for interference.***—Article 136 invests the Supreme Court with a plenitude of plenary appellate power over all Courts and Tribunals in India as there are no words in the Article itself qualifying that power. It is now the well settled practice of the Supreme Court to permit the invocation of the power under the Article only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court. But, within the restriction imposed by itself, the Supreme Court has the undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at those findings, has acted 'perversely or otherwise improperly'. In dealing with any appeal against acquittal, the Court will, naturally, keep in mind the presumption of innocence in favour of the accused, re-inforced, as may be, by the judgment of acquittal. But also the Court will not abjure its duty to prevent violent miscarriage of justice by hesitating to interfere where interference is imperative. Where the acquittal is based on irrelevant ground, or where the High Court allows itself to be deflected by red herrings drawn across the track, or where the evidence accepted by the trial Court is rejected by the High Court after a perfunctory consideration, or where the baneful approach of the High Court has resulted in vital and crucial evidence being ignored, or for any such adequate reason, the Supreme Court may feel obliged to step in to secure the interests of justice, to appease the judicial conscience, as it were. Dying declaration and testimony of direct witnesses were rejected by the

High Court for reasons wholly unsatisfactory. In the light of the principles set out above and in the interests of justice the order of acquittal of A1 by the High Court is set aside and his conviction by the trial Court restored. Judgment of the Madras High Court was reversed. *Arunachalam* v. *P.S.R. Setharathnam*, AIR 1979 SC 1284 : (1979) 2 SCC 297 : 1979 SCC (Cri) 454 : 1979 CrLJ 875 : 1979 CrLR (SC) 544 : 1979 SCCrR 316 : (1979) 3 SCR 482 : (1979) 2 SCJ 134 : 1979 LS (SC) 61 : 1979 MLJ (Cri) 527 : 1979 ACrC 165.

[9875] ● ***Special leave petition—Entertainment of.***—Special leave petition is not ordinarily entertained by the Supreme Court without going to the High Court in the first instance. *Rajender Kumar* v. *State*, AIR 1980 SC 1510 : (1980) 3 SCC 435 : 1980 SCC (Cri) 757 : 1980 CrLJ 1084 : 1980 CrLR (SC) 454 : 1980 ACrC 201 : 1980 CrAppR (SC) 219 : 1980 ChandCrC 127 (SC).

[9876] ● ***Appeals against acquittal.***—Supreme Court has jurisdiction to entertain appeals against judgment of acquittal by the High Court at the instance of private parties. Where in a murder case the State did not file an appeal against acquittal, a brother of the deceased, a private citizen who is neither a complainant nor a first informant, could invoke the special power under Article 136 for leave to appeal and the same would not violate Article 21. *P.S.R. Sadanatham* v. *Arunachalam*, AIR 1980 SC 856 : (1980) 3 SCC 141 : 1980 SCC (Cri) 649 : 1980 UJ (SC) 403 : 1980 CrAppR (SC) 107 : ILR (1980) HP 147.

[9877] ● ***Habeas corpus—Order of High Court to produce girl.***—The High Court ordered parents of the petitioner to produce her before it and also issued coercive process for her production. The petitioner made a statement in Supreme Court expressing apprehension that one of the respondents was after her and was threatening to kill her if she did not go with him and that she never married him or chose him as her life partner. In view of the statement, Supreme Court granted special leave and quashed the orders of the High Court and directed it to dispose of the *habeas corpus* petition pending before it in the light of her statement before the Supreme Court. Decision of the Allahabad High Court was reversed. *Kiran* v. *Anand Pratap Singh*, AIR 1980 SC 1749 : 1980 CrLJ 1268 : 1980 CrLR (SC) 473 : 1980 ACrC 247.

[9878] ● ***Appeal by special leave in criminal matter.***—In an appeal by special leave in a criminal matter where the question raised related to appreciation of evidence, there is no ground for interference by the Supreme Court. Where the State did not prefer any appeal against quantum of punishment the Supreme Court will not interfere with the quantum. *Naresh* v. *State of U.P.*, AIR 1981 SC 1385 : (1981) 3 SCC 74 : 1981 SCC (Cri) 631 : 1981 CrLJ 1044 : 1981 CrLR (SC) 432 : 1981 ALJ 674 : 1981 ACrR 285 : 1981 AWC 569 : 1981 CrAppR (SC) 243 : 1981 Chand CrC 142 : 1981 ChandLR (Cri) 637.

[9879] ● ***Complaint of offence under Copyright Act.***—*Article 136 and Copyright Act, Section 63.*—Complaint of offence under the Act was filed before the Magistrate. The accused contended before the lower Courts that the Magistrate had no territorial jurisdiction to hear the complaint. New plea raised for the first time in argument in Special Leave Petition that complainant has no copyright cannot be allowed. *Surendra Kumar* v. *Satya Varshneya*, AIR 1981 SC 1234 : (1979) 4 SCC 750 : 1980 SCC (Cri) 172 : 1981 CrLJ 740 : 1979 CrLR (SC) 521 : 1979 UJ (SC) 645 : 1979 CrAppR (SC) 403 : (1979) 2 SCWR 304.

[9880] ● ***Concurrent finding of fact.***— Concurrent findings of fact will not be interfered with by the Supreme Court. Mere circumstance that two or more Courts have taken the same view of facts could not shut out all further inquiry into the correctness of that view. Concurrence in not an insurance against charge of perversity though a strong case had to be made out in order to support the charge that findings of fact recorded by more than one Court were perverse, that is to say, they were such that no reasonable tribunal could have recorded them. Merit of the normal rule that concurrent findings ought not to be reviewed by the Supreme Court consisted in the assumption that it is not likely that two or more tribunals would come to the same conclusion unless it was a just and fair conclusion to come to. *Dudh Nath Pandey* v. *State of U.P.*, AIR 1981 SC 911 : (1981) 2 SCC 166 : 1981 SCC (Cri) 379 : 1981 CrLJ 618 : 1981 CrLR (SC) 353 : 1981 ALJ 228 : 1981 CrApp R (SC) 152 : 1981 ACrR 165 : 1981 ACrLJ 1 : 1981 AWC 297.

[9881] ● ***Cryptic judgment.***—Where the High Court wrote a cryptic judgment acquitting the accused without trying to displace the reasoning of the trial Court and did not even attempt to scan the intrinsic merits of the evidence, the Supreme Court remanded the appeal. *Qamruddin* v. *Acqeel*, AIR 1982 SC 1229(1) : 1982 SCC (Cri) 135 : 1982 CrLJ 1741 (2) : 1982 ALJ 981 : 1981 Supp SCC 58

[9882] ● *Concurrent finding of fact not to be opened.*—A concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established : (1) that the finding of fact is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value, or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it, or (4) some vital piece of evidence which would tilt the balance in favour of the convict had been overlooked, disregarded or wrongly discarded. In the present case the finding of guilt recorded by the Sessions Court as affirmed by the High Court was challenged mainly on the basis of minor discrepancies in the evidence. Over much importance could not be attached to minor discrepancies. Discrepancies which did not go to the root of the matter and shook the basic version of the witnesses, therefore, could not be annexed with undue importance. More so, when the all important "probabilities factor" echoed in favour of the version narrated by the witness. *Bhoginbhai Hirjibhai* v. *State of Gujarat*, AIR 1983 SC 753 : (1983) 3 SCC 217 : 1983 SCC (Cri) 728 : 1983 CrLJ 1096 : 1983 CrLR (SC) 396 : (1983) 2 Crimes 232 : 1983 BujLH 792 : 1983 CrAppR (SC) 343 : 1983 (2) 24 BujLR 1073 : 1983 IJR (Cri) 126 : 1983 (2) ChandLR (Cri) 509 : (1983) 2 CrLC 252 : (1983) 2 SCWR 190.

[9883] ● *Appeal against acquittal.*—In an appeal against acquittal, the Supreme Court has power to substitute its own assessment of evidence for that of the High Court when it is impossible to accept its conclusion on any hypothesis. *State of Rajasthan* v. *Sukhpal Singh*, AIR 1984 SC 207 : (1983) 1 SCC 393 : 1983 SCC (Cri) 213 : 1983 SCCrR 332 : 1983 CrLJ 1923 : 1983 CrLR (SC) 54 : 1983 CrAppR (SC) 109 : 1983 UJ (SC) 171 : 1983 (1) CrLC 291 : 1983 AllCrLJ (SC) 71 : 1983 IJR (Section 2) 71.

[9884] ● *Plea that accused child at time of occurrence not taken during trial.*—*Article 136 and U.P. Children Act, 1951, Section 27.*—Plea that the accused was a child at the time of the occurrence was not taken during the trial. It was also not taken before the High Court when the appeal against the conviction of the accused under Section 302 r/w. Section 34 and Section 394, IPC, was heard. Even in the Special Leave Petition as originally filed that contention was not taken. Only in the additional grounds filed long after the filing of the Special Leave Petition that plea was taken. The Supreme Court refused to entertain that plea and dismissed the Special Leave Petition. *Sushil Kumar* v. *State of U.P.*, AIR 1984 SC 1232 : (1984) 3 SCC 123 : 1984 SCC (Cri) 418 : 1984 CrLJ 990 : 1984 CrLR (SC) 266 : 1984 CrAppR (SC) 235 : 1984 UJ (SC) 716 : 1984 ACrR 292.

[9885] ● *High Courts refusal to enhance sentence.*—Petition by State Government against High Court's refusal to enhance sentences awarded to accused for offences under Sections 408 and 477-A, IPC, the State Government failed to file necessary documents. The Supreme Court declined to invoke its jurisdiction under Article 136 though in its view the sentences awarded to the accused were inadequate and based on misplaced sympathy. *State of Karnataka* v. *Surender Kotiankar*, AIR 1984 SC 1586 : (1984) 4 SCC 370 : 1984 CrLJ 1727.

[9886] ● *High Court reducing sentence.*—Order of High Court interfered with sentence imposed by the trial Court and reducing it to sentence already undergone for offence under Section 5(2), Prevention of Corruption Act, by showing misplaced sympathy on utterly untenable reasons. Special Leave Petition was rejected even though High Court was in error in showing such sympathy. *Harbans Singh* v. *State of Punjab*, AIR 1984 SC 1594 : (1984) 4 SCC 1.

[9887] ● *Re-appreciation of evidence.*—In an offence of theft re-appreciation of evidence was done by the Supreme Court in the interest of justice. Delay in filing the FIR and presence of the accused, a Government servant, at the place of occurrence not having been proved by evidence the accused is entitled to acquittal. *Purna* v. *State of U.P.*, AIR 1984 SC 454 : (1984) 2 SCC 393 : 1984 CrLJ 187 : 1983 CrLR (SC) 258 : (1983) 1 Crimes 973 : 1983 CrAppR (SC) 201 : 1983 UJ (SC) 532 : 1983 ACrR 390 : 1983 ChandCrC (SC) 53.

[9888] ● *Enhancement of sentence.*—In an appeal under Article 136 when a notice to enhance the sentence is issued, the case would be wide open and the appellants are entitled to challenge the correctness of the order of the conviction. *Sadha Singh* v. *State of Punjab*, AIR 1985 SC 1130 : (1985) 3 SCC 225 : 1985 CrLJ 1361.

[9889] ● *Benefit under U.P. Children Act—Availability.*—The Supreme Court allowed the appellant to raise the question regarding the benefit of the U.P. Children Act being raised before it though not raised before the High Court or the Sessions Court in the interest of justice in the special leave petition. *Hawaldar Singh* v. *State of U.P.*, AIR 1985 SC 955 : (1984) 3 SCC 617 :

1984 SCC (Cri) 453 : 1984 SCCrR 96 (2) : 1986 CrLJ 874 : 1984 ALJ 6 : (1983) 2 Crimes 940 : 1984 CrAppR (SC) 83 : 1984 CurCrJ (SC) 33 : 1984 ACrC 36 : 1984 ACrR 36 : 1984 IJR 155.

[9890] ● ***Appeal against acquittal.***—In an acquittal recorded by the High Court the Supreme Court does not ordinarily interfere. But when incriminating evidence of a satisfactory character is brushed aside mainly by relying upon a few circumstances which do not go to detract from the value of such incriminating evidence, it becomes the duty of the Supreme Court to interfere with the acquittal in order to redeem the course of justice. High Court adopted a hyper –technical approach to the entire prosecution case, particularly the direct ocular evidence furnished by the three injured witnesses whose presence at the scene of occurrence could not be doubted and much had been made of the circumstances which do not detract from their evidence. Order of acquittal was reversed. *State of U.P.* v. *Gokaran*, AIR 1985 SC 131 : 1985 SCC (Cri) 41 : 1985 SCCrR 13 : 1985 CrLJ 511 : 1984 CrLR (SC) 428 : (1984) 2 Crimes 761 : 1985 CurCrJ (SC) 10. **TO THE SAME EFFECT** : (1) *Chander Kala* v. *Ram Krishan,* AIR 1985 SC 1268 : (1985) 4 SCC 212 : 1985 CrLJ 1490 : 1985 CrLR (SC) 365 : (1985) 2 Crimes 642 : 1985 CrAppR (SC) 191.

[9891] ● ***Supreme Court can direct reversal of conviction.***—Supreme Court can direct reversal of conviction when conviction appears to be not justified in law. Powers of the Court are plenary under the Article and restrictions in the exercise, if any, are self-imposed. *Ramesh Chand* v. *State of U.P.*, AIR 1985 SC 766 : (1985) 1 SCC 464 : 1985 SCC (Cri) 100 : 1985 CrLJ 530 : 1985 CrLR (SC) 70 : 1985 CrAppR (SC) 65 : (1985) 1 ACrLR 449.

[9892] ● ***No illegality in order passed by lower Courts.***—Where there was no illegality or any question of principle involved in sentencing, the Supreme Court will not interfere. *Gopal* v. *State of Tamil Nadu*, AIR 1986 SC 702 : (1986) 2 SCC 93 : 1986 CrLJ 801 : 1986 CrLR (SC) 105 : (1986) 1 Crimes 448.

[9893] ● ***Special leave petition—Public interest litigation.***—The special leave petitions of "small men" are as much entitled to consideration as those of "big industrialists". In fact, the Supreme Court has always regarded the poor and the disadvantaged as entitled to preferential consideration than the rich and the affluent, the businessmen and the industrialists. *Bihar Legal Support Society, New Delhi* v. *C.J. of India*, AIR 1987 SC 38 : (1986) 4 SCC 767 : 1986 SCC (Cri) 537 : 1987 CrLJ 313 : (1986) 4 Supreme 264 : 1986 ACrC 563.

[9894] ● ***Retrial—Supreme Court not to order.***—*Article 136 and Section 321, CrPC* —The Supreme Court will not embark upon a roving enquiry into facts and evidence and set aside the consent given by the Special Judge under Section 321, CPC and direct a retrial. *Sheo Nandan Paswan* v. *State of Bihar*, AIR 1987 SC 877 : (1987) 1 SCC 288 : 1987 SCC (Cri) 82 : 1987 CrLJ 793 : 1987 CrLR (SC) 51 : (1986) 4 Supreme 393 : (1987) 1 (1) IJ Rep 253(2).

[9895] ● ***Bride burning.***—In a case of murder of bride burning, one of the accused was acquitted but where no appeal was preferred against the said acquittal, the Supreme Court is not called upon to go into that aspect any further in an appeal filed by the convicted person. *Kailash Kaur* v. *State of Punjab*, AIR 1987 SC 1368 : (1987) 2 SCC 621 : 1987 SCC (Cri) 431 : 1987 CrLJ 1127 : 1987 Rajdhani LR 327 : (1987) 1 Supreme 614 : (1987) 2 SCJ 516 : (1987) 2 Crimes 418 : 1987 CrLR (SC) 393 : 1987 APLJ (Cri) 184 : 1987 IJR 281 : (1987) 2 UJ (SC) 223 : (1987) 2 HinduLR 167 : (1987) 2 RecCrR 63 : 1987 PatLJR (SC) 45 : (1987) 2 DMC 94 : (1987) 2 LS (SC) 7.

[9896] ● ***Appeal against connection by co-accused.***—*Article 136 and CrPC, Section 386.*—Where the appeals of certain accused were allowed by the Supreme Court, it held that the conviction and sentence of the non-appealing accused could not also be sustained consistent with the findings in and the result of the said appeals as the findings were interdependent and inextricably integrated and therefore set aside the conviction and sentence of the non- appealing accused also. *Hari Nath* v. *State of U.P.*, AIR 1988 SC 345 : (1988) 1 SCC 14 : 1988 SCC (Cri) 14 : 1988 CrLJ 422 : JT1987 (5) SC 316 : (1987) 3 Crimes 667 : (1987) 2 IJ Rep 561 : 1987 ACrC 582 : 1988 BLJ 55.

[9897] ● ***Power of Supreme Court to review and reappreciate evidence.***—The Supreme Court in appeal can review and reappreciate evidence. Order of acquittal grossly erroneous : on reappreciation of facts it can be set aside. *State of U.P.* v. *Krishna Gopal,* AIR 1988 SC 2154 : (1988) 4 SCC 302 : 1989 CrLJ 288 : (1988) 3 Crimes 195 : 1988 All WC 1328 : 1988 All Cr R 668.

[9898] ● ***Concurrent finding of fact.***—Where the High Court has reached conclusion based on partly inadmissible evidence and partly on circumstances which are not justified on the basis of evidence, or partly on facts which are not borne out from the evidence on record, it cannot be contended that in an appeal under Article 136 this Court will not go into the facts of the case and come to its own conclusion. Some of the findings of fact reached by the High Court cannot be said to be such which are concurrent or conclusive. This Court is, therefore, put to the necessity of examining the evidence wherever it is necessary. *Kehar Singh* v. *State (Delhi Adm.)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1989 CrLJ 1 : (1988) 3 Crimes 209.

[9899] ● ***Concurrent findings by Trial Court as well as High Court that there was fish on—Board which included hold of trawlers.***— *Article 136 and Maritime Zones of India (Regulation of Fishing By Foreign Vessels) Act (1981), Sections 13, 22 & 25. Maritime Rules (1982), R. 16.*— Where it was contended that at the time of apprehension of the trawlers, no fish was found on board and the net was not wet, that there was no evidence that fish on board was seized nor there was any evidence to show what had happened to the first or who put the fish in the hold of the trawlers and that no presumption under Section 22 of the Act could be drawn, that the trawlers were engaged in fishing within the exclusive Economic Zone of India in contravention of the provisions of the Act and the Rules made thereunder, this contention could not be considered in the appeal by special leave as there had been concurrent findings by the trial Court as well as by the High Court that there was fish on board which included the hold of the trawlers. *C.T. Shang* v. *S.D. Baijal*, AIR 1988 SC 603 : (1988) 1 SCC 653 : 1988 SCC (Cri) 162 : 1988 CrLJ 855 : (1988) 1 Crimes 524 : (1988) 1 SCWR 128 : (1988) 90 Bom LR 56 : (1988) 1 ACrLR 468.

[9900] ● ***Special leave—Grant of—Parties not entitled to open out and argue whole case.***—The grant of special leave does not entitle the parties to open out and argue the whole case and they are not entitled to contest all the findings recorded by the Courts below unless it is shown by error apparent on the record that substantial and grave injustice has been done. *Appabhai* v. *State of Gujarat*, AIR 1988 SC 696 : 1988 Supp SCC 241 : 1988 CrLJ 848 : (1988) 1 Crimes 606.

[9901] ● ***Appeal against acquittal.***—The principles relating to limitations of the appellate Court in an appeal against acquittal do not detract from the plenitude of the power of the appellate Court to review and re-appreciate the evidence if the order of acquittal on a review of the evidence is found to be grossly erroneous. The powers of the appellate Court, in an appeal against acquittal, are not different from or inconsistent with, those that the appellate Court has in an appeal against a conviction; the difference is, as is sometimes stated, more in the manner of approach and the perspective rather than in the content of the power. The expressions "very substantial reasons", "substantial and compelling reasons", "strong reasons" used in several pronouncements which tend to qualify the power of the appellate Court do no more than to convey the principles stated by the Judicial Committee in *Sheo Swarup's* case, AIR 1934 PC 227 (2), and in *Sanwat Singh* v. *State of Rajasthan*, AIR 1961 SC 715 : (1961) 1 CrLJ 766, and *Chandra Kanta Debnath* v. *State of Tripura*, AIR 1986 SC 606 : (1986) 1 SCC 549 : 1986 CrLJ 809. There is thus no immunity to an erroneous order from a strict appellate scrutiny. But the appellate Court where it finds justification to reverse an acquittal must record reasons why it finds the lower Court wrong. This, in the ultimate analysis, is merely a reiteration of a principle which every exercise of appellate jurisdiction in the matter of reversal of an order under appeal is subject to. *State of U.P.* v. *Krishna Gopal*, AIR 1988 SC 2154 : (1988) 4 SCC 302 : 1988 SCC (Cri) 928 : 1989 CrLJ 288 : 1988 (3) Crimes 195 : 1988 ACrR 668 : 1988 AWC 1328 : 1988 CrAppR (SC) 233.

[9902] ● ***Interference by Supreme Court in order of acquittal.***—The scope of appeals under Article 136 is undisputedly very much limited. This Court does not exercise its overriding powers under Article 136 to re-weigh the evidence. The Court does not disturb the concurrent finding of facts reached upon proper appreciation. Even if two views are reasonably possible, one indicating conviction and the other acquittal, this Court will not interfere with the order of acquittal. But this Court will not hesitate to interfere with the acquittal if it is perverse in the sense that no reasonable person would have come to that conclusion, or if the acquittal is manifestly illegal or grossly unjust. *State of U.P.* v. *Anil Singh*, AIR 1988 SC 1998 : 1988 Supp SCC 686 : 1989 CrLJ 88 : (1988) 3 Crimes 367 : 1988 ACrR 621.

[9903] ● ***Plea of right of defence.***—High Court when acquits without intelligent appreciation of the question whether accused acted in exercise of right of private defence, acquittal is to be reversed by Supreme Court (here Supreme Court held that two person in exercise of right of private defence cannot kill two and injure third; the plea of right of private defence *per se* unbelievable) *State of U.P.* v. *Jodha Singh*, AIR 1989 SC 1822 : (1989) 3 SCC 465 : 1989 CrLJ 2113.

[9904] ● ***Lower Courts if misread evidence.***—If the lower Courts have misread evidence or have ignored vital pieces of evidence resulting in miscarriage of justice, it is the duty of the Supreme Court to interfere. *Suryamoorthi* v. *Govindaswamy*, AIR 1989 SC 1410 : (1989) 3 SCC 24 : 1989 CrLJ 1451.

[9905] ● ***Appeal against conviction.***—Even in appeal against conviction the Supreme Court will not generally reappreciate evidence. In this case, however on merits the conviction was found justified. *Rattan Singh* v. *State of Haryana*, AIR 1989 SC 1401 : 1989 Supp (1) SCC 548.

[9906] ● ***Supreme Court when can interfere with findings of fact of Courts below.***—Supreme Court ordinarily is slow, in substituting its findings of fact in place of those recorded by the Courts below. However, this does not mean that the Supreme Court has no power to do so. The discretion conferred by Article 136 of the Constitution is wide enough to permit the Supreme Court to interfere even on facts in suitable cases if the approach of the Courts below has resulted in grave miscarriage of justice. By way of self-imposed discipline, the Supreme Court does not ordinarily reappreciate or reassess the evidence unless it is of opinion that the approach of the Courts below has resulted in failure of justice necessitating correction. *Suryamoorthi* v. *Govindaswamy*, AIR 1989 SC 1410 : (1989) 3 SCC 24 : 1989 CrLJ 1451 : (1989) 2 Crimes 176 : 1989 All Cr C 389.

[9907] ● ***Undue delay in execution of death sentence.***—Undue delay in execution of death sentence will entitle the condemned person to approach the Supreme Court under Article 32, Constitution of India. But the Court then will examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by judicial process. The Court will have no jurisdiction to reopen the conclusion reached by Court while finally maintaining the sentence of death. *Triveniben* v. *State of Gujarat*, AIR 1989 SC 1335 : (1989) 1 SCC 678 : 1990 CrLJ 1810 : (1989) 2 Crimes 391 : (1989) 30 Guj LR 622 : 1989 Cur CrJ (SC) 153.

[9908] ● ***Death of accused in Police lockup.***—Evidence on record established that an arrested accused suffered death in police lock up because of third-degree-method torture on him. The conviction by trial Court on police officer was reversed by High Court on the finding that a witness, a police officer of some other station would not depose falsely. The Supreme Court can interfere and restore conviction because High Court entirely misdirected itself. Instances are not rare that police officer to save his colleague deposes falsely.

Death in police custody by reason of third-degree-torture, calls for deterrent sentence on concerned police officer. *Gourishanker Sharma* v. *State of U.P.*, AIR 1990 SC 709 : 1990 Supp SCC 656.

[9909] ● ***Reappreciation of evidence.***—Though generally speaking the Supreme Court does not reappreciate the evidence in an appeal, on special leave being granted, under Article 136 of the Constitution of India where two Courts have appreciated the evidence and recorded concurrent findings, but since the High Court acquitted some of the accused, the Supreme Court may appreciate evidence to determine whether the conviction and sentence recorded against the three appellants is justified or not. *Chinta Pulla Reddy* v. *State of Andhra Pradesh*, AIR 1993 SC 1899 : 1993 Supp (3) SCC 134 : 1993 (1) Crimes 1136 : JT 1993 (3) SC 633 : 1993 (2) CCR 100 (SC).

[9910] ● ***Communal riot—Causing death of woman and child.***—A crowd consisting of Muslims unlawfully damaged the house properties of Hindus and attacked some of them resulting in death of wife and daughter of a PW. An injured witness gave details of incident. A dying declaration too gave details of the incident implicating the accused. Conviction followed reversing the acquittal passed by trial Court under TADA by apex Court. *Paresh Kalyandas* v *Sadia Yakabhi*, AIR 1993 SC 1544 : 1993 (3) SCC 95 : 1993 CrLJ 1857 : JT 1993 (2) SC 435 : 1994(1) Crimes 20 (SC) : 1993 (3) CCR 244 (SC).

[9911] ● ***Supreme Court normally not appraise evidence.***—Normally Supreme Court does not appraise the evidence for itself under Article 136 of the Constitution. The conclusion of High Court on question of fact on appreciation of evidence is considered to be final. *Arjun* v. *State of Rajasthan*, AIR 1994 SC 2507 : 1994 Supp (3) SCC 189 : 1995 CrLJ 410 (SC).

[9912] ● ***Supreme Court not justified in reopening whole case and disturb concurrent findings of fact.***—While exercising jurisdiction under Article 136 of the Constitution, the Supreme Court will not be justified in re-opening the whole case and disturbing concurrent findings of fact recorded on a pure appreciation of evidence unless those findings have been recorded in utter disregard of mandatory provisions of law resulting in serious prejudice and substantial injustice to the accused. The other area justifying interference would be where on the proved facts wrong inference of law has been drawn or the conclusion on facts are manifestly perverse based on no evidence. *Ranbir Yadav* v. *State of Bihar*, AIR 1995 SC 1219 : (1995) 4 SCC 392 : 1995 SCC (Cri) 728 : 1995 CrLJ 2665.

[9913] ● ***Enhancement of sentence.***—Trial Court acquitted the accused and the High Court convicted him under Section 226, IPC. The Supreme Court under Articles 136 and 142 can issue *suo moto* rule of enhancement of sentence. *E.K. Chandrasenan* v. *State of Kerala*, AIR 1995 SC 1066 (1067) : (1995) 2 SCC 99 : 1995 SCC (Cri) 329 : 1995 CrLJ 2060 : (1995) 1 Crimes 421.

[9914] ● ***Supreme Court not be justified in disturbing concurrent findings of fact.***—Sitting in the jurisdiction under Article 136, the Supreme Court will not be justified in re-opening the whole case and disturbing concurrent findings of fact recorded on a pure appreciation of evidence unless we hold that those findings have been recorded in utter disregard of mandatory provisions of law resulting in serious prejudice and substantial injustice to the accused. The other area justifying our interference would be where on the proved facts wrong inference of law has been drawn or the conclusions on facts are manifestly perverse and based on no evidence. *Ranbir Yadav* v. *State of Bihar*, AIR 1995 SC 1219 : (1995) 4 SCC 392 : 1995 CrLJ 2665 : (1995) 2 Crimes 161 (SC).

[9915] ● ***Concurrent finding of facts by Court below—Challenge to.***—In an appeal pursuant to leave under Article 136, Constitution the appellant challenged concurrent findings of fact recorded by Courts below against the appellant. The apex Court held, the apex Court in appeals against conviction recorded by the trial Court and as confirmed by the High Court usually and as a matter of course does not interfere with concurrent findings of fact based on appreciation of relevant prosecution evidence. In the present case both the Courts, the trial Court as well as the High Court, have placed implicit reliance on eyewitness account of prosecution witnesses. Consequently unless the concurrent findings of fact reached by both the Courts below are found to be unreasonable or are found to involve any error of law or they are shown to be against the weight of evidence, they would not be lightly interfered with by this Court in appeals on special leave. *Gitesh Yadav* v. *State of M.P.*, AIR 1996 SC 3098 : (1996) 8 SCC 186 : 1996 CrLJ 2159 : (1996) 2 Crimes 1 (SC).

[9916] ● ***Murdering wife by strangulation—Concurrent finding of fact.***—In a case by concurrent finding of fact both the Courts held the accused guilty of murdering his wife by strangulation. The findings were based on circumstantial evidence and autopsy report. The question was whether it was a death by suicide or homicide. One doctor in panel categorically stated the fracture of hyoid bone was ante-mortem in nature. He was corroborated by autopsys surgeon. The Supreme Court refused to interfere in appeal. Mere observation made by a doctor that possibility of hyoid bone fracturing in process of dead body being taken out from well does not in any way weaken the prosecution case. *Tej Prakash* v. *State of Haryana,* (1996) 7 SCC 322 : 1996 SCC (Cri) 412 : 1996 CrLJ 394 (SC) : JT 1995 (7) SC 561 : 1995 (5) Scale 734 : 1995(4) CCR 132 (SC).

[9917] ● ***Normally Supreme Court not reappreciate evidence.***—As a normal, rule, the Supreme Court does not in exercise of its jurisdiction under Article 136 of the Constitution of India, while hearing appeals by special leave, reappreciate the evidence, where two Courts have concurrently appreciated the evidence and arrived at findings of guilt of the accused persons. An effort to do justice between the parties is a compulsion of judicial conscience and Courts can and should strive to evolve an appropriate remedy in the facts and circumstances of a given case so as to further the cause of justice. *C.Chenga Reddy* v. *State of A.P.*, AIR 1996 SC 3390 : (1996) 10 SCC 193 : 1996 SCC (Cri) 1205 : 1996 CrLJ 3461 : JT 1996 (6) SC 739 : 1996 (6) Supreme 83 : (1996) 3 Crimes 119 (SC).

[9918] ● ***Contempt proceedings—Nature of.***—Contempt proceeding is not a dispute between two parties, the proceeding is primarily between the Court and the person who is alleged to have committed the contempt of Court. The person who informs the Court or brings to the notice of the Court that anyone has committed the contempt of such Court is not in the position of a prosecutor, he is simply assisting the Court so that the dignity and the majesty of the Court is maintained and upheld. It is for the Court, which initiates the proceeding to decide whether the person against whom such proceeding has been initiated should be punished or discharged taking into consideration the facts and circumstances of the particular case. Leave to appeal to Supreme Court is not available. *State of Maharashtra* v. *Mahboob S Allibhoy*, AIR 1996 SC 2131 : (1996) 4 SCC 411 : 1996 SCC (Cri) 675 : 1996 CrLJ 2879 : JT 1996 (6) SC 151 : 1996 (4) Scale 158 : 1996 (2) CCr 207 (SC) : (1996) 2 Crimes 130 (SC).

[9919] ● *Supreme Court's interference under Article 136 with concurrent finding of fact when called for.*—While exercising its jurisdiction under Article 136 of the Constitution of India, if the Supreme Court notices that concurrent finding of fact has been recorded by the trial Court and the appellate Court on the testimony of a witness, ignoring or overlooking other evidence and attending facts and circumstances which have an important bearing on the credibility of such a witness, it becomes the duty of this Court to reappraise the evidence, and interfere, with such finding if the interest of justice so requires. *Nayudu Srihari* v. *State of A.P.*, (1996) 10 SCC 393 : 1996 SCC (Cri) 1285 : 1996 CrLJ 4441 : JT 1996 (10) SC 519 : 1996 (6) Scale 86 : (1996) 3 Crimes 154 (SC).

[9920] ● *Power of Supreme Court to convert finding of acquittal into one of conviction.*—In appeal against acquittal, if acquittal is found wrongful, then Supreme Court would be competent to convict the accused and the case would not be sent back on remand for retrial. The limitation imposed by Section 401(3), CrPC cannot be read into the power of Supreme Court under Article 136, CrPC Article 136 is not circumscribed by any limitation. In any case power under Article 142, Constitution is available to pass such order as may be deemed appropriate to do complete justice. *Dharama* v. *Nirmal Singh Bitter*, AIR 1996 SC 1136 : 1996 (7) SCC 471 : 1996 SCC (Cri) 444 : 1996 CrLJ 1631 (SC) : JT 1996 (4) SC 608 : 1996(1) CCR 139 (SC).

[9921] ● *Finding arrived without considering admission of adversary.*—It is no doubt true that a finding arrived at on a question of fact by the lower Appellate Court or the High Court is not ordinarily interfered with by this Court under Art. 136 of the Constitution. But if such finding is recorded by non-consideration of some vital piece of evidence or admission of the adversary, then this Court will be fully justified in interfering with the finding in question. In the case in hand, the consistent evidence being that Panditrao and Shevantabai were living together for long years as husband and wife and plaintiff No. 1 is their son and the defendant also admitted the aforesaid fact but contended that there had been no valid marriage between Panditrao and Shevantabai, a legal presumption does arise, though the presumption is rebuttable and this presumption has not been rebutted by the defendant. It has been held by this Court in the case of *S.P.S. Balasubramanyam* v. *Surutayan* (1994) 1 SCC 460 : AIR 1994 SC 133 that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two. But the presumption is rebuttable. The High Court, committed an error of law in recording a finding that the presumption would arise only if the factum of marriage is proved. We are afraid if factum of marriage is proved, the question of raising presumption does not arise. The lower Appellate Court on the other hand has merely entered into the arena of conjecture and surmises by interfering with the finding of the Trial Judge without considering the relevant and material evidence on the point. In this view of the matter findings arrived at by the lower Appellate Court as well as by the High Court on the question of relationship of Panditrao and Shevantabai cannot be sustained in law. In our considered opinion a legal presumption arises on the admitted fact that they were living together as husband and wife and the said presumption has not been rebutted. We would accordingly set aside the findings of the High Court as well as the findings of the Additional District Judge on this score and restore the finding of the Trial Judge on this score and hold that Shevantabai was the wife of Panditrao and plaintiff's having been begotten by Shevantabai from Panditrao are the legal heir's over the property of Panditrao. *Ranganath Parmeshwar Pandit Rao Mali* v. *Eknath Gajanan Kulkarni*, AIR 1996 SC 1290 (1292) : (1996) 7 SCC 681 : JT 1996 (1) SC 293.

[9922] ● *Power of Supreme Court under Article 142 not conditioned by any statutory provision.*—The amplitude of powers available to this Court under Article 142 of the Constitution of India is normally speaking not conditioned by any statutory provision but it cannot be lost sight of that this Court exercise jurisdiction under Article 142 of the Constitution with a view to do justice between the parties but not in disregard of the relevant statutory provisions. The transfer of the appeal to the High Court, after hearing the appeal on merits and finding that offence under Section 3 of the Terrorist and Disruptive Activities (Prevention) Act on the basis of the evidence led by the prosecution, was not made out, is neither desirable nor proper nor permissible let alone justified. There cannot be piece meal hearing of an appeal on merits—first by this Court to be entered in the register maintained for the purpose and shall be forwarded by the Collector or the DC who receives them under the relevant rule, with or without enquiry, as the case may be, to the Central Government for its consideration in accordance with law; even returned applications shall be called back or fresh ones shall be obtained from the concerned persons and shall be processed and forwarded to the Central Government for consideration; (5) while the application of any individual chakma is pending consideration, the first respondent shall not evict or remove the concerned person from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision in that behalf. *National Human Rights Commission* v. *State of Arunachal Pradesh*, AIR 1996 SC 1234 (1239) : (1996) 1 SCC 742 : JT 1996 (1) SC 163.

[9923] ● ***Concurrent finding of fact by both lower Courts that injuries caused by accused.***—Twelve persons who shot the Harijans entailing killing of some of them were convicted of Section 304, Part II read with Section 149, IPC. The only dispute on the anvil of Supreme Court was when the appellants before the Court were responsible for causing the injuries on the victim. The question essentially was one of fact and both the trial Court and High Court came to a concurrent finding of fact that the said injuries had been caused by the appellants. The said conclusion also flowed from the evidence on record. A dying declaration reliable and cogent was also on record implicating the appellants. The Supreme Court refused to interfere with conviction. *Kuldeep Singh* v. *State of Haryana*, AIR 1996 SC 2988 : 1996 CrLJ 1884 (SC).

[9924] ● ***Evidence of eye-witness when reliable.***—When the evidence of an eye-witness who is a natural, probable and disinterested witness, clearly establishes the guilt of the accused, concurrent finding of conviction recorded by both the Courts below is legally sustainable. *Surajdeo Yadav* v. *State of Bihar*, AIR 1996 SC 3157 : 1996 CrLJ 2302 : JT 1996 (6) SC 54 : 1996 (2) Crimes 54 (SC) : 1996(2) CCR 36 (SC).

[9925] ● ***Concurrent findings of lower Courts when.***—The version of eye-witnesses some of whom were injured tallied with medical evidence. FIR was lodged promptly. At the behest of some of the accused some weapons were discovered under Section 27, Evidence Act. They were convicted by the Sessions Judge and then by High Court. The Supreme Court refused to interfere with the conviction observing that in appeal against conviction when the findings of lower Courts are concurrent, well-considered, well supported and well-founded, there is no scope for interference either with the conviction or with the enhancement of sentence awarded by the High Court. *Rakesh Singh* v. *State of H.P.*, AIR 1996 SC 3173 : (1996) 9 SCC 89 : JT 1996 (4) SC 53 : (1996) 2 Crimes 45 (SC).

[9926] ● ***Concurrent findings of Courts below not brushed aside in appeal by special leave.***—In an appeal by special leave against orders of conviction, the concurrent findings reached by Courts below on evidence cannot be lightly brushed aside and unless it is shown that the findings are against the weight of evidence or are vitiated by any legal error, the Supreme Court does not interfere with them as a matter of course, especially when they are based on appreciation of evidence of eye-witnesses found to be acceptable by both the Courts below. *Ram Sanjiwan Singh* v. *State of Bihar*, AIR 1996 SC 3265 : (1996) 8 SCC 552 : 1996 CrLJ 2528 : (1996) 2 Crimes 162 (SC).

[9927] ● ***Concurrent findings of guilt against appellant when.***—All the accused persons armed with rifles attacked the victim. They fired from their respective weapons causing death of one and injury to others. The other accused are convicted under Section 324/34, IPC. The appellant-accused's plea is that the accused simultaneously fired and it is not ascertainable who shot the victim to death. But a reliable eye-witness deposed that the appellant accused fired shot first. This hit the deceased. There is concurrent finding of guilt under Section 302, IPC against the appellant. This Court refuses to interfere. *Ram Dutta* v. *State of U.P.*, (1996) 2 Crimes 106 (SC).

[9928] ● ***Conversion of acquittal to conviction.***—Conversion of acquittal to conviction by Supreme Court after unsuccessful revision against acquittal by High Court. Yes, the apex Court is competent to convert acquittal to conviction after unsuccessful revision against acquittal in High Court. *Dharma* v. *Nirmal Singh*, AIR 1996 SC 1136 : (1976) 7 SCC 471 : 1996 CrLJ 1631 : (1996) 1 Crimes 83.

[9929] ● ***Expunging of adverse remarks.***—While deciding Criminal Appeal No. 548 of 1988 some remarks came to be made against his competence as counsel. These applications have been given by him that those remarks may be deleted as he was not given opportunity to explain his conduct before those remarks were made. *K.I. Pavunny* v. *Asstt. Collector, Cochin,* AIR 1998 SC 2613 : (1998) 4 SCC 69 : 1998 CrLJ 4018 (SC) : JT 1998 (2) SC 533 : 1998 (2) Scale 354 : 1998 (4) SLT 371 : 1998 (4) Crimes 89 (SC) : 1998 (8) Supreme 289.

[9930] ● ***Court martial—Evidence.***—On the other hand, the Court Martial has expressly referred to the evidence of 'K' himself and contents of Ex. AW. Secondly, the High Court is wrong in thinking that the report fixing the responsibility on Subedar Sukhdev Singh should have been accepted and the respondent should have been exonerated. Admittedly, Subedar

Sukhdev Singh is a subordinate official. The responsibility for the stores was with the respondent. He cannot escape by contending that a subordinate official was responsible. It is for the Court Martial to consider the said question and come to a conclusion. When the Court Martial has held that the respondent was responsible for the lapse, it was not for the High Court to interfere with the same as there was no omission on the part of the Court Martial to consider the relevant evidence. *General Court Martial* v. *Aniltej Singh Dhaliwal*, AIR 1998 SC 983 : (1998) 1 SCC 756 : 1998 CrLJ 1402 at 1405, 1406 (SC) : JT 1997 (10) SC 110 : 1998 (1) Crimes 62 (SC) : 1997 (7) Scale : 1998 (1) SLT 463 : 1998 (78) FLR 414 : 1998(1) CCR 66 (SC).

[9931] ● ***Order taking cognizance of offences under Sections 193, 194, 211 and 218, IPC.***—It was, not proper and legal for the Designated Court at Chandigarh to take cognizance of the offences under Sections 193, 194, 211 and 218, IPC and to proceed with the trial of those offences against the appellant and the other three police officers. However, the process issued by the Designated Court against them need not be set aside as inquiry contemplated by Section 340(1) of the Code has already been held by this Court and a finding has been recorded that they appear to have committed these offences in relations to the proceeding which was pending in the Designated Court at Nabha. In view of sub-section (2) of Section 340 it was competent for this Court to exercise the power of trial Court under Section 340(1) and hold an inquiry. As the appellant and the three police officers *prima facie* appear to have committed the said offences it was opened to the Designated Court at Chandigarh, now that the case has been transferred to that Court, to have issued process under clause (d) to take security for their appearance before the Magistrate having jurisdiction to try those offences. *Arvindervir Singh* v. *State of Punjab*, AIR 1998 SC 2950 : (1998) 6 SCC 352 : 1998 CrLJ 4014 at 4018 (SC) : JT 1998 (5) SC 329 : 1998 (3) Crimes 125 (SC) : 1998 (4) Scale 403 : 1998 (6) SLT 520 : 1998 (2) JCC (SC) 113 : 1998 (6) Supreme 243.

[9932] ● ***Identification of accused.***—In the circumstances of the case when the accused persons entered that room, it would have been easier for the inmates of the room to identify the new entrants as the former were accustomed to the dim light at that time inside the room. If the accused who had come from outside could identify the victim, whom they hacked with the deadly weapons, there would have been no difficulty for PW 3 in identifying the accused. *Jinnat Mia* v. *State of Assam*, AIR 1998 SC 533 : (1998) 9 SCC 319 : 1998 CrLJ 851 at 853 (SC) : JT 1997 (10) SC 104 : 1997 (10) Supreme 449 : 1997 (7) Scale 614 : 1998 (1) Crimes 1 (SC) : 1998 (1) CCR 45 (SC).

[9933] ● ***Non-service of notice within period prescribed.***—The Additional Sessions Judge and the High Court recorded a finding that before filing the complaint the appellant did not serve a notice within the period prescribed under Section 138 of the Negotiable Instruments Act. Since the above finding is one of fact and based on proper appreciation of the evidence no interference in respect thereof if called for. However, the impugned judgment of the High Court so far as it set aside the order of discharge passed in favour of the appellant cannot be sustained for on perusal of the record the Apex Court finds that the trial Court was fully justified in concluding that the evidence adduced on behalf of the respondent was insufficient to make out a *prima facia* case against the appellant. *Tomy Jacob Kattikkaran* v. *Thomas Manjaly*, AIR 1998 SC 366 : (1997) 11 SCC 24 : 1998 CrLJ 661 at 662 (SC).

[9934] ● ***Scope of interference in criminal matter—Questions of fact.***—(i) The powers of this Court under Articles 136 of the Constitution *are very wide* but in criminal appeals this Court does not interfere with the concurrent findings of fact *save in exceptional circumstances.*

(ii) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has *acted perversely or otherwise improperly.*

(iii) It is open to this Court to invoke the power under Article 136 only in *very exceptional circumstances* as and when a question of law of general public importance arises *or a decision shocks the conscience of the Court.*

(iv) When the evidence adduced by the prosecution *fell short of the test of reliability and acceptability* and as such it is highly unsafe to act upon it.

(v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or *where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record. Ganga Kumar Srivastava* v. *State of Bihar*, AIR 2005 SC 3123 : (2005) 6 SCC 211 : 2005 SCC (Cri) 1424 (1429) : 2005 CrLJ 3454.

[9935] ● ***Criminal appeal—Re-appreciation of evidence.***—In the instant case, seven eye-witnesses were examined by the prosecution and out of them some were injured witnesses. The trial Court as well as the High Court concurrently found the appellant guilty. The Courts below had found the evidence of the prosecution witnesses, some of them injured witnesses was worthy of credence and could be relied upon for convicting the appellants. The medical evidence on record corroborated the case of prosecution. The Supreme Court held that in view of the concurrent findings of fact recorded by the Courts below was were found to be based on evidence on record, it was not necessary for the Supreme Court to consider the facts of the case in details. *Nagarjit Ahir* v. *State of Bihar*, AIR 2005 SC 722 : (2005) 10 SCC 369 : 2005 SCC (Cri) 1530 (1532) : 2005 CrLJ 904 : 2005 (1) Crimes 191.

[9936] ● *Criminal appeal—Where two Courts below concurrently analysed evidence.*— Where two Courts concurrently accepted the evidence to sustain the charge the Supreme Court declined to go into the meticulous analysis of the evidence at the invitation of counsel of the appellants. *Mangu Khan* v. *State of Rajasthan*, AIR 2005 SC 1912 : (2005) 10 SCC 374 : 2005 SCC (Cri) 1535 (1538) : 2005 CrLJ 1748 : 2005 (1) Crimes 338. TO THE SAME EFFECT : (1) *Sheikh Mehboob* v. *State of Maharashtra*, AIR 2005 SC 1805 : (2005) 10 SCC 387 : 2005 SCC (Cri) 1544 (1545) : 2005 CrLJ 2136 : 2005 (1) Crimes 386.

[9937] ● *Plenary powers under Article 136.*— Court as the appellate dealing with the judgments of the Trial Court and the appellate Court exercising plenary powers under Article 136 of the Constitution while directing retiral has ample jurisdiction to fix the place or the Court which should undertake such exercise, keeping in view the needs of justice in a given case with the object ensuring real, substantial, due and proper justice and that for as an inevitable and necessary corollary of the decision to set aside the judgments of the Courts below. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2004 SC 3467 : (2004) 5 SCC 353 : 2004 CrLJ 2855.

[9938] ● *Non-application of mind or erroneous application of law.*—When an appeal is heard and Appellate Court finds non-application of mind or erroneous application of law or perversity in appreciation of evidence it is not required to hear the concerned member(s) of judiciary whose orders are questioned. It is only when adverse comments are made personally attributing *mala fides* or personal bias or involvement in the case, dehors the role as a judicial functionary and that too unrelated to the subject matter of *lis*, in a given case, the position may be different. Observations made while considering the legality, propriety, reasonableness, rationality or in a given case perversity in the manner of exercise of powers and passing orders by the Courts below under challenge in relation to a particular case do not reflect adversely on the competence of the entire network of Courts. The observations made in any way cannot have demoralizing effect on the highest Court of the State Judiciary in discharging its functions. A judgment, the observations and criticisms as to the manner of disposal have to be soberly read with objectivity and not out of context or even as a provision of an Act or Rule, with pre-conceived notions apparently exposing virtually ones' own hidden desires or agendas, if any, if only this Court intends to castigate or condemn anyone, who deserved such treatment, be it an institution or authority or incumbent in office, there is no need for it to labour on an excuse to do so indirectly. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2004 SC 3467 : (2004) 5 SCC 352 : 2004 CrLJ 2855 (2861).

[9939] ● *Transfer of case for trial outside State—Petition for modification of order—Review permissible under Article 137.*—A petition was filed for modification of the order passed in *Best Bakery case* (Vide 2004 AIR SCW 2325) whereby the case was transferred for trial outside the State of Gujarat. The grounds were that the direction for fresh trial outside the State of Gujarat is unwarranted, per incuriam being not permissible in law in violation of principles of natural justice without consideration of real factual scenario, without specific prayer in that regard and reflect adversely on the credibility of the entire judiciary and administration of the State. The Court rejected the petition. A review application can be filed under Article 137 of the Constitution read with order XL of the Supreme Court Rules, 1966. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2004 SC 3467 : (2004) 5 SCC 353 : 2004 CrLJ 2855 (2858).

[9940] ● *Courts' power to transfer case for trial outside State.*—The Court has power to transfer a case outside the State for trial, if such a prayer is one amongst others, specified as incidental or ancillary to the main relief. A separate application for the purpose is not required. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2004 SC 3467 : (2004) 5 SCC 353 : 2004 CrLJ 2855 (2859).

[9941] ● *High Court's judgment perverse conclusions.*—Where the order of acquittal passed by the High Court is based on patently perverse conclusions, the same would be set aside. *State of Uttar Pradesh* v. *Devendra Singh*, AIR 2004 SC 3696 : (2004) 10 SCC 616 : 2004 CrLJ 3118 (3119).

While hearing a petition under Article 32 it is not permissible for the Supreme Court either to exercise a power of review or some kind of an appellate jurisdiction over a decision rendered in a matter which has come to the Court by way of a petition under Article 136 of the Constitution. *T.P. Maideen Koya* v. *Government of Kerala*, AIR 2004 SC 4733 : (2004) 8 SCC 106 : 2004 CrLJ 4957.

[9942] ● ***Power of Supreme Court under Article 136—Summarised.***—After discussing the earlier case law the Supreme Court summarized the law as under—

(i) The powers of the Supreme Court under Article 136 of the Constitution are very wide but in criminal appeals the Supreme Court does not interfere with the concurrent findings of the fact save in exceptional circumstances.

(ii) It is open to the Supreme Court to interfere with the findings of fact given by the High Court if the High Court has acted perversely or otherwise improperly.

(iii) It is open to the Supreme Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

(iv) When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.

(v) It is open to the Supreme Court to interfere where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record. *Ganga Kumar Srivastava* v. *State of Bihar*, AIR 2005 SC 3123 : (2005) 6 SCC 211 : 2005 CrLJ 3454 (3457).

[9943] ● ***Acquittal not interfered by Supreme Court.***—There was no evidence to suggest that soon before the occurrence the deceased was subjected to torture or harassment, the medical evidence was also ambiguous, the acquittal recorded by the High Court for offence under Section 304B reversing the judgment of conviction recorded by the trial Court was not interfered. *State of Orissa* v. *Niranjan Mahapatra*, AIR 2005 SC 970 : (2005) 9 SCC 578 : 2005 CrLJ 1427 (1427).

[9944] ● ***Bail order interfered with by Supreme Court.***—Where the High Court without looking into the gravity of the crime and threats to the life of the complainant and other witnesses given by the complaint granted bail in a case under Sections 302, 307 after conviction recorded by the trial Court by a non-speaking order, held that the Supreme Court would be justified under Article 136 of the Constitution in setting aside bail order passed by the High Court. *Panchanan Mishra* v. *Digambar Mishra*, AIR 2005 SC 1299 : (2005) 3 SCC 143 : 2005 CrLJ 1721 (1725) : 2005 (1) Crimes 244.

[9945] ● ***Private interest public interest.***—Where a private interest is pitted against the public interest, in such cases the latter must prevail over the former. *Tarak Singh* v. *Jyoti Basu*, AIR 2005 SC 338 : (2005) 1 SCC 201 (211).

[9946] ● ***Element of doubt—Supreme Court refused to interfere.***—Where the accused was alleged to have killed the deceased by fire by gun when the deceased along with his wife was going the deceased's wife is not examined in the case the presence of the two eye-witness on the spot in doubtful, there being conflict between medical evidence in the testimony of one witness and another witness being inimical, the Supreme Court refused to interfere with acquittal in view of the element of doubt permeating in the case. *State of Uttar Pradesh* v. *Shiv Kumar*, AIR 2005 SC 2992 : (2005) 11 SCC 212 : 2005 CrLJ 2604 : (2005) 2 Crimes 153.

[9947] ● ***Acquittal of accused—Supreme Court did not interfere.***—In a case under the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the Act') the High Court after considering the evidence on record found that the prosecution has not been able to make out a case under Section 16(1)(a)(ii) read with Section 7 of the Act. It accordingly allowed the appeal and acquitted the respondent. As the finding recorded by the High Court was based on evidence, the Supreme Court did not interfere with the judgment of acquittal. Accordingly appeals were dismissed. *State of Haryana* v. *Satish Kumar*, AIR 2005 SC 1297 : 2005 CrLJ 1726 (1726) : (2005) 1 Crimes 372.

[9948] ● ***Expunction of adverse remarks.***—A Sessions Judge filed Special leave petition before the Supreme Court for expunction of certain adverse remarks. The Supreme Court directed the Sessions Judge to file application before the High Court for expunction of remarks. *S.K. Bhatt* v. *State of Uttar Pradesh*, (2005) 3 SCC 634 : 2005 CrLJ 1747 (1748) : 2005 (1) Crimes 398.

[9949] ● ***Detention order—Ground for quashing.***—The detention of the detenu would not be set aside/quashed on the mere ground that the earlier incidents were state. *Collector and District Magistrate, Eluru* v. *Sangala Kondamma*, AIR 2005 SC 1165 : (2005) 3 SCC 666 : 2005 CrLJ 689 (692).

[9950] ● ***Matter totally outside scope of proceedings for contempt.***—There was also no justification for the further direction by the single Judge in the contempt proceedings, that too by an interlocutory order, that the complainant should immediately and forthwith be reinstated into the service of the Bank, and shall be deemed to be in the service of the Bank all through, that the employee shall not be prevented in any manner from discharging his duties and that he shall be paid all arrears of salary within four weeks, and that the suspension order shall be deemed to have been revoked. These were totally outside the scope of the proceedings for contempt and amounted to adjudication of rights and liabilities not in issue in the contempt proceedings. At all events, on the facts and circumstances, there was no disobedience, breach or neglect on the part of the Bank and its President and Secretary, to even assuming that such directions could be issued in the course of the contempt proceedings. Hence, directions (2) and (3) and the direction relating to revocation of suspension are liable to be set aside. *Midnapore People's Co-op. Bank Ltd.* v. *Chunilal Nanda*, AIR 2006 SC 2190 : (2006) 5 SCC 399 : 2006 CrLJ 2903 (2912).

[9951] ● ***Appeal against acquittal.***—Where the order of acquittal passed by the High Court did not suffer from infirmity, the Supreme Court declined interference with acquittal. *State of Rajasthan* v. *Yusuf*, AIR 2009 SC 2674 : (2009) 12 SCC 139 : 2009 CrLJ 3470. **To the same effect** : *State of Andhra Pradesh* v. *P. Khaja Hussain*, (2009) 15 SCC 120 : 2009 (6) SCR 660 : JT 2009 (7) SC 477.

[9952] ● ***Appeal against acquittal.***—We have found that Assadid Poddar (A-2) had absolutely no role to play in the whole affair. We have already rejected the theory of illegal intimacy between Sonali Mukherjee (A-1) and Assadid Poddar (A-2). Even otherwise, according to the evidence led by Subbash Dass (PW-5), Assadid Poddar (A-2) had no opportunity to administer the tablets to Biswajit. He was acting like a true family friend in going with Sonali Mukherjee (A-1) to receive the deceased from Chennai. Even according to Subbash Dass (PW-5), they were all through together outside the house. We do not, therefore, think that there is any case against Assadid Poddar (A-2). The High Court is correct in acquitting Assadid Poddar (A-2) and we confirm the judgment of the High Court. In the result, we also dismiss the appeal, challenging the acquittal of Assadid Poddar (A-2). *Sonali Mukherjee* v. *Union of India*, 2009 (14) SCR 858 : 2009 (13) Scale 42 : JT 2009 (12) SC 626.

[9953] ● ***Jurisdiction under Article 136.***—Jurisdiction under Article 136 of the Constitution is to be exercised wherever it is required to do so for securing the ends of justice. *S.V.L. Murthy* v. *State*, AIR 2009 SC 2717 : (2009) 6 SCC 77 : 2009 CrLJ 3930.

[9954] ● ***Reappraisal of evidence.***—While hearing an appeal under Article 136 the Supreme Court will normally not reappreciate a review the evidence unless the trial Court or High Court is shown to have committed an error of law or procedure and the conclusions arrived at are perverse. *Chikkarangiah* v. *State of Karnataka*, 2009 CrLJ 4667 : 2009 (13) SCR 1182.

[9955] ● ***Two views.***—Appellate Court would not interfere with acquittal only because another view is possible. *Union of India* v. *Bal Mukund*, (2009) 2 SCC 161 : 2009 CrLJ 2407 : 2009 (2) Crimes 171 (SC).

[9956] ● ***Appeal against conviction.***—It is one thing to say that ordinarily a concurrent finding of fact shall not be interfered with by this Court in exercise of its jurisdiction under Article 136 of the Constitution, but it is another thing to say that despite opining that accused are entitled to acquittal, a judgment of conviction passed against them should be upheld. In fact, the jurisdiction of the Supreme Court must be exercised wherever it is required to do so for securing the ends of justice and to avoid injustice. *S.V.L. Murthy* v. *State*, AIR 2009 SC 2717 : (2009) 6 SCC 77 : 2009 CrLJ 3930 (3942).

[9957] ● *Circumstances on which Court would be justified in interfering with acquittal.*—Following are some of the circumstances in which perhaps this Court would be justified in interfering with the judgment of the High Court, but these are illustrative not exhaustive.

(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record.

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) The Court must always give proper weight and consideration to the findings of the High Court.

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal. *State of Uttar Pradesh* v. *Banne*, 2009 (4) SCC 271 : 2009 CrLJ 2234 (2242) : 2009 (3) Scale 35.

25. ARTICLE 137

[9958] ● *Power of Supreme Court to—Review judgment.*—Article 137, Constitution of India gives a special power to the Supreme Court to review any judgment pronounced or order made by it. An order passed in a criminal case can be reviewed and set aside only if there are errors apparent on the record. When a Bench of Supreme Court in a proceeding admits a review petition but does not set aside the earlier judgment sought to be reviewed, the earlier judgment is not set aside. The direction to rehear the appeal is only to ascertain reasons to see whether judgment could be set aside. (Mr. Jagannath Mishra, CM, Bihar was charged for various criminal offences-the prosecution was withdrawn after Sri Mishra came to Power as CM—Supreme Court allowed the withdrawal. *Sheo Nandan Paswan* v. *State of Bihar*, AIR 1983 SC 194 : (1983) 1 SCC 438 : (1983) 2 SCR 61 : 1983 CrLJ 348.

[9959] ● *Withdrawal of prosecution.*—This decision was sought to be reviewed by a Bench consisting of two learned Judges and by A.N. SEN, J. who delivering the order said the review petition is admitted but did not set aside the earlier judgment and that judgment is reported in AIR 1983 SC 1125 : (1983) 4 SCC 104. Next, in this decision the Supreme Court (Majority) pointed out the scope after the review petition being admitted and eventually the Supreme Court held that the order allowing withdrawal of prosecution should remain unaffected. *Sheo Nandan Paswan* v. *State of Bihar*, AIR 1987 SC 877 : (1987) 1 SCC 288 : 1987 SCC (Cri) 82 : 1987 CrLJ 793 : (1986) 4 Supreme 393.

26. ARTICLE 141

[9960] ● *Decisions of English Courts persuasive authority.*—Decisions of the English Courts are merely of persuasive authority. Even where a later decision of an English Court is at variance with a decision of the Supreme Court, that cannot by itself justify an application to the Court to reconsider its earlier decision on a question of law. *Manipur Administration, Manipur* v. *Thokchom Bira Singh*, AIR 1965 SC 87 : 1965 (1) CrLJ 120 : 1965 SCD 8 : (1965) 1 SCJ 451 : (1964) 7 SCR 123 : 1965 ACrR 250 : 1965 MLJ (Cri) 233 : 1965 AWR (HC) 358 : (1965) 1 ALT 96.

[9961] ● *Nothing in Constitution to prevent Supreme Court from departing its previous decision.*—There is nothing in our Constitution which can prevent Supreme Court from departing from its previous decision if it is satisfied of its error and its baneful effect on general interests of the public. While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviations will retard its growth. *Supdt. And Remembrancer of legal Affairs, West Bengal* v. *Corporation of Calcutta*, AIR 1967 SC 997 : 1967 CrLJ 950 : (1967) 1 SCA 508.

[9962] ● *Decisions based on concession made by parties.*—Decision of the Court, based on a concession made by parties, cannot be given the same value as one given upon a careful consideration of *pros and cons* of the question raised. *Supdt. And Remembrancer of legal Affairs, West Bengal* v. *Corporation of Calcutta*, AIR 1967 SC 997 : 1967 CrLJ 950 : (1967) 1 SCA 508.

[9963] ● *Common law doctrine that crown not bound by statute.*—The rule of construction that the King is not bound by a statute unless he is expressly named or brought in by necessary implication, which was accepted by the Privy Council in interpreting statutes *vis-à-vis* the Crown is inconsistent with and incongruous in the present set up. We have no Crown. It is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination. There is no justification to accept the English canon of construction, for it brings about diverse results and conflicting decisions. The said canon of construction was not 'the law in force' within the meaning of Article 372 of the Constitution, and should not be applied for construing statutes in India. There is an essential distinction between a law and canon of construction. *Supdt. And Remembrancer of legal Affairs, West Bengal* v. *Corporation of Calcutta*, AIR 1967 SC 997 : 1967 CrLJ 950 : (1967) 1 SCA 508.

[9964] ● ***Declaration of law by Supreme Court to be respected.***—Declaration of law by the Supreme Court even if it be only by the way has to be respected. Even *obiter dictum* of that Court should be accepted as binding. But it does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force, as on facts no two cases could be similar and its own decisions which were essentially on questions of fact could not be relied upon as precedents for decision of other cases. *Amritsar Municipality* v. *Hazara Singh*, AIR 1975 SC 1087 : (1975) 1 SCC 794 : 1975 SCC (Cri) 354 : 1975 CrLJ 928 : 1975 MLW (Cri) 76 : 1975 KLT 275.

[9965] ● ***Observations made by two out of six Judges.***—Articles 141 & 22(5) and MISA, Section 8(1): where two of the six judges made certain observations, it cannot be regarded as laying down the law on the point when a bench of five judges have held otherwise. *John Martin* v. *State of West Bengal*, AIR 1975 SC 775 : (1975) 3 SCC 836 : 1975 SCC (Cri) 255 : 1975 CrLJ 637.

[9966] ● ***Judgment of Supreme Court proceeding on concession.***—Judgment of the Supreme Court proceeding on concession and not on any analysis or examination of the relevant provisions in no way helps as a precedent. *Lakshmi Shanker* v. *State (Delhi Administration)*, AIR 1979 SC 451 : (1979) 1 SCC 229 : 1979 SCC (Cri) 269 : 1979 CrLJ 207 : 1979 SCCrR 28 : (1979) 2 SCR 348 : 1979 UJ (SC) 63 : 1979 CrAppR (SC) 126 : 1978 CrLR (SC) 541 : 1979 CurLJ (Cri) 48.

[9967] ● ***Certain question when neither raised nor argued.***—When a certain question is neither raised nor argued, a discussion by the Court after "pondering over the issue in depth" would not be a precedent binding on the Courts. *Sita Ram* v. *State of U.P.*, AIR 1979 SC 745, is not an authority regarding the scope of Section 384, CrPC to summarily dismiss the appeal. *Rajpur Ruda Meha* v. *State of Gujarat*, AIR 1980 SC 1707 : (1980) 1 SCC 677 : 1980 SCC (Cri) 317 : 1980 CrLJ 1246 : 1980 CrLR (SC) 100 : (1980) 2 SCR 353 : 1980 CrAppR (SC) 57 : (1980) Guj LR 411.

[9968] ● ***Previous decision when over-ruled by larger Bench.***—Whenever a previous decision is overruled by a larger bench, the previous decision is wiped out and Article 141, Constitution of India will have no application. So acquittal by High Court based on a decision of Supreme Court overruled – acquittal to be reversed by Supreme Court. *Ramdas* v. *Sadanand*, AIR 1980 SC 126 : (1980) 1 SCC 550 : 1980 CrLJ 111.

[9969] ● ***Law laid down by Supreme Court applicability.***—Law laid down by the supreme Court applies to all pending proceedings. *A.S. Gauraya* v. *S.N. Thakur*, AIR 1986 SC 1440 : (1986) 2 SCC 709 : 1986 SCC (Cri) 249 : 1986 CrLJ 1074 : 1986 CrLR (SC) 225 : 1986 SCCrR 122 : 1986 East CrC 497.

[9970] ● ***Over-ruling view of small Bench by larger Bench.***—Larger Bench of Supreme Court can overrule the view of smaller Bench. *Triveniben* v. *State of Gujarat*, AIR 1989 SC 1335 : (1989) 1 SCC 678 : 1990 CrLJ 1810 (SC).

[9971] ● ***Handcuffing of undertrial.***— Successive pronouncement by the apex Court to the effect that handcuffing undertrial prisoner is condemnable constitutes the law of the land, a law declared by the supreme Court, Ignorance of the law overlooking the law by Magistrate is condemnable. *Khedan Mazdoor Chetha Sangal* v. *State of Madhya Pradesh*, (1994) 6 SCC 260 : 1995 CrLJ 508(SC).

[9972] ● ***Observations from—Judgment of not to be read in isolation.***—The observations from a judgment of the Supreme Court cannot be read in isolation and divorced from context in which the same were made and it is improper for any Court to take out a sentence from the judgment of Supreme Court divorced from the context in which it was given, and to treat such an isolated sentence as the complete enunciation of law by the Supreme Court. *Sukhawant Singh* v. *State of Punjab*, AIR 1995 SC 1601 : (1995) 3 SCC 367 : 1995 SCC (Cri) 524 : JT 1995 (3) SC 495 : (1995) 2 Crimes 148 (SC).

[9973] ● ***Supreme Court's order to High Court—Binding nature of.***—In a case there was a deliberate and conscious obstruction, put and recorded by the Hon'ble Judges of the High

Court, even when the judicial order of the Supreme Court was before them, in support of the prayer for an early hearing of the appeal. This case is of a negative or reverse action instead of a bare in action of far less in gravity on the part of the Judges of the High Court. Patently the order of the Supreme Court had been flouted by the High Court.

An order by the Supreme Court to the High Court should outwardly neither be commanding in nature nor be explicitly in terms of a direction. Such is not the sheen and tone of the order of the Supreme Court in this case, meant as it was, for a high constitutional institution, being the High Court. It comes from another high constitutional institution (the Supreme Court) hierarchically superior in the corrective ladder. When one superior speaks to another it is always in language sweet, soft and melodious; more suggestive than directive. Judicial language is always chaste. *Spencer* v. *Vishwadarshan Distributors*, (1995) 1 SCC 259 : JT 1995 (1) SC 113 : 1994 (5) Scale 93.

[9974] ● ***Order of Supreme Court construction of.***—The order of Supreme Court cannot and should not be construed in a manner inconsistent with the provisions of the Act. *Ravindra Singh* v. *Phool Singh*, (1995) 1 SCC 251 : JT 1994 (7) SC 503 : 1995(1) UJ 21 : 1995(75) ELJ 24.

27. ARTICLE 142, 161

[9975] ● ***Judicial power under Article 142 and executive power under Article 161 both exercisable in same field.***—The judicial power under Article 142 and the executive power under Article 161 are both exercisable in the same field, and hence they cannot be exercised at the same time. The question that immediately arises is whether the two Articles can be reconciled on the principle of harmonious construction so as to avoid the conflict between the two authorities, one judicial and the other executive, in the exercise of the same power. The first thing to be noted in this connection is that neither Article 161 nor Article 142 is made subject to the other specific words, and neither of the two Articles contains any words of limitation. Thus in the fields covered by them, both Articles are entirely unfettered. It will also be seen that the ambit of Article 161 is very much wider than that of Article 142, and it is only in a very narrow field that the power contained in Article 161 is also contained in Article 142, namely, the power of suspension of sentence during the period when the matter is sub-judice in the Supreme Court. Therefore, on the principle of harmonious construction and to avoid a conflict between the two powers, it must be held that Article 161 does not deal with the suspension of sentence during the time when Article 142 is in operation and the matter is sub-judice in the Supreme Court. It is open to the Governor to grant a full pardon at any time, even during the pendency of the case in the Supreme Court, in the exercise of what is ordinarily called "mercy jurisdiction". If such a pardon is granted after the accused person has been convicted by the Supreme Court, it has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such mercy jurisdiction. But the Governor cannot exercise his power to suspend the sentence for the period when the Supreme Court is in seizure of the case. If it were held that under Article 161 the Governor has the power to suspend the sentence during the same period when the Supreme Court is in seizure of the case, it would mean that both the judiciary and the executive would have the power to function in the same field at the same time, and this would lead to the possibility of a conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution. So long as the judiciary has the power to pass a particular order in a pending case, to that extent the power of the executive is limited, both in view of the words of Sections 401 and 426 of the Code of Criminal Procedure and of Articles 142 and 161 of the Constitution. If Articles 142 and 161 are to be harmonized, and if Sections 401 and 426 of the Code are to be similarly harmonized, that can only be done by holding that what is covered by Article 142 is not covered by Article 161, and that what is covered by Section 426 is not covered by Section 401. On such an interpretation alone, would it be possible to say that there is no conflict between the prerogative power of the Sovereign State to grant pardon and the power of the Courts to deal with a pending case judicially.

There is an essential difference between the general power to grant pardon and the power to suspend sentence in criminal matters pending before the Supreme Court. The first is an exclusively executive power vesting in the Governor under Article 161, and as it does not vest in the Supreme Court, the field covered by it is exclusively subject to the exercise of the executive power. In such a case, there can be no question of any conflict. On the other hand, the power of suspension of sentence vests both in the Supreme Court and the Governor and so the same field is covered under both Articles, and that raises the problem of a possible conflict between the two powers. It cannot be said, therefore, that the power to suspend sentence, is part of the larger power to grant pardon and can be similarly exercised. So to say it ignores the essential difference between the very nature of the two powers. For all these reasons, it must be held that once a petition for special leave to appeal under Article 136 has been filed before the Supreme Court, it is for the Supreme Court alone under Article 142 to deal with the case in accordance with law, and to pass such orders as are required in the matter of grant of bail or surrender to sentence, and the Governor has no power to make any order under Article 161 as regards suspension of sentence for the period during which the matter is sub judice in the Supreme Court. *K.M. Nanavati* v. *State of Bombay*, AIR 1961 SC 112 : (1961) 1 CrLJ 173 : (1961) 1 SCA 54 : (1961) 1 SCR 497 : (1961) 2 SCJ 100.

[9976] ● ***Apex Court when ordered CBI investigation consent of State Govt. not needed.***—When apex Court in exercise of power under Article 142, Constitution orders CBI investigation, consent of concerned State Government is not needed. *Maniyeri Madhavan* v. *Sub-Inspector of Police*, AIR 1994 SC 1033 : (1994) 1 SCC 536 : 1994 CrLJ 3063 (SC) : (1993) 3 Crimes 550 : 1994 SCW 1131.

[9977] ● ***Powers of Supreme Court under Article 142.***—The amplitude of powers available to the Supreme Court under Article 142 of the Constitution of India is normally speaking not conditioned by any statutory provision but it cannot be lost sight of that this Court exercises jurisdiction under Article 142 of the Constitution with a view to do justice between the parties but not in disregard of the relevant statutory provisions. The transfer of the appeal to the High Court, after hearing the appeal on merits and finding that offence under Section 3 of the Terrorist and Disruptive Activities (Prevention) Act on the basis of the evidence led by the prosecution, was not made out, is neither desirable nor proper nor permissible let alone justified. There cannot be piece meal hearing of an appeal on merits—first by Supreme Court to determine if an offence under the Terrorist and Disruptive Activities (Prevention) Act is made out or not any then by the High Court. *Bonkya alias Bharat Shivaji Mane* v. *State of Maharashtra*, AIR 1996 SC 257 : 1995 SCC (Cri) 1113 : (1995) 6 SCC 447 : 1996 CrLJ 414 : JT (1995) 7 SC 194.

[9978] ● ***Culpability of accused.***—Though police had chargesheeted the accused also alternatively under Section 498-A the Trial Court framed charge under Section 302 which is obviously for a graver offence and did not think it fit to frame any charge under Section 398-A, IPC But the evidence on record, as we will presently point out, clearly attracted the said charge. Under these circumstances we would have been required to remand these proceedings for re-trial on the available evidence after framing a charge under Section 498-A against the respondent accused but that exercise is not required in view of the fact that this Court in exercise of powers under Article 142 of the Constitution of India may itself examine the question of culpability of the accused for the offence under the said section in the light of the evidence on record so as to obviate protraction of trial and multiplicity of proceedings against the accused. *Balram Prasad Agarwal* v. *State of Bihar*, AIR 1997 SC 1830 : 1997 CrLJ 1640 : JT 1997 (11) SC 60 : 1997(1) Crimes 10 (SC).

[9979] ● ***Supreme Court confirmed conviction of accused.***—The accused has a further right in this case to canvass for reviewing the finding arrived at by this Court over again. The right envisaged in Section 377(3) of the CrPC 1973 shall be confined to appeals presented by Government to the High Court against sentence on the ground of its inadequacy. There is no scope to afford a further opportunity in the appeal, at this stage, since the finding of the trial Court has already been considered elaborately by re-evaluating the entire evidence in the light of the elaborate arguments canvassed on behalf of the parties. A repetition of the whole process over again is, apart from waste of time of this Court, unnecessary and unwarranted by law. *Chandrakant Patil* v. *State*, AIR 1998 SC 1165 : (1998) 3 SCC 38 : 1998 CrLJ 1613 at 1614, 1615 (SC) : 1998(1) Scale 326 : 1998(1) Supreme 428.

[9980] ● ***Appellant victim of prolonged illegal incarceration.***—Since the appellant has been made a victim of prolonged illegal incarceration due to machination of PWs 5 and 6 and other police personnel of ISBT. Police post the Apex Court direct the Delhi Government to pay him a sum of Rs. 50,000/- as compensation. The payment should be made within two months from the date of receipt of the order. The State Government will, however, be at librty to recover the said amount from the erring police officers. *Mohd. Zahid* v. *Government of NCT of Delhi*, AIR 1998 SC 2023 : (1998) 5 SCC 419 : 1998 CrLJ 2908 at 2910 (SC) : JT 1998 (3) SC 750 : 1998 (3) Scale 459 : 1998 (2) Crimes 325 (SC) : 1998 (5) SLT 216 : 1998 (4) Supreme 533.

[9981] ● ***Proceedings under Sections 406, 498A, IPC quashed under Article 142, Consti-***

tution.—Where in proceedings under Sections 406, 498-A IPC, the parties have entered into a compromise, wife complaint under the settlement has accepted Rs. 275000/- as 'Mehar', and present and future maintenance allowance, *ex facie* the settlement between the parties appears to be genuine, further continuance of the criminal proceedings under Sections 498A and 406 would be abuse of the process of the Court, would be quashed under Section 482 Cr.P.C. The Supreme Court quashed the proceedings exercising jurisdiction under Article 142 of the Constitution. *Mohd. Shamim* v. *Mahid Begum*, AIR 2005 SC 757 : (2005) 3 SCC 302 : 2005 CrLJ 889 (892) : (2005) 1 Crimes 108.

[9982] ● ***Transfer of under-trial prisoner to jail outside State.***—A convict or an under-trial who disobeys the law of the land, cannot contend that it is not permissible to transfer him form one Jail to another because the Jail Manual (a case of Bihar Jail Manual, Rules, 623, 626, 628) does not provide for it. If the factual situation requires the transfer of a prisoner from one prison to another, be he a convict or an under-trial, Courts are not to be a helpless bystander when the rule of law is being challenged with impunity. The arms of law are long enough to remedy the situation even by transferring a prisoner from one prison to another, that is by assuming that the concerned Jail Manual does not provide such a transfer. The facts of the case clearly showed that the respondent had time and again flouted the law even while he was in custody and sometimes even when he was on bail. Therefore, it was found imperative to transfer the respondent outside Bihar. The Supreme Court exercising powers under Article 142 of the Constitution transferred the respondent outside the State of Bihar, even though the Jail Manual did not contemplate such transfer. *Kalyan Chandra Sarkar* v. *Rajesh Ranjan*, AIR 2005 SC 972 : (2005) 3 SCC 284 : 2005 CrLJ 1441 (1449).

[9983] ● ***Jurisdiction of Supreme Court under Article 142.***—In a case students of MBBS were prosecuted for offences under Sections 452, 323, 504 and 506 IPC as they had dispute with college-staff and Principal. Keeping in view their future career, criminal proceedings were quashed by Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution. *Monica Kumar* v. *State of Uttar Pradesh*, AIR 2008 SC 2781 : 2008 AIR SCW 4618 (4633, 4634) : (2008) 8 SCC 781.

[9984] ● ***Power of Supreme Court to put an end to dispute.***—Under Article 142 of the Constitution the Supreme Court has jurisdiction to put an end to dispute between the parties. *Monica Kumar* v. *State of Uttar Pradesh*, AIR 2008 SC 2781 : 2008 AIR SCW 4618 (4633, 4634) : (2008) 8 SCC 781.

[9985] ● ***Power under Article 142 is a Constitutional power and hence not restricted.***—Power under Article 142 of the Constitution is a Constitutional power and, hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these Constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief, which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties. *Laxmidas Morarji* v. *Behrose Darab Madan*, 2009 (10) SCC 425 : 2009 (14) SCR 777 : JT 2009 (12) SC 291.

[9986] ● ***Supreme Court cannot render provisions of statutes nugatory.***—The Supreme Court, while exercising its powers under Article 142 cannot render provisions of statutes nugatory or otiose. *Lail David* v. *State of Maharashtra*, AIR 2009 SC 3272.

[9987] ● ***Power under Article 142, Constitution of India.***—The Supreme Court has power under Article 142 to pass appropriate orders in line with Section 320(8), CrPC in an application under Section 147 of N.S. Act in order to do justice to the parties. *K.M. Ibrahim* v. *K.P. Mohamed*, AIR 2010 SC 276 : (2010) 1 SCC 798 : 2010 CrLJ 525 : (2009) 4 Crimes 271 : JT 2009 (14) SC 651.

[9988] ● ***Power of Supreme Court under Article 142, Constitution—Compounding of offence.***—The appellant is ready and willing to get the disputes and differences between the parties settled. In that view of the matter and keeping in view the peculiar facts and circumstances of this case and with a view to do complete justice to the parties, we, in exercise of our jurisdiction under Article 142 of the Constitution of India, direct that in the event the appellant appears before the learned Magistrate within a period of four weeks from date and files an application for grant of bail, he shall be released on bail on such terms and conditions as the learned Magistrate may seem fit and proper. In the event, the appellant files an application for exemption from his personal appearance, the same may also be considered on its own merits. It would be open to the complainant to consider the offer of the appellant. *Mahesh Choudhary* v. *State of Rajasthan*, 2009 (4) SCC 439 : 2009 (3) SCR 1005 : JT 2009 (3) (SC) 314 : 2009 (2) Supreme 721 (2) : 2009 (2) Crimes 38 (SC).

[9989] ● ***Power of Supreme Court under Article 142.***—The Supreme Court can grant the relief in cases where manifest injustice has been done or where this manifest illegality or manifest want of jurisdiction. *Pazhassi Raja Charitable Trust* v. *Union of India*, AIR 2010 SC 310 : 2009 (15) SCR 1290.

28. ARTICLE 227

[9990] ● ***Article 227 not limit jurisdiction of High Court.***—Article 227 is of wider ambit; it does not limit the jurisdiction of the High Court to the hierarchy of Courts functioning directly under it under the Civil Procedure Code and Criminal Procedure Code but it gives the High Court power to correct errors of various kinds of all Courts and tribunals in appropriate cases. The subordination for the purpose of Section 3 of the Contempt of Courts Act means judicial subordination and not subordination under the hierarchy of Courts under the Civil Procedure Code or the Criminal Procedure Code. *Thakur Jugal Kishore Sinha* v. *Sitmarhi Central Cooperative Bank Ltd.*, AIR 1967 SC 1494 : 1967 CrLJ 1380 : (1967) 2 SCA 428.

29. ARTICLE 227 AND CRPC SECTION 397 (3)

[9991] ● ***Power of High Court under Article 227 discretionary.***—The power of the High Court under Article 227 is a discretionary one and should be sparingly exercised to keep subordinate Courts and Tribunals within the bounds of their authority and not to correct mere errors. *Jagir Singh* v. *Ranbir Singh*, AIR 1979 SC 381 : (1979) 1 SCC 560 : 1979 SCC (Cri) 348 : 1979 CrLJ 318 : 1979 CrLR (SC) 29 : 1979 SCCrR 182 : (1979) 2 SCR 282 : 1979 CrAppR (SC) 79 : 1979 ACrC 74 : (1979) 1 APLJ (SC) 17 : 1979 Hindu LR 179 : (1979) 81 PunLR 205 : (1979) 3 MahLR 103 : 1979 MLW (Cri) 64 : (1979) 6 CrLT 17 : 1979 MatLR (SC) 84 : 1979 MarrLJ 1.

[9992] ● ***Administrative power of High Court exercised to transfer cases.***—From the material on record it is clear that the order was passed by the High Court in its administrative jurisdiction under Article 227 of the Constitution every High Courts has superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction and its trite that this power of superintendence entitles the High Court to pass orders for administrative exigency and expediency. In the instant case, it appears that the High Court had exercised the power of transfer in the context of the petition filed by some of the accused from jail complaining that they could not be accommodated in the Court room as a result of which some of them had to remain outside. It further appears that the other grievance raised was that the Court was so crowded that even clerks of the lawyers were not being allowed to enter the Court room to carry the briefs. Such a situation was obviously created by the trial of a large number of persons. If in the context of the above facts, the High Court exercised its plenary administrative power to transfer the case to the 5th Court, which we assume had a bigger and better arrangement to accommodate the accused, lawyers and other connected with the trial, no exception can be taken to the same, particularly by those at whose instance and for whose benefit the power was exercised. *Ranbir Yadav* v. *State of Bihar*, AIR 1995 SC 1219 (1223, 1224) : (1995) 4 SCC 392 : 1995 SCC (Cri) 728 : 1995 CrLJ 2665.

30. ARTICLE 145

[9993] ● ***Law on subject fully decided by Supreme Court.***—A substantial question of interpretation of a provision of the constitution as contemplated by Article 145(3) cannot arise when the law on the subject has been finally and effectively decided by the Supreme Court. *Bhagwan Swarup* v. *State of Maharashtra*, AIR 1965 SC 682 : 1965 (1) CrLJ 608 : (1964) 2 SCJ 771 : (1964) 2 SCR 378.

31. ARTICLE 166

[9994] ● ***Executive act of State Govt. within Article 166.***—The decision that he circumstances mentioned in Section 144 (6), CrPC continue to exist and the original order passed by the Magistrate should be continued for a certain period of time or indefinitely is that of the Government. Hence it is an executive act of the State Government coming within Article 166. *State of Bihar* v. *K.K. Misra*, AIR 1971 SC 1667 : (1969) 3 SCC 337 : (1970) 2 SCA 574 : (1970) 3 SCR 181 : (1971) 1 SCJ 621 : 1969 PatLJR (SC) 93 : 1971 MLW (Cri) 24 : 1971 MLJ (Cri) 305.

[9995] ● ***Sanction to prosecute—Validity.***—Where the High Court disposed of the appeal solely on the ground that the sanction to prosecute the respondent was not given by the Governor and where the State alleged that the Chief Minister had sanctioned the prosecution earlier after seeing the case and all that remained was a formal order embodying that decision and it was that order which had been signed by the Chief Secretary during the period when Haryana was under President's Rule, the validity of the sanction would have to be decided both on the basis whether the Chief Minister had seen the case as also on the basis whether the Chief Secretary could be said to have made the sanction order and there being no materials on record to show whether the Chief Minister had seen the case, the Supreme Court remanded the matter to the High Court for fresh disposal on merits. *State of Punjab* v. *M.L. Puri*, AIR 1975 SC 1633 : (1975) 4 SCC 112 : 1975 SCC (Cri) 366 : 1975 CrLJ 1425.

32. ARTICLE 226
(See article 32, 226)—ARTICLE 233

[9996] ● ***Civil Judge when appointed as ASJ.***—When a Civil Judge is also appointed as an Additional Sessions Judge or when a person is appointed both as a Civil Judge and also an Additional Sessions Judge such appointment as an Additional Sessions Judge is made in exercise of power under Section 9 of the CrPC. When such an appointment is made, the appointee exercises both the powers of a Civil Judge and those of an Additional Sessions Judge and falls within the definition of a "District Judge" in Article 236(a). Since such a post falls under that definition it would be Article 233 and the Rajasthan Higher Judicial Service Rules which would apply to him and not Article 234 or the Rajasthan Judicial Service Rules, 1955. Articles 233 and 234 contemplate appointments falling under one or the other. It cannot fall under both the Articles. If such a construction were to be adopted, it would render the two Articles unworkable. If the appointment is in contravention of Article 233, it becomes valid under the new Article 233 A. *Prem Nath* v. *State of Rajasthan*, AIR 1967 SC 1599 : 1967 CrLJ 1569 : (1967) 2 SCA 253 : (1967) 2 SCWR 543.

[9997] ● ***Defective appointment of de facto Judge—Challenge to.***—*Articles 233 & 21 and CrPC, Section 9.*—Appointment of Sessions Judge was subsequently declared as invalid on the ground that his appointment was in violation of Article 233. Judgments pronounced by him prior to such declaration are not void. *De facto* doctrine applies to such acts and saves them. It is a doctrine of necessity and public policy. Defective appointment of a *de facto* Judge cannot be challenged in a collateral proceeding. *Gokaraju Rangaraju* v. *State of A. P.*, AIR 1981 SC 1473 : (1981) 3 SCC 132 : 1981 SCC (Cri) 652 : 1981 CrLJ 876 : 1981 CrLR (SC) 294 : 1981 CrAppR (SC) 236 : 1981 ACrC 203 : 1981 BBCJ (SC) 187 : 1981 ChandLR (Cri) 560 (SC) : 1981 ChandCrC (SC) 133 : 1981 MLJ (Cri) 258.

[9998] ● ***Writ petition for quashing detention order—Maintainability.***—A writ petition for quashing the detention order is not maintainable, before the order of detention was actually served and the detenu was taken into custody. *Union of India* v. *Vidya Bagaria*, AIR 2004 SC 2220 : (2004) 5 SCC 577 : 2004 CrLJ 2480 (2481) : 2004 (2) Crimes 362.

[9999] ● ***Competency of Legislature to create fictions.***—The submission that a law can create only a single fiction must also be repelled. This Court in *Yellappagouda Shankargouda Patil* v. *Basangouda Siddangouda Patil*, AIR 1960 SC 808; held that the Legislature may sometimes create a chain of fictions by the same Act or by succeeding Acts. If the Legislature is competent to enact a provision creating a legal fiction, we see no reason why it cannot create a chain of fictions if necessity arises. It is true that in interpreting a provision creating a legal fiction it is not open to the Court to import another fiction. *State of West Bengal* v. *Sadan K. Bormal*, AIR 2004 SC 3666 : 2004 CrLJ 3034 (3041) : (2004) 6 SC 59 : 2004 (3) Crimes 161.

[10000] ● ***Administrative action—Judicial review.***—The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability, like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient. *State of (NCT of Delhi)* v. *Sanjeev*, AIR 2005 SC 2080 : (2005) 5 SCC 181 : 2005 CrLJ 2179 (2185) : 2005 (2) Crimes 70.

[10001] ● ***Administrative Action—Reasonableness.***—To arrive at a decision on reasonableness the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles and must have been a *bona fide* one. The decision could be one of many choices open to the authority but it is for that authority to decide upon the choice and not for the Court to substitute its views. *State of (NCT of Delhi)* v. *Sanjeev*, AIR 2005 SC 2080 : (2005) 5 SCC 181 : 2005 CrLJ 2179 (2185) : 2005 (2) Crimes 70.

[10002] ● ***Magistrate taking cognizance—Jurisdiction of High Court to interfere.***—The High Courts should not ordinarily interfere with an order taken cognizance passed by a competent Court of law except in a proper case. Furthermore only such High Court within whose jurisdiction the order of subordinate Court has been passed, would have the jurisdiction to entertain an application under Article 227 of the Constitution of India unless it is established that the earlier cause of action arose within the jurisdiction thereof. *Musaraf Hossain Khan* v. *Bhagheeratha Engg. Ltd.*, AIR 2006 SC 1288 : (2006) 3 SCC 658 : 2006 CrLJ 1683 (1689).

[10003] ● ***Jurisdiction of High Court to interfere.***—In this case, the averments made in the writ petition filed by the respondent herein even if given face value and taken to be correct in their entirety would not confer any jurisdiction upon the Kerala High Court. The agreement was entered into within the jurisdiction of the Calcutta High Court. The project for which the supply of stone chips and transportation was being carried out was also within the State of West Bengal. Payments were obviously required to be made within the jurisdiction of the said Court where either the contract had been entered into or where payment was to be made. For the purpose of proving the aforementioned ingredients of the offence under Section 138 of the Act, the complainant appellant was required to prove the facts constituting the cause of action therefore none of which arose within the jurisdiction of the Kerala High Court. It is, apt to mention that in *Prem Chand Vijay Kumar*, (2005) 4 SCC 417) this Court held that cause of action within the meaning of Section 142(b) of the Act can arise only once. For the reasons aforementioned, we are of the opinion that the Kerala High Court had no jurisdiction to entertain the writ petition as no part of cause of action arose within its jurisdiction. *Musaraf Hossain Khan* v. *Bhagheeratha Engg. Ltd.*, AIR 2006 SC 1288 : (2006) 3 SCC 658 : 2006 CrLJ 1683 (1691).

[10004] ● ***Relief beyond issue cannot be granted.***—It is unfortunate that the High Court while considering the Habeas Corpus writ petition filed under Article 226 of the Constitution of India by the wife of the detenu challenging the order of detention on various grounds, on going through the materials of the department as if as an Appellate Court relying on Section 482 Code of Criminal Procedure directed the Commissioner of Customs ICD, Tughlakabad, to lodge a report with the police station Tughlakabad within a period of 15 days along with he complete of relevant documents to enable them to register a case under Sections 199, 420, 468 and 471 of the Indian Penal Code against the detenu. The said direction is not warranted considering the fact that issue before the High Court was about the validity of detention order and the curtailment of the personal liberty of detenu and nothing more. We are of the view that the High Court is not justified in issuing such direction and awarding an exemplary cost of Rs. 60,000/- payable to the sponsoring authority. *Pooja Batra* v. *Union of India*, 2009 AIR (SC) 56 : 2009 (5) SCC 296 : 2009 (5) SCR 67 : 2009 CrLJ 97 : 2009 (2) Supreme 790 : 2009 (2) Crimes 9 (SC). **To the same effect** : *Dharimal Tobacco Products Ltd.* v. *State of Maharashtra*, AIR 2009 SC 1032 : (2009) 2 SCC 370 : 2009 CrLJ 974.

[10005] ● ***Alternate remedy.***—Rule of exhaustion of alternative remedies is a rule of convenience and discretion rather than a rule of law. *Mohmmed Ishaq* v. *S. Kazam Pasha*, (2009) 12 SCC 748 : 2009 CrLJ 3063 : (2009) 3 Crimes 96.

[10006] ● ***Disappearance of writ petitioner's husband from custody—Compensation.***—Questioning correctness of the order, counsel for the appellant-State and the concerned Police officials *i.e.* respondents 2 to 4 have submitted that when the matter was pending in a criminal Court, the High Court's observations about the officials being responsible for the disappearance for the writ petitioner's husband and the conclusions about the remissness and failure of duty are clearly unsustainable. These observations are bound to have effect on the trial. It is pointed out that before this Court passed the order of stay on 10.11.2006, the State Government had already made payment of the amount as directed by the High Court on 20.5.2006. We agree with learned counsel for the appellant and the respondent police officials that when the matter is pending adjudication in a trial before a criminal Court, the High Court should not have made any observation which would have effect on the trial by the trial Court. We, therefore, dispose of this appeal with the direction that even if payment has been made pursuant to the High Court's order by the State Government, that shall not be construed to be a concession to the allegations made. The trial before the criminal Court shall be conducted in accordance with law, without being influenced by any observation made by the High Court about the remissness and neglect in duty is by the police officials. The appeal is accordingly disposed of. *State of Punjab* v. *Paramjit Kaur*, 2009 (11) SCC 255 : 2009 CrLJ 2844 : 2009 (4) SCR 1145 : JT 2009 (14) (SC) 231 : 2009 (5) Scale 33.

[10007] ● ***Issuance of writ of mandamus.***—The High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion *mala fide* or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion. *Destruction of Public & Private Properties* v. *State of Andhra Pradesh*, AIR 2009 SC 2266 : 2009 (5) SCC 212 : 2009 CrLJ 2807 : 2009 (6) SCR 439 : JT 2009 (6) (SC) 1 : 2009 (3) Supreme 557.

[10008] ● ***Suo motu initiation of public interest litigation.***—A writ petition was filed by selected candidates for the recruitment of Panchayat Secretaries. The High Court while entertaining writ petition formed an opinion *prima facie* as regards the systematic commission of fraud. In such circumstances, the High Court while dismissing writ petition entitled to initiate a *suo motu* public interest litigation. *Nirmal Singh Kahlon* v. *State of Punjab*, AIR 2009 SC 984 : 2009 CrLJ 958.

[10009] ● ***Supervisory Jurisdiction of High Court.***—The High Court apart from exercising its supervisory jurisdiction under Articles 227 and 235, of the Constitution has a duty to exercise continuance of superintendence over the Judicial Magistrates in term of Section 483 of the Code of Criminal Procedure. *Dharmeshbhai Vasudevbhai* v. *State of Gujarat*, (2009) 6 SCC 576 : 2009 CrLJ 2969 (2971, 2972) : 2009 (2) Crimes 369 (SC).

[10010] ● ***Courts cannot undertake Governmental duties and functions.***—The Courts cannot be called upon to undertake Governmental duties and functions. Courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review the Court is more concerned with the decision-making process than the merit of the decision itself. *State of Maharashtra* v. *Prakas Prahlad Patil*, AIR 2010 SC 463 : (2009) 12 SCC 159 : 2010 CrLJ 466 (467) (SC).

33. ARTICLES 245 AND 254

[10011] ● ***Law relating to preventive detention within legislative competence of Parliament.***— A law relating to preventive detention is within the legislative competence of Parliament if it is made for any of the purposes mentioned in List 1 Entry 9 or List III Entry 3 of the 7th Schedule. The Preventive Detention Act, 1950, was not *ultra vires*, since the purposes for which a detention could be made under it are covered by the said Entries. *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 CrLJ 1383 : 1950 SCJ 174 : 1950 SCR 88.

[10012] ● ***Law relating to closure of shops one day in week.***—A provision in a law relating to shops and establishments which requires all shops in the State to remain closed for one day in a week, and makes it an offence not to do so, is within the legislative competence of the State Legislature under Entry 26 of List II and Entries 24 and 33 of List III. *Manohar Lal* v. *State*, AIR 1951 SC 315 : 52 CrLJ 1237 : 1951 SCJ 475 : 1951 SCR 671 : 1951 (2) MLJ 139 : 1951 ALJ 605 : 1951 MWN 763 : 64 MLW 943 : 1951 MWN (Cri) 231.

[10013] ● ***Bombay Prohibition Act validity of.***—The provisions of the Bombay Prohibition Act, 1949, in so far as they prohibit the possession, sale or purchase of foreign imported liquor were perfectly constitutional and *intra vires* since they were covered by Entry 8 of List II. Even assuming that the impugned provisions touched the matter of "import" which falls under Entry 41 of List I, it could not be said merely on that account that these provisions were outside the legislative competence of the State Legislature, because in their pith and substance they related to activities concerning imported liquor only after it had come into State territory. *State of Bombay* v.

F.N. Balsara, AIR 1951 SC 318 : 52 CrLJ 1361 : 1951 SCJ 478 : 1951 SCR 682 : 1951 (2) MLJ 141 : 53 BomLR 982.

[10014] ● *Legislation by Parliament and State "in respect same matter".*—Article 254 provides for the situation when in relation to the same subject matter Parliament as well as a State Legislature have made laws, and the two laws are inconsistent with each other. The question which arises in such a case is which of the two laws shall prevail in that State, and that question is to be decided according to the following rules :—

(1) The law made by Parliament shall prevail over the law made by the State Legislature, whether it is passed earlier or later, and the State law shall, to the extent of its repugnancy with the Parliament law, be void. But this rule is subject to what is stated in Rule 2 below [254(1)].

(2) If the State law is *later* in time and it has received the *assent* of the President under Article 200, it shall prevail in that State over the Parliament law [254(2)].

(*Note :*—Article 200 provides that when a Bill has been passed by the State Legislature it shall be presented to the Governor of the State for his assent, but the Governor may at his discretion withhold his assent and may reserve the bill for the consideration of the President, in which case Article 201 provides that the President shall either give his assent to the Bill or withhold his assent therefrom).

(3) Even when a State Legislature has made a law inconsistent with an earlier law made by Parliament, and it is in force in that State by reason of the President's assent, Parliament shall have the power to enact a law with respect to the same subject-matter which adds to, amends, varies or repeals the law so made by the State Legislature (254 Proviso). *Zaverbhai Amaidas* v. *State of Bombay*, AIR 1954 SC 752 : 1954 CrLJ 1822 : 1954 SCA 1295 : 1954 SCJ 851 : 1955 SCR 799 : 1955 AWR (Sup) 1 : 57 BomLR 589.

[10015] ● *Essential Supplies (Temporary Powers) Act validity.*—The provisions of the Essential Supplies (Temporary Powers) Act, 1946, which declared that orders made under the Act were to be effective notwithstanding anything inconsistent therewith in any other enactment, were perfectly constitutional and *intra vires*. Parliament was supreme and had full power to make such a provision. *Harishankar Bagla* v. *State of M.P.*, AIR 1954 SC 465 : 1954 CrLJ 1322 : 1954 SCA 824 : 1954 SCJ 637 : 1955 SCR 380 : (1954) 2 MLJ 211 : 1954 AWR (Sup) 63 : 1954 MWN 749.

[10016] ● *Provisions of Preventive Detention Act and Foreigner act constitutional.*—The provisions of Section 3(1)(*b*) of the Preventive Detention Act, 1950, and Section 3(2)(*c*) of the Foreigners Act, 1946, which authorize the detention of any foreigner with a view of making preparation for his expulsion, are perfectly constitutional and *intra vires*, as they fall under Entries 9 and 10 of List 1 which authorize Parliament to make a law relating to preventative detention for reasons connected with "foreign affairs" which means all matters which bring the union in relation with any foreign country. *Hans Muller of Nurenburg* v. *Supdt., Pres. Jail, Calcutta*, AIR 1955 SC 367 : 1955 CrLJ 876 : 1955 SCA 487 : 1955 SCJ 324 : 1955 SCR 1284 : 1955 MWN 478 : 1955 (1) MLJ (SC)188.

[10017] ● *Madras Prohibition Act—Effect of incidental encroachment.*—The provisions of the Madras Prohibition Act, 1937, which create special presumptions and lay down special rules of procedure and evidence applicable only to the offences punishable under the Act, were not *ultra vires* as being an encroachment on the power of Parliament to make laws as to evidence and criminal procedure. In its pith and substance the Act was a law relating to intoxicating liquors which was a matter within the competence of the State Legislature, and the special rules of evidence and procedure prescribed under the Act were not general rules of evidence and procedure applicable to all criminal inquires, but only rules confined in their application to offences created by the Act itself. *Krishna, A.S.* v. *State of Madras*, AIR 1957 SC 297 : 1957 CrLJ 409 : 1957 SCJ 216 : 1957 SCA 480 : 1957 SCR 309 : 1957 (1) MLJ (Cri) 88 : 1957 (1) MLJ (SC) 59 : 1957 (1) AnWR (SC) 59.

[10018] ● *No Customs duty or tax be levied or collected except by authority of law.*— *Article 265.*—No Customs Duty or tax can be levied or collected except by authority of law. Hence no customs duty is leviable on the basis of administrative instructions. Every levy of customs duty or any other tax must be sanctioned by law. The decision in ILR (1969) Bom 484 is reversed. *H.L. Mehra* v. *State of Maharashtra*, AIR 1971 SC 1130 : (1971) 2 SCC 54 : 1971 CrLJ 842 : 1971 UJ (SC) 512 : (1971) 2 SCCrR 449.

[10019] ● *Maintenance of public order.*—To appreciate the terms one has to imagine three concentric circles. Law and Order represents the largest circle within which is the next circle representing public Order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740 : 1966 CrLJ 608 : (1966) 1 SCR 709. **To the same effect :** (1) *Kartar Singh* v. *State of Punjab*, (1994) 3 SC 569 : 1994 CrLJ 3139 (3171) (SC).

[10020] ● ***No Customs duty or tax be levied or collected except by authority of law.***— *Article 265.*—No Customs Duty or tax can be levied or collected except by authority of law. Hence no customs duty is leviable on the basis of administrative instructions. Every levy of customs duty or any other tax must be sanctioned by law. The decision in ILR (1969) Bom 484 is reversed. *H.L. Mehra* v. *State of Maharashtra*, AIR 1971 SC 1130 : (1971) 2 SCC 54 : 1971 CrLJ 842 : 1971 UJ (SC) 512 : (1971) 2 SCCrR 449.

[10021] ● ***Repugnancy between law made by State and by Parliament.***—Where the provisons of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

Where, however, a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause(2) of Article 254.

Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

Hence, on a consideration of the various provisions of the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973, the Code of Criminal Procedure, 1973, the Prevention of Corruption Act and the Criminal Law Amendment Act, the Supreme Court held that what the State Act did was merely to create different and distinct offences and not to overrule any provisions of the Central Act. *M. Karunanidhi* v. *Union of India*, AIR 1979 SC 898 : (1979) 3 SCC 431 : 1979 SCC (Cri) 691 : 1979 CrLJ 773 : 1979 CrLR (SC) 219.

[10022] ● ***Conflict between Central and State law.***—Article 254 of the Constitution made provision firstly as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the concurrent List, and secondly for resolving such conflict. That being so, when Parliament stepped in and enacted the Central Amendment Act, it being a later law made by Parliament 'with respect to the same matter', the West Bengal Amendment Act stood impliedly repealed. Just as a person accused of the commission of an offence had no right to be tried by a particular Court or to a particular procedure, the prosecutor equally had no right to insist upon that the accused be subjected to an enhanced punishment under the repealed Act. Even if the Central Amendment Act had not expressly repealed the W.B. Amendment Act, it would still be repealed by necessary implication under the proviso to Article 254(2) as it conflicts with a later law with respect to the same matter enacted by Parliament.

It was quite clear that in so far as the Central Amendment Act created new offences or enhanced punishment for a particular type of offence no person could be convicted by such *ex post facto* law nor could the enhanced punishment prescribed by amendment be applicable. But in so far as the Central Amendment Act reduced the punishments for an offence punishable under Section 16 (1) (a) of the Act, there was no reason why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction required that even *ex post facto* law of such a type should be applied to mitigate the rigour of the law. The principle was based on both sound reason and common sense. The accused should have the benefit of these reduced punishment. *T. Brrai* v. *Henry Ah Hoc*, AIR 1983 SC

150 : (1983) 1 SCC 177 : 1983 SCC (Cri) 143 : 1983 CrLJ 164 : 1983 CrLR (SC) 32.

[10023] ● ***Legislative competence of Parliament to pass law by virtue of residuary power.***—Under clause (1) of Article 246, notwithstanding anything in clauses (1) and (3) of the said Article, the Parliament has exclusive power to make laws with respect to any of the 97 subjects enumerated in List 1 of the Seventh Schedule. Under clause (3) of the said Article, the State Legislatures have exclusive powers to make laws with respect to 66 items enumerated in List II. The powers in respect of the 47 items enumerated in List III are concurrent i.e. both the Parliament and the Legislature of any State, subject to clause (1) have power to make laws. With regard to a law made in respect of matters enumerated in the Concurrent List provision has been made in Article 254 which gives overriding effect to a law made by Parliament in the event of there being any repugnancy between the said law and the law made by the legislature of a State and the State law would prevail over a law made by Parliament only if such State law was enacted after the law made by Parliament and has received the assent of the President. While examining the question of legislative competent of Parliament to make a law, the proper approach is to determine whether the subject matter of the legislation falls in the State List which Parliament cannot enter. If the law does not fall in the State List, the Parliament would have the legislative competence to pass the law by virtue of the residuary powers under Article 24B read with Entry 97 of the Union List and it would not be necessary to go into the question whether if falls under any entry in the Union List or Concurrent List. *Kartar Singh* v. *State of Punjab*, (1994) 4 SCC 569 : 1994 CrLJ 3139 (3169) **following TO THE SAME EFFECT :** (1) *Union of India* v. *H.S. Dillon*, AIR 1972 SC 1061 : (1971) 2 SCC 779 : (1972) 2 SCR 33; (2) *S.P. Mittal* v. *Union of India*, AIR 1983 SC 1 : (1983) 1 SCC 51 : (1983) 1 SCR 729; (3) *Khandelwal Metal* v. *Union of India*, AIR 1985 SC 1211 : 1985 Sup (1) SCR 750.

[10024] ● ***Examining particular legislation its pith and substance.***—But the entries cannot be construed in a narrow and pedantic sense and that widest amplitude must be given to the language of these entries. Sometimes the entries in different lists or the same list may be found to overlap or to be in direct conflict with each other. In that event it is the duty of the Court to find out its true intent and purpose and to examine the particular legislation in its (pith and substance) to determine whether it fits in one or other of the lists. *Synthetics & Chemicals* v. *State of U.P.*, AIR 1990 SC 1927 : (1990) 1 SCC 109 : 1989 Supp (1) SCR 623 (673). **TO THE SAME EFFECT :** (1) *India Cement* v. *State of T.N.*, AIR 1990 SC 85 : (1990) 1 SCC 12 : 1989 Supp (1) SCR 692; (2) *Kartar Singh* v. *State of Punjab*, 1994 CrLJ 3139 (3169) (SC).

34. ARTICLE 300

[10025] ● ***Article 300 (1) Scope—Suits by or against Government.***—By referring to Article 300(1), it would be noticed that this Article consists of three parts. The first part deals with the question about the form and the cause title for a suit intended to be filed by or against the Government of India or the Government of a State. The second part provides, *inter alia*, that a State may sue or be sued in relation to its affairs in cases like those in which a corresponding Province might have sued or been sued if the Constitution had not been enacted. In other words, when a question arises as to whether a suit can be filed against the Government of a State, the enquiry has to be : could such suit have been filed against the corresponding Province, if the Constitution had not been passed? The third part of the Article provides that it would be competent to the Parliament or the Legislature of a State to make appropriate provisions in regard to the topic covered by Article 300 (1). Since no such law has been passed by the respondent in the present case, the question as to whether the respondent is liable to be sued for damages at the instance of the appellant, has to be determined by reference to another question and that is whether such a suit would have been competent against the corresponding Province. *Kasturi Lal Ralia Ram Jain* v. *State of Uttar Pradesh*, AIR 1965 SC 1039 : 1965 (2) CrLJ 144 : (1965) 1 SCA 809 : (1965) 2 SCJ 318 : (1965) 1 SCWR 995 : 1965 MLJ (Cri) 571 : (1965) 2 AnWR (SC) 15 : (1965) 2 MLJ (SC) 15.

35. ARTICLE 309

[10026] ● ***Pleasure of—President not to be fettered by ordinary legislation.***—Pleasure of the President under Article 310 could not be fettered except by provisions of Article 311. Accordingly their pleasure could not be fettered by ordinary Legislation. *Sampuran Singh* v. *State of Punjab*, AIR 1982 SC 1407 : (1982) 3 SCC 200 : 1982 CrLJ 1973 : (1982) 2 SCWR 148 : (1982) 8 ALR 665 : 45 FacLR 272 : 1982 BBCJ (SC) 183 : (1982) 2 LabLN 663 : 1982 SCCrR 357 : 1982 CrAppR (SC) 327 : (1982) ServLJ 551.

[10027] ● ***Provision placing embargo on prosecution of Govt. servant.***—*Articles 309, 21 & 14,* *Punjab Civil Services Rules, Column 2, Chapter 2, Rule 2.2(b), Proviso 3.*—It is not proper to say that an assurance to an employee that he shall not be prosecuted after his retirement, even though guilty or committing a grave misconduct or negligence during the period of his service, after the lapse of a particular time is a condition of service calculated to ensure a person peace of mind after retirement, and so falls within the purview of "conditions of service" as contemplated by Article 309. It is likely to be an incentive not for efficient work but for committing offence including embezzlement and misappropriation by some of them at the fag end of their tenure of service. Such a situation cannot be created by framing a rule under Article 309 laying down an embargo on prosecution as a condition of service. Granting such immunity only to Government servants would on the face of it be discriminatory and thus arbitrary. On the face of it, Government servants cannot constitute a class by themselves so as to bring their case within the purview of reasonable classification if the purpose of granting immunity from prosecution is ensuring peace of mind in old age. The principle that there should be speedy trial may not be disputed; yet it cannot be invoked by the respondents in support of their interpretation of the third proviso to clause (b) of Rule 2.2 framed under Article 309 whose purpose is not to place an embargo on prosecution. The third proviso has been framed for a different purpose, namely, to provide an exception to the power of the Government in the matter of withholding or withdrawing *etc.* of pension of a retired Government servant contained in clause (b) of Rule 2.2. It was then urged for the respondents that the third proviso to clause (b) of Rule 2.2 is in the nature of a beneficent legislation and in case of doubt has to be interpreted in favour of the person for whose benefit the Rule has been framed. Keeping in view the scope of the power to frame a rule under Article 309 and the purpose of Rule 2.2, this Court is of opinion that there is no doubt with regard to the interpretation of the said rule. By applying the rule of interpretation with regard to a beneficent legislation, a benefit never intended to be conferred cannot be conferred. *State of Punjab* v. *Kailash Nath*, AIR 1989 SC 558 : (1989) 1 SCC 321 : 1989 CrLJ 813 : 1989 CrLR (SC) 16 : (1989) 1 Crimes 126 : (1989) 1 ATLT 55 : (1989) 1 CaseLR 60 : (1989) 58 FacLR 32 : (1989) 1 ServLR 12 : (1989) 1 ReCCrR 139 : (1989) 1 LabLN 256.

36. ARTICLES 352 AND 359

[10028] ● ***Expression "any Court" in Article 359 of Constitution.***—The expression "any Court" in Article 359 takes in every Court of competent jurisdiction and includes the Supreme Court as well as the High Courts, and the words "right to move any Court for the enforcement of such rights", cover all legal actions which can be taken by a detenue for the enforcement of the rights specified in the Presidential Order during the operation of the Proclamation of Emergency, so as to preclude proceedings under Articles 32 and 226 of the Constitution as well as proceedings under Section 491 of the Code of Criminal Procedure. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 381 : 1964 (1) CrLJ 269 : (1964) 2 SCA 663.

[10029] ● ***Validity of Defence of India Act—Challenge to.***—As long as the present Presidential Order remains in force, no application can lie in any Court for challenging the validity of the Defence of India Act, 1962, or the Rules made thereunder on the ground of violation of the fundamental rights of the detenu under Articles 14, 21 and 22 of the Constitution, and in any proceeding before any Court it is not open to the detenue to urge that the said Act or Rules are void for the reason that they offend against his said rights. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 381 : 1964 (1) CrLJ 269 : (1964) 2 SCA 663.

[10030] ● ***Provisions of Article 358 and Article 359—Distinction between.***—There are three points of distinction between the provisions of Article 358 and Article 359.

(1) Article 358 provides that as soon as Proclamation of Emergency under Article 352 has been issued by the President, and so long as the Proclamation is in operation, Article 19 becomes automatically suspended, and to that extent the powers of the Legislatures as well as the Executive are widened. The suspension of Article 19 during the pendency of the proclamation of emergency removes the fetters created by Article 19, and if the legislature makes laws or if the executive does acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge as long as the proclamation is in force. As soon as the Proclamation ceases to operate, Article 19 is automatically revived and the laws passed and the executive actions taken during the course of the emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Article 19. Article 358, however, makes it clear that during the period of emergency, the suspension of

Article 19 is complete, and that things done during the emergency cannot be challenged even after the emergency is over. Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. It authorises the President to issue an Order declaring that the right to move any Court for the enforcement of any such right as is specified in the Order shall remain suspended for the period during which the Proclamation of Emergency is in force or for any shorter period. Thus, under Article 359, the rights covered by the Order are not expressly suspended, but only the citizen is deprived of his right to move any Court for their enforcement. That is one important distinction between Article 358 and Article 359.

(2) The other distinction between the two Articles lies in the fact that whereas under Article 358 the suspension of Article 19 continues so long as the Proclamation of Emergency under Article 352 is in operation, under Article 359 the suspension of the right to move any Court brought about by the Presidential Order can last either for the whole period of proclamation or for any shorter period, if it is so specified in the order.

(3) The third distinction between the provisions of Article 358 and Article 359 is this that, whereas the suspension of Article 19 provided for in Article 358 applies to the whole of the country, and so covers all legislations and all executive actions, the order issued under Article 359 may be made to extend to the whole of India or may be confined to any part of the territory of India. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 381 : 1964 (1) CrLJ 269 : (1964) 2 SCA 663.

[10031] ● *Presidential order—Effect of.*—Even while a Presidential Order issued under Article 359 is in force and the right of the detenu to move any Court for the enforcement of his fundamental rights specified in the Order is suspended, it is open to the detenu to challenge the legality or propriety of his detention on any of the following grounds :—

(a) that he has been detained in violation of the mandatory provisions of the Defence of India Act, or the Rules made thereunder under which the order of detention was made;

(b) that the order of detention was made '*mala fide*'; provided that it would not be enough to make an allegation of *mala fides* against the detaining authority, and that before the plea can succeed, the allegation would have to be proved;

(c) that the operative provisions of the law under which he is detained suffer from the vice of excessive delegation and are, therefore, invalid.

In short, Article 359 or the President Order made under it does not bar the detenu from challenging the validity of his detention on any ground which is independent of his fundamental rights, the enforcement of which is suspended under the said order. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 381 : 1964 (1) CrLJ 269 : (1964) 2 SCA 663.

[10032] ● *After the petitioner had been deprived of his right to move the Court it is manifestly that.*—It was not open to the petitioner to raise before the Court any question as regards the vires or constitutionality of the said Ordinance or the Rules and Orders made thereunder. *Mohan Chowdhury* v. *Chief Commissioner, Union Territory of Tripura,* AIR 1964 SC 173 : 1964 (1) CrLJ 132 : (1964)1 SCA 611.

[10033] ● *Proclamation of emergency.*—Article 352 requires only a declaration of emergency threatening the security of India by one of the causes mentioned. The words "to that effect" can have no other meaning. The power to make the declaration can no doubt be exercised only when the President is satisfied about the emergency, but we do not see that the Article requires the condition precedent for the exercise of the power, that is, the President's satisfaction to be stated in the declaration.

Article 352 by clause (2) provides that a Proclamation issued under clause (1) may be revoked by a subsequent proclamation and shall cease to operate at the expiration of two months unless before the expiration to that period it has been approved by resolution of both Houses of Parliament. This clause also states that the Proclamation shall be laid before each House of Parliament. It has not been stated that the Houses of Parliament did not approve of the proclamation within the period of two months. It would appear, therefore, that the only way a proclamation ceases to have effect is by one of the events mentioned in this clause. None of this has happened. Nothing contained in an address by the President to the House of the Parliament can operate to terminate the Proclamation. *P.L. Lakhanpal* v. *Union of India,* AIR 1967 SC 243 : 1967 CrLJ 282 : (1967) 2 SCJ 165 : (1967) 1 SCA 443.

[10034] ● *Validity of ordinance or rule or order made under presidential order.*—*Articles 358, 359(1).*—Defence of India Rules (1962)—Rule 30—During the pendency of the Presidential Order, if a citizen seeks to challenge the validity of the ordinance, rule or order made thereunder on any ground other than the contravention of Articles 14, 21 and 22, the Presidential Order cannot come into operation. It is not, however, open to a citizen to challenge the order on the ground of contravention of Article 19, because as soon as a Proclamation of Emergency is issued by the President under Article 358, the provisions of Article 19 are automatically suspended. *Jaichand Lal Sethia* v. *State of W.B.,* AIR 1967 SC 483 : 1967 CrLJ 520 : (1966) 2 SCA 299 : 1967 SCD 84 : (1966) Sup SCR 464 : (1967) 2 SCWR 559 : 9 LawRep 111 : 1967 MLJ (Cri) 601.

[10035] ● *Order of detention—Satisfaction of Government subjective.*—The satisfaction of the Government which justifies the order is a subjective satisfaction and if the order is prima facie regular and in conformity with the language of Rule 30, it is not ordinarily open to a Court to enter into an investigation about the sufficiency of material on which the order is based. *Jaichand Lal Sethia* v. *State of W.B.,* AIR 1967 SC 483 : 1967 CrLJ 520 : (1966) 2 SCA 299.

[10036] ● *Order of detention—Satisfaction of Govt.—When can be challenged.*—The accuracy of the recital that the State Government was satisfied, in a normal case, in the absence of any evidence as to its inaccuracy, can be accepted by the Court as establishing that the necessary condition was fulfilled. *Jaichand Lal Sethia* v. *State of W.B.,* AIR 1967 SC 483 : 1967 CrLJ 520 : (1966) 2 SCA 299.

[10037] ● *Order of President to comply with Article 14.*—There is nothing in the Article 359 which prevents the President from restricting the scope of the order to a class of persons, provided the operation of the order is confined to an area and to a period. If the orders apply to the entire country the fact that only the persons who are affected by that order cannot move the Court for the enforcement of their right cannot make them any the less valid orders. An order making an unjustified discrimination in suspending the right to move a Court under Article 14 itself, will be void at its inception. However, if the order does not violate Article 14, it can validly take away the right to move the Court to enforce Article 14. *Ghulam Sarwar* v. *Union of India,* AIR 1967 SC 1335 : 1967 CrLJ 1204 : (1967) 1 SCA 246 : (1967) 2 SCR 271.

[10038] ● *President's order under Article 359 providing for suspension of fundamental right.*—Where the President's Order under Article 359 provided that enforcement of fundamental rights under Articles 14, 21 and 22 would be suspended if any person is deprived of such right under the Defence of India Ordinance (later replaced by the Act) or the rules or the orders made thereunder, it is not necessary to make any express provision in the Defence of India Act or the rules for the suspension of the enforcement of fundamental rights under Articles 14, 21 and 22. *Mohd. Yaqub* v. *State of J&K,* AIR 1968 SC 765 : 1968 CrLJ 972 : (1968) 1 SCA 418 : (1968) 1 SCWR 793 : 1968 SCD 930 : (1968) 2 SCJ 914 : (1968) 2 SCR 227 : 1968 LabIC 872 : 16 LawRep 774 : 1968 MLJ (Cri) 793.

[10039] ● *Detention order passed in State of J&K.*—*Articles 359 & 22(5) and DOI Rules (1962), Rule 30(1)(b) & (h).*—When the President makes an order under Article 359 suspending Article 22, it follows that clause (5) of Article 22 cannot continue. There is, therefore, no question of furnishing any ground under Article 22 (5) to the detenu if the detention is under the Act or the Rules, for the entire Article 22 has been suspended.

Where a detention order is passed in the State of Jammu and Kashmir under the DOI Rules, 1962, Rule 30 (1) (b) in the form required by Section 45 of the Constitution of Jammu and Kashmir though not in the form as required by Article 166 of the Constitution of India, the presumption is that it was passed validly unless it can be shown that it was not passed as required by law since Article 166 does not apply to the State of Jammu and Kashmir. *Mohd. Yaqub* v. *State of J&K,* AIR 1968 SC 765 : 1968 CrLJ 972 : (1968) 1 SCA 418 : (1968) 1 SCWR 793 : 1968 SCD 930 : (1968) 2 SCJ 914 : (1968) 2 SCR 227 : 1968 LabIC 872 : 16 LawRep 774 : 1968 MLJ (Cri) 793.

[10040] ● *President can suspend enforcement of any of fundamental right.*—It is open to the President to suspend the enforcement of any of the fundamental rights conferred by Part III by an order under Article 359 and this Article shows that whenever such suspension is made it is in the interest of the security of India and no further proof of it is necessary, An order passed under Article 359(1) cannot be tested with the aid of Article 13(2) under that very fundamental right the enforcement of which it suspends. *Mohd. Yaqub* v. *State of J&K,* AIR 1968 SC 765 : 1968 CrLJ 972 : (1968) 1 SCA 418 : (1968) 1 SCWR 793 : 1968 SCD 930 : (1968) 2 SCJ 914 : (1968)

2 SCR 227 : 1968 LabIC 872 : 16 LawRep 774 : 1968 MLJ (Cri) 793.

[10041] ● ***Fundamental rights concerning personal liberty—Suspension of.***—Fundamental rights concerning personal liberty are suspended during the operation of the proclamation of emergency and the COFEPOSA and the orders made under it are not open to challenge on the ground of their being inconsistent with or repugnant to Articles 14, 19, 21 & 22 in view of the Presidential Orders dated 27-6-1975 and 8-1-1976 which totally take away the *locus standi* of the detenus to move any Court for the enforcement of the aforesaid fundamental rights and the petitions out of which the present appeals had arisen did not seek to enforce the orders laying down the conditions of detention but on the contrary challenged them and covertly sought to enforce the very rights that were suspended. Hence it was not open to the High Court to strike down the particular clauses of the Maharashtra Detention Order, 1974. *Union of India* v. *Bhanudas,* AIR 1977 SC 1027 : (1977) 1 SCC 834 : 1977 SCC (Cri) 208 : 1977 CrLJ 785.

[10042] ● ***Detenu confined in prison—Not treated as civil prisoner.***—The mere fact that a detenu is confined in a prison for the sake of administrative convenience does not entitle him to be treated as a Civil Prisoner or to be governed by the provisions of the Prisons Act. *Union of India* v. *Bhanudas,* AIR 1977 SC 1027 : (1977) 1 SCC 834 : 1977 SCC (Cri) 208 : 1977 CrLJ 785.

[10043] ● ***Bar to jurisdiction of High Court.***—The jurisdiction of the High Court under Article 226 is barred during the emergency if the object of a proceeding is to enforce the fundamental right to personal freedom even if it involves adjudication on the question of vires of a rule made under enactments authorizing preventive detention. *Union of India* v. *Bhanudas*, AIR 1977 SC 1027 : (1977) 1 SCC 834 : 1977 SCC (Cri) 208 : 1977 CrLJ 785.

[10044] ● ***Proclamation under Article 356(1) subject to judicial review.***—The proclamation under Article 356 (1) is not immune from judicial view. The Supreme Court or the High Court can strike down the proclamation if it is found to be *mala fide* or based on wholly irrelevant or extraneous grounds. The deletion of clause (5) which was introduced by 38th (Amendment) Act by the 44th (Amendment) Act removes the cloud on the renewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It can not refuse to do so, if it seeks to defend the action. This Court will not go into the correctness of the material or its adequacy. Even if part of the material is irrelevant, the Court cannot interfere so long as there is some material which is relevant to the action taken. *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918 (2112, 2113) (1994) 3 SCC 1.

[10045] ● ***Power of President to suspend enforcement of fundamental right.***—While clause (1) of Article 359 empowers the President to suspend the enforcement of the fundamental rights named in such notification (and any and all proceedings in that behalf in any Court), it does not empower the President to suspend the fundamental rights. Evidently, the founding fathers did not think it necessary to clothe the President with such a power. The words in clause (1) are clear and unambiguous. They only speak of suspending the enforcement of the rights in Part III and not suspending the rights themselves. There is no justification and no basis for holding that the suspension of enforcement of the rights means in effect the suspension of the rights themselves. If that were the intension of the Founding Fathers, they would have said so expressly. Indeed, they have stated what tney meant in explicit language. In view of the fact that the fundamental rights in Part III are allowed to be affected by a Presidential Order, one ought not to read anything more than what the clause expressly says—and its language leave no room for any doubt. *Attorney General for India* v. *Amratlal Prajivandas*, AIR 1995 SC 2179 : (1994) 5 SCC 54 : 1994 SCC (Cri) 1325 : 1995 CrLJ 426 (SC) : JT 1994 (3) SC 583.

CONSTRUCTIVE LIABILITY
§ (See "COMMON INTENTION" and "COMMON OBJECT")

CONSULTATION

[10046] ● ***Preparation of FIR in consultation with others.***—Regarding preparation of the FIR in consultation with others, it is noticed that this is spoken to by PW-2 who is the brother of the deceased. The complaint is said to have been prepared by PW-1, son of the deceased, late in the night at about 2.00 a.m. When there are two male members of the family who were grief-stricken, it was but natural that PW-1 and his uncle (PW-2) should talk about giving the complaint and draft the same. This fact, in the circumstances of this case, can hardly be a ground to weaken the case of the prosecution. *State of Uttar Pradesh* v. *Nahar Singh*, AIR 1998 SC 1328 (1332) : (1998) 3 SCC 561 : 1998 SCC (Cri) 850 : 1998 CrLJ 2006 : 1998 CrLR (SC) 224 : JT 1998 (2) SC 41

CONSUMERS PROTECTION ACT, 1986

[10047] ● ***"Deficiency in service" scope—Doctors.***—With the awareness in society, and people in general gathering consciousness about their rights, actions for damages in tort are on the increase. Not only are civil suits filed, the availability of a forum for grievance redressal under the Consumer Protection Act, 1986 having jurisdiction to hear complaints against professionals for "deficiency in service", which expression is very widely defined in the Act, has given rise to a large number of complaints against professionals, in particular against doctors, being filed by the persons feeling aggrieved. Criminal complaints are being filed against doctors alleging commission of offences punishable under Section 304-A or Sections 336/337/338, IPC, alleging rashness or negligence on the part of the doctors resulting in loss of life or injury (of varying degree) to the patient. The present one is such a case. *Jacob Mathew* v. *State of Punjab*, AIR 2005 SC 3180 : (2005) 6 SCC 1 : 2005 SCC (Cri) 1369 (1385) : 2005 CrLJ 3710 : 2005 (3) Crimes 63.

[10048] ● ***Negligence.***—[Note. The order of reference enabled the Apex Court to examine the concept of "negligence in particular" professional negligence and as to when and how it does give rise to an action under the Criminal Law. The Apex Court dealt with the issues in the interests of settling the law.]

[10049] ● ***Motor accident—Death of victim in hospital—Jurisdiction of consumer forum.***—In the instant case, one Mr. Rajeev Sapra was travelling in a Maruti car. The car was hit by a tempo as a result of which he said Mr. Sapra became unconscious and was rushed to Safdarjung Hospital. The appellants who are the wife and children filed a claim before the National Consumer Disputes Redressal Commission for damages on the ground of negligence of the hospital and the doctors. By the impugned judgment, the National Commission dismissed the claim merely on the ground that in view of the judgment of this Court in the case of *Chairman, Thiruvalluvar Transport Corpn.* v. *Consumer Protection Council*, (1995) 2 SCC 479 : AIR 1995 SC 1384 they had no jurisdiction.

The Supreme Court held as under :

"In our view, this judgment has no relevance at all. That was a case where the claim before the National Commission was based on the accident itself. In that context this Court held that the claim based on a motor accident can only be before the Motor Accidents Claims Tribunal. In this case, the claim is not based on the accident. The claim is based on the alleged negligence of the hospital and doctors after the said Mr. Sapra was taken to the hospital. That is entirely a different cause of action. In respect of such a claim the National Commission would have jurisdiction.

It was, however, urged that the appellants have also filed a claim before the Motor Accidents Claims Tribunal claiming therein that the death had taken place due to the accident. It was submitted that if death had taken place due to accident there was no question of maintaining a claim based on the negligence of the hospital and doctors. This raises questions which are to be decided by the National Commission. It will be open to the National Commission whilst considering the merits to decide whether the appellants can maintain an action under the Motor Vehicles Act on the basis that death resulted from the accident as well as a claim for damages for alleged negligence of the hospital and doctors.

We, thus, set aside the impugned order and remit the matter back to the National Commission. The appeal is disposed of accordingly. No order as to costs." *Geetu Sapra* v. *B.L. Kapoor Memorial Hospital*, (2005) 10 SCC 549 : 2005 SCC (Cri) 1621 (1622).

CONTEMPT OF COURTS ACT, 1971

SYNOPSIS

1. **Section 1** **2076**
2. **Section 2** **2077**
3. **Section 3** **2119**
4. **Section 4** **2120**
5. **Section 5** **2124**
6. **Section 8** **2125**
7. **Section 10** **2126**
8. **Section 12** **2127**
9. **Section 13** **2135**
10. **Section 14** **2135**
11. **Section 15** **2136**
12. **Section 16** **2139**
13. **Section 17** **2140**
14. **Section 18** **2141**
15. **Section 19** **2141**
16. **Section 20** **2144**
17. **Section 21** **2144**

1. SECTION 1

[10050] ● ***Law of contempt—Object of.***—The object of the law of contempt is not to vindicate the prestige or position of a presiding Judge, for which the proper remedy is an action in libel or defamation by the officer concerned, but to maintain the continuity of the crystal-clear flow of the stream of justice by sustaining the confidence of the public at large in the administration of justice. *Brahma Prakash* v. *State of Uttar Pradesh*, AIR 1954 SC 10 : 1954 CrLJ 238 : 1953 SCR 1169. **To the same effect :** (1) *Tuka Ram G. Gakar* v. *R. N. Shukla*, AIR 1968 SC 1050 : 1968 CrLJ 1234 : 1968 (3) SCR 422.

[10051] ● *Act or words spoken tending to obstruct administration of justice.*—The law of contempt stems from the rights of the Courts to punish by imprisonment or five persons guilty of words or acts which either abstracts or tend to obstruct the administration of justice. This right is exercised in India by all Courts when contempt is committed *in facie cunae* by the superior Courts on their own behalf or on behalf of the Courts subordinate to them even if committed outside the Courts. Formerly it was regarded as inherent in the powers of a Court of record and now by the Constitution it is a part of the powers of the Supreme Court and the High Courts. *E.M.S. Namboodripad* v. *T.N. Nambiar*, AIR 1970 SC 2015 : (1970) 2 SCC 325 : 1970 CrLJ 1670 : (1971) 1 SCR 697 : 1971 LW (Cr) 145 : 1971 Mad LJ (Cr) 315 : (1971) 1 SCJ 631.

[10052] ● *Power to punish for contempt to be exercised cautiously.*—"We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity and status of the Court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct". *S. Mulgaokar In re*, AIR 1978 SC 727 (743) : (1978) 3 SCC 339 : 1978 SCC (Cri) 403 : 1978 (3) SCR 162.

[10053] ● *Criticism about judicial system.*—Any criticism about the judicial system or the Judges which hampers the administration of justice or which erodes the faith in the objective approach of Judges and brings administration of justice into ridicule must be prevented. The contempt of Court proceedings arise out of that attempt. Judgments can be criticised, the motives of the Judges need not be attributed, it brings the administration of justice into deep disrepute. Faith in the administration of justice is one of the pillars through which democratic institution functions and sustains. In the free market place of ideas criticisms about the judicial system of Judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice. This is how Courts should approach the powers vested in them as Judges to punish a person for an alleged contempt, be it by taking notice of the matter *suo motu* or at the behest of the litigant or a lawyer. *P.N. Duda* v. *P. Shiv Shankar*, AIR 1988 SC 1208 : (1988) 3 SCC 167 : (1988) SCC (Cri) 589 : 1988 CrLJ 1745 : 1988 CrLR (SC) 641 : JT 1988 (2) SC 102 : 1988 (3) SCR 547. **To the same effect :** (1) *V.M. Kanade* v. *Madhab Gadiari*, 1990 CrLJ 190 (199).

[10054] ● *Exercise of power to be cautious.*—The exercise of powers under the Contempt of Courts Act shall have to be rather cautious and use of it rather sparingly after addressing itself to the true effect of the contemptuous conduct. The Court must otherwise come to a conclusion that the conduct complained of tantamounts to obstruction of justice which if allowed, would even permeate in our society (vide *Murray*). This is a special jurisdiction conferred on to the law Courts to punish an offender for his contemptuous conduct or obstruction to the majesty of law. *Mrityunjoy Das* v. *Syed Hasibur Rahman*, AIR 2001 SC 1293 : (2001) 3 SCC 739 : (2006) 1 SCC (Cri) 296 (302) : 2001 CrLJ 1702.

[10055] ● *Offences under Sections 175, 178, 179, 180 or 228, IPC per se not amount to contempt.*—On a fascicule reading of Section 345, CrPC, it is clear that offences under Sections 175, 178, 179, 180 or S. 228, IPC would constitute contempt only it they are committed in the view or presence of the Court. This would also show that offences under Sections 175, 178, 179, 180, or 228 *per se* do not amount to contempt. They are contempt only if they are committed "in the view or presence of the Court", otherwise, they remain offences under the Indian Penal Code *simpliciter*. *Arun Paswan* v. *State of Bihar,* AIR 2004 SC 721 : (2004) 5 SCC 53 : 2004 SCC (Cri) 1503 (1512) : (2004) 1 Crimes 184.

2. SECTION 2

[10056] ● *Court—What constitutes.*—Before a person or persons can be said to constitute Court it must be held that they have derived their powers from the state and are exercising judicial powers. *Bharat Bank* v. *Employees Bharat Bank*, AIR 1950 SC 188 : 1955 SCA 317 : 1950 SCR 459 : 1950-51 (2) FJR 1 : 1950 LLJ 921.

[10057] ● ***Libel and contempt of Court—Distinction.***—A libellous reflection upon the conduct of a Judge in respect of his judicial duties may certainly come under Section 499, Penal Code, and it may be open to the Judge to take steps against the libeller in the ordinary way for vindication of his character and personal dignity as a Judge; but such libel may or may not amount to contempt of Court, which is something more than mere defamation and is of a different character. What is made punishable in the Indian Penal Code is the offence of defamation as defamation and not as contempt of Court. If the defamation of a subordinate Court amounts to contempt of Court, proceedings can certainly be taken under Section 2, Contempt of Courts Act, quite apart from the fact that other remedy may be open to the aggrieved officer under Section 499 Penal Code. *Ramakrishna, Bathina* v. *State of Madras*, AIR 1952 SC 149 : 1952 CrLJ 832 : 1952 SCR 425 : (1952) 1 Mad LJ 736 : 1952 SCJ 137 : 7 DRR (SC) 161 TO THE SAME EFFECT : (1) *Brahma Prakash* v. *State*, AIR 1954 SC 10 : 1953 SCR 1169 : (1953) 2 Mad LJ 231 : 1953 SCA 624.

[10058] ● ***Contempt of Supreme Court.***—When any publication criticising a decision not only preaches the Court of law the sermon of divine detachment from extraneous consideration such as politics and policies but also proceeds to attribute improper motive to the Judge, it not only transgresses the limits of fair and *bona fide* criticism but had a clear tendency to affect the dignity and prestige of the Court and thus it amounts to contempt of Court. *Aswani Kumar Ghose* v. *Arbinda Bose*, AIR 1953 SC 75 : 1953 SCJ 381 : 8 DLR 91 SC : 1953 SCA 188 : 1953 SCR 215.

[10059] ● ***Contempt of Court—What amounts to.***—Where an application containing allegations against a trial Magistrate is made by a third party to the District Magistrate the latter is entitled to use his powers under CrPC and send the application in the normal and usual course of his functions to the Magistrate concerned for remarks. There is nothing in such action of the District Magistrate which amounts to a contempt of Court. *Rizwan-ul-Hasan* v. *State of Uttar Pradesh*, AIR 1953 SC 185 : 1953 CrLJ 911 : 1953 SCR 581 : 1953 SCA 546 : 1953 SCJ 255 : 8 DLR 260 (SC).

[10060] ● ***Member of Bar Association do not occupy privileged position in matter of contempt.***—In the matter of contempt the members of the Bar Association do not occupy a privileged position. *Brahma Prakash* v. *State of Uttar Pradesh*, AIR 1954 SC 10 : 1954 CrLJ 238 : 1953 SCR 1169 : 1953 SCA 694 : 1953 All LJ 571 : (1953) 2 Mad LJ 231 : 7 All Cr D 720 : 8 DLR (SC) 493 : 1953 SCJ 52B : 1953 BLJR 600.

[10061] ● ***Defamatory attack on Judge libel.***—No lenient attitude can be shown to the President Bar council of India in case *Vinay Mishra In re*, AIR 1995 SC 2348 : 1995 CrLJ 3934 : (1995) 2 Crimes 38. A defamatory attack on a judge may be a libel as far as the Judge is concerned and it would be open to him to proceed in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such Court, it can be punished summarily as contempt. One is a wrong done to the Judge personally while the other is a injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. It is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law. *Brahma Prakash* v. *State of U P.*, AIR 1954 SC 10 : 1954 CrLJ 238 : 1953 SCJ 52B : 1953 SCR 1169 : 1953 SCA 694 : 1953 All LJ 571 : (1953) 2 Mad LJ 231 : 7 All Cr D 720 : 8 DLR (SC) 493 : 1953 BLJR 600.

[10062] ● ***Nature of jurisdiction to punish for contempt.***—The jurisdiction of a High Court in a contempt proceeding being a special jurisdiction High Court can deal with it summarily and adopt its own procedure. It is, however, desirable that a Judge who has been personally attacked should not as far as possible hear a contempt matter which to that extent concerns him personally. It is otherwise when the contempt is not directed towards him personally. No general rule, however, can be laid down, for there may be only one Judge or two or more who have been attacked. Other cases may also arise where it is more convenient and proper for the Judge to deal with the matter himself as for example in a contempt *ex facie curiae*. *Sukhdev Singh Sodh* v. *Chief Justice*, AIR 1954 SC 186 : 1954 CrLJ 460 : 1954 SCR 454 : 1954 SCA 363 : (1954) 1 Mad LJ 137 : 1954 Mad WN 133 : 1954 SCJ 67.

[10063] ● ***Allegation of political motivation against Judge—Contempt.***—Allegation of political motivation against a Judge is contempt.

Hiralal Dixit v. *State of Uttar Pradesh*, AIR 1954 SC 743 : (1955) 1 SCR 677.

[10064] ● *Origin of Jurisdiction to punish for contempt.*—So far as contempt of High Court, as distinct from a subordinate Court is concerned, the constitution vests these rights in every High Court. So no Act of the legislature can take away that jurisdiction and confer it afresh by virtue of its own authority. *Sukhdev Singh* v. *Teja Singh, Chief Justice*, AIR 1954 SC 186 : 1954 CrLJ 460 : 1954 SCR 454.

[10065] ● *Scandalizing Court.*—A section of the Bar is under an erroneous impression that when a counsel is acting in the interests of his client, or in accordance with his instructions he is discharging his legitimate duty to his client even when he signs an application or a pleading which contains matter scandalizing the Court. They think that when there is conflict between their obligations to the Court and their duty to the client, the latter prevails. The misconception has to be rooted out by a clear and emphastic pronouncement, and we think it should widely made known that counsel who sign applications or pleadings containing matter scandalizing the Court without reasonably satisfying themselves about the *prima facie* existence of adequate grounds therefore, with a view to prevent or delay the course of justice, are themselves guilty of contempt of Court, and that it is no duty of a counsel to his client to take any interest in such applications; on the other hand, his duty is to advise his client for refraining from making allegation of this nature in such applications. *M.Y. Shareef* v. *Hon'ble Judges of the Nagpur High Court*, AIR 1955 (SC) 19 : 1955 CrLJ 133 : 1955 (1) SCR 757.

[10066] ● *Court and Tribunal Distinction.*—"It may be stated broadly that what distinguishes a Court from a *quasi* judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declares the rights of parties in a definitive Judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports and obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority creates by an Act is a Court as distinguished from a *quasi* judicial tribunal what has to be decided is whether it possesses all the attributes of a Court." *Virendra Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153, 157 : 1956 CrLJ 326 : (1955) 2 SCR 1013 : 1956 SCJ 138.

[10067] ● *Pronouncement of definitive Judgment essential sine qua non of Court.*—The pronouncement of a definitive Judgment is considered the essential *sine qua non* of a Court and unless and until a binding and authoritative Judgement can be pronounced by a person or body of persons it cannot be predicted that he or they constitute a Court. *Brijnandan Sinha* v. *Jyoti Narayan*, AIR 1956 SC 66 : 1956 CrLJ 156 : (1955) 2 SCR 955.

[10068] ● *Courts—Commissioners appointed under Public Servant (Inquiries) Act not.*—Commissioners appointed under the Public Servants (Inquiries) Act are not Courts. *Brijnandan Sinha* v. *Jyoti Narayan*, AIR 1956 SC 66 : 1956 CrLJ 156 : (1965) 2 SCR 955 : 1956 SCA 52 : 1956 SCJ 155.

[10069] ● *Professional misconduct—Imputations of partiality and unfairness against Munsiff in open Court.*—A member of the Bar undoubtedly owes a duty to his client and must place before the Court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may ask for a review of that order. At the same time, a member of the Bar is an officer of the Court and owes a duty to the Court in which he is appearing. He must uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute. It is gross overstepping of the limits of propriety when he made imputations of partiality and unfairness against the Munsif in open Court. In suggesting that the Munsif followed no principle in his orders, the appellant was adding insult to injury, because the Munsif had merely upheld the order of his predecessor on the preliminary point of jurisdiction and Court fees which order had been upheld by the High Court in revision. Scandalising the Court in such manner is really polluting the very fountain of justice. Such conduct as the appellant indulged in was not a matter between an individual member of the Bar and a member of the judicial service. It brought into disrepute the whole administration of justice. *Lalit Mohan Das* v. *Advocate General*, AIR 1957 SC 250 : 1957 SCJ 338 : (1957) 1 Mad LJ (Cr) 151 : 1957 SCR 167.

[10070] ● *Scandalising Court itself.*—There are innumerable ways by which attempts could be made to hinder or obstruct the due administration of justice in Courts and one type of such interference is found in cases where there is an act which amounts to "scandalising the Court itself" : this scandalising might manifest itself in various ways but in substance it is an attack on individual

Judges or the Court as a whole with or without reference to particular cases, causing unwarranted and defamatory aspersions upon the character and ability of the Judges. Such conduct is punished as contempt for the reason that it tends to create distrust in the popular mind and impair the confidence of the people in the Courts which are of prime importance to the litigants in the protection of their rights and liberties. *State of M. P.* v. *Revashanker*, AIR 1959 SC 102 : 1959 CrLJ 251.

[10071] ● *High Court right to protect—Subordinate Courts against contempt.*—The High Court has the right to protect subordinate Courts against contempt, but subject to this restriction that cases of contempt which have already been provided for in the IPC should not be taken cognizance of by the High Court. It was observed-that it was not necessary to determine exhaustively what were the cases of contempt which had been already provided for in the Indian Penal Code; it was pointed out, however, that some light was thrown on the matter by the provision of Section 480 of the Code of Criminal Procedure. (now Section 345, CrPC, 1973) which empowers any civil, criminal or revenue Court to punish summarily a person who is found guilty of committing any offence under Sections 175, 178, 179, 180 or Section 228 of the Indian Penal Code in the view or presence of the Court. The essential ingredients of Section 228, IPC are : (1) intention, (2) insult or interruption to a public servant and (3) the public servant insulted or interrupted must be sitting in any stage of a judicial proceeding. In the case at hand there was an initial difficulty that the respondent was sought to be proceeded against by reason of the aspersions he made in the application dated December 17, 1953, and the affidavit dated December 21, 1953. It is not very clear from the record if the Magistrate was sitting in any stage of a judicial proceeding when the application and the affidavit were filed. But the petition and affidavit casting aspersions which *prima facie* showed that they were much more than a mere insult to the Magistrate; in effect, they scandalised the Court in such a way as to create distrust in the popular mind and impair the confidence of people in Courts. Two of the aspersions made, taken at their face value, were (1) that the learned Magistrate had joined in a conspiracy implicate the respondent in a false case of theft. In the affidavit it was stated that the learned Magistrate had sent for the respondent and his brother and had asked them to make a false report to the police that the ornaments of Chandra Mukhi Bai had been stolen. The learned Magistrate characterised the aspersion as totally false and said that he neither knew the respondent nor his brother and had no acquaintance with them. Another aspersion was that the Magistrate had taken a bribe of Rs. 500. This aspersion was also stoutly denied. In the facts above the contemnor should be dealt with by the High Court for contempt. *State of Madhya Pradesh* v. *Reva Shanker*, AIR 1959 SC 102 : 1959 CrLJ 251 : 1959 SCR 1367.

[10072] ● *Aspersions against Magistrate.*—An accused filed an application under Section 528, CrPC, 1898 and an affidavit containing serious aspersion against the Magistrate, *viz.,* the man had a hand in the conspiracy to involve the accused in the case and that the Magistrate had been paid illegal gratification. It amounted to contempt. *State of Madhya Pradesh* v. *Reva Shankar*, AIR 1959 SC 102 : 1959 CrLJ 251 : 1959 SCR 1367 : 1959 SCJ 86.

[10073] ● *Special committee constituting itself as Court of parallel enquiry.*—The circumstances do not establish that the Special Committee had constituted itself as a Court of parallel enquiry to look into matters in issue in the Section 497 case against B.K. Sen or which were in issue in the pending proceedings in the High Court. What exactly is meant by a Court of parallel enquiry is not clear. No doubt it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of that investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice whether the investigation tends to prejudice the accused or the prosecution. There is no comparison between a trial by a newspaper and what has happened in this case. The Special Committee had embarked upon an enquiry on the directions of the Corporation in order to discover malpractice on the part of the Corporation's servants. Malpractices on the part of a servant of the Corporation would presumably include making unworthy appointments. The ascertainment of the motive for the appointments would be merely incidental to the main purpose of the enquiry. It would be difficult to conclude therefrom that the Special Committee were holding a parallel enquiry on matters pending decision by a Court of law and that thereby their action tended to interfere with the course of justice. *Saibul Kumar Gupta* v. *B.K. Sen*, AIR 1961 SC 633 : 1961 (1) CrLJ 749 : 1961 (3) SCR 460.

[10074] ● *Interference with due administration of justice.*—Direction by under Secretary to the Magistrate not to follow the binding decision of the High Court till the matter is again contested before the High Court on appropriate case is a flagrant interference with the administration of justice by the Court. *Dibakar Satpathi* v. *Hon'ble the Chief Justice and his Companion Justices of the Orissa High Court*, AIR 1961 SC 1315 : (1961) 2 CrLJ 437 : 1962 (1) SCR 326.

[10075] ● ***Contempt to be constituted by any conduct.***—To speak generally contempt may be said to be constituted by any conduct that tends to bring the authority and administration of law to disrespect or disregard or to interfere with or prejudice parties, litigants or their witnesses during the litigation. *Pratap Singh* v. *Gurbux Singh*, AIR 1962 SC 1172 : 1962 (2) CrLJ 262 : 1962 Supp (2) SCR 838.

[10076] ● ***Service of order not essential for founding action in contempt.***—The judgment or order should be served on the party personally, except in the following cases : (1) prohibitive orders, the drawing up of which is not completed; (2) orders embodying an undertaking to do an act by a named day; (3) orders to answer interrogatories or for discovery or inspection of documents; (4) where an order for substituted service has been made; (5) where the respondent has evaded service of the order.......

In order to justify committal for breach of a prohibitive order it is not necessary that the order should have been served upon the party against whom it has been granted, if it be proved that he had notice of the order aliunde, as by telegram, or newspaper report, or otherwise, and knew that it was intended to be enforced, or if he consented to the order, or if he was present in Court when the order was pronounced, or when the motion was made, although he left before the order was pronounced, or when the motion was made, although he left before the order was pronounced.

There may be circumstances where officials entrusted with the duty of carrying out a legal order may have valid reasons to doubt the authenticity of the order conveyed to them by interested parties and in those circumstances it may be said that there was no wilful disobedience of the order made.

The appellants were informed not merely by interested parties but by an Advocate, who was an officer of the Court, that the High Court had extended the stay order up to May 23, 1958. A formal application supported by an affidavit was made to that effect. *Hoshiar Singh* v. *Gurbachan Singh*, AIR 1962 (SC) 1089 : 1962 (2) CrLJ 236 : 1962 Supp (3) SCR 127 : 1962 All WR (HC) 553.

[10077] ● ***Powers of High Court for punishment of contempt.***—The High Court's powers for punishment of contempt have been preserved by the Constitution and they are also inherent in a Court of Record. The learned Judges were perhaps in error in describing it as contempt in *facie curiae*. That is contempt of a different sort. This was contempt by disobedience of an order of the High Court which is sometimes a civil contempt punishable under the Code of Civil Procedure and sometimes a criminal contempt punishable by imprisonment. The only curbs on the powers of the High Court to punish for contempt of itself are contained in the Contempt of Courts Act which limits the term for which a person can be imprisoned to six months simple imprisonment. The High Court was justified in punishing this contempt. In view of the grossness of the contempt it cannot be said that the punishment of three months simple imprisonment was excessive. *Mohd. Ikram Hussain* v. *The State of Uttar Pradesh*, AIR 1964 (SC) 1625 : 1964 (2) CrLJ 590 : 1964 (5) SCR 86.

[10078] ● ***Assistant Registrar functioning under Bihar and Orissa Co-operative Societies Act Court.***—Assistant Registrar working under Section 48 read with Section 6(2) of the Bihar and Orissa Co-operative Societies Act, 1955 is a Court in the specific case and as such the Contempt of Courts Act is applicable in the case. *Thakur Jugal Kishore* v. *Sitamarhi Central Coop. Bank*, AIR 1967 SC 1494 : 1967 CrLJ 1380 : (1967) 2 SCA 428 : 1969 Mad LJ (Cr) 344.

[10079] ● ***Commission of enquiry when appointed to enquiry into matter of justice importance.***—When a commission of enquiry had been appointed to inquire into matters of public importance there would not be any contempt of Court even though the matters which would be enquired into by the inquiry commissioner were the same as those which were pending in a litigation before the Civil or Criminal Court. *T.C. Waker* v. *N.L. Shukla*, AIR 1968 SC 1050 : 1968 CrLJ 1234 : 1968 (3) SCR 422. TO THE SAME EFFECT : (1) *K.T. Chandy* v. *M.R. Jardi*, AIR 1974 SC 642 : (1974) 1 SCC 414 : (1974) SCC (Cri) 210 : 1974 (1) LLJ 278 : 1974 CrLJ 594 : 1974 CrLR (SC) 81 (2) : 1974 (2) SCR 650.

[10080] ● ***Interference with due course of justice in pending proceedings.***—The plaintiff in a suit lost in election for membership of primary congress committee and to his opponent B. This led the plaintiff to sue in Munsif's Court for having the election of B declared void and inoperative. He had alleged various irregularities regarding the conduct of the election and he also filed an application for injunction restraining the District Election Officer and other officers from holding elections for membership of the District Congress Committee. He also asked for an injunction restraining B from taking part in those elections and the interim injunction was granted. The Working Committee of the Indian National Congress passed a resolution dated December 4/5, 1950, the substance of which was that any member of the Congress, having any grievance, in respect of any action taken, or decision given, by a Congress Organization, should take advantage of the tribunals provided to seek redress by way of appeal or reference, and that such matters should not be taken to law Courts. That resolution further provided that initiating of such litigation, and securing of *ex parte* interlocutory orders, against the Congress Committee and Congress authorities, was highly detrimental to the discipline of the organisation, and its smooth working. The resolution wound up, by saying that the Working Committee resolved that any member, who instituted a suit or other proceeding in law Courts against any Congress Committee or official did so at the risk of being considered guilty of gross indiscipline and of being summarily, and without any further notice removed from membership of the Congress, by order of the Provincial Congress Committees concerned or the Working Committee. When application for vacating the injunction filed by B came up for hearing the appellant filed an affidavit mentioning the fact that S had been expelled form the Congress organisation. The City Munsiff dismissed the injunction application filed by B on the ground that S was no longer a member of the Congress Organisation. The passing of the orders of expulsion by the appellant, against S and filing of a supporting affidavit in the suit by him clearly indicated that it was a deliberate attempt by the appellants to interfere with, or prejudice S in by him and it was no answer that the action by way of expulsion was taken on the basis of the Resolution of the All India Congress Working Committee and to enforce discipline in the Congress Organisation. *Govind Sahai* v. *State of Uttar Pradesh*, AIR 1968 SC 1513 : 1968 CrLJ 1661 : 1969 (1) SCR 176.

[10081] ● *Punishment under law of contempt when called for.*—A question whether there is contempt of Court or not is a serious one. The Court is both the accuser as well as the Judge of the accusation. It behoves the Court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in Courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemner must be punished. It must be realised that our system of Courts often results in delay of one kind or another, in the matter of transmission of orders of the superior Courts. The remedy for it is reform and punishment departmentally. Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged. *Debabrata Bandopadhaya* v. *State of W.B.*, AIR 1969 SC 189 : 1969 CrLJ 401 : (1969) 1 SCWR 377 : 1969 Mad LJ (Cr) 404 : (1969) 1 SCJ 533.

[10082] ● *Tendering of unqualified apology by Advocate.*—Unqualified apology tendered by advocate on behalf of his client for contemptuous language used by him in a notice under Section, 80, CPC is accepted. *S.G. Mahendar* v. *B.K. Lala*, (1969) 3 SCC 709.

[10083] ● *Nature of contempt proceedings—Duty of Court.*—The question if there has been a contempt is a serious one. The Court is both accuser and Judge. It behoves the Court to act with as great circumspection as possible making allowance for errors of Judgment and difficulties arising from inveterate practices in Courts and tribunals. *Debabrata Bandopadhya* v. *State of W.B.*, AIR 1969 SC 189 : 1969 CrLJ 401. **TO THE SAME EFFECT** : (1) *S.A. Karim* v. *M.K. Prakash*, AIR 1976 SC 859 : (1976) SCC (Cri) 217 : 1976 CrLJ 641 : 1976 (3) SCR 276 : 1976 CrLR (SC) 102 : 1976 CAR 124.

[10084] ● *Setting up of commission of enquiry by State Govt..*—Setting up of the commission of inquiry by the State Government or the continuance of inquiry by the commission so constituted would be tantamount to contempt of Court. *Jagannath* v. *State of Orissa*, AIR 1969 SC 215 : (1969) 2 SCJ 41 : (1968) 3 SCR 789 : (1968) 2 Um NP 891 : (1969) 1 SCWR 298.

[10085] ● *Parallel enquiry on matter pending not contempt.*—If parallel enquiry on a matter pending before a Court is held, the enquiry does not necessarily amount to contempt. *Jang Bahadur* v. *Baijnath*, AIR 1969 SC 30 : (1968) 2 SCJ 935 : 1969 Lab IC 194 : (1968) 2 Andh LT 280 : 1968 BLJR 939 : 1968 MPWR 885 : (1969) 1 SCA 263 : 1969 Mad LJ (Cr) 75 : 17 Fac LR 300 : (1969) 1 Lab LJ 567 : 1969 Cr R 267 : 1968 SCD 913 : 1968 All WR (HC) 580 : 1968 All LJ 1008.

[10086] ● *Delay in transmission of orders of superior Court to subordinate Court.*—Orders of stay, bail, injunctions received from superior Courts must receive close and prompt attention and unnecessary delay in dispatching or dealing with them may well furnish grounds for an inference that it was due to a natural disinclination to deal with the matter born of indifference and sometimes even of contumaciousness. *Debabrata Bandopadhaya* v. *State of W.B.*, AIR 1969 SC 189 : 1969 CrLJ 401 : (1969) 1 SCJ 533 : (1969) 1 SCWR 377 : 1969 Mad LJ (Cr) 404.

[10087] ● ***Authority holding enquiry in good faith not guilty of contempt.***—An authority holding an inquiry in good faith in exercise of the powers vested in it by a statute in not guilty of contempt of Court, merely because a parallel inquiry is imminent or pending before a Court. *Security & Finance* v. *Dattatrya*, AIR 1970 SC 720 : (1969) 1 SCC 181 : 1970 CrLJ 756 : (1970) 1 SCJ 508 : 72 Bom LR 415 : 1970 Mad LW (Cr) 154 : (1969) 2 SCR 668 : (1970) 1 SCA 251 : (1969) 2 Um Nip 659 : 1970 SC Cr R 90 : (1969) 2 SCWR 162 : 1969 Mah LJ 522 : 1969 MPLJ 454.

[10088] ● ***Interference with administration of justice.***—Any act done or writing published which is calculated to bring a Court or a Judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the Court is a contempt of Court. Contempt by speech or writing may be by scandalising the Court itself, or by abusing parties to actions, or by prejudicing mankind in favour or against a party before the cause is heard. It is incumbent upon Courts of justice to preserve their proceedings from being misrepresented, from prejudicing the minds of the public against persons concerned as parties and causes before the cause is finally heard has pernicious consequences. Speeches or writings misrepresenting the proceedings of the Court or prejudicing the public for or against a party or involving reflections on parties to a proceeding amount to contempt. To make a speech tending to influence the result of a pending trial, whether civil or criminal is a grave contempt. Comments on pending proceedings, if emanating from the parties or their lawyers, are generally a more serious contempt than those coming from independent sources. The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice. The question is not so much of the intention of the contemner as whether it is calculated to interfere with the administration of justice. *In re, P.C. Sen*, AIR 1970 SC 1821 : 1970 CrLJ 1525 : (1970) 2 SCJ 67 : (1969) 2 SCR 649.

[10089] ● ***Allegation of class bias—Contempt.***—Allegation of class bias is contempt. *R.C. Cooper* v. *Union of India*, AIR 1970 SC 1318 : (1970) 2 SCC 298. **TO THE SAME EFFECT :** (1) *E.M.S. Namboodiripad* v. *T.N. Nambiar*, AIR 1970 SC 2015 : (1970) 2 SCC 325 : (1970) SCC (Cri) 451 : 1970 CrLJ 1670 : (1971) 1 SCR 697.

[10090] ● ***Judiciary—Instrument of oppression.***—E.M.S. Namboodiripad, the then Chief Minister of Kerala told at a press conference :

> "Marx and Engels considered the Judiciary as an instrument of oppression and even today when the State set-up has not undergone any change it continues to be so, Mr. Namboodiripad told a news conference this morning. He further said that Judges are guided and dominated by class hatred, class interests and class prejudices and where the evidence is balanced between a well dressed pot-bellied rich man and a poor ill-dressed and illiterate person the Judge instinctively favours the former, the Chief Minister alleged. The Chief Minister said that election of Judges would be a better arrangement, but unless the basic State set-up is changed, it could not solve the problem. Referring to the Constitution the Chief Minister said the oath he had taken was limited only to see that the constitutional provisions are practised. 'I have not taken any oath' the Chief Minister said "that every word and every clause in the Constitution is sacred". This utterance held to constituted contempt. *E.M.S. Namboodiripad* v. *T.N. Nambiar*, AIR 1970 SC 2015 : (1970) 2 SCC 325 : (1970) SCC (Cri) 451 : 1970 CrLJ 1670 : (1971) 1 SCR 697.

[10091] ● ***Acts or words spoken tending to obstruct administration of justice—Amount to contempt of Court.***—The law of contempt stems from the right of the Courts to punish by imprisonment or fines persons guilty of words or acts which either obstruct or tend to obstruct the administration of justice. This right is exercised in India by all Courts when contempt is committed in *facie curaie* and by the superior Courts on their own behalf or on behalf of Courts subordinate to them even if committed outside the Courts. Formerly, it was regarded as inherent in the powers of a Court of Record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts. There are many kinds of contempt's. The chief forms of contempt are insult to Judges, attacks upon them, comment on pending proceedings with a tendency to prejudice fair trial, obstruction to officers of Courts, witnesses or the parties, abusing the process of the

Court breach of duty by officers connected with the Court and scandalising the Judges or the Courts. The last form occurs, generally speaking, when the conduct of a person tends to bring the authority and administration of the law into disrespect or disregard. In this conduct are included all acts which bring the Court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single Judge or a single Court but may, in certain circumstances, be committed in respect of the whole of the judiciary or judicial system. The question is whether in the circumstances of this case the offence was committed. *E.M.S. Namboodiripad* v. *T.N. Nambiar*, AIR 1970 SC 2015 : (1970) 2 SCC 325 : (1970) SCC (Cri) 451 : 1970 CrLJ 1670 : (1971) 1 SCR 697.

[10092] ● ***Interference with due administration of justice.***—If the speech which was broadcast by the Chief Minister was calculated to interfere with the Court of justice, it was liable to commit a contempt of the Court even assuming that he had not intended thereby to interfere with the due course of justice. There is nothing in *Saibal Kumar Gupta* v. *B. K. Sen,* [AIR 1961 SC 633) : (1961) SCR 460], on which counsel for the appellant relied which supports the contention that intention of the contemner is the decisive test. *P.C. Sen, In re*, AIR 1970 SC 1821 : 1970 CrLJ 1525 : (1970) 2 SCJ 67 : (1969) 2 SCR 649.

[10093] ● ***Corporate body can be punished for contempt.***—A corporation (Municipal Board in the case) is liable to be punished by imposition of fine and by sequestration for contempt for disobeying orders of competent Courts directed against them. A command to a Corporation is in fact a command to those who are officially responsible for the conduct of its affairs. If they, after being apprised of the order directed to the Corporation, prevent compliance or fail to take appropriate action, within their power, for the performance of the duty of obeying those orders, they and the corporate body are both guilty of disobedience and may be punished for contempt. *Aligarh Municipal Board* v. *Ekka Tanga Mazdoor Union*, AIR 1970 SC 1767 : (1970) 3 SCC 98 : (1970) SCC (Cri) 570 : 1970 CrLJ 1520 : (1970) UJ (SC) 729 : 1970 SCD 904.

[10094] ● ***Contempt for breach of prohibitive order of Court.***—In order to justify action for contempt of Court for breach of prohibitive order it is not necessary that the Order should have been officially served on the party against whom it is granted, if it is proved that he had knowledge of the exact order aliunde and he knew that it was intended to be enforced. Official communication is not a condition precedent, provided there is no valid reason to doubt the authenticity of the order conveyed to him. *Aligarh Municipal Board* v. *Ekka Tonga Mazdoor Union*, AIR 1970 SC 1767 : (1970) 3 SCC 98 : (1970) SCC (Cri) 570 : 1970 CrLJ 1520 (SC) : 1970 UJ (SC) 729 : 1970 SCD 904.

[10095] ● ***Principle governing cases of contempt by scandalising Court.***—The principle governing cases of contempt by scandalising Court are as follows : (1) It will not be right to say that committals for contempt by scandalising the Court have become obsolete, (2) the summary jurisdiction is to be exercised with caution only when its exercise is necessary for the proper administration of law and justice, (3) it is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men, (4) distinction must be made between a mere libel or defamation of a Judge and what amounts to a contempt of Court. The test in each case would be whether the impugned publication is a mere defamatory attack on the Judge or whether it is calculated to interfere with the due course of administration of justice—it is only in the latter case it is contempt, (5) alternatively the test is whether the wrong is done to the Judge personally or it is done to the public. Publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the public regarding the integrity, ability and fairness of the Judge or to deter actual or prospective litigants from placing complete reliance upon Court's administration of justice. *Perspective Publication* v. *State of Maharashtra*, AIR 1971 SC 221 : 1971 CrLJ 268 : (1970) 2 SCJ 35 : (1969) 2 SCR 779 : 1970 Mad LJ (Cr) 425 : 73 Bom LR 57.

[10096] ● ***Scandalising Court.***—Scandalising the Court cannot be justified. If a Judgment is criticised on containing errors and coupled with such criticism dishonest is alleged, the Court hearing contempt petition would first have to act as an appellate Court and decide whether there are errors or not. This is not and cannot be said to be the function of a Court trying to justify allegations amounting to contempt, it would tend to encourage disappointed litigants to avenge their defeat by abusing the Judge. *C.K. Daphtary* v. *O.P. Gupta*, AIR 1971 SC 1132 : (1971) SCC 626 : 1971 CrLJ 844 : 1971 Supp SCR 76.

[10097] ● ***Contempt of Court—Scandalising Court.***—"(1) It will not be right to say that committals for contempt for scandalising the Court become obsolete.

(2) The summary jurisdiction by way of contempt must be exercised with great care and caution and only 'then its exercise is necessary for the proper administration of law and justice.

(3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men"

(4) A distinction must be made between a mere libel or defamation of a Judge and what amounts to a contempt of the Court.

The test in each case would be whether the impugned publication is a mere defamatory attack on the Judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as Contempt.

(5) Alternatively the test will be whether the wrong is done to the Judge personally or it is done to the public. To borrow from the language of MUKHERJEE, J. (as he then was) (*Brahma Prakash Sharma's Case*) (1953 SCR 1169) : (AIR 1954 SC 10) the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice or if is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties." *Perspective Publication* v. *State of Maharashtra*, AIR 1971 SC 221 : 1971 CrLJ 268 : (1970) 2 SCJ 35.

[10098] ● ***Article imputing dishonesty.***—Article imputing dishonesty and lack of integrity on the part of a Judge of the High Court in a case decided by him, it being an indirect imputation and mostly innuendo but imputation being such that it create, strong prejudicial impact on the mind of the reader about the lack of honesty, integrity and impartiality of Judge deciding the suit—it amounts to gross contempt of Court. *Perspective Publication* v. *State of Maharashtra*, AIR 1971 SC 221 : 1971 CrLJ 268 : (1969) 2 SCR 799 : (1970) 2 SCJ 35.

[10099] ● ***Scandalising Court.***—In a case the allegation was that the Magistrate was friendly relation with advocates and he enjoys their hospitality on the question whether such allegation constitute contempt of Court. The mere statement in an application for transfer that a Magistrate is friendly with a party who happens to be an advocate and enjoys his hospitality or has friendly relations with him will not constitute contempt unless there is an imputation of some improper motives as would amount to scandalising the Court itself and as would have a tendency to create distrust in the popular mind and impair the confidence of the people in the Courts. It is true that in the garb of a transfer application a person cannot be allowed to commit contempt of Court by making allegations of a serious and scurrilous nature scandalizing the Court and imputing improper motives to the Judge trying the case. But then the nature of the allegations has to be closely examined and so long as they do not satisfy the requirements of what may be regarded as contempt of Court no punishment can he inflicted. *Govinda Ram* v. *State of Maharashtra*, AIR 1972 SC 989 : (1972) 1 SCC 740 : 1972 CrLJ 620.

[10100] ● ***Lowering authority of Court or interference with due course of justice not—Ingredient of contempt of Court.***—Two persons K & P by names were accused in a criminal case and the criminal case was sought to be withdrawn by public prosecutor on the ground that it was inexpedient for State and public policy to prosecute them. After hearing the counsel for the complainant and others, the committing magistrate dismissed the said application on October 6, 1967. The application for withdrawal of the prosecution amounted to an abuse and improper interference in the normal, course of justice. As intention of contemnor to cause the effect of bringing a Court or Judge into contempt, or lowering his authority, or interfering with the due course of Court is not a necessary ingredient of contempt of Court and it is enough to show this act was calculated to obstruct or interfere with the due course of justice and administration of law. *Shambhu Nath Jha* v. *Kedar Prasad Sinha*, AIR 1972 SC 1515 : (1972) 1 SCC 573 1973 CrLJ 453 : (1972) 3 SCR 183.

[10101] ● ***Absence of precedent.***—Absence of precedent should not preclude an act being held to be contempt of Court. The absence of precedent only puts the Court on guard that the area of contempt is not being unduly extended. *Barada Kanta Mishra* v. *Bhimsen Dixit*, AIR 1972 SC 2466 : (1973) 1 SCC 446 : (1975) SCC (Cri) 360 : 1973 CrLJ 19 : (1973) 2 SCR 495 : 1973 Mad LJ (Cr) 226.

[10102] ● ***Contempt—What amounts to.***—Two revision petitions were filed against the order dated 6, October, 1967. One of the revision petitions was filed by the State of Bihar and the other was filed by one Abani Kumar Mandal. Both the revision petitions were admitted by the High Court on November 30, 1967. During the pendency of the above mentioned criminal revision petitions, the Governor of Bihar as per notification dated March 12, 1968 appointed a Commission of Inquiry consisting of Shri T.L. Venkatarama Aiyer, retired Judge of the Supreme Court, under Section 3 of the Commissions of Inquiry Act, 1952 (Act 60 of 1952) to inquire into a number of charges against 14 persons who had earlier held the offices of Chief Minister and ministers in the State of Bihar. One of the persons against whom inquiry was ordered was Shri Hasibur Rahman who had held the office of Minister during the period from March 16, 1967 to January 28, 1968. The allegations which were the subject matter of the inquiry were set forth in the schedule annexed to the notification. Allegation No. J-4 which was the subject of inquiry against Shri Hasibur Rahman was as under :

'*K*' and '*A*' were facing prosecution along with nine others in a serious case of rioting with murder which was pending before the Munsif-Magistrate Jamui. They filed a revision petition before the Additional Sessions Judge, Monghyr against their prosecution, which was dismissed. Thereupon on 6th June, 1967 they presented an application direct to the then Minister for Law, '*H*' who directed that the Law Secretary should examine the matter and report and in the meanwhile the District Magistrate was requested to take two month's adjournment of the case and also send the case diary with his report.

'*H*' ignoring the positive advice of Law Department and of the District Magistrate ordered to ask for withdrawal. When the matters before the Commission of Enquiry appointed under Section 3 of Commissions of Inquiry Act and the matters for the decision of the Court in a pending criminal revision are distinct and separate and are not identical the publication of the Notification appointing the Commission in press does not amount to contempt of Court particularly when the notification is published in whole and not in part. It may be that some of the matters which were connected with the criminal revision petition were the subject of inquiry by the commission of inquiry, but that would not attract liability for contempt of Court. *Shambhu Nath Jha* v. *Kedar Prasad Sinha*, AIR 1972 SC 1515 : (1972) 1 SCC 573 : 1973 CrLJ 453 : (1972) 3 SCR 183.

[10103] ● ***Contemptuous imputations made with reference to administrative function of High Court.***—Contemptuous imputations made with reference to the administrative functions of the High Court amounts to contempt, although it may be made in the *memo* of appeal. *Barada Kanta Mishra* v. *Registrar, Orissa High Court*, AIR 1974 SC 710 : (1974) 1 SCC 374 : (1974) SCC (Cri) 128 : 1974 CrLJ 631 : 1973 SCD 981 : ILR (1973) Cut 1243.

[10104] ● ***Wrong or misleading statement deliberately and wilfully made.***—If a wrong or misleading statement is deliberately and wilfully made by a party to a litigation with a view to obtain a favourable order, it would prejudice or interfere with the due course of judicial proceeding and thus amount to contempt of Court. But it must be established satisfactorily that any deliberate and wrong statement was made and there was a favourable order in consequence of the statement. *Naraindas* v. *Govt. of Madhya Pradesh*, AIR 1974 SC 1252 : (1975) 3 SCC 31 : (1974) SCC (Cri) 727 : 1974 CrLJ 924.

[10105] ● ***No right to compel Court to initiate proceeding for contempt.***—So far as criminal contempt is concerned it is a matter entirely between the Court and the alleged contemner. No one has a statutory or a common law right to say that he is entitled to an order for committal because the alleged contemner is guilty of contempt. All that he can do is to move the Court and draw its attention to the contempt alleged to have been committed and then it is for the Court, if it so thinks fit, to take action to vindicate its authority and commit the alleged contemner for contempt. It is for the Court in exercise of its discretion to decide whether or not to initiate a proceeding for contempt. Even if the Court is *prima facie* satisfied that contempt has been committed, the Court yet may choose to ignore it and decline to take action. There is no right in anyone to compel the Court to initiate a proceeding for contempt even where a *prima facie* case appears to have been made out. *Barada Kanta Mishra* v. *Cati Krishna Mishra, C.J., Orissa*, AIR 1974 SC 2255 : (1975) 3 SCC 535 : (1974) SCC (Cri) 128 : 1975 CrLJ 1 : 1974 CrLR (SC) 124 : (1974) 2 Serv LR 549.

[10106] ● ***Exhibition of film contrary to Supreme Court judgment.***—Court order was passed declaring a resolution passed by a Town Municipal Committee allowing conversion of a lecture hall to cinema illegal, but even after the order cinema was exhibited in the hall, it is contempt. *K. Ramadas Shenoy* v. *Chief Officer, Town Municipal Council, Udipi*, AIR 1976 SC

994 : (1976) (1) SCC 24 : (1975) SCC (Cri) 746 : 1976 CrLJ 722 : 1975 UJ 705.

[10107] ● ***Test to decide contempt.***—The test to decide contempt is whether the act complained of was calculated to construct or had an intrinsic tendency to interfere with the course of justice and due administration of law the standard of proof is the same as in any criminal proceeding. *Abdul Karim* v. *M.K. Prakash*, AIR 1976 SC 859 : (1976) 1 SCC 975 : (1976) SCC (Cri) 217 : 1976 CrLJ 641 : 1976 Cur LJ (Cr) 50 : 1976 Ker LT 184.

[10108] ● ***Criminal contempt not be confused with contumacious conduct.***—Members of Bar Association met and resolved that the Chief Justice was acting in a most partisan manner under the influence of the Allahabad Bar. The text of the resolution was this—"The Action Committee is of the opinion that the Chief Justice's action in the discharge of administrative power under cl. 14 of the U.P. High Courts (Amalgamation) Order, 1948 is in a most partisan manner under the influence of Allahabad Bar quite unbecoming of the office which he holds." High Court did not take any penal measure and discharged its notice observing "It is a matter of regret that the contemners who are prominent members of the Avadh Bar should have themselves embarked on the path of vilifying the Chief Justice of this Court and that we do not want to be over-sensitive in the matter, keeping in mind the surrounding circumstances in which the contumacious act was committed by them and also keeping in view the fact that it was a single act of the Chief Justice for which the attack was made, we do not propose to punish contemners for the contumacious conduct for which we have adjudged them guilty, though we express our strong disapproval of that conduct and hope that the indiscretion will not be repeated." It is not a contumacious conduct but also contempt. *Hargovind Dayal Srivastav* v. *G. N. Verma*, AIR 1977 SC 1334 : (1977) 1 SCC 744 : (1977) SCC (Cri) 175 : 1977 CrLJ 1003 : (1977) 2 SCR 601.

[10109] ● ***Suit against Receiver without obtaining leave of Court.***—Suit against Receiver appointee under Order. 40 CPC without obtaining leave of the Court appointing the said Receiver is contempt. *Everest Coal* v. *State of Bihar*, AIR 1977 SC 2304 : (1978) 1 SCC 12 : (1978) 1 SCR 571 : (1978) 1 SCJ 188.

[10110] ● ***Criticism of judiciary by press.***—The first rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. The Court will act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the Judges, where the attack is calculated to obstruct or destroy the judicial process. The Court is willing to ignore, by a majestic liberalism, trifling and venial offences—the dogs may bark, the caravan will pass. The Court will not be prompted to act as a result of an easy irritability. Much rather, it shall take a look at the conspectus of features and be guided by a constellation of constitutional and other considerations when it chooses to use, or desist from using, its power of contempt. The second principle must be to harmonise the constitutional values of free criticism, the fourth estate included, and the need for a fearless curial process and its presiding functionary, the Judge A happy balance has to be struck, the benefit of the doubt being given generously against the Judge, slurring over marginal deviations but severely proving the supremacy of the law over pugnacious, vicious, unrepentant and malignant contemners, be they the powerful press, gang-up of vested interests, veteran columnists or olympian establishmentarians. Not because the Judge, the human symbol of a high value, is personally armoured by a regal privilege but because be you—the contemner—ever so high, the law—the People's expression of Justice—is above you. Curial courage overpowers arrogant might even as judicial benignity forgives errant or exaggerated critics. Indeed, to criticise the Judge fairly, albeit fiercely, is no crime but a necessary right, twice blessed in a democracy. For, it blesseth him that gives and him that takes. Where freedom of expression fairly exercised, subserves public interest in reasonable measure, public justice cannot gag it or manacle it, constitutionally speaking, free people are the ultimate guarantors of fearless justice. Such is the comerstone of our Constitution; such is the touchstone of our Contempt power, oriented on the confluence of free speech and fair justice which is the scriptural essence of our Fundamental Law. Speaking of the social philosophy and philosophy of law in an integrated manner as applicable to contempt of Court, there is no conceptual polarity but a delicate balance, and judicial 'sapience' draws the line. As it happens, our Constitution-makers foresaw the need for balancing all these competing interests.

The third principle is to avoid confusion between personal protection of a libelled Judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt, the latter is although overlapping spaces abound.

Because the law of contempt exists to protect public confidence in the administration of justice, the offence will not be committed by attacks upon the personal reputation of individual Judges as such. *In re, S. Madagaonkar*, AIR 1978 SC 727 : (1978) 3 SCC 339 : (1978) SCC (Cri) 402 : 1978 MLJ (Cr) 593.

[10111] ● *Judiciary not immune from criticism.*—The judiciary cannot be immune from criticism. But, when that criticism is based on obvious distortion or gross misstatement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it cannot be ignored. It is not correct to say that an action for contempt of Court, which is discretionary should be frequently or lightly taken. But, at the same time, it is not correct to suggest that the Court should abstain from using this weapon even when its use is needed to correct standards of behaviour in a grossly and repeatedly erring quarter. It may by better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of *bona fide* concern for improvement. But, when there appears some scheme and a design to bring about results which must damage confidence in our judicial system and demoralise Judges of the highest Court by making malicious attacks, any one interested in maintaining high standards of fearless, impartial, and unbending justice will feel perturbed. *Re. S. Mulgaokar*, AIR 1978 SC 727 : (1978) 3 SCC 339 : (1978) SCC (Cri) 402 : (1978) 2 SCJ 114 : 1978 Mad LJ (Cr) 593.

[10112] ● *Fearless and impartial Courts of justice bulwark of healthy democracy.*—The judiciary cannot be immune from criticism, but, when that criticism is based on obvious distortion or gross mix-statement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it cannot be ignored. I am not one of those who think that an action for contempt of Court, which is discretionary, should be frequently or lightly taken. But at the same time, one should not abstain from using this weapon even when its use is needed to correct standards of behaviour in a grossly and repeatedly erring quarter. It may be better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of *bona fide* concern for improvement. But, when there appears some scheme and a design to bring about results which must damage confidence in our judicial system and demoralize Judges of the highest Court by making malicious attack, any one interested in maintaining high standards of fearless, impartial and unbending justice will feel perturbed. One may be able to live in a world of Yogic detachment when unjustified abuses are hurled at one's self personally, but when the question is of injury to an institution, such as the highest Court of justice in the land, one cannot overlook its effects upon national honour and prestige in the comity of nations. If fearless and impartial Courts of justice are the bulwark of a healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks upon them. *Re. S. Mulgaokar*, AIR 1978 SC 727 : (1978) 3 SCC 339 : (1978) SCC (Cri) 402 : (1978) 2 SCJ 114 : 1978 Mad LJ (Cr) 593.

[10113] ● *Contempt of Court—False representation to Court.*—The reasons why a breach of clear undertaking given to the Court amounts to contempt of Court is that the contemner by making a false representation to the Court obtains a benefit for himself and if he fails to honour the undertaking, he plays a serious fraud on the Court itself and thereby obstructs the course of justice and brings into disrepute the judicial institution. The same cannot, however, be said of a consent order or a compromise decree where the fraud, if any, is practised by the person concerned not on the Court but on one of the parties. Thus, the offence committed by the person concerned is *qua* the party not *qua* the Court, and, therefore, the very foundation for proceeding for contempt of Court is completely absent in such cases. Where there is an express undertaking given in writing before the Court by the contemner or incorporated by the Court in its order, there can be no question of wilful disobedience of such an undertaking. *Babu Ram* v. *Sudhir Bhasin*, AIR 1978 SC 1528 : (1980) 3 SCC 47 : (1980) SCC (Cri) 527 : 1979 CrLJ 952 : 1979 (3) SCR 685.

[10114] ● *Wilful breach of undertaking.*—It is manifest that any person appearing before the Court can give an undertaking in two ways : (1) that he files an application or an affidavit clearly setting out the undertaking given by him to Court, or (2) by a clear and express oral undertaking given by the contemner and incorporated by the Court in its order. If any of these conditions are satisfied then a wilful breach of the undertaking would doubtless amount to an offence under the Act. *Babu Ram* v. *Sudhir Bhasin*, AIR 1979 SC 1528 : (1980) 3 SCC 47 : 1979 CrLJ 952.

[10115] ● *Breach of undertaking.*—An offence of cheating punishable under Section 420, IPC was compounded and the accused was acquitted on the basis of an undertaking namely that he would refund a sum. Breach of undertaking would entail an offence of contempt of Court. *Pushpaben* v. *Naran Das*, AIR 1979 SC 1536 : (1979)

2 SCC 394 : (1979) SCC (Cri) 511 : 1979 CrLJ 960 : 1979 CrLR (SC) 421 : 1979 (3) SCR 636.

[10116] ● *Disobedience of Court order by Govt.*.—It is true that filing of appeal or revision is no excuse for not complying with Court's order but when Government was the respondent the Court should have given more time than mere 15 days to comply with its order as it is common knowledge that necessary formalities could not have been completed in such short time. *Union of India* v. *Satish Chandra Sharma*, AIR 1980 SC 600 : (1980) 2 SCC 144 : (1980) 2 SCR 298 : 1980 BLJR 95.

[10117] ● *Resorting to judicial proceedings mala fide.*—Resorting to judicial proceedings *mala fide* to thwart a previous judicial proceeding to circumvent an earlier order of a competent Court may amount to contempt. *Advocate General, Bihar* v. *M.P. Khaira*, AIR 1980 SC 946 : (1980) 3 SCC 311 : (1980) SCC (Cri) 688 : 1980 CrLJ 684 : 1980 CrLR (SC) 260 : 1980 Cr App R (SC) 135 : (1980) 2 SCJ 33 : 1980 BLJR 233 : 1980 UJ (SC) 474 : 1980 Mad LJ (Cr) 511 : (1980) 2 SCR 1172.

[10118] ● *Proceedings for contempt—Duty of Court.*—Every abuse of the process of the Court may not necessarily amount to contempt of Court abuse of the process of the Court calculated to hamper the due course of a Judicial proceeding or the orderly administration of justice we must say, is a contempt of Court. It may be that certain minor abuses of the process of the Court may be suitably dealt with as between the parties, by striking out pleadings under the provisions of Order 6, Rule 16 or in some other manner. But, on the other hand, it may be necessary to punish as a contempt, a course of conduct which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice. The public have an interest, an abiding and a real interest, and a vital stake in the effective and orderly administration of justice, because, unless justice is so administered, there is the peril of all rights and liberties perishing. The Court has the duty of protecting the interest of the public in the due administration of justice and, so, it is entrusted with the power to commit for contempt of Court, not in order to protect the dignity of the Court against insult or injury as the expression "Contempt of Court" may seem to suggests, but, to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with. We are satisfied that the filing of the application dated December 14, 1972, was an abuse of the process of the Court, calculated to obstruct the due course of a judicial proceeding and the administration of justice and was, therefore, a criminal contempt of Court. *Advocate General, State of Bihar* v. *M.P. Khair Industries*, AIR 1980 (SC) 946 : (1980) 3 SCC 311 : (1980) SCC (Cri) 688 : 1980 CrLJ 684 : 1980 CrLR (SC) 260 : 1980 CAR 135.

[10119] ● *Criminal contempt.*—It seems to be criminal contempt. Section 1 of the Judicial Officers' Protection Act, 1850 affords protection to two broad categories of acts done or ordered be done by a judicial officer in his judicial capacity. In the first category fall those acts which are within the limits of his jurisdiction. The second category compasses those acts which may not be within the jurisdiction of the judicial officer, but are nevertheless, done or ordered to be done by him believing in good faith that he had jurisdiction to do them or order them to be done. If the judicial officer is found to have been acting in the discharge of his judicial duties, then, in order to exclude him from the protection of this statute, the complaint has to establish that, (1) the judicial officer complained against was acting without any jurisdiction whatsoever, and he was acting without good faith in believing himself to have jurisdiction. The tone, temper and contents of the notice issued by the appellants of the notice issued by the appellant, particularly of the passage which inputs malice, partiality and dishonesty to the subordinate judge in the judicial adjudication of the aforesaid suits against the appellants, constitute a deliberate attempt to scandalise the judge to terribly embarrass him and to lower the authority of his office and the Court. The act and conduct of the appellant in issuing the notice : therefore, fell squarely within sub-clause (i) and (ii) of the definition of "criminal contempt" given in Section 2 of the Contempt of Courts Act. *Rachapuddi Subba Rao* v. *Advocate General, Andhra Pradesh*, AIR 1981 SC 755 : (1981) 2 SCC 577 : (1981) SCC (Cri) 566 : 1981 CrLJ 315 : 1981 CrLR (SC) 87 : (1981) 2 SCJ 27 : 1981 Cr App R (SC) 46 : 1981 Cur LJ (Cr) 60 : 1981 Mad LJ (Cr) 340 : (1981) 2 SCR 320.

[10120] ● *Gross contempt—Hurling shoe to Presiding officer of Court.*—Hurling shoe to presiding officer of Court is a gross contempt (Supreme Court however in view of apology tendered reduced six months. R.I. to one month). *R.K. Garg, Advocate* v. *State of Himachal Pradesh*, AIR 1981 SC 1382 : (1981) 3 SCC 166 : (1981) SCC (Cri) 663 : 1981 CrLJ 1029 : 1981 CrLR (SC) 325 : 1981 Ker LJ 406 : 1981 Cr App

R (SC) 211 : 1981 All WC 446 : 1981 Cur LJ (Cr) 163.

[10121] ● ***Snatching away child from custody of mother.***—Father snatching away child from mother's custody resulting in a criminal case under Section 363, IPC launched against him—father proceeded against for contempt of Court for not complying with Court's order for returning the baby—*held* the father cannot make a grievance that the writ should not have been issued as he was proceeded against for the offence of snatching away the child and he was protected by Article 20(3), Constitution of India in not divulging his defence in the criminal case and that the entire question whether he had unlawfully removed the child from the custody of his mother could be exhaustively enquired into in the criminal case. *Capt. D. Somal* v. *Sushma Somal*, AIR 1981 SC 1026 : (1981) 2 SCC 277 : (1981) SCC (Cri) 413 : 1981 CrLR (SC) 576 : 1981 Cr LT 719 : 1981 BBCJ (SC) 62 : 1981 Cur LJ (Cr) 125 : 1981 Cr App R (SC) 284 : 1981 Chand Cr R (SC) 169 : 1981 Chand LR (Cr) 325 (SC).

[10122] ● ***News item about institution of suit by Chief Minister against publication.***—In the instant case, the worst that can be said against the publication is that it exposes the respondent to mild ridicule. To say that a publication which exposes a suit to such mild ridicule in connection with the suit prejudices or interferes or tends to interfere with, the due course of any judicial proceeding or interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner is to take a highly sensitive view of 'the contempt jurisdiction'. We do not mean to say that pouring ridicule on a suitor can never interfere or obstruct the administration of justice but we find it impossible to say so in the present case where the ridicule is not so violent and the parties are well known public figures well able to bear with equanimity any ridicule poured on them. *M. Kalyanasundaram* v. *Karunanidhi*, AIR 1981 SC 1416 : (1983) 3 SCC 576 : 1981 CrLJ 1017 : 1981 CrLR (SC) 435(2).

[10123] ● ***Breach of undertaking—Contempt petition.***—The defendant in a suit for recovery of possession who lost his case eventually filed a special leave for appeal to Apex Court under Article 136 Constitution. The leave petition was also dismissed but on agreement between the parties and on an undertaking being given by the defendant to the Court that he would give possession of disputed, premises in agreed time the Court pave time to the defendant to give vacant possession of the disputed property to the plaintiff. Just before the expiration of the period granted by the Supreme Court the defendant filed a petition urging the Supreme Court to extend time. The plaintiff thereupon alleged that the defendant has committed a contempt of the Supreme Court as he has committed willful breach of the solemn undertaking given in the Supreme Court. The defendant appeared in response to the notice issued and contended that he is willing to handover possession of that part of the property which was subject matter of litigation but further contended that he is in possession of some other portion of the plot which he could not be asked to vacate under the hanging sword of contempt proceedings. The defendant had also filed a suit for declaration of his title to the said other portion of plot. The Supreme Court thereupon ordered the Sub-Divisional Magistrate having jurisdiction over the locality to take possession of entire property *i.e.* property which was subject-matter of litigation and also the other property possessed by the defendant. At the hearing of the contempt petition the defendant agreed that the entire property be given in possession of the plaintiff until the decision of the suit for declaration of title filed by him and also gave an undertaking that he was willing and ready to carry out the undertaking given to Supreme Court. In these circumstances the Supreme Court refused to take action against the defendant-contemner. *Shanti Sarup Gupta* v. *Anjuman Isnai Ashria,* AIR 1982 SC 1461 : (1982) 3 SCC 128 : 1982 SCC (Cri) 632 : 1982 CrLJ 1941 : 1982 CrLR (SC) 521.

[10124] ● ***Writ petition against non—Granting of accreditation.***—Where a writ petition is filed against the order of Government declining to grant accreditation under R 2(1) of S II of the Rules for Accreditation of Press Correspondents and News Agencies and the operative part of the order therein was based on the assurance given by the Government advocate that he 'would advise the Government' that accreditation be issued to the petitioner on condition that he should be at the headquarters of the Government, as required by the said R. 2(1), however, the Government advocate never intended or meant to convey that the Government would in all circumstances grant accreditation, there being no undertaking for the grant of accreditation, the failure of the Government to do so would not amount to contempt of Court. *Union of India* v. *Mario Central*, AIR 1982 SC 691 : (1982) 3 SCC 262 : 1982 CrLJ 187 : 1982 CrLR (SC) 51.

[10125] ● ***Departmental proceeding after acquittal.***—Departmental proceeding after acquittal. Whether or not a departmental proceeding should continue after acquittal depends upon the nature of findings given by the Court. Normally when the accused is acquitted honourably and completely exonerated of the charges it is not expedient to continue a departmental enquiry on the basis of the same charges. But this does not take away the power of the authority to continue the departmental proceeding. *Corpn. of City of Nagpore* v. *Ramchandra G. Modak*, AIR 1984 SC 636 : (1981) 2 SCC 714 : 1984 Lab IC 179 : (1981) 3 SCR 22 : 1981 (43) FLR 78 : 1981 UJ 316 : 1981 (1) Scale 503.

[10126] ● ***Criminal contempt—Standard of proof.***—Considering the high position which Chief Minister occupy in the public life of our country, their words and deeds have to be presumed to be intended. The defence that what was said or done was not intended is not open to persons occupying high public offices. The formal expression of regard for the Courts under the pressure of a contempt notice becomes a mere escape if speeches and writings betray defiance of judicial authority and constitute an exhortation to the public to disregard orders passed by Courts. But, the Chief Minister denies to have made the utterances, as stoutly as the editor asserts that the reports of the speeches published in his newspaper are true. There is word against word, and no preponderating circumstance which, objectively, compels the acceptance of the word of one in preference to the word of the other.

It is not for us to advise a chosen representative of the people as to how he should conduct his public affairs and what precautions he should take in order to protect himself from similar allegations in future. But, it causes us some surprise that there is no official record whatsoever of the speeches made by the Chief Minister at the two functions. He was invited at those functions in his capacity as the Chief Minister. And, admittedly, he spoke at those functions. With the little knowledge that we have of these matters, we suppose that when a Chief Minister makes a formal speech, an official record of the speech is generally available. If he speaks from a prepared text, that forms the record of what he spoke, But, whether he speaks from a text or speaks extempore, it is unlikely, in the times in which we live, that a speech made by a Chief Minister on a formal occasion will not be taken down of tape-recorded. Tapes have become a part of our life, public and private, sometimes to the point of annoyance.

It is so much safer for persons who have to make frequent public appearance to have their utterances duly put on paper, before or soon after the event. For those who have nothing to conceal or fear, that is a prudent course of action. For the rest, a constant friction with the law of contempt is inevitable. The former will lay their cards on the table and be cleared. The latter have to live in the hope that the rigorous standard of 'proof beyond a reasonable doubt' will act as their saviour. The latter course of conduct leaves much to be desired from the point of view of men of honour. Courts are not astute to resort to their power to punish any one for criminal contempt. But that reluctance should not be overtaxed.

The Chief Minister has stated in his affidavit that he spoke extempore. We are not on that. In the first place, extempore speeches confer on greater immunity on the speaker than the speeches made from prepared texts. Secondly, extempore speeches are not to be made without the application of a careful mind. That is not the definition of an extempore speech. Thirdly, more the extempore, greater the need to keep a written record of the spoken word. In the written record lies the safety of the public speaker, though not, perhaps, the benefit of posterity.

Those who attack the judiciary must remember that they are attacking an institution which is indispensable for the survival of the rule of law but which has no means of defending itself. In the very nature of things, it cannot engage itself in an open war, nor indulge in releasing contradictions. The sword of justice seisin the hands of the Goddess of Justice, not in the hands of mortal Judges. Therefore, Judges must receive the due protection of law from unfounded attacks on their character. *M.R. Parashar* v. *Dr. Farooq Abdullah,* 1984 AIR (SC) 615 : 1984 SCC (Cri) 254 : 1984 CrLJ 337 : 1984 CrLR (SC) 113 : 1984 CAR 259 : 1984 KerLT 264.

[10127] ● ***Breach of undertaking when.***—When there is clear breach of undertaking, Court can direct in addition to imposing sentence, its closure of breach. *Mohammed Idris* v. *Rustam Jehangir Babuji*, AIR 1984 SC 1826 : (1984) 4 SCC 216 : 1985 CrLJ 353.

[10128] ● ***Habeas corpus petition—Failure of Govt. to produce person.***—Government failing to produce a person on *habeas corpus* petition—it is grave contempt (a fine of one lakh imposed). *Sebestian* v. *Union of India*, AIR 1984 SC 1026 : (1984) 3 SCC 82 : 1984 CrLJ 830 : (1984) 2 Crimes 22.

[10129] ● ***Power to commit contempt to be exercised with greatest caution.***—The power to commit for contempt of Court has to be exercised with the greatest caution. Neither too sensitive attitude nor on easy escape from performing the harsh duty would help in maintaining respect and decorum for the judicial process. The Court is to steer clear between two extremes but it must be remembered that the petitioner who has moved for taking action in contempt is not entitled as a matter of right to withdraw the petition when ever it suits his purpose once the Act, which *prima facie* shows that contempt of the Court has been committed is brought to the notice of the Court, it is the Court which has to decide whether the contempt has been committed or not or whether it is appropriate to take action or at a later date whether to drop the proceedings. The matter is primarily between the Court and the contemner. *Shri Amrit Nahata* v. *Union of India,* AIR 1986 SC 791 : (1985) 3 SCC 382 : 1985 SCC (Cri) 402 : 1986 CrLJ 806 : 1985 CrLR (SC) 362.

[10130] ● ***Contempt—Officer expressing independent opinion against Court orders' in notings not necessarily amount to contempt.***—A Government functions by taking decisions on the strength of views and suggestions expressed by the various officers at different levels, ultimately getting finality at the hands of the Minister concerned. Till then, conflicting opinions, views and suggestions would emanate from various officers at the lower level. There should not be any fetter on the fearless and independent expression of opinions by officers on matters coming before them through the files. This is so even when they consider orders of Courts. Officers of the Government are often times confronted with orders of Court, impossible of immediate compliance for various reasons. It would be dangerous to found an action or contempt, for the views expressed in the file notes, on the discovery of unpleasant or unsavory notes, on a perusal of the notes filed by the Court after getting them summoned. This would impair the independent functioning of the civil service essential to democracy. This would cause impediments in the fearless expression of opinion by the officers of the Government. The notings on files differ from officer to officer. It may well be that the notes made by a particular officer, in some cases, technically speaking is in disobedience of an order of the Court or may be in violation of such order but a more experienced officer sitting above him can always correct him. To rely upon the notings in a file for the purpose of initiating contempt therefore, would be to put the functioning of the Government out of gear. Courts must guard against being over sensitive, when they come across, objectionable notings made by officers, sometimes out of inexperience, sometimes out of over zealousness and sometimes out of ignorance of the nuances of the question of law involved. *State of Bihar* v. *Kripalu Shankar,* AIR 1987 SC 1554 : (1987) 3 SCC 34 : 1987 SCC (Cri) 442 : 1987 CrLJ 1860 : 1987 CrLR (SC) 521 : JT 1987 (3) SC 49 : 1987 (3) SCR 1 : 1987 (2) SLJ 96 : 1987 (1) Scale 1070.

[10131] ● ***Administration of justice and Judges open to public criticism.***—Administration of justice and Judges are open to public criticism. Criticism about Judges and judicial system is welcome. But any criticism which hampers the administration of justice or which erodes the faith in the objective approach of judges and brings administration of justice into ridicule is contempt. *P.N. Duda* v. *Shiv Shankar,* AIR 1988 SC 1208 : (1988) 3 SCC 167 : 1988 SCC (Cri) 589 : 1988 CrLJ 1745 : 1988 CrLR (SC) 641 : JT 1988 (2) SC 102 : (1988) 1 SCWR 230 : 1988 (3) SCR 547 : 1988 (1) Scale.

[10132] ● ***Status quo—Connotation.***—The expression 'status quo' is undoubtedly a term of ambiguity and at times gives rise to doubt and difficulty. According to the ordinary legal connotation' the term 'status quo' implies the existing state of things at any given point of time. The qualifying words 'as in the High Court' clearly limit the scope and effect of the status quo order. In the present case, the High Court determined only one question, namely, that slurry was not coal or mineral. It refrained from entering into the question of right or title of the parties on the ground that it involved investigation into disputed questions of facts. Therefore, apart from the abstract question that slurry was not coal or mineral, the impugned Judgement does not adjudicate upon the rights of the parties. Viewed from that angle, it is obvious that status quo as in the High Court cannot mean anything else except status quo as existing when the matter was pending in the High Court before the Judgement was delivered. In the fact situation of the particular case, no case for contempt is made out as in consequence of status quo order parties were relegated to position that obtained when writ petition was pending and they were subject to order of High Court permitting petitioner to remove sludge/slurry. *Bharat Coking Coal* v. *State of Bihar,* AIR 1988 SC 127 : 1988 CrLJ 396 : 1987 Supp SCC 394 : JT 1987 (4) SC 403 : (1988) 1 SCJ 9 : 1988 (1) SCR 869 : 1987 (2) Scale 1015.

[10133] ● ***Public interest litigation couched in savoury language.***—The petition has been couched in the savoury language and the petition seems to have made an intentional attempt to indulge in mud slugging against the advocates, this Court in particular as also other constitutional institutions. Many of the allegations in his writ petition are likely to lower the prestige of this

Court as the apex judicial institution. At one place in the writ petition, he has alleged :—

> "Thus the working of the Judges are cocktail based on Western Common Laws and American techniques, as such unproductive and out-dated according to socio-economic conditions of the country."

At one another place, the petitioner has stated that :—

> "This Court has become a constitutional liability without having control over the illegal acts of the Government.......Thus the people for whom the Constitution is meant have now turned down their faces against it which is a disillusionment for fear that justice is a will of the wisp."

Yet at another place the petitioner has stated that his Court is sleeping over the issues like Kumbhkarna. The reading of the writ petition gives the impression that it is clearly intended to denigrate this Court in the esteem of the people of India. We are of the *prima facie* view that the petition has been drawn up with a designed purpose of bringing the Court into contempt and the petitioner is, therefore, *prima facie* guilty of contempt. *Charan Lal Sahu* v. *Union of India*, AIR 1988 SC 107 : (1988) 3 SCC 255 : 1989 SCC (Cri) 662 : 1988 CrLJ 181 : 1988 CrLR (SC) 757.

[10134] ● ***Public interest litigation—Designed to bring Court into contempt.***—An experienced advocate filed a writ petition in Apex Court alleging it to be a Public Interest Litigation alleging *inter alia*, that working of the Judges are based on Western Common law and American techniques which are unproductive and outdated in India. It was also alleged that the Supreme Court has become a constitutional liability without having control over illegal acts of Govt. Pleadings were also meaningless. The reading of the writ petition gives the impression that it is clearly intended denigrate the Supreme Court in the esteem of the people of India. The *prima facie* view would be that the petition has been draw up with a designed purpose of bringing the Court into contempt and the petitioner is, therefore, *prima facie* guilty of contempt Supreme Court directed issue of show cause notice to petitioner. *Charan Lal Sahu* v. *Union of India,* AIR 1988 SC 107 : (1988) 3 SCC 255 : 1988 CrLJ 181 : JT 1989 (4) SC 582 : 1990 (1) Comp LJ 125 : 1989 Supp (2) SCR 597.

[10135] ● ***Criminal proceedings pending in trial.***—Supreme Court directed that trial Court is to conduct trial from day to day and that prosecution must examine every witness, but no witness examined even after one year of such direction. Contempt proceeding cannot be initiated as no charge has been framed and stage of examination of witness has not come. *Diwan Naubat Rai* v. *State (Delhi Administration),* AIR 1989 SC 542 : (1989) 1 SCC 297 : 1989 SCC (Cri) 142 : 1989 CrLJ 802 : 1989 CrLR (SC) 1 : JT 1988 (4) SC 570.

[10136] ● ***Contempt proceedings—Initiation of.***—We see no justification to initiate any contempt proceeding against the respondents for withholding a sum of Rs. 1,20,000/- out of the sum of Rs. 4 lakhs directed to be paid to the petitioner. Rs. 1,20,000/- has been withheld on the plea that under Chapter XVII of the Income-tax Act of 1961, the Union of India has the obligation to deduct income-tax at source. The intention of the payer in the facts of the case for withholding the amount cannot be held to be either *mala fide* or is there any scope to impute that the respondents intended to violate the direction of this Court. *Lt. Col. K.D. Gupta* v. *Union of India,* AIR 1989 (SC) 2071 : (1989) 3 SCC 566 : 1989 SCC (Cri) 653 : 1989 CrLJ 2204 : 1989 CrLR (SC) 644.

[10137] ● ***Undertaking to vacate given by—Tenant.***—When Court accepts an undertaking given by one of the parties and passes orders based on such undertaking, the order amounts in substance to an injunction restraining that party from acting in breach thereof. The breach of an undertaking given to the Court by or on behalf of a party to a civil proceedings is, therefore, regarded as tantamount to a breach of injunction although the remedies were not always identical. For the purpose of enforcing an undertaking, that undertaking if broken, would involve the same consequences on the persons breaking that undertaking as would their disobedience to an order for an injunction. It is settled law that breach of an injunction or breach of an undertaking given to a Court by a person in a civil proceeding on the faith of which the Court sanctions a particular course of action is misconduct amounting to contempt. The remedy in such circumstances may be in the form of a direction to the contemnor to purge the contempt or a sentence imprisonment or fine or all of them. *Noor Ali Babul* v. *K.M.M. Shetty,* AIR 1990 SC 464 : 1990 (1) SCC 259 : 1990 CrLJ 316 (SC) : JT 1989 (4) SC 573 : Supp (2) SCR 561.

[10138] ● ***Undertaking based on implication or assumption known by contemner to be false.***—The party giving undertaking to Court based on implication or assumptions which are false to its knowledge is guilty of misconduct amounting to contempt. In a case, a tenant (a company) filed a writ petition against eviction decree passed against it and on it petitioner being dismissed prayed for grant of time to vacate the premises and the time was granted subject to its filing a written undertaking that it would not part with the possession of the suit premises or create third party interests in the suit premises and the tenant Company although knowing fully well that the Chairman of the Company was already a lawful sub tenant of the suit premises, gave the requisite undertaking which clearly implied that the Company was in possession of the suit premises after the time granted to vacate the premises expired and thus mislead the Court, the tenant was guilty of misconduct amounting to contempt. *Roshan Samboyee (Dr.)* v. *S.R. Cotton Mills,* AIR 1990 SC 1881 : 1990 (2) SCC 636 : 1990 CrLJ 1770 (SC) : JT 1990 (3) SC 522 : 1990 (1) SCJ 611 : 1990 (2) (SCR) 381 : 1990 (1) Scale 718.

[10139] ● ***Criminal contempt.***—The definition of criminal contempt is wide enough to include any act by way a person which would tend to interfere with the administration of justice or which would lower the authority of Court. The public have a vital stake in effective and orderly administration of justice and, so, it is entrusted with the power to commit for contempt of Court, not to protect the dignity of the Court against insult or injury, but to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered with. "It is a mode of vindicating the majesty of law, in its active manifestation against obstruction and outrage." (FRANK FURTER, J. in *Offutt* v. *U.S.,* (1954) 348 US 11). The object and purpose of punishing contempt for interference with the administration of justice is not to safeguard or protect the dignity of the Judge or the Magistrate, but the purpose is to preserve the authority of the Courts to ensure and ordered life in society. In a case a Chief Judicial Magistrate was assaulted, arrested and handcuffed by police inspector and other police officer. The police officers tied him with a tick rope as if he was wild animal. In that condition he was taken to hospital for medical examination where he was made to sit in varanda exposing him to the public gaze, providing opportunity to the members of the public to see that the Police had the power and privilege to apprehend and deal with a Chief Judicial Magistrate according to its sweet will. This constituted gross criminal contempt. *Delhi Judicial Service Association* v. *State of Gujarat,* AIR 1991 SC 2176 : (1991) 4 SCC 406 : 1991 CrLJ 3086 : 1991 CrLR (SC) 753 : JT 1991 (3) SC 617 : 1991 (3) SCR 936 : 1992 (1) CCR 23 : 1991 (3) Crimes 232 : 1991 (2) Scale 501 : 1992 CAR 17.

[10140] ● ***Wilful and deliberate disobedience of order of Court.***—For committing contempt there must be wilful and deliberate disobedience of order of Court. *Jiwani Kumari Parekh* v. *Satyabrata Chakravorty, Managing Director and Chief Executive of the West Bangal Handicraft Development Corpn. Ltd.,* AIR 1991 SC 326 : (1990) 4 SCC 737 : 1991 CrLJ 471.

[10141] ● ***Unfounded and uncalled allegation against Judges.***—Unfounded and uncalled for allegation against Judges and statements casting aspersions on Court would justify initiation of contempt proceeding as scandalising Court. *S.P. Sawhney* v. *Life Insurance Corp.,* AIR 1991 (SC) 661 : (1991) 2 SCC 318 : JT 1991 (5) SC 122 : 1991 LIC 648 : 1991 (16) ATC 483 : 1991 (1) Scale 90 : 1991 (1) SLR 785 : 1992 (1) ATR 45 : 1991 (1) UJ 478.

[10142] ● ***Wilful disobedience of order of Court by Govt. officer.***—We find ourselves unable to conclude beyond all doubt that the appellant had acted wilfully in this regard. We think that we should give the appellant the benefit of doubt in the circumstances of the case. Such lapses, even during a short interval, can sometimes cause irreparable damage and injury. In the circumstances of this case we have, though with a certain degree of reservation, extended to the appellant the benefit of doubt but we should like to put out a warning that where a case of wilful disobedience is made out, the Courts will not hesitate and will convict the delinquent officer and that no lenience in the Court's attitude should be expected from the Court as a matter of course merely on the ground that an order of conviction would damage the service career of the concerned officer. *Tapan Kumar Mukherjee* v. *Heramani Mondal,* AIR 1991 (SC) 281 : (1991) 1 SCC 397 : 1991 SCC (Cri) 198 : 1991 CrLJ 390 : 1991 CrLR (SC).

[10143] ● ***Contempt of Court union of India represented by Secretary guilty of.***—Shri A.N. Verma is a senior administrative officer and should have taken appropriate care to strictly comply with the direction of this Court. This Court on an earlier occasion pointed out that Courts constitute an inbuilt mechanism within the framework of the Constitution for purposes of social audit and to ensure compliance of the rule of law. In enforcing compliance of orders of this Court and in punishing for lapses in the matter of compliance by invoking the power of contempt, this Court seeks only to ensure that the majesty of this institution may not be lowered and the functional utility of the constitutional edifice may not be rendered ineffective. This Court expects the Union of India to exhibit the most ideal conduct for others to evaluate. We have, therefore, come to the conclusion that the respondent Union of India in the Ministry of productive represented by Shri A.N. Verma, Secretary is guilty of contempt of this Court. *M.L. Sachdev* v. *Union of India,* AIR 1991 SC 311 : 1991 (1) SCC 605 : 1991 CrLJ 392.

[10144] ● ***State Govt. not wilfully or deliberately or contemptuously flouting or disobeying order of Court.***—We are not satisfied that it is a case in which it can conclusively be said that the respondents have wilfully or deliberately or contemptuously flouted or disobeyed the orders of this Court dated 7-2-1991. It appears to us to be a case of misinterpretation of executive directions and order of this Court dated 7-2-1991 and is, therefore, not a fit case in which contempt proceedings need to proceed any further. We, accordingly, drop the contempt proceedings and discharge the rule issued against the respondents. *Ashok Kumar Singh* v. *State of Bihar,* AIR 1992 (SC) 407 : (1992) 1 SCC 152 : 1992 SCC (Cri) 84 : 1992 CrLJ 284 : 1992 CrLR (SC) 174.

[10145] ● ***Interference with administration of justice.***—The contemner is guilty of contempt. He deliberately used insulting language to overawe the Court with a view to securing a favourable order. Of late this type of behaviour by litigants appearing in person is on the increase.

It is a painful duty which we are called upon to perform, more so because the contemner had no valid or good reason for the manner in which he behaved in this Court. Even the order which we were passing was an innocuous one. Such behaviour and utterances cannot be tolerated as it vitiates the Court's prestige and dignity and affects the working of the Court as it vitiates the atmosphere in which the Court normally functions. It has a direct impact on the Court's independence, dignity and decorum. To protect the administration of public justice, we are constrained to take action as his conduct and utterances cannot be ignored or pardoned. As stated earlier, he does not regret his action, on the contrary he has filed a written reply which is not only defiant but adds insult to injury and dares the Court to send him to jail. However, notwithstanding his conduct and behaviour we do not desire to be harsh with him but at the same time, as stated earlier, we cannot overlook his unbecoming conduct and the use of insulting language. We, therefore, hold him guilty for *per se* contempt and direct him to suffer simple imprisonment for one month. *Mohd. Zahir Khan* v. *Vijay Singh,* AIR 1992 (SC) 642 : 1992 Supp (2) SCC 72 : 1992 SCC (Cri) 526 : 1992 CrLJ 610.

[10146] ● ***Criminal contempt sentence.***—It appears from the order of the High Court that the appellant had adopted a defiant attitude and tried to justify the aspersions made by him even without thinking it necessary to apologise. Before this Court also, the appellant has neither expressed any contrition nor has he any repentance for the vicious allegations made against the learned Judges of the High Court. But on the other hand he was exhibited a dogged determination to pursue the matter, come what may. A reading of his memorandum of grounds and the written and signed arguments show that he has ventured into another bout of allegations against the High Court Judges and persisted in his campaign of vilification. His present conduct has aggravated rather than mitigating his offence. Therefore, having regard to the sentencing policy that punishment should be commensurate with the gravity of the offence, we hold that the sentence of 2 months imprisonment in no way calls for interference and accordingly the sentence is confirmed. *Pritam Lal* v. *High Court of Madhya Pradesh, Jabalpur through Registrar,* AIR 1992 (SC) 904 : 1993 Supp (1) SCC 529 : 1992 CrLJ 1269 : 1992 CrLR (SC) 244 : 1992 (1) Crimes 1012.

[10147] ● ***Newspaper reports—Hearsay secondary evidence.***—In the present case, no evidence has been let in proof of the statement of facts contained in the newspaper report. The absence of any denial by Ch. Bhajan Lal will not absolve the applicant from discharging his obligation of proving the statement of facts as appeared in the Press report. In fact, Ch. Bhajan Lal in his counter-affidavit has taken a stand that the statements attributed to him based on the newspaper report are mere hearsay and cannot in law be relied upon for the purpose of initiating such proceedings. Therefore, in the absence of required legal proof, the Court will not be justified in issuing a *suo motu* notice for contempt of Court. As Mr. Kapil Sital has pointed out. When this alleged statement was made, the entire proceedings inclusive of investigation culminating from the registration of the FIR had been quashed by the High Court and no stay had been granted by the Supreme Court and the petitioner was not a party to the proceeding. A perusal of the news item does not spell out any reference to the case of corruption or its proceedings pending before the this Court. In the alleged contemptuous statement (Annexure A) only the view of the reporter is mentioned as if Ch. Bhajan Lal had perhaps been provoked about the proceedings of the case before the Supreme Court. We do not see any reason much less compelling reasons to issue "*suo motu*" notice to Ch. Bhajan Lal for contempt of Court for reason mentioned." *State of Haryana* v. *Ch. Bhajan Lal,* AIR 1993 SC 1348 (1354-1355) : (1993) 3 SCC 151 : 1993 CrLJ 1042.

[10148] ● ***Remarks intended to bring down image of judiciary in estimation of public—Contemner guilty of gross contempt.***—Judgments of the Court are open to criticism. Judges and Courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language don't attract any punishment for contempt of Court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of the judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the Courts must bestir themselves to uphold their dignity and the majesty of law. No litigant can be permitted to overstep the limits of fair, *bona fide* and reasonable criticism of a judgment and bring the Courts generally in disrepute or attribute motives to the judges rendering the judgment. Perversity, calculated to undermine the judicial system and the prestige of the Court, cannot be permitted for otherwise the very foundation of the judicial system is bound to be undermined and weakened and that would be bad not only for the preservation of rule of law but also for the independence of judiciary. Liberty of free expression is not to be confused with a licence to make unfounded, unwarranted and irresponsible aspersions against the judges or the Courts in relation to judicial matters. No system of justice can tolerate such an unbridled licence. Of Course "Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men", but the members of the public have to abstain from imputing improper motives to those taking part in the administration of justice and exercise their right of free criticism without malice or in any way attempting to impair administration of justice and refrain from making any comment which tends to scandalise the Court in relation to judicial matters. If a person committing such gross contempt of Court were to get the impression that he will get off lightly it would be a most unfortunate state of affairs. Sympathy in such a case would be totally misplaced mercy having no meaning. His action calls for deterrent punishment to that it also serves as an example to others and there is no repetition of such contempt by any other person. *Roshan Lal Ahuja In re*, 1994 SCC (Cri) 75 : 1993 Supp (4) SCC 446 : 1992 (3) Crimes 1145.

[10149] ● ***Disobedience of order.***—Once a decree has been passed it is the duty of the Court to execute the decree whatever may be consequence thereof. But while examining the grievance of the person who has invoked the jurisdiction of the Court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the Court has to record a finding that such disobedience was wilful and intentional. If from the circumstances of a particular case, brought to the notice of the Court, the Court is satisfied that although there has been disobedience but such disobedience is the result of some compelling circumstances under which it was not possible for the contemner to comply with the order, the Court may not punish the alleged contemner. *Niaz Mohammad* v. *State of Haryana*, AIR 1995 SC 308 : 1994 (6) SCC 332 : 1995 CrLJ 3280 : JT 1994 (6) SC 260 : 1994 (4) Scale 292 : 1995 (5) SLR 600 : 1995 (1) UJ 124.

[10150] ● ***Flouting of order of Court by contemner.***—In a case writ petition was filed for directing the respondent to provide telecast and broadcast of a few cricket matches. High Court passed an interim order which was flouted by the respondent, the contemner working as Deputy Secretary to Ministry of Information and Broadcasting. In the affidavit sworn by the Deputy Secretary there was reckless accusation against the Court and further it attributed motive to Court. It was held not only the author of the affidavit but also the advocate who filed it in Court are guilty of contempt. The unconditional apology of advocate accepted. But the apology tendered by the other contemner was not accepted and he was sentenced to pay fine by the Apex Court. *Sanjiv Datta, in re.*, (1995) 3 SCC 619 : 1995 CrLJ 2910 (SC) : JT 1995 (3) SC 538 : 1995 (2) Scale 704 : 1995 (2) UJ 786 : 1995 (2) SCJ 707 : (1995) 2 Crimes 312 (SC).

[10151] ● ***Order not communicated by lawyer to contemnor.***—Order restraining construction was served on contemnor's lawyer not upon the contemnor. The contemnor was not communicated the order by his lawyer. Contempt proceeding fails. *Suresh* v. *Imran Khan*, 1995 Supp (3) SCC 306 : 1995 CrLJ 3652 (SC).

[10152] ● *Wilful circumvention of Court's order.*—It is not merely positive acts of violation but also surreptitious and indirect aids to circumvention and violation of the orders that are equally impermissible. If reasonable steps are not taken to prevent the violation of the orders of the Court, Government cannot be heard to say that violation of the orders were at the instance of others. The presumption is that the Government intended not to take such preventive steps. In the facts and circumstances of the case, we are unable to persuade ourselves to the view that the Government was helpless and the situation that had developed was in spite of all reasonable steps taken by the Government. Indeed there is no indication that the Government bestirred itself to take any steps, reasonable or otherwise, to prevent large scale building material getting into the site. The Chief Minister having given a solemn assurance to the National Integration Council and permitted the terms of that assurance to be incorporated as his own undertaking to this Court and allowed an order to be passed in those terms cannot absolve himself of the responsibility unless he placed before the Court sufficient material which would justify that he had taken all reasonable steps and precautions to prevent the occurrence. . . . .

There is no immunity for any authority of Government, if a personal element is shown in the act of disobedience of the order of the Court, from the consequence of an order of the Court. Even in England where the maxim "Crown can do no wrong" has had its influence, a distinction is made between the Crown as such and the Executive.

The State Government is, therefore, liable in contempt. A Minister or Officer of Government is also either in his official capacity or if there is a personal element contributing to contempt, in his personal capacity, liable in contempt. We find that the undertaking given by Sri Kalyan Singh was both on his personal capacity and on behalf of his Government. There has been a flagrant breach of that undertaking. There has been wilful disobedience of the order. It is unhappy that a leader of a political party and Chief Minister has to be convicted of an offence of contempt of Court. But it has to be done to uphold the majesty of law. We convict him of the offence of contempt of Court. Since the contempt raises larger issues which affect the very foundation of the secular fabric of out nation, we also sentence him to a token imprisonment of one day. We also sentence him to pay a fine of Rs. 2,000. The fine shall be paid within a period of two months. *Mohd. Aslam alias Bhure* v. *Union of India*, AIR 1995 SC 548 (554, 557) : (1994) 6 SCC 422.

[10153] ● *Contempt punishment.*—The Apex Court ordered on April 5, 1991 that respondents should comply with the directions within four months from the date of the receipt of the Judgement. The contempt application was filed on 9-1-1992. No time for extension was sought for. Even after the contempt proceedings, while notice was issued, though time was repeatedly taken the respondents have done the exercise at a snail's speed. These facts clearly impress us that the respondents have deliberately delayed in finalisation of seniority list to benefit the existing promotees till they retired from the service. This impression gets fortification from a cursory glance at the mandatory time frame fixed in the Judgement, orders passed from time to time and final list prepared by the respondents. Even then the fitment itself has not been done as per the specific and unambiguous findings recorded and directions contained herein. There was no sincerity on the part of the respondents in implementation of the Rules as directed by this Court. This conduct is wilful and the impugned action was designedly done to give a twist to the orders so as to favour the promotees for whom the respondents already fought for but lost. Therefore, the respondents are directed to rectify this illegality as pointed out earlier and place the rectified order within one week. The concerned officer should be present on that day to receive appropriate orders on contempt. *A.N. Sahgal* v. *Raja Ram Shedran,* 1995 CrLJ 2919 : JT 1995 (5) SC 664 : (1995) 2 SLR 431.

[10154] ● *Contempt of High Court.*—When Article 129 Constitution vests Supreme Court powers of the Court of record accordingly to punish for contempt of itself, it vests such powers in the Supreme Court in its capacity as the highest Court of record and also as a Court charged with the appellate and superintending powers over the lower Courts and tribunals as detailed in the Constitution. To discharge its obligations as the custodian of the administration of justice in the country and as the highest Court imbued with supervisory and appellate jurisdiction over all the lower Courts and tribunals, it is inherently deemed to have been entrusted with power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner. That justice is delivered without fear or favour and for that purpose all the Courts and tribunals are protected while discharging their legitimate duties. To discharge this obligation, the Supreme Court has to take cognisance of the deviation from the path of justice in the tribunals of the land, and also of attempts to cause such deviations and obstruct the course of justice. To hold otherwise would mean that although the Supreme Court is charged with the duties and responsibilities enumerated in the Constitution, it is not equipped with the power to discharge them. Therefore, it cannot be said that Supreme Court cannot take cognisance of the contempt committed of the High Court. *Re. Vinay Chandra Mishra*, AIR 1995 SC 2348 : (1995) 2 SCC 584 : 1995 CrLJ 3994 : (1995) 2 Crimes 38.

[10155] ● *Conduct having tendency to interfere with administration of justice amounts to commission of criminal contempt.*—Any conduct which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt. The swearing of false affidavit in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice. Filing of false affidavits or making false statement on oath in Courts aims at striking a blow at the rule of law and no Court can ignore such conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. *Dhananjay Sharma* v. *State of Haryana*, AIR 1995 SC 1795 : (1995) 3 SCC 757 : 1995 SCC (Cri) 608 : (1995) 2 Crimes 592.

[10156] ● *Filing of forged and fabricated document in Court.*—The respondent filed a forged and fabricated document in the Court to resist his wife in having a matrimonial proceeding transferred on the ground of her poverty. It interferes with the course of justice. Not only fine but corporeal punishment is needed to be imposed on the contemnor. *Chandra Shashi* v. *Anil Kumar Verma,* (1995) 1 SCC 421 : 1995 SCC (Cri) 239 : JT 1994 (7) SC 459 : 1995 (1) UJ 242 : 1995 (78) ELT 7 : 1995 (1) SCJ 84 : 1994 (4) Scale.

[10157] ● *Criminal contempt—Refusing of bail—Magistrate acted with mala fide intention.*—One Gurdial Singh was arrested on the basis of an F.I.R. dated 24th April, 1983 by the police of Anandpur Sahib, District Ropar, for offences under Sections 307/353/392/394 *etc*. of the Indian Penal Code. He was then produced before Judicial Sub Divisional Magistrate, Anandpur Sahib, for remand and he was remanded to judicial custody. A bail application was filed and the learned Magistrate refused bail though it was not a case under Section 307, IPC Aggrieved by this order, Gurdial Singh served notice on the Magistrate which was drafted by the appellant. In the said notice, certain remarks have been made against the learned Magistrate. Since they were found to be somewhat scandalous, proceedings under contempt of Courts Act were initiated and the matter was placed before the High Court. A division bench after considering the remarks made against the Judge reached the conclusion that they were scandalous and that they tended to pervert the course of justice and likely to interfere with the proper administration of justice. These remarks against the Magistrate who refused to grant bail are definitely scandalous and are definitely with reference to the discharge of his judicial function. We are unable to agree that the objectionable remarks made in the notice do not in any way interfered with the administration of justice by that Court. *Shamsher Singh Bedi* v. *State of Punjab*, AIR 1995 SC 1974 : 1996 (7) SCC 99 : 1996 SCC (Cri) 181 : 1995 CrLJ 3627.

[10158] ● *Allegation by contemner that order passed in undue haste and against national interest.*—Contemnor, a public servant filed an affidavit alleging that an order passed by the Apex Court was passed in undue haste and was against national interest and was leading to undermine the sovereignty of nation. The contemnor before filing such affidavit did not even take any advice of advocate. The contemnor is guilty of contempt of Court. The Apex Court decided to accept apology and was sentenced to pay sum of Rs. 2000/-. *Sanjiv Dutta in re*, 1995 (3) SCC 619 : 1995 CrLJ 2910 (SC) : JT 1995 (3) SC 538 : 1995 (2) Scale 704 : 1995 (2) UJ 786.

[10159] ● *Suo-motu proceedings for criminal contempt.*—A Judge wrote a letter to Enquiry committee constituted under Judges Enquiry Act in proceeding for his removal by impeachment in Parliament. In this letter were made certain sweeping allegations against the Judges and judiciary. But by a subsequent letter the Judge explained the context of his letter. As a result the apprehension about the generality of the sweep mitigated. *Suo motu* contempt proceeding was dropped. *Sub Committee of Judicial Accountability* v. *Justice V. Ramaswamy,* (1995) 1 SCC 5 : 1995 (1) SCJ 227 : 1994 (4) Scale 634.

[10160] ● *Petition for suo motu initiation of contempt proceedings.*—The petitioner sought for a *suo motu* contempt proceeding against the members of the sub-committee for judicial accountability as they made certain statements and utterances against a sitting Judge of the Supreme Court proceeding for whose removal by impeachment proceeding was under contemplation. Those statements were alleged to be impairing the public image about judiciary. The petition was rejected and *suo motu* proceeding not started. *Rajiv V. Garg* v. *Shanti Bhushan,* AIR 1995 SC 573 :

(1995) 1 SCC 3 : 1995 (1) SCJ 228 : 1994 (4) Scale 35.

[10161] ● ***Misbehaviour and bad conduct of Judge—Self-regulation against in-house procedure laid-down.***—Articles 124 (4) and 121 would put the nail squarely on the projections prosecutions or attempts to by any other forum or group of individuals or associations statutory otherwise, either to investigate or enquire into or discuss the conduct of a Judge or the performance of his duties and on/off Court behaviours except as per the procedure provided under Articles 124(4) and (5) of the constitution, and Act and the Rules. Thereby equally no other agency or authority like the CBI, Ministry of Finance, the Reserve Bank of India, as sought for by the petitioner would investigate into the conduct or acts or action of a Judge. No *mandamus* or direction would be issued to the speaker of Lok Sabha or Chairman of Rajya Sabha to initate action for impeachment when its allegations are against a judge of High Court, the Bar Association could take up the matter with the Chief Justice of the High Court and want his response for the action taken thereunder for a reasonable period. In case the allegations are against Chief Justice of a High Court, the Bar should bring them directly to the notice of the chief Justice of India on receipt of such complaint the Chief Justice of India would in the same way act as stated above give complaint against a judge of the High Court, and the Bar would await for a reasonable period the response of the Chief Justice of India.

It would thus be seen that yawning gap between proved misbehavior and bad conduct inconsistent with the high office on the part of a non co-operating Judge/ Chief Justice of a High Court could be disciplined by self regulation through in house procedure. This in-house procedure would fill in the constitutional gap and would yield salutary effect. *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee,* (1995) 5 SCC 457 : 1995 SCC (Cri) 953 : JT 1995 (6) SC 339 : 1995 (7) SLR 161 : 1995 (2) LLN 615 : 1995 (5) Scale 142 (2).

[10162] ● ***PIL—Maintainability—Vague allegations.***—A person styling himself to be a sevadar in a Gurudwara filed a public interest writ petition alleging that an oil mill owners were engaged in nefarious activities including smuggling and selling of opium, heroin, brown sugar, poppy husk and the like. The High Court observe that "howsoever absurd the prayer may be and whatever may be the intention of the petitioner in filling the alleged public interest litigation, one thing is clear that he is obsessed with great and lofty ideals and therefore for whatever worth it is, in order to satisfy his vanity, we direct to whomsoever it may concern, the smuggling and underground activities in such dangerous articles should be stopped and sooner the better for the country". The High Court also noted that the officers who were alleged to have been carrying on nefarious activities were more imaginary than real but it directed that the officers who were carrying on such activities should be sacked "and the entire administrative machinery of the country should be overhauled by recruiting only conscientious and devoted people like the petitioner. On the basis of the order of the Court the petitioner made complaints before different authorities. A miscellaneous petition was filed by him before the High Court alleging that no action was taken on the complaint.

The High Court having dismissed the petition, the complaint approached the Supreme Court. Dismissing the special leave petition, the Apex Court held : if the High Court intends to pass an order on an application presented before it by treating it as a public interest litigation, the High Court must precisely indicate the allegations or the statements contained in such petition relating to public interest litigation and should indicate how public interest was involved and only after ascertaining the correctness of the allegation, should give specific direction as may deem just and proper in the facts of the case. In this case the application was disposed of by the High Court in a lightervein and its order is couched in veiled sarcasm. Such course of action, to say the least, is not desirable and the High Court should not have issued mandate in general and sweeping terms which were not intended to be implemented and were not capable of being implemented because of utter vagueness of the mandate in general and sweeping terms which were not intended to be implemented and were not capable of being implemented because of utter vagueness of the mandate and of its inherent absurdity. In the special leave petition there was an allegation against a Judge. As to this Supreme Court observed : The petitioner has also made a wide and sweeping allegation against a Judge of the High Court without giving any instance how and in what manner the said Judge has influenced the other judicial officers of the State. Such sweeping allegations against a Judge and other judicial officers need to be deprecated in no uncertain terms. But it appears that the petitioner is a confused person obsessed with various lofty ideals and perhaps has failed to appreciate the consequence of making wild allegation against judicial officers. Such statements, to say the least, reveal utter confusion and obsessions of the petitioner. It is, therefore, not necessary to take any serious view of the wild allegations made against some of the members of the Judiciary. *Giani Devender Singh* v. *Union of India,* AIR 1995 SC 1847 : (1995) 1 SCC 391 : JT 1995 (1) SC 263 : 1995 (1) UJ 425 : 1995 (1) Crimes 298 : 1995 (1) Scale 25.

[10163] ● ***Advocate not having wider protection than layman when he commits contempt of Court.***—An Advocate has no wider protection than a layman when he commits an act which amounts to contempt of Court. It is most unbefitting for an Advocate to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because a lawyer appears as a party in person, he does not get a license thereby to commit contempt of the Court by intimidating the Judges or scandalising the Courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentray.

The appellant has, undoubtedly committed contempt of the Court by the use of the objectionable and intemperate language. No system of justice can tolerate such unbridled license on the part of a person, be he a lawyer, to permit himself the liberty of scandalising a Court by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice. . . . . . . In view of the unqualified apology tendered by the appellant and reiterated in absolute terms by him and his learned Counsel at the Bar and being satisfied that the appellant is genuinely repentant, we accept his unqualified apology but issue a strong admonition and warning to him to be more careful in future and let the matters rest there. *Jaswant Singh* v. *Virender Singh*, AIR 1995 SC 520 : 1995 Supp (1) SCC 384.

[10164] ● ***Advocate resenting questions asked by Judge.***—For an advocate to resent the question by any member of the bench, be he a junior or senior member of the Bench, while hearing a case to be disrespectful to him, to question his authority to ask the questions, to shout at him, to threaten him with transfer and impeachment, to use insulting language and abuse him, to dictate the order that he should pass, to create scenes in the Court, to address him by losing temper, are all acts calculated to interfere with and obstruct the course of justice. Such acts tend to overawe the Courts and to prevent it from performing its duty to administer justice. Such conduct brings the authority of the Court and the administration of justice into disrespect and disrepute and undermines and erodes the very foundation of the judiciary by shaking the confidence of the people in the ability of the Court to deliver free and fair justice. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the course have to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. It is for this purpose that the Courts are entrusted with the extraordinary power punishing those who indulge in acts whether inside or outside the Courts, which tend to undermine their authority and bring them in disrepute and disrespect by scandalising them and obstructing them from discharging their duties without fear or favour. When the Court exercises this power, it does not vindicate the dignity and honour of the individual Judge who is personally attacked or scandalised to uphold the majesty of the law and of the administration of justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to delivery fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the Court by creating distrust in its working, the edifice of the judicial system gets eroded.

The contemnor advocate is suspended from practice for three years with the consequence that all elected and nominated offices/posts held by him in his capacity as an advocate stand vacated by him forthwith *Re. Vinay Chandra Mishra*, AIR 1995 SC 2348 : (1995) 2 SCC 584 : 1995 CrLJ 3994 : (1995) 2 Crimes 381.

[10165] ● ***Contempt—Punishment.***—This Court on May, 13th, 1994 passed an order which read as follows : "So far as the NRI quota is concerned, we fixed the same as 15 per cent last year. We fixed the NRI quota in respect of minorities institutions as 5 per cent. Although the NRI quota should not, normally, be more than 5 per cent, but keeping in view the reduction in the fee structure, we fix the same as 10 per cent (of the total seats) for this year. We further make it clear that in case any seat in the NR1 quota remains unfilled, the same can be filled by the management at the discretion." This brought a contempt proceeding *suo moto* when it was brought to the notice of the Court the government of Maharashtra has framed rules regarding admission to medical, dental and engineering courses reserving fifteen per cent seats for NRIs/ Foreign students contrary to the orders of this Court dated April 5, 1994 and May 13, 1994. The order was clear and there was no scope of its being misunderstood. The officers acted deliberately to subvert orders of the Court at the instance of certain association. It is necessary to erase an impression which has been gaining ground that 'montra' of unconditional apology is complete answer to violations and infractions of orders of Supreme Court. The officers concerned are guilty of contempt of Court. Direction is given that order of Court should form part of annual confidential reports of each of officers. *T.M.A. Pai Foundation, Petitioners* v. *State of Karnataka,* AIR 1995 (SC) 1938 : (1995) 4 SCC 1 : 1995 CrLJ 3220 : JT 1995 (4) SC 624 : 1995(3) Scale 387 : 1995(2) UJ 552 : 1995(4) SLR 12.

[10166] ● ***Hearing of case—Every member of Bench on par with other member or members of Bench.***—Every member of the Bench is on par with the other member or members of the Bench and has a right to ask whatever questions he wants to appreciate the merits or demerits of the case. It is obvious that the contemner was incensed by the fact that the learned Judge was asking the questions to him. This is clear from his contention that the learned Judge being a junior member of the Bench, was not supposed to ask him any question and if any questions were to be asked, he had to ask them through the senior member of the Bench because that was the convention of the Court.. The Apex Court did not endorse its view and held that assuming that there is such a convention, it is for the learned Judges forming the Bench to observe it *inter se*. No lawyer or a third party can have any right or say in the matter and can make either an issue of' it or refuse to answer the questions on that ground. The lawyer or the litigant concerned has to answer the questions put to him by any member of the Bench. *In re., Vinay Chandra Mishra*, AIR 1995 SC 2348 : (1995) 2 SCC 584 : 1995 CrLJ 3994 : (1995)2 Crimes 38.

[10167] ● ***Party proceeding with construction after three weeks—No contempt.***—The Court restrained a party from making any construction for three weeks only. The period was not extended. Making construction after three weeks does not answer contempt of Court. *N. Rathina Sabapathy* v. *K. S. Paloniappa*, (1996) 7 SCC 205 : 1995 CrLJ 3622 (SC).

[10168] ● ***Wild allegations of corruption by Advocates against authority functioning under U.P Sales Tax.***—Advocates who made wild allegations of corruption against authority functioning under Section 9. U.P. Sales Tax and demanded enquiry and transfer of its functions to other jurisdiction are guilty of criminal contempt. *U.P. Sales Tax Service Association* v. *Taxation Bar Association,* AIR 1996 (SC) 98 : (1995) 5 SCC 716 : 1996 (100) STC 108 : 1995 (71) FLR 836 : 1995 (3) SCJ 672 : JT 1995 (6) SC 306 (2) : 1995 (5) Scale 102.

[10169] ● ***Govt. officer meeting Judge of Supreme Court at his residence.***—An I.A.S. officer met a Supreme Court Judge at his residence and asked for lenient view in the matter of sentence on his colleague namely Mr. J Vasudevan, the concerned Judge being K. RAMASWAMY J. The said I.A.S. officer made the request not on the behest of Mr. J. Vasudevan. He did on his own. It is contempt of Court. *J. Vasudevan* v. *T.R. Dhananjaya,* 1996 AIR (SC) 137 : 1995 (6) SCC 249 : 1995 CrLJ 4192 (SC) : JT 1995 (7) SC 484 : 1995 (5) Scale 245 : 1995 (7) SLR 228 : 1996 (1) SLJ 185.

[10170] ● ***Acts done in violation of Court order.***—The Court is not entitled to give appropriate directions for remedying and rectifying the things done in violation of the orders of the Court. The inherent powers of the Court can be exercised by overruling technical objections to ensure full justice to the parties. *Delhi Development Authority* v. *Skipper construction Co. Pvt. Ltd.*, AIR 1996 SC 2005 : (1996) 4 SCC 622.

[10171] ● ***None of contemnor making any candid admission or tendering apology.***—None of the contemnors made any candid admission nor tendered unqualified contrite apology. Police Officers, who are supposed to be the so-called disciplined force, have deliberately fabricated false records placed before this Court without any compunction. It is, therefore, of utmost importance to curb this tendency, particularly, when they have the temerity to fabricate the records with false affidavit and place the same before the highest Court of the land. Their depravity of the conduct is writ large. M.S. Ahlawat is unworthy to hold any office of responsibility. Therefore, Randhir Singh (ASI) and Ishwar Singh (SI) shall be punishable under Section 193, IPC and accordingly they are convicted and sentenced to undergo rigorous imprisonment for a term of 3 months and 6 months respectively. Ahlawat, the Superintendent of Police, is punishable under Section 193, IPC He also committed contempt of the proceedings of the Supreme Court punishable under Article 129 of the Constitution. Accordingly, he is convicted and sentenced under Section 193 IPC to undergo rigorous imprisonment for a term of one year. He is convicted and sentenced to undergo rigorous imprisonment for a term of 6 months under Article 129 of the Constitution. Both the sentences are directed to run concurrently. Krishna Kumar, Head Constable, is exonerated of the charge under Section 193, IPC with warning to show exemplary conduct hereafter. His bail bonds are discharged. *Afzal* v. *State of Haryana*, AIR 1996 SC 2326 : (1996) 7 SCC 397 : 1996 SCC (Cri) 424 : 1996 CrLJ 1679 : JT 1996 (1) (SC) 328.

[10172] ● ***Handcuffing of under-trial prisoners—Contempt.***—The handcuffing of the under-trial prisoners cannot, however, be justified even under the provisions of Regulation 465 of the M.P. Police Regulations in as much as the said regulation requires an express authorization from the Magistrate/Jail Officer for the purpose of taking him to Court from Jail and from Jail to Court. Admittedly no such authorization was obtained in this case. As regards the role and responsibility of contemnors Nos. 1 to 5 in these actions involving handcuffing of under-trial prisoners, it may be stated that contemnors Nos. 3 to 5 were directly involved in the said incidents of handcuffing because the handcuffing was done under their directions or in their presence. Contemnors Nos. 1 and 2, even though not directly involved in the said incidents since they were not present, must be held responsible for having not taken adequate steps to prevent such actions and even after the said actions came to their knowledge, they condoned the same by not taking stern action against persons found responsible for this illegality.

That a note regarding the disapproval of their conduct by this Court be placed in the personal file of all of them.

The contemnor was apprised about the decision of the Supreme Court and he is reported to have stated that "…. the Supreme Court decision has no application there and that the Police has the right to transport the accused as they want, with or without handcuffs". *In re M.P. Dwivedi*, AIR 1996 SC 2299 : (1996) 4 SCC 152 : 1996 SCC (Cri) 612 : 1996 CrLJ 1670.

[10173] ● ***Threatening of writ petitioners—Criminal contempt.***—Threatening of writ petitioners is an attempt to contempt of interfere with the proceedings pending before the Court and the contemner is guilty for criminal contempt. *In re Balwan Singh*, (1996) 11 SCC 74 : JT 1996 (10) SC 733 : 1996 (4) Crimes 226 (SC) : 1996 (8) Scale 485 : 1996 (8) Supreme 363 : 1997 (1) CCR 51 (SC).

[10174] ● ***Premises not vacated inspite of undertaking.***—Inspite of an undertaking given to vacate the premises the premises were not vacated. The party in contempt case, took the plea that he was not informed by his counsel about the undertaking. The party had refused to accept dasti notice of contempt. It was held that the order of sentence for six months imprisonment was not liable to be recalled. *Dental* v. *Mohan Prasad,* (1996) 5 SCC 378 : 1996 (5) Scale 77 : 1996 (5) Supreme 480 : 1996 (5) AD (SC) 695.

[10175] ● ***Obstruction in execution of warrant.***—In Govt. of A.P.V.G. Lakshman Reddy 1997 CrLJ 3127 the Court passed a decree directing demolition of a compound wall of a Police Station. A warrant was issued for demolition of the wall. The warrant was entrusted to one Shri Madhusudhan Bhat for enforcement. He went along with Venkaiah another bailiff, Syed Ahmad Ali and G. Vinayak Raj process servers, alongwith workmen to the site to demolish the constructed wall. While they were in the process of demolishing the wall, it is now clear from the record that Circle Inspector of Police, Narsimaha Raju, the Sub-inspector of Police, Laxminarayan and other police force had gone there and obstructed the execution of the warrant. They took the Court officers to the police station. It is the report of the bailiffs that they were wrongly confined in the police station, despite the fact that they had informed that they are Court officers and had came to the spot with their duty to execute the warrant. On the basis of that report, a complaint came to be filed and is pending decision. In the case of pollution of river by discharge of effluent in the river contrary to the order of the Court by obtaining consent of Pollution Control Board the contemnor is guilty of contempt and Rs. 5 lakhs is imposed on him as fine. *Vineet Kumar Mathur* v. *Union. of India*, (1996) 7 SCC 714 : JT 1996 (1) SC 454 : 1996 (1) Scale 504 : 1996 (1) Supreme 500 : 1996 (1) AD (SC) 797 : 1996 (1) UJ 269.

[10176] ● ***Freedom of speech and expression.***—Freedom of speech and expression cannot give licence to make unfounded allegation against any institution much less judiciary. The freedom of speech and expression has corresponding duty and responsibility to make constructive criticism. A prayer for prosecution of Chief Justice of India tends to lower dignity and authority of Court and, therefore, constitute contempt of Court. *D.C. Saxena* v. *Hon'ble Chief Justice of India,* AIR 1996 SC 2481 : (1996) 5 SCC 216 : 1996 CrLJ 3274.

[10177] ● ***Notary attesting affidavit without proper identification.***—Where the notary attested the affidavit without proper identification, notice was issued to the notary to show cause why he be not prosecuted and his leave be cancelled. *Deputy General Manager, ISB* v. *Sudarshan Kumari,* AIR 1996 SC 1894 : (1996) 3 SCC 763 : JT 1996 (4) SC 243 : 1996 (3) Scale 551 : 1996 (4) AD (SC) 127 : 1996 (5) Supreme 102 : 1996 (3) CCC 31 (SC).

[10178] ● ***Submission of false affidavit—Criminal contempt.***—Submission of false affidavit in order to mislead the Court is a criminal contempt of judicial proceedings of the Court. *Afzal* v. *State of Haryana*, AIR 1996 SC 2326 : (1996) 7 SCC 397 : 1996 SCC (Cri) 424 : 1996 CrLJ 1679 : JT 1996 (1) SC 328 : 1996 (l) Scale 340 : 1996 (l) Supreme 397 : 1996 (l) AD (SC) 537 : 1996 (3) CCR 148 (SC). **TO THE SAME EFFECT :** (1) *Rita Markandey* v. *Surjit Singh Arora,* AIR 1997 (SC) 2174 : (1996) 6 SCC 14 : 1996 (2) UJ 787 : 1996(7) Scale 275 : 1996 (7) AD (SC) 868 : Supreme 233 : 1996(2) RCR 472 : JT 1996 (8) SC 590.

[10179] ● ***Contempt of judicial process.***—A Police Officer in charge of Criminal administration, first filed a fabricated counter-affidavit to obtain a favourable order. Later having found atmosphere in congenial fabricated further false evidence to show that his subordinate has forged his signature without his knowledge on the counter-affidavit. He is guilty of contempt of judicial process. *Afzal* v. *State of Haryana*, AIR 1996 SC 2326 : (1996) 7 SCC 397 : 1996 SCC (Cri) 424 : 1996 CrLJ 1679 (SC) : JT 1996 (1) SC 328 : 1996 (1) Scale 340 : 1996 (1) Supreme 397 : 1996(1) AD (SC) 537 : 1996 (l) Crimes 58 (SC) : 1996 (3) CCR 148 (SC).

[10180] ● ***In contempt proceedings mens rea not relevant.***—"In a contempt proceedings the motive, in other words, the *mens rea* is not relevant. What would be the effect of the act or conduct of imputation is the relevant question for decision ? It is true that in an indicatable offence under penal law generally *mens rea* is an essential ingredient and the burden lies on the prosecution to prove it affirmatively. In a contempt proceedings of summary nature, the proof of *mens rea* is absolutely unnecessary. What is material is the effect or the tendency of the act, conduct or the publication of the words, written, spoken or by signs or by visible representation or otherwise and whether it scandalises or tends to scandalise or lowers or tends to lower the authority of the Court or prejudices or tends to prejudice or interfere or tends to interfere with the due course of any judicial proceeding or interferes or tends to interfere with or obstruct the administration of justice in any othermanner. The tendency due to the publication, whether by words written or spoken or by signs or by visible representation or otherwise, of any matter or the doing of any other act whatsoever is relevant and material." *D.C. Saxena* v. *Hon'ble the Chief Justice of India*, AIR 1996 SC 2481 : (1996) 5 SCC 216 : 1996 CrLJ 3274.

[10181] ● ***Scandalising Court—Hostile criticism of judges.***—"Scandalising the Court, therefore, would mean hostile criticism of judges as judges or judiciary. Any personal attack upon a judge in connection with the office he holds is dealt with under law of libel or slander. Yet defamatory publication concerning the judge as a judge brings the Court or judges into contempt, a serious impediment to justice and an inroad on the majesty of justice. Any caricature of a judge calculated to lower the dignity of the Court would destroy, undermine or tend to undermine public confidence in the administration of justice or the majesty of justice. It would, therefore, be scandalising the judge as a judge, in other words, imputing partiality, corruption, bias, improper motives to a judge is scandalisation of the Court and would be contempt of the Court. Even imputation of lack of impartiality or fairness to a judge in the discharge of his official duties amounts to contempt. The gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of justice. When the contemnor challenges the authority of the Court, he interferes with the performance of duties of judge's office or judicial process or administration of justice or generation or production of tendency bringing the judge or judiciary into contempt. Section 2(c) of the Act, therefore, defines criminal contempt in wider articulation that any publication, whether by words, spoken or written, or by signs, or by visible representations, or otherwise of any matter or the doing of any other act whatsoever which scandalises or tends to scandalise, or lowers or tends to lower the authority of any Court; or prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner, is a criminal contempt. Therefore, a tendency to scandalise the Court to tendency to lower the authority of the Court or tendency to interfere with or tendency to obstruct the administration of justice in any manner or tendency to challenge the authority or majesty of justice, would be a criminal contempt. The offending act apart, any tendency if it may lead to or tends to lower the authority of the Court is a criminal contempt. Any conduct of the contemnor which has the tendency or produces a tendency to bring the judge or Court into contempt or fends to lower the authority of the Court would also be contempt of the Court." *D.C. Saxena (Dr.)* v. *Chief Justice of India*, AIR 1996 SC 2481 : (1996) 5 SCC 216 : 1996 CrLJ 3274.

[10182] ● *Threat of filing complaint against Judge in respect of judicial proceedings conducted by him—Positive attempt to interfere with due course of administration of Justice.*—Any threat of filing a complain against the judge in respect of the judicial proceedings conducted by him in his own Court is a positive attempt to interfere with the due course of administration of justice. In order that the judges may fearlessly and independently act in discharge of their judicial functions, it is necessary that they should have full liberty to act within the sphere of their activity. If, however, litigants and their counsel start threatening the judge or launch prosecution against him for what he has honestly and *bona fide* done in his Court, the judicial independence would vanish eroding the very edifice on which the institution of justice stands. *Ajay Kumar Pandey In re*, AIR 1997 SC 260 : (1996) 6 SCC 510 : 1996 SCC (Cri) 1391 : 1997 CrLJ 231.

[10183] ● *Attack on Judges scurrilous.*—After evaluating the totality of factors, if the Court considers the attack on the Judge or Judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream. *T. Deen Dayal* v. *High Court of Andhra Pradesh*, AIR 1997 SC 3451 : (1997) 7 SCC 535 : 1997 CrLJ 4080 : 1997 (3) Crimes 271.

[10184] ● *Wilful Disobedience of Court order.*—The Supreme Court directed the Principal secretary of the Medical Health and Medical Education Ministry to remain present in the Court on the next date of having, the contempt petition heaving been adjourned for two weeks. The said offer left the country without finding out whether the Court had passed an order exempting her from appearance. She expressed deep regret and apology for the error stating that the mistake on her part was an account of legal advice she received and which she believed as correct. The counsel for the secretary pointed out the circumstances in which she was not present in Court. He submitted that the lapse was unintentional and due to erroneous legal advice. Taking the factors into account the Court accepted the unqualified apology tendered by the secretary. *Anuj Maheshwari* v. *Ramesh Yadav*, (1997) 5 SCC 453.

[10185] ● *Criminal contempt—Vacation of premises.*—Law is well settled that if any party gives an undertaking to the Court to vacate the premises from which he is liable to be evicted under the orders of the Court and there is a clear and deliberate breach thereof it amounts to civil contempt but since, in the present case, the respondent did not file any undertaking as envisaged in the order of this Court the question of his being punished for breach thereof does not arise. How ever even in a case where no such undertaking is given, a party to a litigation may be held liable for such contempt if the Court is induced to sanction at particular course of action or inaction on the basis of the representation of such a party and the Court ultimately finds that the party never intended to act on such representation or such representation was false. In other words, if on the representation of the respondent herein the Court was persuaded to pass the order extending the time for vacation of the suit premises, he may be held guilty of contempt of Court, notwithstanding non furnishing of the undertaking, if it is found that the representation was false and the respondent never intended to act upon it. However, the party cannot be held liable for contempt on this score also for the order in question clearly indicates that it was passed on the basis of the agreement between the parties and not on the representation of the respondent made before the Court. It was the petitioner who agreed to the unconditional extension of time by four weeks for the respondent to vacate and subsequent extension of time on his giving an undertaking and this Court only embodied the terms of the agreement so arrived at in the order. *Rita Markandey* v. *Surjit Singh Arora*, AIR 1997 SC 2174 : (1996) 6 SCC 14 : 1997 CrLJ 2503.

[10186] ● *Attempt to impede or undermine or obstruct free flow of justice.*—Anyone who makes an attempt to impede or undermine or obstruct the free flow of the unsoiled stream of justice by resorting to the filing of false evidence commits criminal contempt of the Court and renders himself liable to be dealt with in accordance with the Act. *Rita Markandey* v. *Surjit Singh Arora*, AIR 1997 SC 2124 : (1996) 6 SCC 14 : 1997 CrLJ 2503.

[10187] ● *Advocate making imputations against Judge only because he did not get expected result.*—It is most unbefitting for an Advocate to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because a lawyer appears as a party in person, he does not get a licence to commit contempt of the Court by intimidating the Judges or scandalising the Courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentary and which has the tendency to interfere in the administration of justice and undermine the dignity of the Court and the majesty of law. These safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the Courts and for upholding the majesty of law. Judges and Courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if out-spoken, but made without any malice and without attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of Court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute, the Courts must bitter themselves to uphold their dignity and the majesty of law. The alleged contemnor, has, undoubtedly committed contempt of the Court by the use of the objectionable and intemperate language. No system of justice can tolerate such unbridled licence on the part of a person, be he a lawyer, to permit himself the liberty of scandalising the Court by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions, as it undoubtedly amounts to an inference with the due course of administration of justice. No litigant, even a lawyer appearing in person in his own cause, can be permitted to overstep the limits of fair, *bona fide* and reasonable criticism of the judgment and bring the Courts generally into disrepute or attribute motives to the Judges rendering the judgment. Perversity, calculated to undermine the judicial system and the prestige of the Court, cannot be permitted for otherwise the very foundation of the judicial system is bound to be undermined and weakened. Liberty of free expression is not to be confused with a licence to make unfounded, unwarranted and irresponsible aspersions against the Judges or the Courts in relation to irresponsible judicial matters. *In re Ajay Kumar Pandey*, AIR 1998 SC 3299 : (1998) 7 SCC 248 : 1998 CrLJ 4606 : JT 1998 (6) SC 571.

[10188] ● ***Advocate using intemperate language and casting unwarranted aspersions on various judicial officers.***—The contemner was a practising Advocate who himself had filed criminal complaint against a brother advocate (Mr. Mahesh Giri) and Ms. Saroj Bela who was a member of the lower judiciary posted as VII Addl. District Judge at Lucknow after giving them a notice demanding compensation for having defamed him by publicly saying that he had sexual relations with one of them, namely, Ms. Saroj Bala. This complaint was dismissed at the initial state as indicated in the earlier part of this Judgment, but he raised a number of controversies, including a demand for enquiry to be set up by the District Judge, Lucknow. The contemner filed a Revision before the High Court against the order by which his complaint was dismissed and the application for summoning the witnesses through Court process was rejected. This revision, was dismissed by Mr. Justice Virendra Saran. In the special Leave Petition filed against that Judgement, the contemner criticised Justice Virendra Saran in intemperate language and termed his Judgement as forged and fictitious, besides imputing bad motive. When the Supreme Court noticed the scandalous and even abusive language by the contemner used against 'V' and other officers of the judiciary, it required the contemner to delete those sentences or portions and/or file a fresh petition. Not satisfied, the contemner moved an application for recall of the order and in that application he again used intemperate language and thereafter started making efforts to avoid the Court (Hon'ble ANAND and MUKHERJEE JJ.) and for this purpose, he adopted derogatory and bad tactics. He gave notice to the two hon'ble Judges seeking unconditional apology from them for their conduct and behaviour in the Court and also demanded compensation from them. He wrote to the President of India for sanction to prosecute the Hon'ble Judges for offences under Sections 167, 500, 504 and 506, IPC giving two months time to the President to grant sanction or else he would treat the sanction to have been granted to him. He also threatened to go on hunger strike before the Supreme Court with effect from 25-9-1996. He then filed a complaint against the Hon'ble Judges Banding their conduct as goondaism. He pleaded for his case to be listed before some other Bench nor to be referred to the constitution Bench on the ground that both the Hon'ble Judges were personally involved in the case and therefore they need not hear the matter, but he was unsuccessful. *Ajay Kumar Pandey, In re*, AIR 1998 SC 3299 : (1998) 7 SCC 379 : 1998 CrLJ 4606 (SC) : 1998 All LJ 2531.

[10189] ● ***Notice requiring party to be personally present in Court.***—Even at that stage the Court directed that if the appellant "evades his presence in Court on that date, he shall be brought into police custody with the assistance of Superintendent of Police of the area where he has been serving. "The Court also directed the order to be sent by Fax as well as personal messenger to the Engineer-in-Chief besides by Fax to the Chief Secretary of the State and simultaneously to the Principal Secretary of the Irrigation Department. Above all, the Court directed the Additional Chief Standing Counsel to take appropriate steps for execution of that order. There was no circumstances warranting the over-anxiety displayed by the Court in that order. There is no presumption that a responsible officer of the Government would disobey an order of the Court requiring his presence in Court on a particular date. What was the occasion for the Court to direct the officer to be taken into police custody even when it was only issuing a notice calling upon him to the present? Significantly, the order did not indicate anywhere that it was issuing a notice of contempt. *State of Uttar Pradesh* v. *Ashok Kumar Saxena*, AIR 1998 SC 925 : (1998) 3 SCC 303 : 1998 CrLJ 1205 (1206, 1207) (SC) : JT 1998 (1) SC 499 : 1998 (1) Scale 387 : 1998 (3) SLT 65 : 1998 (1) Supreme 474 : 1998 (1) SCR 767.

[10190] ● ***Non-implementation of judgment of Supreme Court.***—The complaint of the petitioners is that despite specific directions given and positive observations made in the judgment in *State Bank of India* v. *Kashinath Kher*, (1996) 8 SCC 762 : AIR 1996 SCW 1478, the respondents have not implemented the judgment in its true spirit and purport. On the other hand, they have put up the same interpretation of the provisions set up prior to the judgment as an excuse in promoting the officers, violating the judgment. *Kashinath Kher* v. *Dinesh Kumar Bhagat*, AIR 1998 SC 374 : (1997) 6 SCC 141 : 1998 CrLJ 666 (SC).

[10191] ● ***News item incorrect and misleading.***—Heading of the news item was absolutely incorrect and misleading. The contents of the news item were misleading and published at a time while the matter was pending. It *Prima facie* amounted to contempt of Court for which notice was issued. *Chandigarh News Line (Indian Express Group)*, AIR 1999 SC 144 : (1998) 6 SCC 378 : 1999 CrLJ 27 : JT 1998 (5) SC 243.

[10192] ● ***Additional affidavit—Filing of.***—The prayer to file an additional affidavit for classifying the entire position regarding allegations made in report may be allowed. *In re, V.L. Das*, AIR 1999 SC 99 : 1999 CrLJ 25.

[10193] ● ***Interference with administration of justice.***—The present case, deals with acts which lower the authority of a Court and tend to interfere with the administration of justice. Section 3 has no application in the present case. The letters of the first respondent insinuate a dishonest conduct on the part of the two members, presumably because the view expressed by the Judicial Member in the first alleged order is changed by him in favour of the revenue when he concurs with the order which was actually pronounced. This kind of an attack based on access to a confidential draft exchanged between the Members of the Bench is bound to affect free exchange or ideas between the two Members who have to judicially decide a case. It is a clear obstruction to proper decision-making and to proper administration of justice. The public have a major stake in effective and orderly administration of justice. A letter from a high officer such as the Law Secretary which questions the *bona fides* of the Members of the Tribunal in deciding a case and asks them to explain the judicial order which they have passed, unfairly tampers with the judicial process and interferes with judicial decision-making.

In our view this kind of conduct and that too on the part of the Law Secretary, who is expected to maintain the independence of the Income Tax Appellate Tribunal and not (to) interfere with its judicial functioning, amounts to gross contempt of Court. It is deliberate attempt on his part to question the judicial functioning of the Tribunal coming as it does from a person of his rank. It is rightly perceived by the President as well as the two concerned Members of the Tribunal as a threat to their independent functioning in the course of deciding appeals coming up before them. *Income Tax Appellate Tribunal through President* v. *V.K. Agarwal,* AIR 1999 SC 453 : 1999 (1) SCC 16 : 1999 CrLJ 441 : 1999 Mad LJ (Cri) 196.

[10194] ● ***Allegation against Judge that he had thwarted justice, flouted law—Denigrated face of judiciary and ridiculed sanctity of mandatory provisions and established dictates of law.***—The offending statements made in paragraph 3 of his counter and the implications thereof have the effect of conveying that the learned Judge had acted with bias and was partial to the other side. By alleging that the learned judge had "thwarted justice, flouted law, denigrated the face of the Judiciary and ridiculed the sanctity of the mandatory provisions and established dictates of law," the respondent has by implication attributed ulterior motive to the learned Judge. Fair criticism is that which while criticizing the act of a Judge does not impute any ulterior motive to him. The respondent by alleging that for extraneous considerations and by misusing the power and authority of a Judge, the learned Judge had made the aforesaid remarks against him and also made an uncalled for clarification with respect to the "main O.P.", has gone beyond the permissible limits of fair criticism and committed contempt of this Court. In paragraph 9 of the above quoted offending statements he has further stated by implication that the Supreme Court has not dealt with his case impartially and in accordance with law. This remark has the tendency to scandalise the Court and, therefore, by making that statement he has committed contempt of this Court. It is, therefore, not possible for us to accept his explanation or the submissions made by him. He has to be held guilty for having committed contempt of this Court. Though we have found the respondent guilty of having committed the contempt of this Court, we do not think that this is a fit case in which a strict view should be taken for imposing punishment. Considering the disturbed state of mind of the respondent, the background in which he made the offending statements and the long lapse of time after initiation of this contempt proceeding and also the changed circumstances disclosed by the respondent, we are of the opinion that ends of justice would be met if only a fine of Rs. 250 is imposed upon the respondent. *Padmahasini* v. *C.R. Srinivas*, AIR 2000 SC 68 (69, 70) : (1999) 8 SCC 711 : 2000 CrLJ 187.

[10195] ● ***Litigative spirit of complainant party.***—The Court itself recognized the litigations spirit of the parties and attempt to score over each other and obviously the contempt application is no exception to that-but that by itself would not prompt this Court to come to a conclusion as regards the merits of the contentions raised in the matter. *Murray & Co.* v. *Ashok Kr. Newatia*, AIR 2000 SC 833 (835) : (2000) 2 SCC 455 : 2000 SCC (Cri) 4730 : 2000 CrLJ 1394 : JT 2000 (1) SC 337.

[10196] ● ***Bona fide difficulties in implementing decision.***—Departmental authorities entertaining *bona fide* difficulties in implementing the decision as it was of the opinion that the decision runs contrary to another Supreme Court decision. Contempt proceedings against authorities held liable to be dropped. *Satpal* v. *State of Haryana*, AIR 2000 SC 1702 : 2000 SCC (Cri) 2900 : 2000 CrLJ 2297.

[10197] ● ***Two explanations of order—One adopted by contemnors not unwarranted—No contempt.***—If two explanations are available and out of which one stands adopted by the alleged contemnors which cannot, by any stretch, be termed to be wholly unwarranted, question of returning a verdict of guilty in an application for contempt does not and cannot arise. *Held*, The doubt persists and as such in any event the respondents being the alleged contemnors are entitled to have the benefit or advantage of such a doubt having regard to the nature of the proceeding.

This contempt petition fails. *Mrityunjoy Das* v. *Sayed Hasibur Rahman*, AIR 2001 SC 1293 : (2001) 3 SCC 739 : 2001 CrLJ 1702.

[10198] ● ***Scandalising or tending to scandalising authority of any Court.***—The contempt of Court jurisdiction is not to protect an individual Judge, it is to protect the administration of justice from being maligned. Hence, when his (contemnor) expectation that the Chief Justice of India himself would have personally filed a petition against the contemnor did not fructify, he cannot question the maintainability of the action which was initiated *suo motu* by the Court.

Criminal contempt is vivisected into two categories. One is publication of any matter which scandalises or tends to scandalise the authority of any Court, etc., etc. Second is the doing of any act whatsoever which scandalises or tends to scandalise the authority of any Court, etc., etc. If an act is not a criminal contempt merely because there was no publication, such act would automatically fall within the purview of the other category because the latter consists of "the doing of any other act whatsoever". The latter category is thus a residuary category so wide enough from which no act of criminal contempt can possibly escape. The common denominator for both is that it scandalises or tends to scandalise, etc., etc., of any Court.

The impugned action of the contemnor is a case of the gross criminal contempt of Court. It is a serious matter for the Supreme Court because vilification of the high personage of Chief Justice of India would undermine the majesty of the Court and dignity of this institution. The sentence of imprisonment for six months will stand suspended for a period of one month from today. If the contemnor would give an undertaking in the Supreme Court, in the form of an affidavit, to the effect that he would not commit or even attempt to commit any act of criminal contempt, then the sentence now imposed would remain suspended for a further period of five years. But if the contemnor commits any act of criminal contempt during the said period of five years, the suspension of the sentence will stand revoked and then he will have to undergo the sentence of imprisonment for six months. Otherwise, the question of revival of the sentence would depend upon the order which the Supreme Court would pass on the expiry of five years. *In re S.K. Sundaram*, AIR 2001 SC 2374 : (2001) 2 SCC 171 : 2001 SCC (Cri) 304.

[10199] ● *Doing of act which scandalises or tends to scandalise authority of Court.*—Criminal contempt is vivisected into two categories. One is publication of any matter which scandalises or tends to scandalise the authority of any Court, etc., etc. Second is the doing of any act whatsoever which scandalises or tends to scandalise the authority of any Court, *etc.,* If an act is not a criminal contempt merely because there was no publication, such act would automatically fall within the purview of the other category because the latter consists of the "doing of any other act whatsoever". The latter category is thus a residuary category so wide enough from which no act of criminal contempt can possibly escape. The common denominator for both is that it scandalises tends to scandalise *etc.,* of any Court.

We have therefore, not a speck of doubt in our mind that the impugned action of the contemner is a case of the gross criminal contempt of Court. It is a serious matter for this Court because viiification of the high personage of Chief Justice of India would undermine the majesty of the Court and dignity of this institution. We therefore hold him guilty of criminal contempt and convict him thereunder. The contemnor sand that he is a heart patient we, therefore order that the sentence of imprisonment for six months will stand suspended for a period of one month from today. If the contemner would give an undertaking in this Court, in the form of an affidavit, to the effect that he would not commit or even attempt to commit any act of criminal contempt, then the sentence now imposed by us would remain suspended for a further period of five years. But if the contemner commits any act of criminal contempt during the said period of five years, the suspension of the sentence will stand revoked and then he will have to undergo the sentence of imprisonment for six months. Otherwise, the question of revival of the sentence would depend upon the order which the Supreme Court would pass on the expiry of five years. *In re, S.K. Sundaram*, AIR 2001 SC 2374 (2383) : (2001) 2 SCC 171 : 2001 SCC (Cri) 304 : JT 2001 (1) SC 81.

[10200] ● *Burden and standard of proof in contempt proceedings.*—As regards the burden and standard of proof, the common legal phraseology "he who asserts must prove" has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the standard of proof, be it noted that a proceeding under the extraordinary jurisdiction of the Court in terms of the provisions of the Contempt of Courts Act is quasi-criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond all reasonable doubt. *Chhotu Ram* v. *Urvashi Gulati*, AIR 2001 SC 3468 (3469) : (2001) 7 SCC 530.

[10201] ● *Deponent committing contempt—Notice in prescribed form directed to be issued.*—The respondent No. 3 appears, *prima facie*, to have committed contempt. She has imputed motives to specific Courts for entertaining litigation or passing orders against her. She has accused Courts of "harassing" her (of which the present proceeding has been cited as an instance) as if the judiciary were carrying out a personal vendetta against her. She has brought in matters which were not only pertinent to the issues to be decided but has drawn uninformed comparisons to make statements about this Court which do not appear to be protected by the law relating to fair criticism. We are conscious that the respondent No. 3 has said before us that she stood by the comments made even if they were held to be contumacious. At the same time we are also aware that when the statement was made the respondent had not been called on formally to defend herself. The presented procedure will have to be followed. We direct that notice in the prescribed form be issued to the respondent No. 3 as to why the respondent No. 3 should not be proceeded against for contempt for the statements in the three paragraphs of her affidavit. *J.R. Parashar* v. *Prashant Bhushan,* AIR 2001 SC 3395 (3403) : (2001) 6 SCC 735 : 2001 SCC (Cri) 1242 : 2001 CrLJ 4207.

[10202] ● *Holding dharna by itself not contempt.*—Holding a dharna by itself may not amount to contempt. But if by holding a dharna, access to the Courts is hindered and the officers of Court and members of the public are not allowed free ingress and egress, or the proceedings in Court are otherwise disrupted, disturbed or hampered, the dharna may amount to contempt because the administration of justice would be obstructed. There is no allegation in the petition that the participants in the dharna had picketed the gates of this Court and prevented lawyers or litigants from entering and leaving the Court premises. Nor is it the petitioners' case that the "dharna" disturbed or prevented the Courts from functioning. While holding that a dharna held to protest a decision of a Court may not *per se* amount to contempt, we must not be understood as approving the holding of a "dharna" before the Court. On the other hand, it is deprecated and must be discouraged otherwise every disgruntled litigant could adopt this method of ventilating this grievance. It is, in any case, an inappropriate form of protest since the object of holding a dharna is either to raise public opinion or to exhibit the extent of public opinion against a decision of a Court. Neither of these objects weigh with Courts when deciding a case. Judges are required to decide what they think is right according to the law applicable and on the material placed before them and not be swayed by public opinion on any particular issue. *J.R. Parashar* v. *Prashant Bhushan,* AIR 2001 SC 3395 (3402) : (2001) 6 SCC 735 : 2001 SCC (Cri) 1242 : 2001 CrLJ 4207.

[10203] ● ***Purpose of introducing Contempt of Courts Act, 1971.***—The introduction of the Contempt of Courts Act, 1971 in the statute Book has been for the purpose of securing a feeling of confidence of the people in general for due and proper administration of justice in the country. It is a powerful weapon in the hands of law Courts by reason wherefor it must thus be exercised with due case and caution and for larger interest. *Mrityunjoy Das* v. *Syed Hasibur Rahman*, AIR 2001 SC 1293 : (2001) 3 SCC 739 : (2006) 1 SCC (Cri) 296 (297-298) : 2001 CrLJ 1702.

[10204] ● ***Person trying to scandalise Court or undermining dignity of Supreme Court or High Court attempts Article 129 or Article 215.***—Any expression of opinion would, therefore, be not immune from the liability for exceeding the limit. either under the law of defamation or contempt of Court or the other constitutional limitations under Article 19(2). If a citizen, therefore, in the garb of exercising right of free expression under Article 19(1), tries to scandalise the Court or undermines the dignity of the Court, then the Court would be entitled to exercise power under Article 129 or Article 215, as the case may be. In relation to a pending proceeding before the Court, while showing cause to the notices issued, when it is stated the Court displays a disturbing willingness to issue notice on an absurd despicable, entirely unsubstantiated petition, it amounts to a destructive attack on the reputation and the credibility of the institution and it undermines the public confidence in the judiciary as a whole and by no stretch of imagination, can be held to be a fair criticism of the Court's proceeding. When a scurrilous attack is made in relation to a pending proceeding and the notice states that the issuance of notice to show cause was intended to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it, is a direct attack on the institution itself, rather than the conduct of an individual Judge. The meaning of the expressions used cannot come within the extended concept of fair criticism or expression of opinion, particularly to the case of the contemner in the present case, who on her own right is an acclaimed writer in English. *In re, Arundhati Ray*, AIR 2002 SC 1375 : (2002) 3 SCC 343 : 2002 CrLJ 1792 : JT 2002 (2) SC 508.

[10205] ● ***Judiciary guardian of rule of law.***—The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. If the orders of the Court are disobeyed with impurity by those who owe an obligation to the society to preserve the rule of law, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute. *Bijoy Kumar Mahanty* v. *Jadu*, AIR 2003 SC 657 : (2003) 1 SCC 644 : 2003 CrLJ 841 : JT 2002 (10) SC 349.

[10206] ● ***Assault on Judge in Courtroom.***—In the present case, a judicial officer of the rank of District Judge was attacked in a pre-planned and calculated manner in his Courtroom and when he tried to protect himself from physical harm by retiring to his chambers, by chasing him there and causing injuries to him. The raising of slogans and demanding unconditional bail for Jokhu Singh further compounded the offence. The Courts cannot be compelled to give "command orders". The act committed amounts to deliberate interference with the discharge of duty of a judicial officer by intimidation apart from scandalising and lowering the dignity of the Court and interference with the administration of justice. The effect of such an act is not confined to a particular Court or a district, or the State, it has the tendency to affect the entire judiciary in the country. It is a dangerous trend. Such a trend has to be curbed. If for passing judicial orders to the annoyance of the police the presiding officers of the Courts are to be assaulted and humiliated the judicial system in the country would collapse. *Daroga Singh* v. *B.K. Pandey*, AIR 2004 SC 2579 : (2004) 5 SCC 26 : 2004 SCC (Cri) 1521 (1535).

[10207] ● ***Nature of offence under Section 228, IPC.***—What is made punishable under Section 228, IPC is the offence of intentional insult to a Judge or interruption of Court proceedings but not as a contempt of Court. The definition of criminal contempt is wide enough to include any act by a person which would either scandalise the Court or which would tend to interfere with the administration of justice. It would also include any act which lowers the authority of the Court or prejudices or interferes with the due course of any judicial proceeding. It is not limited to the offering of intentional insult to the Judge or interruption of the judicial proceedings. *Daroga Singh* v

B.K. Pandey, AIR 2004 SC 2579 : (2004) 5 SCC 26 : 2004 SCC (Cri) 1521 (1534-35) : 2004 CrLJ 2084 : JT 2004 (4) SC 608 : (2004) 2 Crimes 423.

[10208] ● ***In application for contempt, the Court is concerned with question whether earlier decision which has become final has been complied with.***—While dealing with an application for contempt, the Court is really concerned with the question whether the earlier decision, which has received its finality, had been complied with or not. It would not be permissible for a Court to examine the correctness of the earlier decision which had not been assailed and to take the different view than what was taken in the earlier decision. *State of Bihar* v. *Rajendra Singh*, AIR 2004 SC 4419 : (2007) 15 SCC 688 : 2004 CrLJ 4187 (4188).

[10209] ● ***Assault on Judge in courtroom in pre-planned and calculated manner.***—In the instant case, a judicial officer of the rank of District Judge was attacked in a preplanned and calculated manner in his courtroom and when tried to protect himself from physical harm by retiring to his chamber, by chasing him there and causing injuries to him. The raising of slogans and demanding unconditional bail for Jokhu Singh further compounded the offence. The Courts cannot be compelled to give a command orders". The act committed amounts to deliberate interference with the discharge of duty of a judicial officer by intimidation apart from scandalising and lowering the dignity of the Court and interference with the administration of justice. The effect of such an act is not confined to a particular Court or District or the State, it has the tendency to affect the entire judiciary in the country. It is a dangerous trend. It has to be curbed. If for passing judicial orders to the annoyance of the police the presiding officers of the Courts are to be assaulted and humiliated the judicial system in the Country would collapse. *Daroga Singh* v. *B.K. Pandey*, AIR 2004 SC 2579 : (2004) 5 SCC 26 : 2004 SCC (Cri) 1521 (1535) : JT 2004 CrLJ 2084.

[10210] ● ***Vacation of interim order in main proceedings.***—If ultimately the interim order is vacated or relief in the main proceedings is not granted to a party, the other side cannot take that as a ground for disobedience of interim order passed by the Court. *Prithawi Nath Ram* v. *State of Jharkhand*, AIR 2004 SC 4277 : (2004) 7 SCC 261 : 2004 CrLJ 4848 (4850).

[10211] ● ***Two versions.***—The present case is of two versions, one as published in the newspaper *Bartaman* on the basis of which the appellant has been found guilty of contempt and the other version that appeared in other newspapers. Without a clear finding based on material on record that the version as appeared in the newspaper *Bartaman* is correct, it is not possible to uphold the conclusion that the appellant is guilty of contempt of Court. The contempt proceedings are *quasi*-criminal. The charge is required to be proved beyond reasonable doubt and not on probabilities. *Biman Bose* v. *State of W.B.*, (2004) 13 SCC 95 : (2006) 1 SCC (Cri) 291 (294).

[10212] ● ***Publication of article in magazine on issue sub-judice—Interference with administration of justice.***—In the instant case the death of Chandni took place on 28.10.2003 and the complaint in this regard was registered and the investigation was in progress. The application for grant of anticipatory bail was disposed of by the High Court of Calcutta on 13.2.2004 and special leave petition was pending before the Supreme Court. Even then an article has appeared in a magazine called "*Saga*" titled "Doomed by Dowry" written by one Kakoli Poddar based on her interview of the family of the deceased, giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The facts narrated therein were all materials that may be used in the forthcoming trial in this case *Held* : "We these type of articles appearing in the media would certainly interfere with the administration of justice. Deprecate this practice and caution the publisher, editor and the journalist who were responsible for the said article against indulging in such trial by media when the issue is subjudice. However, to prevent any further issue being raised in this regard, we treat this matter as closed and hope that the others concerned in journalism would take note of this displeasure expressed by us for interfering with the administration of justice" *M.P. Lohia* v. *State of West Bengal*, AIR 2005 SC 790 : (2005) 2 SCC 686 : 2005 SCC (Cri) 556 : 2005 CrLJ 1416 : 2005 (1) Crimes 283.

[10213] ● ***Civil contempt—High Court directing Municipal corporation and Development authority to initiate action in regard to matters of removing unauthorised encroachments—Mayor requesting authorities to give some time for vacating.***—Contempt proceedings were initiated against the appellant who was an elected Mayor of Indore Municipal Corporation, on the ground that he had created hindrance in executing the order passed by the High Court in public interest litigation. After passing the order, by the High Court to initiate action for demolition of unauthorised construction.

The authorities of the Municipal Corporation started demolishing the unauthorised construction. However, on 29.10.1996, one of the corporators Smt. Ravindra Kaur Saluja who was one of the tenants of the house under demolition requested the appellant on telephone that some time be given to the residents whose houses, shops were being demolished so that they can remove their belongings and household articles. In this view of the matter, on 30.10.1996, the appellant requested the authorities concerned to grant some time on humanitarian ground to the occupants whose houses were to be demolished. This aspect was reported in the newspaper under the caption "MAYOR PROVES TO BE A STUMBLING BLOCK IN ANTI-ENCROACHMENT DRIVE—GIVE ENCROACHERS MORE TIME, SAYS MAYOR." *Held*, *Prima facie* there was no question of initiating any contempt proceedings in a case where the Mayor of the city requests the authorities to give some time for vacating the premises and for removing the household articles of the occupants whose houses were being demolished. In any set of circumstances, it could not be said that he committed any breach of the order passed by the High Court, because as quoted above the High Court only directed Indore Municipal Corporation and Indore Development Authority that they may initiate action in regard to matters of removing unathorised encroachment. *Madhukar Varma* v. *State of M.P.*, (2005) 9 SCC 629 : 2005 SCC (Cri) 1267 (1268).

[10214] ● ***Falsee statement that ban on withdrawal of GPF.***—Where the contemnor, Commissioner-cum-Secretary to Government Finance Department, Government of Nagaland did not lift ban on the withdrawal of GPF imposed by his order, inspite of the directions issued by the High Court, gave false statement in contempt proceedings that ban had been lifted, the contemnor was sentenced to simple imprisonment for a period of one month and fine of Rs. 5000/-, the Supreme Court considering the long career of the contemnor, set aside the sentence of simple imprisonment however maintained the sentence of fine. Their Lordships of the Supreme Court however observed that—

"It has become tendency with the Government Officer to somehow or the other to circumvent the orders of Court and try to take recourse to one justification or other. This shows complete lack of grace in accepting the orders of the Court. This tendency of undermining the Court's order cannot be countenanced. This Court time and again has emphasised that in democracy the role of the Court cannot be subservient to the administrative fiat. The executive and legislature had to work within Constitutional frame work and the judiciary has been given a role of watch dog to keep the legislature and executive within check. In the present case, we fail to understand the counter filed by the appellant before the Court. On one hand they say that all the cases of GPF have been processed and on the other hand they are not prepared to revoke the administrative order. This only shows a deliberate attempt on the part of the bureaucracy to circumvent the order of the Court and stick to their stand. This is clear violation of Courts Order and appellant is guilty of flouting the Court's Order." *E.T. Surup* v. *CANSS Employees Association*, AIR 2005 SC 115 : (2004) 8 SCC 683 : 2005 CrLJ 131 (134).

[10215] ● ***Rule of law foundation of democratic society.***—It has been repeatedly held that the rule of law is the foundation of democratic society. The judiciary is the guardian of the rule of law. The confidence, which the people repose in the Courts of justice, cannot be allowed to be tarnished, diminished or wiped out by the contemptuous behaviour of any person. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the Courts have to be respected and protected at all costs. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the Court by creating distrust in its working, the edifice of the judicial system gets eroded. It is for this purpose that the Courts are entrusted with extraordinary powers of punishing for contempt of Court those, who indulge in acts, which tend to undermine the authority of law and bring it in disrepute and disrespect by scandalising it. When the Court exercises this power, it does not do so to vindicate the dignity and honour of the individual judge who is personally attacked or scandalised, but to uphold the majesty of the law and of the administration of justice. *Rajendra Sail* v. *M.P. High Court Bar Association*, AIR 2005 SC 2473 : (2005) 6 SCC 109 : 2005 SCC (Cri) 1401 (1409) : 2005 CrLJ 2585 : 2005 (2) Crimes 230.

[10216] ● ***Scandalising Court—Not fair criticism.***—The issue as to whether the alleged statements amount to contempt or not does not present any difficulty in the present case. If the conclusions reached by the High Court are correct, there can be little doubt that it is serious case of scandalising the Court and not a case of fair criticism of a judgment. Undoubtedly, judgments are open to criticism. No criticism of a judgment, however vigorous, can amount to contempt of Court, provided it is kept within the limits of reasonable courtesy and good faith. Fair and reasonable criticism of a judgment which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. *Rajendra Sail* v. *M.P. High Court Bar Association*, AIR 2005 SC 2473 : (2005) 6 SCC 109 : 2005 SCC (Cri) 1401 (1418) : 2005 CrLJ 2585 : 2005 (2) Crimes 230.

[10217] ● ***Scandalising Courts and interfere with administration of Justice.***—When there is danger of grave mischief being done in the matter of administration of justice, the animal version cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public reposes in the Courts of law as Courts of justice, the criticism would cease to be fair and reasonable criticism but would scandalise Courts and substantially interfere with administration of justice. Having perused the record, the contention urged on behalf of Mr. Rajendra Sail that on facts the conclusions arrived at by the High Court was not sustainable. Once this conclusion is reached, clearly the publication amounts to a gross contempt of Court. It has serious tendency to undermine the confidence of the society in the administration.

It is one thing to say that a judgment on facts as disclosed is not in consonance with evidence or the law has not been correctly applied. But when it is said that the judge had a predisposition to acquit the accused because he had already resolved to acquit them or has a *bias* or has been bribed or attributing such motives, lack of dispassionate and objective approach and analysis and prejudging of the issues, the comments that a judge about to retire is available for sale, that an enquiry will be conducted as regards the conduct of the judge who delivered the judgment as he is to retire within a month and a wild allegation that judiciary has no guts, no honesty and is not powerful enough to punish wealthy people, would bring administration of justice into ridicule and disrepute. The speech that the judgment is rubbish and deserves to be thrown in a dustbin cannot be said to be a fair criticism of judgment. These comments have transgressed the limits of *fair* and *bona fide criticism* and have a clear tendency to affect the dignity and prestige of the judiciary. It has a tendency to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge and to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, it is also likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. *Rajendra Sail* v. *M.P. High Court Bar Association*, AIR 2005 SC 2473 : (2005) 6 SCC 109 : 2005 SCC (Cri) 1401 (1418) : 2005 CrLJ 2585 : 2005 (2) Crimes 230.

[10218] ● ***Contempt of Court serious matter—Court to act with great circumspection.***—A question whether there is contempt of Court or not is a serious one. The Court is both the accuser as well as the judge of the accusation. The Court has to act with a great circumspection. It is only with a clear case of contemptuous conduct not explainable otherwise, arises that the contemnor must be punished. *Rajendra Sail* v. *M.P. High Court Bar Association*, 2005 SCC (Cri) 1401 (1414).

[10219] ● ***Civil contempt—Scope of proceedings for.***—While dealing with an application for contempt, the Court is really concerned with the question whether the earlier decision which has received its finality had been complied with or not. It would not be permissible for a Court to examine the correctness of the earlier decision which had not been assailed and to take a view different than what was taken in the earlier decision. The Court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party who is alleged to have committed default in complying with the directions in the judgment or order. If there was no ambiguity or indefiniteness in the order, it is for the party concerned to approach the higher Court if according to him the same is not legally tenable. Such a question has necessarily to be agitated before the higher Court. The Court exercising contempt jurisdiction cannot take upon itself power to decide the original proceedings in a manner not dealt with by the Court passing the judgment or order. Right or wrong the order has to be obeyed. Flouting an order of the Court would render the party liable for contempt. While dealing with an application for contempt, the Court cannot traverse beyond the order, non-compliance of which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional directions or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. In that view of the matter, the order of the

High Court is set aside. *Director of Education, Uttaranchal* v. *Ved Prakash Joshi*, AIR 2005 SC 3200 : (2005) 6 SCC 98 : 2005 SCC (Cri) 1357 : 2005 CrLJ 3731.

[10220] ● ***Criminal contempt—Inspector of police abusing Magistrate outside Court premises and thereafter chasing abusing and trying to insult him.***—In the instant case, the appellant (Inspector of Police) abused a Magistrate outside the Court premises intentionally, chased him in a Maruti car when the Magistrate was proceeding on a scooter, abused him and sought to assault him. The Supreme Court held :

> "The High Court, has in a very detailed order summarised the evidence and the material on record. The High Court has correctly come to the conclusion that the appellant was guilty of criminal contempt. We see no substance in the submission that the principles of natural justice were not followed as the appellant was not allowed by the enquiry officer to be represented by a lawyer. In an enquiry of this nature, it is not necessary that parties be allowed to be represented by advocates. We also see no substance in this submission that documents were not looked into by the enquiry officer. The appellant was allowed to cross-examine the witnesses. He tendered documents and even led evidence in support of his case. He had been accorded full opportunity. He could have personally given to the enquiry officer the documents, if he fled they were important. If he failed to do so he had only himself to blame. We, therefore, see no reason to interfere. In fact, the nature of the contempt is such that, in our view, the sentence is too lenient. However, as no notice for enhancement of sentence has been issued, we do not propose to now enhance the sentence." *Babu Singh* v. *State of U.P.*, (2005) 9 SCC 741 : 2005 SCC (Cri) 1472.

[10221] ● ***Violation of orders of Supreme Court regarding unlicensed saw mills.***—Where the Supreme Court had ordered closure of all unlicensed saw mills and plywood industries, but the contemnors granted license to six mills in the State by orders of Minister Forest Department and Principal Secretary, it is a case of deliberate disobedience of Supreme Court orders in brazen manner, the contemnors would be severely punished. Sentence of one month simple imprisonment was awarded. *T.N. Govindaraman Thirummulpad*, AIR 2006 SC 2007 : (2006) 5 SCC 1 : 2006 CrLJ 2773.

[10222] ● ***Government servants are liable to be punished under Act.***—The proceedings under the contempt of Court Act are penal and punitive in nature. But that does not mean that a Government official cannot be punished for contempt of Court. *T.N. Govindaraman Thirummulapad*, AIR 2006 SC 2007 : (2006) 1 SCC 1 : 2006 CrLJ 2773.

[10223] ● ***Unconditional apology not tendered—Punishment.***—All the respondents had deliberately and with *mala fide* motive committed contempt of Supreme Courts order. When they were advised to comply with the order of this Court during the pendency of the contempt proceedings, the act of the respondents in not complying was not only wilful but also deliberate and contumacious. The respondents had not even tendered unqualified apology before the Court. All the respondents were senior and experienced officers and were presumed to know that under the constitutional scheme of this country, orders of the Supreme Court had to be punctually obeyed and not to be trifled with. The Court found that they had acted deliberately to subvert the orders of the Court and held them guilty of contempt of Court and censured severely their conduct. The Court refrained from sending a copy of the order to form part of the annual confidential record of service of each of the said officers. The Court directed that the officers would not indulge in any adventurous act and strictly obey the orders passed by the Courts of law. *Palitana Sugar Mills (Pvt.) Ltd.* v. *Vilasinaben Ramachandran*, AIR 2007 SC 1701 : 2007 (4) SCR 221 : JT 2007 (5) SC 221.

[10224] ● ***Recording statement during course of preliminary inquiry against an official.***—Recording statements of persons during the course of preliminary inquiry against an official, if these statements are contrary to the report of the incident contained in the order sheet of the Court dated 1.11.1999 does not amount to contempt of Court, unless there is material to show that the officer holding preliminary inquiry is part of conspiracy to create false evidence. *Rajesh Kumar Singh* v. *High Court of Judicature of Madhya Pradesh*, AIR 2007 SC 2725 : (2007) 14 SCC 126 : 2007 CrLJ 3753 (3757) : 2007 (7) SCR 869.

[10225] ● ***Deliberate and wilful disobedience of undertaking given to Court.***—In the instant case, the parties gave an undertaking with the object of having a joint management and control of the company the object of joint management and control can be accomplished if every major decisions of the company are taken jointly with the express consent of the petitioner and the respondents. The petitioner in an application for contempt enlisted series of instances where the respondent were keeping the petitioners totally out of management and control of the company. *Held*, the respondents were clearly guilty of committing contempt of Court by deliberate and wilful disobedience of the undertaking given by them to the Court. The respondent were liable to be convicted under Section 2(c) of the Contempt of Courts Act. *Rama Narang* v. *Ramesh Narang*, AIR 2007 SC 2029 : (2009) 16 SCC 126 : 2007 (3) SCR 1099 : JT 2007 (4) SC 407.

[10226] ● ***Bona fide act in the course of discharge of duties.***—An authority holding an inquiry in good faith in exercise of the powers vested in it by a statute is not guilty of contempt of Court, merely because a parallel enquiry is imminent or pending before a Court. This Court pointed out that to constitute the offence of Contempt of Court, there must be involved some act calculated to bring a Court or a Judge of the Court into contempt or to lower his authority or something calculated to obstruct or interfere with the due course of justice on the lawful process of the Court. Applying the said principle, the act of appellant holding the preliminary inquiry, cannot be considered to be contempt of Court. *Rajesh Kumar Singh* v. *High Court of Judicature of Madhya Pradesh*, AIR 2007 SC 2725 : (2007) 14 SCC 126 : 2007 CrLJ 3753 (3757) : 2007 (7) SCR 869.

[10227] ● ***Bona fide act in discharge of duties.***—When appellant held the preliminary inquiry, no contempt proceedings had been initiated by the High Court in regard to the incident of 1.11.1999. There was also no other proceedings pending before the learned Magistrate or any other Court in regard to the incident dated 1.11.1999. Therefore, the question of seeking or obtaining the permission of High Court or other Court, for holding such inquiry, did not arise. Unless the inquiry by the appellant was a parallel proceeding with reference to a matter pending in Court and unless such parallel proceeding interfered with or, intended to interfere with the pending Court proceeding, there is no interference with administration of justice. *Rajesh Kumar Singh* v. *High Court of Judicature of Madhya Pradesh*, AIR 2007 SC 2725 : 2007 CrLJ 3753 (3757) : 2007 (7) SCR 869 : JT 2007 (9) SC) 92.

[10228] ● ***Bona fide act in the course of discharge of duty.***—When a police official misbehaved in the Court, the Magistrate sent a complaint to the I.G. of Police itself requiring action against him. The Inspector General of Police, acting on the said request, directed, the Superintendent of Police to hold an inquiry and take disciplinary action against Raghuvanshi. The Superintendent of Police, in turn, forwarded the complaint dated 1.11.1999 of the Magistrate and the directive of the I.G. of Police dated 10.11.1999 to the appellant, with an instruction to look into the matter and send a detailed report. It is only in pursuance of such directive from his superiors, the appellant held a preliminary inquiry in respect of the conduct of Raghuvanshi. The inquiry was not in regard to the conduct of the Judge. As the inquiry was against Raghuvanshi, the appellant had to give an opportunity to him, to make his statement. He also had to record the statements of persons, whom Raghuvanshi stated were present at the time of the incident. The inquiry by the appellant was a prelude to the disciplinary action against Raghuvanshi. In fact, after the recording of the statements of several witnesses, the appellant submitted a report holding Raghuvanshi guilty of having used unwarranted language in Court and recommending punishment. It cannot, therefore, be said, that recording the statements of Raghuvanshi, and several other persons the request of Raghuvanshi, in the course of the preliminary inquiry, amounts to holding an inquiry in regard to the conduct of a Judge. *Rajesh Kumar Singh* v. *High Court of Judicature of Madhya Pradesh*, AIR 2007 SC 2725 : (2007) 14 SCC 126 : 2007 CrLJ 3753.

[10229] ● ***Bona fide act in performance of duties.***—Any *bona fide* act in the course of discharge of duties and complying with the directions of the superior officers, should not land the Inquiry Officer in a contempt proceedings. Though, common contempt proceedings were initiated against the IG of Police and the appellant, the High Court dropped the proceedings against the IG of Police who directed the inquiry, but chose to proceed against the appellant who merely complied with the directions of the IG of Police. It even ignored the declaration of *bona fides* and unconditional apology. The finding of guilt is totally unwarranted. *Rajesh Kumar Singh* v. *High Court of Judicature of Madhya Pradesh*, AIR 2007 SC 2725 : (2007) 14 SCC 126 : 2007 CrLJ 3753 (3759, 3760) : 2007 (17) SCR 869.

[10230] ● ***Criticism of Court on good faith.***—The right of free speech is one of the greatest guarantee to liberty on a free country like ours, even though that right in frequently and in many instances outrageously abused. If any considerable portion of a community is led to believe that either because of gross ignorance of the law or because of a wrong reason it cannot rely upon the

Courts to administer justice that portion of the community, upon some occasion, is very likely to come to the conclusion that it is better not to take any chances on the Courts failing to do their duty. *Haridas* v. *Usha Rani Banike*, AIR 2007 SC 2688 (2693) : (2007) 14 SCC 1 : 2007 (8) SCR 365.

[10231] ● *Fair and temperate criticism of Court.*—No Court can claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the Judges. They do not think themselves to be in possession of truth to hold that wherever others differ from them are in error. No one is more conscious of his limitations and fallibility than a Judge. But because of his training and the assistance he gets from counsel he is apt to avoid mistakes more than others. While fair and temperate criticism of the Court, even if strong, may not be actionable, but attributing improper motives or tending to bring judges or courts into hatred and another's contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must be and will be taken.

Respect is expected not from those to whom the judgment of the Court is acceptable but also from those to whom is repugnant. Those who in their criticism by indulging in vilification of the institution of the Court, administration of justice and the instruments through which the administration act, should take heed for they will act at their own peril. *Haridas* v. *Asha Ram Banik*, AIR 2007 SC 2688 (2690-2691) : (2007) 14 SCC 1 : 2007 (8) SCR 365.

[10232] ● *Normally Courts should not be oversensitive.*—Normally the Courts should not be oversensitive and should not take very serious note of any loose expressions in the application. Contempt jurisdiction is to be sparingly exercised in very exceptional cases. However, the appellant should use proper language and state corrects facts in his application. Although it is not contempt, proper decorum maintained. In this case SSP had sworn affidavit but the Counsel who had prepared the application should have been more careful while drafting the application. As certain incorrect facts were stated, the High Court issued notice of Contempt. The Supreme Court held the High Court should not have issued contempt notice in the matter. The SSP had sworn the affidavit but the counsel who has prepared the application should have been more careful while drafting such an application. They should not make incorrect statements. The language used by them should be in consonance with the dignity of the Court. The order of the High Court issuing contempt notice was set aside. *State of Punjab* v. *Raninder Singh*, AIR 2008 SC 609 : (2008) 1 SCC 564 : 2008 CrLJ 801 (802) (SC) : (2007) 4 Crimes 321.

[10233] ● *Wilful disobedience of Court's order—Duty of Court.*—For a proper administration of justice and to ensure due compliance with the order passed by a Court, the Court should not hesitate in wielding the potent weapon of contempt. It is the duty of Court to uphold and maintain dignity of Courts and majesty of law. *C. Elumalai* v. *A.G.L. Irudayaraj*, AIR 2009 SC 2214 : (2009) 4 SCC 213 : 2009 (4) SCR 774 : JT 2009 (4) SC 241.

[10234] ● *Wilful disobedience of order of Supreme Court—Allegations against Chief Minister and Officers.*—In the instant case while issuing notice in Special Leave Petition the Court restrained the political parties from proceeding with the call for band. The language of the restraint order was unambiguous. The said order was explicitly directed against the political parties and not against respondent Nos. 1 and 3. The Court did not direct respondent Nos. 1 and 3 to act in any particular manner or take certain specific steps to meet the challenge likely to be posed by implementation of the call given by Democratic Progressive alliance. The Supreme Court observed and held that the bald statement contained in the contempt petitions that violence and coercion was resorted to by members of the party headed by respondent No. 4 has remained unsubstantiated because except the newspaper reports no material has been produced before the Court giving the names and other relevant particulars of the persons who are said to have indulged in forced closure of shops and business establishments on 1.10.2007 and no other evidence has been produced to show that respondent No. 4 had, directly or indirectly, encouraged the members of his party to enforce the call for cessation of work which has been *prima facie* treated by the Courts as call for bandh. Therefore, respondent No. 4 cannot be accused of having engineered violation of the Court's order. *All India Anna Dravida Munnetra Kazhagam* v. *R.K. Tripathi*, AIR 2009 SC 1314 : (2009) 5 SCC 417 : 2009 (6) SCR 583.

[10235] ● *Power of Supreme Court to punish person term "wilful disobedience".*—The word "wilful" has not been defined in the Act. Therefore it will be useful to notice dictionary meaning of the term. On analysing Section 2(b) of the contempt Courts Act, it has been found that wilful disobedience to any judgment, decree, direction, order, writ or other process of a Court or wilful breach of an undertaking given to Court constitutes Civil Contempt. If this definition is read with Article 129 of the Constitution of India, it becomes clear that the Supreme Court being a Court of record can punish a person for Civil Contempt if it is found that he has wilfully disobeyed any judgment etc or violated undertaking given to the Court. *All India Anna Dravida Munnetra Kazhagam* v. *R.K. Tripathi*, AIR 2009 SC 1314 : (2009) 5 SCC 417 : 2009 (6) SCR 583.

[10236] ● *Contempt petition against person who is not party to lis and no direction issued against him—Not maintainable ordinarily.*—A contempt petition would not be against a person who is not a party to the lis and no direction has been issued against him. *Parents Association of Students* v. *M.A. Khan*, (2009) 2 SCC 641 : JT 2009 (1) SC 128.

[10237] ● *Foot-wear thrown at the presiding officer in a Court proceeding.*—*Held*, when an object, such as footwear is thrown at the Presiding officer in a Court proceeding, the object is not merely to scandalise or humiliate the Judge, but to scandalise the institution itself and thereby to lower its dignity in the eyes of public. *Leila David* v. *State of Maharashtra*, (2009) 10 SCC 337 : 2009 (4) SCR 1171 : JT 2009 (13) SC 520.

[10238] ● *Apology—An act of contrition—Proper stage of tendering apology.*—Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace, the apology is shorn of penitence and hence it is liable to be rejected. If the apology is offered at the time when the contemnor finds that the Court is going to impose punishment it ceases to be an apology and becomes an act of a cringing coward.

Apology is not a weapon of defence to purge the guilty of their offence nor is it intended to operate as universal panacea, but it is intended to be evidence of real contriteness. *C. Elumalai* v. *A.G.L. Irudayaraj*, AIR 2009 SC 2214 : (2009) 4 SCC 213 : 2009 (4) SCR 774 : 2009 (4) Scale 73 : 2009 (2) Supreme 587.

[10239] ● *Imposition of punishment—Validity.*—Punishing a person for contempt of Court is indeed a drastic step and normally such action should not be taken. At the same time, however, it is not only the power but the duty of the Court to uphold and maintain the dignity of Courts and majesty of law which may call for such extreme step. If for proper administration of justice and to ensure due compliance with the orders passed by a Court, it is required to take strict view; it should not hesitate in wielding the potent weapon of contempt. *C. Elumalai* v. *A.G.L. Irudayaraj*, AIR 2009 SC 2214 (2216, 2217) : (2009) 4 SCC 213 : 2009 (4) SCR 774.

[10240] ● *Sting operation fully knowing that BMW trial was going on.*—The NDTV did the sting, prepared a programme on the basis of the sting materials and telecast at a time when of fully knew that the BMW trial was going on. *Held*, the programme cannot be accused of interfering or tending to interfere with, or obstructing a tending to obstruct the due course of the BMW case. The programme may have any other faults or weaknesses but it certainly did not interfere with or obstruct the due course of the BMW trial. The programme telecast by NDTV showed to the people that the conspiracy was afoot to undermine the BMW trial. What was shown by proved to be substantially true and accurate. The programme was thus clearly intended to prevent the attempt to interfere with or obstruct the due course of the BMW trial. *R.K. Anand* v. *Registrar, Delhi High Court*, (2009) 8 SCC 106 : 2009 (1) SCR 1026 : JT 2009 (10) SC 1.

[10241] ● *Proceedings under contempt of Court Act—Nature.*—It is one thing to say that the *standard of* proof in a contempt proceeding is no less rigorous than a criminal trial but it is something entirely different to insist that the *manner* of proof for the two proceedings must also be the same. It is now well settled and so also the High Court has held that the proceeding of contempt of Court is *sui generis*. In other words, it is not strictly controlled by the provisions of the CrPC and the Indian Evidence Act. What, however, applies to a proceeding of contempt of Court are the principles of natural justice and those principles apply to the contempt proceeding with greater rigour than any other proceeding. This means that the Court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of Court and that should allow him/her the fullest opportunity to defend himself/herself. *R.K. Anand* v. *Registrar, Delhi High Court*, (2009) 8 SCC 106 : 2009 (11) SCR 1026 : JT 2009 (10) SC 1.

[10242] ● *Contempt in face of Supreme Court.*—The expression "contempt in the face of the Supreme Court" means an incident taking place within the sight of the Judges and others present at the time of incidence. *Leila David* v. *State of Maharashtra*, AIR 2010 SC 862 : (2009) 10 SCC 337 : 2010 CrLJ 455 : 2009 (4) SCR 1171 : JT 2009 (13) SC 520.

[10243] ● ***Contempt in the face of the Supreme Court.***—There is no doubt that Section 14 of the Contempt Courts Act. contemplate issuance of notice and an opportunity to the contemnors to answer charges in notice to satisfy the principles of natural justice. But where an incident of instant nature takes place within the presence and sight of learned Judges, same amounts to contempt in the face of Court and is required to be dealt with at the time of incident itself. This is necessary for the dignity and majesty of Courts to be maintained. *Leila David* v. *State of Maharashtra*, AIR 2010 SC 862 : (2009) 10 SCC 337 : 2010 CrLJ 455 : 2009 (4) SCR 1171 : 2009 (13) Scale 351 : 2009 (7) Supreme 154 : JT 2009 (13) SC 520.

[10244] ● ***Civil contempt—Section 2 of Act—CPC, 1908, Order 21, Rule 2.***—In this case the awarded arbitrator directed the appellant to pay principal amount with interest having regard to the interest of the department concerned the appellant had addressed letters to the respondent to adjust the award. *Held*, the letters for adjustment of award cannot be treated as contempt of Court within the meaning of the provisions of the contempt of Courts Act, 1971. The tenor of the letters do not indicate that there was any willful disobedience on the part of the appellant in not complying with the judgment of the High Court. *P.K. Singh* v. *S.N. Kanungo*, 2010 CrLJ 2049 (2051) : (2010) 2 JT 455.

[10245] ● ***Sections 2(c), 12, Contempt of Court Act—Appellant playing main role.***—The counsel for the appellant argued that in the show cause notice which was given to the appellant, no different role had been attributed to him, so he could not be treated differently by the High Court in the matter of awarding punishment. The Hon'ble Apex Court did not appreciate the said contention and observed. "In the facts of the case and on the materials on record it is clear that the case of the appellant stands on a different foot. In fact the appellant took the main role in causing disruption and there was not lack of opportunity on his part in a answering the charges against him….. All the constituents of charges were stated in the show cause notice and the appellant has understood the charges and has given the reply. Nowhere in the reply the appellant has raised any difficulty in understanding the charges. It does not appear that any contention was raised by the appellant before the High Court about any vagueness in the charges or about furnishing inadequate particulars in the charges. This argument of the learned counsel for the appellant only before this Court and that too without a proper factual basis cannot be entertained. *Ranveer Yadav* v. *State of Bihar*, 2010 CrLJ 3431 (3433) : (2010) 5 JT 335 (SC).

[10246] ● ***Section 2(c)(ii), Contempt of Courts Act—Interference with due course of justice—Word "due".***—Due conduct of any judicial proceeding is a matter of high public importance as it is inextricably connected with rule of law on which is based the constitutional mode of governance in this country. That is why the framers of the Act preceded the expression interfere with the words "tends to" and it has been further emphasized by addition of word 'due' before "course of any judicial proceedings".

We must remember that legislature does not waste words. Therefore, every word used in Section 2(c)(ii) must be given its proper and natural meaning. Thus read, Section 2(c)(ii) must be given a broad sweep so as to include within it even any attempt to interfere with the due course of a judicial proceeding. The word 'due' is very crucial in this context and must mean a natural and proper course of judicial proceeding. *Ranveer Yadav* v. *State of Bihar*, 2010 CrLJ 3431 (3434) (SC) : (2010) 5 JT 335 (SC).

[10247] ● ***Contempt power—How to be exercised.***—Contempt power has to be exercised with utmost caution and in an appropriate case and that is why High Court has been entrusted with it. *Ranveer Yadav* v. *State of Bihar*, 2010 CrLJ 3431.

[10248] ● ***Section 2—Disobedience of orders of Court—Standard of proof.***—High Court has a power to initiate the contempt proceedings *suo motu* for ensuring the compliance of the orders passed by the Court. However, contempt proceedings being quasi-criminal in nature, the same standard of proof is required in the same manner as in other criminal cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the Criminal Jurisprudence, including the benefit of doubt. There must be a clear-cut case of obstruction of administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The alleged contemnor is to be informed as what is the charge, he has to meet. Thus, specific charge has to be framed in precision. The alleged contemnor may ask the Court to permit him to cross-examine the witnesses *i.e.* deponents of affidavits, who have deposed against him. In spite of the fact that contempt proceedings are quasi-criminal in nature, provisions of Code of Criminal Procedure, 1973 (hereinafter called, "CrPC") and Evidence Act are not attracted for the reason that proceedings have to be concluded expeditiously. Thus, the trial has to be concluded as early as possible. The case should not rest only on surmises and conjectures. There must be clear and reliable evidence to substantiate the allegations against the alleged contemnor. The proceedings must be concluded giving strict adherence to the statutory Rules framed for the purpose. *Sahdeo* v. *State of U.P.*, (2010) 3 SCC 705 : 2010 CrLJ 2034 (2040) : (2010) 1 Crimes 195.

[10249] ● ***Contempt of Courts Act, 1971, Sections 2(c), 15, 23—Suo motu proceedings by Supreme Court—Maintainability.***—The *Amicus Curiae*, Mr. Harish Salve, filed an application to bring to the knowledge of the Hon'ble Chief Justice of India certain statements made by a senior advocate (Respondent No. 2) in an interview given to the Tehelka magazine deliberately aimed at transiting the image of the judiciary as a whole, and, in particular a sitting Judge of the Supreme Court in the eyes of general public, without any foundation therefore. *Prima facie*, a case for issuance of notice having been made out, the Hon'ble Chief Justice of India directed issuance of notice to respondent to show cause in regard to the allegations, contained in the application filed by *Amicus Curiae*. *Held,* the contempt proceedings was initiated by the Court on its own motion and it was not covered by Clauses (a), (b) and (c) of sub-section (1) of Section 15 of the Contempt of Courts Act, 1971 or Clauses (b) and (c) of Rule 3 of the Rule to regulate proceedings for contempt of the Supreme Court, 1975, on the other hand the present proceeding is covered by Clause (a) of Rule 3 of the said Rules. Merely because the information regarding the alleged contemptuous statements made by respondent No. 1 and published by Respondent No. 2 was furnished by the *Amicus curiae,* the proceeding cannot lose its nature or character as a *suo motu* proceeding.... Hence the objections raised by the respondents against the maintainability of the present proceedings are without any basis. *Amicus Curiae* v. *Prashant Bhushan*, (2010) 7 SCC 592 : 2010 CrLJ 4466 (4469, 4470) (SC).

[10250] ● ***Setting law in motion on its own accord—Issue of Rule Nisi.***—The message examined the evils prevailing in the judicial system and was written with an object to achieve maintenance of purity in the administration of justice. The message was exposition of Mr. Sibal's ideology and he had shown the corrective measures to be adopted to get the institution rid of the shortcomings mentioned by him. On the facts of the case, the message sent by Mr. Sibal to be published in the souvenir of the Mehfil will have to be regarded as fair criticism of his senior colleagues for their failure to bring up the Junior Bar and of those members of the Bar who were shouting at each other and threatening the Judges. The message is nothing but concerns of a senior advocate who has practiced long in this Court who noticed that the public image of the legal community was at its nadir. The article nowhere targets a particular judge. This is not a case of an attack on a Judge which is scurrilous, offensive, intimidatory or malicious beyond condonable limits, in respect of a judgment or his conduct. The article is an expression of opinion about an institutional pattern. The article by itself does not affect the administration of justice. Resultantly, the message contributed by Mr. Sibal, read in its proper prospective, did not bring the administration of justice into disrepute or impair. Therefore, it must be held that no criminal contempt was committed or attempted to be committed by the respondent No. 1.

In view of the unconditional apology tendered, it is not necessary for this Court to delve into details about the conduct of the respondent No. 3 any further. There is nothing on the record to show that the souvenir of the Mehfil in which the message was printed was sold to the public. This was a kind of internal pamphlet/brochure which was distributed to its members. Therefore, no case is made out against respondent Nos. 4 and 5 who were subsequently impleaded in the petition.

On the facts and in the circumstances of the case, this Court is of the opinion that this is not a fit case where a formal proceedings for contempt should be drawn up and, therefore, notices issued to them will have to be discharged and the petition will have to be dismissed. *Hari Singh Nagra* v. *Kapil Sibal*, (2010) 7 SCC 502 : JT 2010 (8) 56.

[10251] ● ***Criticism of Judiciary in National interest—Permissibility.***—National interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any partisan spirit or tactics. There is no manner of doubt that freedom of expression as contemplated by Article 19(1)(a) of the Constitution is available to the Press and to criticize a judgment fairly albeit fiercely is no crime but necessary right. *Hari Singh Nagra* v. *Kapil Sibal*, (2010) 7 SCC 502 : JT 2010 (8) 56.

[10252] ● ***Criticism of judgment—When not, contempt.***—A fair and reasonable criticism of a judgment which is a public document or which is public act of a Judge with administration of justice cannot be held contempt, rather the same must be encouraged. *Hari Singh Nagra* v. *Kapil Sibal*, (2010) 7 SCC 502.

[10253] ● *Fair criticism of CESTAT regarding its functioning.*—"By writing the editorial which must have caused embarrassment to functionaries of the Central Government and CESTAT and even some members of the petitioner-association but that cannot be dubbed as an attempt to scandalize CESTAT as a body or interfere with the administration of justice. What the respondent projected was nothing but true state of the functioning of CESTAT on administrative side and to some extent on judicial side. By doing so, he had merely discharged the constitutional duty of a citizen enshrined in Article 51A(h). it is not the petitioner's case that the facts narrated in the editorial regarding transfer and posting of the members of CESTAT are incorrect or that the respondent had highlighted the same with an oblique motive.

"In our view, a person like the respondent can appropriately be described as a whistleblower for the system who has tried to highlight the malfunctioning of an important institution established for dealing with cases involving revenue of the State and there is no reason to silence such person by invoking Articles 129 or 215 of the Constitution or the provisions of the Act." *Indirect Tax Practitioners Association* v. *R.K. Jain*, (2010) 8 SCC 281.

[10254] ● *Undertaking given before the Court—Violation of.*—In this case the Hon'ble Allahabad High Court in writ petition directed the State Government to maintain *status quo* and not to raise any construction at any place which had been notified. The High Court passed the above order recording the undertaking on behalf of the State of U.P. that no further construction over the interim properties concerned would be made. In SLP against the High Court's order the interlocutory order was stayed. Subsequently on the basis of news paper report a *suo motu* contempt petition was registered against the State of U.P. for deliberate and conscious violation of undertaking and interim order. The Supreme Court perused the reply filed by the Chief Secretary. State of U.P. to the *suo motu* notice of contempt and found that there had been no construction of any kind after 11.09.2009 and accordingly the *suo motu* notice of contempt was discharged. *State of U.P.* v. *Gomti Nagar Jan Kalyan Maha Samiti*, AIR 2010 SC 963.

[10255] ● *Proceedings before the High Court initiated by filing contempt petition under S. 15—Issuance of rule nisi—Effect of.*—In the present case, the petitioner No. 1 before the High Court is a practicing advocate and argued his case in person. So far as petitioner No. 2 is concerned, he was represented by more than one lawyer. We have meticulously examined the contempt petition in which there was no prayer for taking *suo motu* action against the appellants. The proceedings before the High Court were initiated by the respondents by filing contempt petition under Section 15. The petition was vigorously pursued and argued as private petition. From the material available on record including the impugned judgment, it is impossible to accept the view taken by the High Court that the Court had taken *sou motu* action. Even in this Court, the respondents entered their appearance through their counsel who did not turn up but elaborate written submissions were submitted by the first respondent.

For all the aforesaid reasons, we hold that the petition to take action against the appellant under Section 15 without the written consent of the learned Advocate General was not maintainable in law". *Biman Basu* v. *Kollol Guha Thakurta*, AIR 2010 SC 3328 : (2010) 8 SCC 673 : JT 2010 (9) 1 : 2010 (8) Scale 490.

3. SECTION 3

[10256] ● *Attachment of contemner property.*—We are of opinion that the Chief Court had no right to make over the attached property to Government. The right of the Government to have any control over the attached property flows from the provisions of Section 88 of the Criminal Procedure Code. As no attachment could legally be made under Section 88, Criminal Procedure Code, in any proceeding for contempt, the provisions of Section 88(7) of the Code of Criminal Procedure, under which the property under attachment shall be at the disposal of the State Government, if the proclaimed person does not appear within the time prescribed in the proclamation cannot come into operation.

We have assumed that the Court had the power to attach the properties of the alleged contemnor; but have held that it had no power in law to make these over to the government. The attachment however could only subsist so long as the contemner was alive. On the contemner's death the attachment could not in law or equity continue. For, the purpose for which the attachment was made, viz., to secure the presence of the alleged contemner could no longer be achieved. Obviously, in such a case, the rightful owner of the property would be entitled to restoration of the property on the contemner's death. *V.G. Peterson* v. *O.V. Forbes*, AIR 1963 SC 692 : 1963 (1) CrLJ 633 : 1963 Supp (1) SCR 40 : 1963 All LJ 428.

[10257] ● ***Criminal contempt.***—Section 3 is in the nature of an exception to those categories of "criminal contempt" which fall under sub-clauses (ii) and to certain categories of "criminal contempt" which come under sub-clause (iii) of Section 2(c), but not to that category of contempt which falls under sub-clause (i) of Section 2(c). But there are no words is Section 3 which may be referable to that species of "criminal contempt" which would fall within sub-clause (i) of the definition given in Section 2(c) sub-section (2) of Section 3 expressly confines its operation to those categories of contempt which are referred to in sub-section (1). Section 3(2) therefore, is not applicable to that category of contempt which falls under sub-clause (i) of Section 2(c), or which is otherwise of a kind different from those mentioned in Section 3(1). Unfounded imputation of *mala fides*, bias, prejudice or ridiculing the performance of a Judge or casting aspersions on his integrity—as has been done by the appellant in the notice in question—are always considered to mean scandalising the Court, and lowering the authority of his Court by bringing him and his office into disrespect and disrepute. Villification of the Judge, even in administrative matters or decided judicial matters, may amount to "criminal contempt" under sub-clause (i) of Section 2(c) as it lowers or tends to lower the authority or dignity of the Court by undermining public confidence in the capacity of the judge to meet out even-handed and impartial justice. *Rachapudi Subba Rao* v. *The Advocate-General, Andhra Pradesh,* AIR 1981 SC 755 : (1981) SCC 577 : 1981 SCC (Cri) 556 : 1981 CrLJ 315 : 1981 CrLR (SC) 87.

[10258] ● ***Contempt proceedings against officials of State.***—The High Court seems to have proceeded on the basis that it is for the state to prosecute contemnors. Therefore, counsel for the state cannot appear for the "accused" contemnor. This foundation of the High Courts reasoning is unfortunately not sound. A contempt proceeding is often described as a *quasi*-criminal proceeding because it results in punishment for the contemnor. The prosecution, however cannot be equated with the prosecution of a criminal by the State. Contempt proceedings are essentially a matter between the Court and the contemnor. Our attention was also drawn to Rule 6 of the Allahabad High Court Rules framed under Section 23 of the contempt of Courts Act which provides for a notice of criminal contempt being served on the Government Advocate. This, however, does not make the Government Advocate an interested party in the contempt proceedings. Moreover, the present case deals not with criminal contempt but with civil contempt. The state is therefore, entitled to outhouse a law officer to appear in case where the contempt consists of disobedience of an order of the Court by an official or employee of the State. The further directions given by the High Court that in all such cases the legal expenses should be borne personally by the alleged contemnor except when he is honourable acquitted also appear to be unwarranted.

Where the conduct of the concerned official is contumacious, the Court can direct him to pay costs personally, if the facts and circumstances of the case so warrant. But a general direction of the kind given by the High Court cannot be sustained. *Commissioner, Agra* v. *Rohtas Singh,* AIR 1998 SC 685 : (1998) 1 SCC 349 : 1998 CrLJ 838.

[10259] ● ***Sections 3, 12—Allahabad High Court Rules, 1952, Rules 5 and 6—Non-compliance of mandatory provisions of Rules of 1952.***—The Rules 1952 mandatorily require the framing of charges and furnishing the copy of the documents to the alleged contemnor on the basis of which the charges were framed. In the absence of the charges, a delinquent accused/ accused/ alleged contemnor may not be able to furnish any defence. Therefore, the impugned judgment suffered from non-observance of the principles of natural justice and non-ensuring the compliance of Statutory Rules, 1952. Thus the trial suffered from material procedural defect and stood vitiated. *Sahdeo* v. *State of U.P.*, (2010) 3 SCC 705 : 2010 CrLJ 2034 (2042, 2043) : (2010) 1 Crimes 195.

4. SECTION 4

[10260] ● ***Contempt—Apology.***—There cannot be both justification and an apology. The two things are incompatible. Again an apology is not a weapon of defence to purge the guilty of their offence; nor is it intended to operate as a universal panacea, but it is intended to be evidence of real contriteness. In border line cases where a question of principle about the rights of counsel and their duties has to be settled, an alternative plea of apology merits consideration; for it is possible for a judge who hears the case to hold that there is no contempt in which case a defence of unqualified apology is meaningless, because that would amount to the admission of the commission of an offence. As soon as we indicated to the learned counsel that they were in error, they and their counsel immediately tendered an unqualified apology which as already indicated was repeated again in absolute terms at the second hearing. We have not been able to appreciate why the learned Judges of the High Court should have doubted this genuineness of this apology. *M.Y. Shareef* v.

Hon'ble Judges of the Nagpur High Court, AIR 1955 SC 19 : 1955 CrLJ 133 : (1955) 1 SCR 757 : 1955 All LJ 90.

[10261] ● ***Punishment—Apology.***—In the matter relating to contempt of Court there cannot be both justification and apology. *Hoshiar Singh* v. *Gurbachan Singh*, AIR 1962 SC 1089 : 1962 (2) CrLJ 236.

[10262] ● ***Contemner to offer apology and that too clearly.***—Contemner must offer an apology and that too clearly and at earliest opportunity. Person offering belated apology sum the risk that it may not be accepted, for such an apology hardly shows contrition which in the essence of purging of contempt. *Debabrates Bandopadhyay* v. *State of West Bengal,* AIR 1969 SC 189 : 1969 CrLJ 401 : (1969) 1 SCJ 533 : 1969 (1) SCR 304.

[10263] ● ***Employing subterfuge to avoid compliance of Court order.***—Contempt proceeding against a person who has failed to comply with the Court's order serves a dual purpose : (1) vindication of the public interest by punishment of contemptuous conduct and (2) coercion to compel the contemnor to do what the law requires of him. The sentence imposed should effectuate both these purposes. It must also be clearly understood in this correction that to employ a subterfuge to avoid compliance of a Courts order about which there could be no reasonable doubt may in certain circumstances aggravate the contempt. *Aligarh Municipal Board* v. *Ekka Tonga Mazdoor Union,* AIR 1970 SC 1767 : (1970) 3 SCC 98 : 1970 CrLJ 1520.

[10264] ● ***Contemnor—Acquittal.***—In appeal the Apex Court will not acquit the contemnor unless he makes out a case for complete exoneration by accepting an unconditional apology tendered by him for the first time in appeal. *Marthi Venkata Subbarao* v. *Kruthis Vents Kntumba Rao*, (1971) 3 SCC 896.

[10265] ● ***Apology tendering of.***—The apology tendered was not merely an apology but was something more than an apology because what was asked of the Court out of its generosity was forgiveness; that this was sincerely meant is amply demonstrated by its being repeated again before us. We think that the contempt if any has been certainly purged in the manner in which the apology was given and the matter should have been set at rest there. It is no part of the judicial personal or other consideration to enter in the discharge of its functions. *Dinabandhu Sahu* v. *State of Orissa,* 1972 AIR (SC) 180 : (1972) 4 SCC 761 : 1972 CrLJ 39.

[10266] ● ***Contempt—Apology when to be tendered.***—Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace apology is short of penitence. If apology is offered at a time when the contemnor finds that the Court is going to impose punishment it ceases to be an apology and it becomes an act of a cringing coward. The High Court was right in not taking any notice of the appellants expression of apology "without any further words". The High Court correctly said that acceptance of apology in the case would amount to allow the offender to go away with impunity after having committed gross contempt. *Mulkh Raj* v. *State of Punjab*, AIR 1972 SC 1197 : (1972) 3 SCC 839 : 1972 CrLJ 754.

[10267] ● ***Apology—Acceptance of.***—Apology goes to sentence and may be accepted only upon a finding that contempt has been committed. *K.T. Chandy* v. *Mausa Ram Zadi,* AIR 1974 SC 642 : (1974) 1 SCC 414 : 1974 SCC (Cri) 210 : 1974 CrLJ 594 : (1974) 1 SCWR 552.

[10268] ● ***Acceptance of apology only for remitting punishment.***—The appellant tendered apology with grace and not as a coward. The appellant produced the detenu. The appellant at no stage interfered with any order of the High Court. The appellant never showed any disobedience. On the contrary the appellant acted in obedience to the order of the High Court.

The High Court accepted the apology for the limited purpose or remitting the punishment. The order of the High Court cannot be sustained in view of the tender of apology by the appellant as well as the production of the detenu. The appeal is accepted. The judgment and order of the High Court are set aside. *Arun Kshetrapal* v. *Registrar, High Court, Jabalpur,* AIR 1976 SC 1967 : 1976 CrLJ 1539 : 1976 CrLR (SC) 354 : 1976 Jab LJ 813.

[10269] ● ***Apology—Acceptance of.***—The elementary basis of acceptance of apology is that there is to be a finding of committal of contempt. The deponents stated that if the Court is of the view that the letter of the deponents constitute for any reason contempt of Court, the deponents tender apology. It is a conditional apology. The condition is that if there is contempt the deponents tender apology. In the absence of any finding by the High Court that the appellants committed any contempt of Court there was never any occasion for acceptance of apology. *Ram Pratap Sharma* v. *Daya Nand,* AIR 1977 SC 809 : (1977) 1 SCC 150 : 1977 SCC (Cri) 44 : 1977 CrLJ 579 : 1976 CrLR (SC) 383.

[10270] ● *Letter written by appellant containing scurrilous allegation against judicial officers.*—In the instant case there is an allegation of writing letter containing scurrilous allegation against judicial officers. The contemnor was acting under stress of litigation. which lasted for about 8 years in disposal of appeal against conviction of contempt. In the circumstance of the case. The apology is accepted. *Ram Chandra Mahapatra* v. *State of Orissa*, AIR 1983 SC 508 : 1983 SCC (Cri) 403 : 1983 CrLJ 857 : 1983 CrLR (SC) 218 : (1983) 2 Crimes 213.

[10271] ● *Serious allegations by contemner against chief justice of High Court.*—We approach the question not from the point of view of the judge whose honour and dignity require to be vindicated, but from the point of view of the public who have entrusted to us the task of due administration of justice. Having given our utmost consideration, we have come to the conclusion that it is not open to us to accept the easy and ready solution of accepting the apology and imposing a fine. We think that a contumacious disregard of all decencies, such as, that exhibited by the contemner in this case can only lead to a serious disturbance of the system of administration of justice, unless duly repaired at once by inflicting an appropriate punishment on the contemner which must be to send him to jail to atone for his misconduct and thereafter to come out of prison a chastened but a better citizen. We accordingly sentence him to suffer simple imprisonment for a period of two months. *Asharam M. Jain* v. *A.T. Gupta*, AIR 1983 (SC) 1151 : (1983) 4 SCC 125 : 1983 SCC (Cri) 771 : 1983 CrLJ 1499 : 1983 CrLR (SC) 659.

[10272] ● *Contemner charging High Court Judges with corruption.*—The contemner seems to think that he can deter the Judges from discharging their duty by maligning them before the public by alleging that their judgments are influenced by corrupt motives. The fact that the contemner has made allegations of corruption against the four Judges is not denied by him and indeed, he stated before us that he wanted an opportunity to establish those allegations. If we were to grant him such an opportunity, that would have aggravated the contempt. A reckless and malicious person like the contemner could have borrowed the support of some disgruntled litigants of his own feather to aid and abet him. Even then, in order to test the *bona fides* of the contemner, we asked him to furnish to us a list of the names of persons, particularly advocates, whose affidavits he proposed to file in support of the charges of corruption levelled by him against the High Court Judges. He did scribble a few names in our presence but that was the end of the matter. He conveniently forgot all about his tall claim that he will be able to get the affidavits of even practicing lawyers in supports of his case.

It is clear that the contemner was only trying to trick that Court into believing that he is not a lone fighter in his demand for justice against the four dispensers of justice. No one came forward to support him. No one possibly could. He is not fighting in the cause of justice.

The conduct and writings of the contemner constitute serious interference with the administration of justice, since his sole object in giving publicity to the defamatory allegations against the High Court Judges is to deter them from deciding cases against him or against those in whom he is apparently interested. The apology tendered by him is an eye-wash, a make-belief, and cannot be accepted. In fact, there is no apology to accept because he has resiled from it. He is penitent for having apologised to the High Court Judges whose character he has assailed without the semblance of sincerity of purpose or purity of means. He is not penitent for his conduct.

Very often, contemners are so contemptible that it is useless to take any serious notice of their conduct. We are compelled to take action in this case because nothing else will stop this systematic campaign of vilification against the defenceless Judges of the High Court. *National Textile Workers' Union,* v. *P.R. Ramakrishnan,* AIR 1983 SC 759 : (1983) 3 SCC 105 : 1983 SCC (Cri) 572 : 1983 CrLJ 1102 : 1983 CrLR (SC) 314 : 1983 CAR 448 : 1983 (1) Crimes 1161.

[10273] ● *Appellant not to escape with impunity on more tendering apology.*—Merely because the Contemner Advocate tendered his apology, interference with conviction is not proper to maintain independence of judiciary.

We do not think that we can adopt an attitude of unmerited leniency at the cost of principle and at the expense of the Judge who has been scandalized. We are fully aware that it is not very difficult to show magnanimity when some one else is the victim rather than when oneself is the victim. To pursue a populist line of showing indulgence is not very difficult in fact it is more difficult to resist the temptation to do so rather than to adhere to the nail-studded path of duty. Institutional perspective demands that considerations of populism are not allowed to obstruct the path of duty. We, therefore, cannot take a lenient or indulgent view of this matter. We dread the day when a Judge cannot work with independence by reason of the fear that a disgruntled member of the Bar can publicly humiliate him and heap disgrace on him with impunity, if any of his orders, or the decision rendered by him, displeases any of the Advocates appearing in the matter. Considerations regarding maintenance of the independence of the judiciary and the morale of the Judges demand that we do not allow the appellant to escape with impunity on the mere tendering of an apology which in any case does not wipe out the mischief. *L.D. Jaikwal* v. *State of Uttar Pradesh*, AIR 1984 SC 1374 : (1984) 3 SCC 405 : 1984 SCC (Cri) 421 : 1984 CrLJ 993 : 1984 CrLR (SC) 277.

[10274] ● ***Attorney General/Solicitor General when refused to give consent.***—There are difficulties in the Court making frequent use of the *suo motu* power for punishing persons guilty of contempt. The Attorney General offers his aid and assistance in two way. On the one hand, he moves the Court for action when he comes across cases where he thinks there is necessity to vindicate the dignity and reputation of the Court. On the other he helps in screening complaints from the public to safeguard the valuable time of the Court.

Secondly, if we analyse the types of action which the Attorney General/Solicitor General may take on a application made to him, the position will be this. Firstly, he may grant permission in which case no further question will arise. I do not think it will be open to any other person to come to the Court with a prayer that the Attorney General/Solicitor General ought not to have given his consent. For, it would always be open to the Court, in case they find no reason to initiate action, to dismiss the petition. Secondly, it is possible that the Attorney General/Solicitor General may not be able to discharge his statutory function in particular case for one reason or other. There might be cases in which both the Attorney General and the Solicitor General are not in a position to take a decision on the application made to them by a private party. Thirdly, both of them may refuse their consent. In the latter two cases, I am unable to see what purpose would be served by the Court spending its time to find out whether the Attorney General/Solicitor General should have been given a decision one way or the other. For, the petitioner is not without remedy. It is open to him always to place the information in his possession before the Court and request the Court to take action. In case, the Attorney-General/Solicitor-General refuse consent or decline to act, their decision is not judicially renewable and petitioners remedy is to approach the Court for action. Under R. 3 (a). *P.N. Duda* v. *P. Shiv Shanker*, AIR 1988 SC 1208 : (1988) 3 SCC 167 : 1988 SCC (Cri) 589 : 1988 CrLJ 1745 : 1988 CrLR (SC) 641.

[10275] ● ***Supreme Court not hypersensitive in matters relating to contempt of Court.***—The Supreme Court is not hypersensitive in matters relating to contempt of Courts and has always shown magnanimity in accepting the apology on being satisfied that the error made in the publication was without any malice or without any intention of disrespect towards the Courts or towards any member of the Judiciary. The Supreme Court has always entertained fair criticism of the judgments and orders or about the person of a Judge. Fair criticism within the parameters of law is always welcome in a democratic system. But the news items in the instant case could neither be said to be fair or made in good faith but wholly false and the explanation given was far from satisfactory. The stand by the Editors and Publishers that the news items were taken to be correct on the basis of the information supplied by a very senior journalist of long standing could not be accepted as a valid excuse. They cannot escape the responsibility for being careless in publishing it with out caring to verify the correctness. However, since they have not only expressed repentance on the incident but have expressed their sincere written unconditional apology, the same was accepted with the warning that they should be very careful in future. As regards the case of the concerned reporter, he acted in gross carelessness. Being a very experienced journalist of long standing it was his duty while publishing the news item relating to the members of the Apex Court, to have taken extra care to verify the correctness and if he had done so, there would not have been any difficulty in coming to know that the information supplied to him had absolutely no legs to stand and was patently false and the publication would have been avoided which not only caused great embarrassment to Supreme Court but conveyed a wrong message to the public at large jeopardizing the faith of the illiterate masses in our judiciary. He has no doubt committed a serious mistake but he has realised his mistake and expressed sincere repentance and has tendered unconditional apology for the same. He was present in the Court and virtually looked to be gloomy and felt repentant of what he had done. This sufferance in itself is sufficient punishment for him. He being a senior journalist and an aged person and, therefore, taking a lenient view of the matter his apology was also accepted, it was directed that the contemnors will publish in the front page of their respective newspapers within a box their respective apologies specifically mentioning that the said news items were absolutely incorrect and false. *In Re : Harijai Singh*, AIR 1997 SC 73 : (1996) 6 SCC 466 : 1997 CrLJ 58 : AIR 1996 SCW 4227 : JT 1996 (8) SC 332 : 1997 SC Cri R 354.

[10276] ● ***Report about matter pending before Supreme Court published in newspaper in correct.***—The report about a matter pending before Supreme Court published in a newspaper was found to be factually incorrect. The contemnor reporter tendered apology pleading unintentional lapse. Contempt proceedings were dropped with warning to the contemnor. *Chandigarh Newsline (Indian Express Group) In re,* AIR 1999 SC 144 : (1998) 6 SCC 378 : 1999 CrLJ 27.

5. SECTION 5

[10277] ● ***Recovery of fines—Period of limitation.***—So far as contempt of the High Court itself is concerned, as distinguished from that of a Court subordinate to it, the Constitution vests these rights in every High Court, and so no Act of a legislature could take away that jurisdiction and confer it afresh by virtue of its own authority.

Section 25 in the General Clauses Act, 1897 cannot apply. The result is that Section 70 of the Penal Code is no impediment by way of limitation in the way of the recovery of the fine.

It is true that the deposit was made for a particular purpose, that is, to secure the presence of the appellant at the time of the hearing of the said contempt proceedings. But the High Court, as a Court of record, being clothed with a special jurisdiction, has also all incidental and necessary powers to effectuate that jurisdiction. Consequently, it had the power to order satisfaction of fine imposed by it from out of an available fund deposited by or on behalf of or for the benefit of the appellant. *R.L. Kapur* v. *State of Tamil Nadu*, AIR 1972 (SC) 858 : 1972 SCC (Cri) 380 : 1972 CrLJ 643 : 1972 (3) SCR 417.

[10278] ● ***Fair and reasonable criticism of judgment—Public document.***—Fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. A fair and reasonable comment would even be helpful to the judge concerned because he will be able to see his own shortcomings, limitations or imperfection in his work. The society at large is interested in the administration of public justice. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. It is one thing to say that a judgment on facts as disclosed is not in consonance with evidence of the law has not been correctly applied. Ordinarily, the judgment itself will be the subject-matter of criticism and not the judge. But when it is said that the judge had a predisposition to convict or deliberately took a turn in discussion of evidence because he had already resolved to convict the accused, or he has a wayward bend of mind, is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of the issues which would bring infamy. When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly repose in the Court of law as Courts of justice, the criticism would cease to be fair and reasonable criticism as contemplated by Section 5 but would scandalise Courts and substantially interfere with administration of justice. It is also to be borne in mind the setting in which the Court is functioning and the attack on the administration of justice. In this country justice at grass-root level is administered by Courts set up in rural backward areas largely inhabited by illiterate persons. It is they who bring their problems to the Court for resolution and they are the litigants, or consumers of justice service. Their susceptibility is of a different type than the urban elite reading newspapers and exposed to wind of change or even wind of criticism. The people in rural backward areas unfortunately illiterate have different kinds of susceptibilities. A slight suspicion that the judge is pre-disposed or approaches the case with a closed mind or has no judicial disposition would immediately affect their susceptibilities administration of justice. There is no greater harm than infusing or instilling in the minds of such people a lack of confidence in the character and integrity of the judge. Conversely, it makes the task of the judge extremely difficult when operating in such area. The contemnor is a lawyer belonging to the fraternity of noble and liberal profession. A criticism by him would attract greater attention than by others because of his day-today concern with the administration of justice in that area and his belief about the judge's judicial disposition would adversely affect a large number of persons. Therefore, when in such a back ground it is said that the judge has a wayward pen and that he took a deliberate turn in the discussion of evidence because he had resolved to convict the accused would indicate that the judge has no judicial disposition and that he pre-judges the issues and thee cannot be a greater infamy and calumny apart for the judge of the Court. People around would lose all confidence in him and in the ultimate analysis the administration of justice would considerably suffer, and, therefore, would constitute contempt. *Rama Dayal Markarha* v. *State of Madhya Pradesh,* AIR 1978 SC 921 : (1978) 2 SCC 630 : 1978 SCC (Cri) 327 : 1978 CrLJ 917 : 1978 CrLR (SC) 167.

[10279] ● ***Petition filed without complying with requirement of obtaining written consent of Attorney General or Solicitor General.***—The petitioner filed contempt petition in public interest against statement made by contemnor against Supreme Court Judges who decided National Anthem case. The petition was filed without complying with the requirement of obtaining written consent of Attorney-General or Solicitor-General. This Court permitted withdrawal of petition with liberty to review petition on obtaining consent or in case refusal of consent was on relevant ground. The Solicitor General has declined to grant consent to institution of contempt proceedings in question. Elaborate reasons have been given by the learned Solicitor General in support of his conclusion that it would not be in the public interest to give his consent to the initiation of the contempt proceedings. After scrutinising the reasons given by the learned Solicitor-General for declining to grant consent cannot be said to be irrelevant on the eye of law; nor can view the expressed by the Solicitor-General be characterised as arbitrary, illegal and unreasonable. In the circumstances it has to be held that the petitioner is not entitled to succeed in his prayer for revival of the contempt petition. *Conscientious Group* v. *Mohammed Yunus*, AIR 1987 SC 1451 : (1987) 3 SCC 89 : 1987 SCC (Cri) 465 : 1987 CrLJ 1182 : 1987 CrLR (SC) 321 : JT 1987 (2) SC 377.

[10280] ● ***Fair criticism of judgment—Not amount to criminal contempt.***—The operative words is "fair". In other words, in the guise of criticising a judgment, personal criticism of the judge is impermissible. To ascribe motives to a judge is to sow the seed of distrust in the minds of the public about the administration of justice as a whole and nothing is more pernicious in its consequence than to prejudice the mind of the public against Judges of the Court who are responsible for implementing the law. Judges do not defend their decisions in public and if citizens disrespect the persons laying down the law, they cannot be expected to respect the law laid down by them. The only way the Judge can defend a decision is by the reasoning in the decision itself and it is certainly open to being criticised by anyone who thinks that it is erroneous. *J.R. Parashar* v. *Prasant Bhushan*, AIR 2001 SC 3395 : (2001) 6 SCC 735 : 2001 SCC (Cri) 1242 : 2001 CrLJ 4207.

[10281] ● ***Filing of—Affidavit publication.***—There can be no doubt that the filing of an affidavit is publication within the definition of criminal contempt. An affidavit is not a secret document. It forms part of the Court records and is available to and accessible by the public. *J.R. Parashar* v. *Prasant Bhushan,* AIR 2001 SC 3395 (3403) : (2001) 6 SCC 735 : 2001 SCC (Cri) 1242 : 2001 CrLJ 4207.

6. SECTION 8

[10282] ● ***Statements made in affidavit—Not protected by second exception to Section 491, IPC.***—Even a person claiming the benefit of second exception to Section 499 of the Indian Penal Code, is required to show that the opinion expressed by him was in good faith which related to the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct. Under the law of contempt statements made in pleadings, petitions and affidavits of the parties, in a number of cases, have been held defamatory statements amounting to offences under the section unless it is shown that they fall within any of the exceptions. The statements made in an affidavit filed in the Court was held to amount to a criminal contempt by this Court. *In re, Arundhati Roy*, AIR 2002 SC 1375 : (2002) 3 SCC 343 : 2002 CrLJ 1792 : JT 2002 (5) SC 508.

[10283] ● ***Fair criticism of Judge or its functioning.***—Fair criticism of the conduct of a Judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the Courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the Courts in the name of fair criticism which, if not checked, would destroy the institution itself. Litigant losing in the Court would be the first to impute motives to the judges and the institution in the name of fair criticism which cannot be allowed for preserving the public faith in an important pillar of democratic set up, *i.e.* judiciary. *In re,* *Arundhati Roy*, AIR 2002 SC 1375 : (2002) 3 SCC 343 : 2002 CrLJ 1792 : 2002 (2) SCR 213 : 2002 (2) SCJ 218.

7. SECTION 10

[10284] ● ***Expression "Court subordinate to it" used in Section 10 of contempt of Courts Act—Meaning.***—The expression "Court subordinate to it" as used in Section 10 is wide enough to include all Courts which are judicially subordinate to High Court, although not subordinate administratively under Article 227, Constitution of India. High Court has power of superintendence over all Courts and tribunals within its area. So High Court can take cognizance of contempt of the Court of Revenue Board. *S.K. Sarkar* v. *Vinay Chandra Mishra*, AIR 1981 SC 723 : (1981)1 SCC 436 : 1981 SCC (Cri) 175 : 1981 CrLJ 283.

[10285] ● ***Contempt of subordinate Court—Power of Supreme Court.***—Article 129 declares the Supreme Court a Court of record and it further provides that the Supreme Court shall have all the powers of such a Court including the power to punish for contempt of itself. The expression used in Article 129 is not restrictive instead it is extensive in nature. If the Framers of the Constitution intended that the Supreme Court shall have power to punish for contempt of itself only, there was no necessity for inserting the expression "including the power to punish for contempt itself". The Article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power relating to contempt as would appear from the expression "including". The expression "including" has been interpreted by Courts to extend and widen the scope of power. The plain language of Article clearly indicates that the Supreme Court as a Court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a Court of record. In interpreting the Constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The Courts ought not accept any such construction. While construing Article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since, the Supreme Court is designed by the Constitution as a Court of record and as the founding fathers were aware that a superior Court of record had inherent power to indict a person for the contempt of itself as well as of Courts inferior to it, the expression "including" was deliberately inserted in Article. Article 129 recognised the existing inherent power of a Court of record in its full plenitude including the power to punish for the contempt of inferior Courts. If Article 129 is susceptible to two interpretations, the interpretation which would preserve the inherent jurisdiction of the Supreme Court being the superior Court of record can be accepted to safeguard and protect the subordinate judiciary, which forms the very backbone of administration of justice. The subordinate Courts administer justice at the grass root level, their protection is necessary to preserve the confidence of people in the efficacy of Courts and to ensure unsullied flow of justice at its base level. *Delhi Judicial Service Association* v. *State of Gujarat,* AIR 1991 SC 2176 : AIR 1991 SCW 2419 : (1991) 4 SCC 406 : 1991 CrLJ 3086 (SC) : 1991 CrLR (SC) 753 : JT 1991 (3) SC 617 : 1991(3) SCR 936 : 1992(1) CCR 23 : 1991(3) Crimes 232 : 1991 (2) Scale 501 : 1992 CAR 17.

[10286] ● ***Section 15(2) of contempt of Courts Act does not restrict power of High Court to take cognizance of contempt.***—Entry 77 of List I, Sch. 7 read with Article 246 confers power on the Parliament to enact law with respect to the Constitution, organisation, jurisdiction and powers of the Supreme Court including the contempt of the Supreme Court. The Parliament is thus competent to enact a law relating to the powers of Supreme Court with regard to 'contempt of itself' such a law may prescribe procedure to be followed and it may also prescribe the maximum punishment which could be awarded and it may provide for appeal and for other matters. But the Central Legislature has no legislative competence to abridge or extinguish the jurisdiction or power conferred on the Supreme Court under Article 129 of the Constitution. The Parliament's power to legislate in relation to law of contempt relating to Supreme Court is limited, therefore, the contempt of Courts Act does not impinge upon the Supreme Court's power with regard to the contempt of subordinate Courts under Article 129. There is no provision in Contempt of Courts Act, 1971 curtailing the Supreme Court's power with regard to contempt of subordinate Courts, Section 15 on the other hand expressly refers to the Supreme Court's power for taking action for contempt of subordinate Courts. Section 15 prescribes modes for taking cognizance of criminal contempt by the High Court and Supreme Court, it is not a substantive provision conferring power or jurisdiction on the High Court or on the Supreme Court for taking action for the contempt of its subordinate Courts. The whole object of prescribing procedural mode of taking cognizance in Section 15 is to safeguard the valuable time of the High Court and the Supreme Court being wasted by frivolous complaints of contempt of Court Section 15(2) does not restrict the power of the High Court to take cognizance of the contempt of itself or of a subordinate Court on its own motion although apparently the Section does not say so. *Delhi Judicial Service Association* v. *State of Gujarat,* AIR 1991 SC 2176 : AIR 1991 SCW 2419 : (1991) 4 SCC 406 : 1991 CrLJ 3086 (SC) : 1991 CrLR (SC) 753 : JT 1991 (3) SC 617 : 1991(3) SCR 936 : 1992 (1) CCR 23 : 1991(3) Crimes 232 : 1991 (2) Scale 501 : 1992 CAR 17.

8. SECTION 12

[10287] ● ***Apology—Alternative plea of.***—In borderline cases where a question of principle about the rights of counsel and their duties has to be settled an alternative plea of apology merits consideration. *M.Y. Shareef* v. *Judges of Nagpur High Court,* AIR 1955 SC 19 : 1955 CrLJ 133 : 1955 SCR 757 : 1955 SCA 205 : 1955 SCJ 54 : 1955 BLJR 112 : 1955 All WR 6 : 1955 All LJ 90 : (1955) 1 Mad LJ 13 : 57 Punj LR 198 : 1955 Andh LT (Cri) 72.

[10288] ● ***Contempt—Apology.***—Under Expl. to Section 12 now there can be both justification and apology under the new law of 1971, there could not be both justification and apology under the old law. *Shareef* v. *Judges of Nagpur High Court,* AIR 1955 SC 19 : 1955 SCJ 54 : 1955 SCA 205 : 1955 SCR 757.

[10289] ● ***Imputing dishonesty to Supreme Court Judges.***—Imputing dishonesty to Supreme Court Judge in deciding a case and suggesting that he influenced the other Judge sitting with him, is a gross contempt calling for heavy punishment. *C.K. Daphtary* v. *O.P. Gupta*, AIR 1971 SC 1132 : (1971) 1 SCC 626 : 1971 CrLJ 844 : (1971) 1 SCWR 581.

[10290] ● ***Making scandalising allegation against Supreme Court Judge.***—When a person indulges in making scandalising allegation against a Supreme Court Judge and despite opportunities does not apologise and instead he is given to intimidating Judges, magistrates, officer of the Court he is guilty of gross contempt calling for heavy punishment. *Amrik Singh* v. *Delhi Administration,* (1971) 3 SCC 215 : 1971 SCC (Cri) 423 : 1971 UJ (SC) 515 : (1971) SCWR 581.

[10291] ● ***Sentence of imprisonment exception.***—A close and careful interpretation of the extracted section leaves no room for doubt that the Legislature intended that a sentence of fine alone should be imposed in normal circumstances. The statute, however, confers special power on the Court to pass a sentence of imprisonment if it thinks that ends of justice so require. Thus before a Court passes the extreme sentence of imprisonment, it must give special reasons after a proper application of mind that a sentence of imprisonment alone is called for in a particular situation. Thus, the sentence of imprisonment is an exception while sentence of fine is the rule. *Pushpaben* v. *Narandas V. Badiani,* AIR 1979 SC 1536 : (1979) 2 SCC 394 : 1979 SCC (Cri) 511 : 1979 CrLJ 960 : 1979 CrLR (SC) 421.

[10292] ● ***Written submissions not private communication to Judge.***—Written submissions filed on the directions of Court is not a private communication to the judge which may said to be interference in the due cause of justice. *R.R. Murgai (Major)* v. *Major P.N. Kaushik*, AIR 1980 SC 107 : (1980) 1 SCC 10 : 1980 SCC (Cri) 181 : 1980 CrLJ 191 : 1980 CrLR (SC) 7.

[10293] ● ***Disobedience of Court's order by Govt.***—In a proceeding against Government and its officers on ground of disobedience by them of a Court's injunction order directing reinstatement of an employee and to pay his back wages, it was ordered to send the respondent to civil prison (though the particular officer who was to be imprisoned was not specified) and to attach the Government property (though no particulars of the property to be attached were given). The constitutional sanctity of liberty and the protection of property will become chimerical and the processual law will hang limp if the substantive order is silent and identifying the offender is left over as a ministerial measure. Nameless humans can not be whisked off to prison even in the name of contempt by insertion of the name after the Judgment is delivered. Natural justice is a pervasive doctrine integral to processual fairplay in Indian jurisprudence. *Union of India* v. *Satish Chandra Sharma*, AIR 1980 SC 600 : (1980) 2 SCC 144 : (1980) 2 SCR 298 : 1980 BLJR 95 : 1980 UJ (SC) 241 : 1980 Lab LN 23 : 1980 Lab IC 384 : 40 Fac LR 61 : 1980 Serv LJ 61.

[10294] ● ***Court not to allow gross contempt unpunished.***—Court should not allow gross contempt to go unpunished without adequate sentence. *Balram Singh* v. *Bhikam Chand,* AIR 1985 SC 1726 : (1985) 4 SCC 246 : 1985 SCC (Cri) 517 : 1986 CrLJ 19 : 1985 CrLR (SC) 458 : (1985) 2 Crimes 731 : 1986 BLJ 48 : (1986) 1 Supreme 76 : 1985 Cur CrLJ (SC) 511 : (1986) 1 CrLC 114 : 1986 East Cr C 70.

[10295] ● ***Flagrant violation of orders of University.***—An employee of college was asked to be reinstated board of Trustee of the college violated the orders of Gujarat High Court, orders of Vice Chancellor, Syndicate and to forestall the order of Court filed a criminal miscellaneous petition in Supreme Court against a person knowing that he had died 11 days prior to filing of petition. Belated apology cannot be accepted. Contempt being a civil contempt contemner is ordered to pay Rs. 2000 to Legal Aid Committee plus Rs. 3000 to the dismissed employee. *Principal, Rajni Parekh Arts College* v. *Mahendra Ambalal,* AIR 1986 SC 1074 : (1986) 2 SCC 560 : 1986 SCC (Cri) 183 : 1986 CrLJ 869 : 1986 CrLR (SC) 237 : 1986 Cr AppR (SC) 237 : (1986) 1 SCWR 272.

[10296] ● ***Judgment of Court can be criticised.***—One is entitled to criticise the judgment but one should not attack the judges who deliver judgments. It derogates the judicial institution and the democratic process in the long run. *Consciente Group* v. *Union of India*, 1987 Supp SCC 170 : 1987 SCC (Cri) 777.

[10297] ● ***Wilful disobedience by Government official.***—Government official when wilfully disobeys the order of Court, no leniency in Court's attitude should be expected from Court as a matter of course merely on the ground that an order of conviction would damage the service career of concerned officer—*Tapan Kumar Mukherjee* v. *Heromoni Mondal,* AIR 1991 SC 281 : (1991) 1 SCC 397 : 1991 SCC (Cri) 198 : 1991 CrLJ 390 (SC) : 1991 CrLR (SC) 13 : JT 1990 (4) SC 399 : 1990 Supp (3) SCR 55 : 1991 (1) UJ 144 : 1990 (2) Scale 1000.

[10298] ● ***Reduction of sentence.***—In view of the old age of accused who has undergone imprisonment for some time, sentence is reduced to the period already undergone. *Khushi Ram* v. *Hon'ble High Court, Punjab and Haryana*, AIR 1992 SC 2203 : (1992) 4 SCC 8 : 1992 CrLJ 3783.

[10299] ● ***Criminal contempt of Court.***—Accept the plea of guilt of the contemner for the offence of criminal contempt of Court and convict him accordingly. So far as the sentence is concerned, we must note that his acts were absolutely unprovoked and unjustifiable. But, there are certain human aspects to the case. It is submitted before us that the contemner is a singled bird of misfortune as he had lost all his possessions in this mining misadventure Further submitted that the contemner had lost his father recently due to cancer; and that contemner himself is seriously afflicted by tuberculosis. Shri Iyengar showed us certain medical documents which bear this out. Shri Inyengar said that the out-burst of the contemner at the spot must have been due to some exasperation and his own personal frustrations and desperation at his misfortunes in life. Having regard to the physical condition and the unfortunate personal circumstances of the contemner we take a sympathetic view and sentence him to simple imprisonment for seven days and a fine of Rs. 500/- *Tarun Bharat Sangh, Alwar* v. *Union of India,* AIR 1993 SC 293 : 1992 Supp (2) SCC 750 : 1993 CrLJ 50.

[10300] ● ***Petition to be drafted in dignified manner.***—In the present case, the petitioner, an advocate claiming to be motivated by a desire to clause the judiciary, moved a petition by way of PIL for certain reliefs. The petition was not drafted in dignified language and abounded in the use of unwarranted adjectives. With a view to giving the petitioner an opportunity to present a properly drafted revised petition, we directed the Registry that if a revised petition is filed, the same may be annexed to this petition. Thereafter the petitioner instead of presenting a revised petition replaced a couple of words in the original petition itself. On 27th February, 1992 this Court observed that the action was not consistent with the order of 11th February, 1992 by which only a revised petition was permitted and amendments in the original petition had not been allowed. We accept his apology even though we are not satisfied with his explanation. We, however, hope that the petitioner will be more careful in future in the choice of his language and in his dealings with the Registry. Having regard to his age and his physical condition we have accepted his apology notwithstanding the fact that his petition abounds in language which is far from dignified. The petitioner in his zeal to project himself as a saviour of the judiciary has made allegations against one and sundry and sought reliefs which betray confused thinking. We are not required to deal with them as we do not consider *suo motu* action necessary on such allegations. *Captain Virender Kumar* v. *Union of India,* AIR 1994 SC 1711 (1711-1712) : (1993) 4 (Supp) SCC 24.

[10301] ● ***Contumacious or objectionable publishing in newspaper.***—A very objectionable article was published in a journal describing a High Court Judge as a depraved individual. High Court of Rajasthan convicted and sentenced its editor to imprisonment for two months. The High Court in its Judgement commented upon the article in the following terms. "The article in question makes its start in a very sarcastic manner by pin-pointing Justice VINOD SHANKAR DAVE against whose impartiality and judicial integrity fingers are said to being raised. Even the company of a Judge with Justice DAVE is stated to be a starting point of degradation of that Judge. What can be more contemptuous and outrageous than mentioning in the article that 'company of Justice DAVE' can convert even a godly man into a "devil" within a short span of time. Anand Sharma further wrote that on account of Justice S. C. AGRAWAL acting on the indications of Justice DAVE, the Judgeship of Supreme Court which was at the door-step of Justice Agrawal has now become only a dream. It has next been said that Justice DAVE became ready to accept the interim bail application of Mohan Lal accused because his junior Shri Biri Singh, Advocate, was conducting the case on behalf of Mohan Lal. There is further the allegation in the article that as Justice GUMAN MAL LODHA was acquiring fame on account of his various steps to make available cheap and quick justice, a Full Bench of Justice AGRAWAL, Justice KASLIWAL and Justice DAVE issued a restraint order against the treating of a letter as writ petition by any Judge. It is said that there was politics in the High Court and its polarisation". In view of the fact that the said editor was 70 year old gentlemen who had undergone bypass surgery of heart, conviction was maintained by High Court but sentence of imprisonment was modified to fine only. *Vishwa Deu Sharma* v. *State of Rajasthan,* AIR 1994 (SC) 949 : (1993) 4 SCC 75 : 1994 CrLJ 1223 (SC) : 1993 CrLR (SC) 515 : JT 1993 (4) SC 358 : 1993(2) UJ 303 : 1993 (3) Scale 241 : 1993 (2) Crimes 1173 : 1993(3) CCR 282 (SC).

[10302] ● ***Power of Supreme Court plenary to punish any person for contempt of Court.***—The power of the Supreme Court is not confined merely to the provisions of the Contempt of Courts Act, 1971 and the Rules framed thereunder but is plenary to punish any person for contempt of Court, and for that purpose to require his presence in person in Court in the matter considered appropriate in the facts of the case. The contention of the contemnors immunity from the process of this Court even in a contempt proceeding, when a *prima facie* case of criminal contempt is made out against him, requiring his personal hinted by the contemnor in his officiates is totally misconceived presence to answer that charge and to be present at the hearing the immunity given by Article 361 of the Constitution is not to a Speaker. The Government of India is therefore directed to produce the contemner, in person in this Court on the next day of hearing. *Manilal Singh* v. *Dr. H. Borobabu Singh*, AIR 1994 SC 505 : (1994) 1 SCC 718.

[10303] ● ***Contempt—Contemner ordered to give bond for observing good conduct for two years.***—Since the appellant was ordered to execute a bond for observing good conduct for two years, the operation of which order was stayed by this Court on admission of appeal, one of the points which arises for consideration is whether the operation of the order be now revived on giving it a fresh lease of time. Almost six years have gone by. The appellant has not attracted any complaint of any untoward behavior on misconduct. The observance of good conduct expected of him would now, if at all, have to be in future. That apart, on merit we find no ground to interfere insofar as the establishment of contempt is concerned. Therefore, without any meaningful relief due to the appellant, the appeals stand disposed of. It is made clear that the appellant need not execute the bond as required of him earlier. No costs. *Brij Gopal Chaturvedi* v. *State of Madhya Pradesh*, AIR 1994 SC 1436 : (1999) 1 SCC 471 : 1995 CrLJ 2117.

[10304] ● ***Advocate found guilty of contempt of Court.***—In the instant case an advocate was found guilty of criminal contempt of Court. The plea by him was that in the exercise of power of Supreme Court under Articles 129 and 142 the license of an advocate was not liable either to be cancelled or suspended. Reference in this was made to the provision of Sections 35 and 36 of the Advocates Act under which the power to punish the advocate is vested in the disciplinary committees of the State Bar Council and the Bar Council of India. Held the plea was not be tenable for the simple reason that the disciplinary jurisdiction of the State Bar Council and the Bar Council of India to take action for professional misconduct is different from the jurisdiction of the Courts to take action against the advocates for the contempt of Court. The said jurisdiction co-exist independently of each other. The action taken under one jurisdiction does not bar an action under the other jurisdiction. *Vinay Mishra In re*, AIR 1995 SC 2348 : (1995) 2 SCC 584 : 1995 CrLJ 3994 : (1995) 2 Crimes 381.

[10305] ● ***Wilful disobedience of Supreme Court's order.***—While awarding sentence on a contemnor, the Court does so to uphold the majesty of law and not with any idea of vindicating the prestige of the Court or to uphold its dignity. It is really to see that unflinching faith of the people in the Courts remain intact. But, if the order of even the highest Court of the land is allowed to be wilfully disobeyed and a person found guilty of contempt is let off by remitting sentence on plea of mercy, that would send wrong signals to everybody in the country. It has been a sad experience that due regard is not always shown even to the order of the highest Court of the country. Now, if such orders are disobeyed, the effect would be that people would lose faith in the system of administration of justice and would desist from approaching the Court, by spending time, money and energy to fight their legal battle. If in such a situation mercy is shown, the effect would be people would not knock the door of the Courts to seek justice, but would settle score on the streets, where muscle power and money power would win, and the weak and the meek would suffer. That would be a death knell to the rule of law and social justice would received a fatal blow. Supreme Court cannot be a party to it and, harsh though it may look, it is duty bound to award proper punishment to uphold the rule to law, how so high a person may be. *J. Vasudevan* v. *T.R. Dhananjaya*, AIR 1996 SC 137 : (1995) 6 SCC 249 : 1995 CrLJ 4192 (SC) : JT 1995 (7) SC 484 : 1995 (5) Scale 245 : 1995 (7) SLR 228 : (1996) SLJ 185.

[10306] ● ***Conditional apology.***—The apology of the respondent was only conditional and not an unconditional one. Public interest, therefore, demands that the judicial decision should not be pre-empted or circumvented by mere statement of conditional apology or as a fact even unconditional apology. The unconditional apology should be contrite for the acts committed by him. Therefore, the conditional apology would not be a premium to avoid conviction. Though it is open to the Court in an appropriate case to accept an unconditional apology based on factual scenario but accepting the apology and dropping the proceeding of contumacious acts deliberately done to overreach the due process of the law without compunction would amount to a premium to fabricate the Court order with impunity. Therefore, the conditional apology of the respondent has to be rejected. It is a grave and contumacious act and conduct on the part of the respondent which cannot be lightly brushed aside. Therefore, it is a fit case that this respondent should be convicted under Article 129 of the Constitution and sentenced to undergo rigorous imprisonment for a period of three months. The *suo motu* contempt petition is accordingly ordered. *Ram Autar Shukla* v. *Arvind Shukla*, (1995) 2 Supp SCC 130.

[10307] ● ***Govt. Officer meeting Judge of Supreme Court at his residence to seek mercy for his friend.***—An I.A.S. officer met a Supreme Court Judge in respect of a matter when his friend had been found guilty of Contempt of Court. The I.A.S. officer stated he met Hon'ble Mr. Justice K. RAMASWAMY at his residence and the object of this visit was to seek his Lordship's blessings and good wishes and also "to beg some mercy for Shri J. VASUDEVAN". No sooner did he realise that Hon'ble Mr. Justice K. RAMASWAMY resented the prayer for mercy, than he sincerely apologised and left the place and left for Bangalore in the afternoon. It is a most reprehensible conduct on the part of the officer meeting the Judge. However, it was not shown that he met at the behest of the contemnor. The Apex Court closed the matter by ordering that an entry would be made in his CCR about gross impropriety committed by him in meeting Supreme Court Judge. *J. Vasudevan.* v. *T.R. Dhananjaya*, AIR 1996 (SC) 137 : (1995) 6 SCC 249 : 1995 CrLJ 4192 (SC) : JT 1995 (7) SC 484 : 1995 (5) Scale 245 : 1995 (7) SLR 228 : 1996 (l) SLJ 185.

[10308] ● ***Non-implementation of order of Supreme Court.***—Supreme Court passed certain order in relation to supply of water from Jamuna to Delhi. The contemnors admitted that the order was not implemented in view of a memo of understanding between the concerned States. The contempt proceeding was dropped when the persons moving for contempt on certain assurance given by the concerned State as to supply of water did not desire to pursue the matter. *Delhi Water Supply* v. *State of Haryana,* AIR 1996 SC 2992 : (1996) 2 SCC 572 : 1996 CrLJ 1887 (SC) : JT 1996 (6) SC 107 : 1996 (2) Scale (SP) 75 (2) : 1996 (2) Supreme 529 : 1996 (2) AD (SC).

[10309] ● ***Contemner publishing news without knowing implication of High Court judgment.***—The appellant had made an attack on the learned Subordinate Judge which was disparaging in character and derogatory to his controversy without being influenced by any of the findings and observations made by the High Court including of this Court. Thus, M.P. Mishra has deliberately done the act of misleading the public by making mis-statement of the contents of the order and, thereby, committed contempt of this Court. We do not think that he has done so deliberately with a view to undermine the order of this Court. We accept his unconditional apology and close this matter as against him. Equally, M. Gopal Reddy, being the Director, it is his duty to see that the Directorate functions properly, particularly when it relates to the issuance of the public information of contents of an order of this Court; unfortunately, he has not done it. It is not clear from the record whether it was brought to his notice before publishing or matters are passing without his knowledge from his Directorate side-tracking him. Even then Director himself as Director ultimately bears responsibility for the acts done by the Directorate. Under these circumstances, we accept his unconditional apology and close the matter. *Sadhvi Ritumbhara* v. *Digvijay*

Singh, AIR 1997 SC 1387 : (1997) 3 SCC 662 : 1997 CrLJ 1905 : 1997 (1) Crimes 248 (SC).

[10310] ● *Tendering unconditional apologies by contemners.*—Where the contemners tendered their unconditional apologies for the mistake committed by them then the contemners are now truly repentant and their apologies are sincere and *bonafide*, therefore, warning them to be careful in future, proceedings dropped. *In Re., Chandigarh News Line (Indian Express Group)*, AIR 1999 SC 144 : (1988) 6 SCC 378 : 1999 CrLJ 27 (SC).

[10311] ● *Criminal contempt on face of Court.*—The action of the contemnor, both by his words and deeds, in the presence of the Court amounts to gross criminal contempt of Court. His action was aimed at intimidating the Court and causing interference in judicial proceedings. It is unfortunate and we feel rather concerned that a person belonging to the Bar should have behaved in this manner. Law does not give a lawyer, unsatisfied with the result of any litigation, licence to permit himself the liberty of causing disrespect to the Court or attempting, in any manner, to lower the dignity of the Court. A lawyer does not enjoy any special immunity under the Contempt of Courts Act where he is found to have committed a gross Contempt of Court. Courts cannot be intimidated to seek favourable orders. The action of the respondent is most reprehensible and has the tendency to interfere with the administration of justice and undermine the dignity of the Court and the majesty of law. From the manner in which the contemnor has behaved a deliberate, motivated and calculated attempt to impair the administration of justice is discernible.

From the affidavit, filed by the contemnor, he appears to be aggrieved of alleged suffering at "the hands of all police agencies". This was, however, no way to ventilate his grievances against the police agencies. As a lawyer, he should have known better. It is most unbefitting for an Advocate to act in the manner in which the contemnor acted. No system of justice can tolerate such type of behaviour. In the established facts and circumstances of the case, the contemnor has committed gross criminal contempt and we hold him guilty as such. The apology tendered by the contemnor does not appear to us to be at all *bona fide* and genuine in view of his attitude exhibited in Court during his questioning and seems to have been made only to escape punishment. He does not appear to be repentant at all. We, therefore, do not accept the apology. Keeping in view the seriousness of the offence committed by the contemnor it is necessary to impose deterrent punishment on him so that it serves as an example to others and no one indulges in repetition of such acts. We, therefore, sentence him to suffer simple imprisonment for four months and to pay a fine of Rs. 2,000/-and in default of payment of fine, to further undergo simple imprisonment for two months. *In Re, Nand Lal Balwani*, AIR 1999 (SC) 1300 : (1999) 2 SCC 743 : 1999 CrLJ 2032 : 1999 (3) Raj LW 465 : 1999 (1) Andh LT (Cr) 186 : 1999 (2) Mad LW 703.

[10312] ● *Publication of incorrect and misleading matter pending before Supreme Court.*—News item published in the Chandigarh Newsline published by the Indian Express Group was not only absolutely incorrect and misleading but even the contents were misleading and the news item has been published while the matter was pending in this Court. The contemnors published apology after realising mistake even before service of contempt notice. Both the respondents were truly repentant and has *bana fide* tendered their unconditional apology for the mistake committed by them. Both the contemnors have placed themselves at the mercy of the Court submitting that their lapse, though grave, was unintentional. Under the circumstances, while warning them to be careful in future we do not consider it necessary to proceed any further with the contempt proceedings. *Chandrgarh News Line (Indian Express Group) In re,* AIR 1999 SC 144 (145) : (1998) 6 SCC 378 : 1999 CrLJ 27.

[10313] ● *Refusal to initiate proceedings for contempt.*—A private party or a litigant may also invite the attention of the Court to such facts as may persuade the Court in initiating proceedings for contempt. However, such person filing an application or petition before the Court does not become a complainant or petitioner in the proceedings. He is just an informer or relator. His duty ends with the facts being brought to the notice of the Court. It is thereafter for the Court to act on such information or not to act though the private party or litigant moving the Court may at the discretion of the Court continue to render its assistance during the course of proceedings. That is why it has been held that an informant does not have a right of filing an appeal under Section 19 of the Contempt of Courts Act against an order refusing to initiate the contempt proceedings or disposing the application or petition filed for initiation such proceedings. He cannot be called an aggrieved party. *Om Prakash Jaiswal* v. *D.K. Mittal*, AIR 2000 SC 1136 (1140, 1141) : (2000) 3 SCC 171 : 2000 CrLJ 1700 : JT 2000 (2) SC 293.

[10314] ● *Jurisdiction to punish contempt summary but consequences serious.*—The jurisdiction to punish for contempt is summary but the consequences are serious. That is way the jurisdiction to initiate proceedings in contempt as also the jurisdiction to punish for contempt inspite of a case of contempt having been made out are both discretionary with the Court. Contempt generally and criminal contempt certainly is a matter between the Court and the alleged contemner. No one can compel or demand as of right initiation of proceedings for contempt. *Om Prakash Jaiswal* v. *D.K. Mittal*, AIR 2000 SC 1136 (1140) : (2000) 3 SCC 171 : 2000 CrLJ 1700 : JT 2000 (2) SC 293.

[10315] ● *Handcuffing of under-trial.*—Apart from the fact that under Article 141 of the constitution the law laid down by the Supreme Court is the law of the land, Article 141 mandates that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. Hand-cuffing of an under-trial or a prisoner, in spite of the law laid down by this Court, is a serious matter. According to the report of the superintendent of Police, the respondents had resorted to hand-cuffing Shri Kelwa. Their action may invite an action under the Contempt of Courts Act against them but we refrain from passing any order under the Contempt of Courts Act in view of the fact the respondents have been charge-sheeted and changes under Section 220, IPC have already been framed against them by the learned Chief Judicial Magistrate. The learned Chief Judicial Magistrate shall expeditiously try the case and pass appropriate orders keeping in view the law laid down by the this Court on the subject. *G.L. Gupta* v. *R.K. Sharma*, AIR 2000 SC 3632 (3633) : 1999 SCC (Cri) 1150.

[10316] ● *Advocate convicted and sentenced cannot practice in Courts in respect of which he committed contempt.*—The respondent-Advocate who was convicted and sentenced in one case cannot practise in the Courts in respect of which he committed contempt until he purges himself. We do not want to be vindictive and, therefore we do not think it worth while to take any further action against the respondents. *State of Madhya Pradesh through Distt. Judge, Ujjain* v. *Shiv Mohan Singh*, JT 2000 (10) SC 491 : (2001) 10 SCC 443 : (2001) 2 Crimes 48 (SC).

[10317] ● *Exercise of power to be cautious.*—The exercise of powers under the Contempt of Courts Act shall have to be rather cautious and use of it rather sparingly after addressing itself to the true effect of the contemptuous conduct. The Court must otherwise come to a conclusion that the conduct complained of tantamounts to obstruction of justice which if allowed, would even permeate in our society (vide *Murray*). This is a special jurisdiction conferred on to the law Courts to punish an offender for his contemptuous conduct or obstruction to the majesty of law. *Mrityunjoy Das* v. *Syed Hasibur Rahman*, AIR 2001 SC 1293 : (2001) 3 SCC 739 : (2006) 1 SCC (Cri) 296 (302) : 2001 CrLJ 1702.

[10318] ● *Scandalisation of Court.*—Proceedings in contempt are always with reference to the administration of justice. The scandalisation within the meaning of sub-section (i) must be in respect of the Court or the judge with reference to administration of justice. This Court concluded that the Courts of justice are, by their constitution, entrusted with functions directly connected with the administration of justice, and it is the expectation and confidence of all those who have or likely to have business therein that the Court perform all their functions on a high level of rectitude without fear or favour, affection or ill-will. It is this traditional confidence in Courts of justice that the justice will be administered to the people which is sought to be protected by proceedings in contempt. The object obviously is not to vindicate the judge personally but to protect the public against any undermining of their accustomed confidence in the institution of the judiciary. Scandalisation of the Court was held to be a species of contempt which may take several forms. *In re, Arundhati Roy*, AIR 2002 SC 1375 : (2002) 3 SCC 343 : 2002 CrLJ 1792 : JT 2002 (2) SC 508 : 2002 (2) SCR 213.

[10319] ● *Discharge of contemner tendering apology.*—Section 12 of the Contempt of Courts Act, 1971 has indicated a caution that while dealing with the powers of contempt, the Court should be generous in discharging the contemner if he tenders an apology to the satisfaction of the Court. In the present case the apology tendered was found to be not genuine by the Tribunal. We are dismayed, if not distressed, that despite delineating on all the steps adopted by the appellant for challenging the order of the Tribunal before the High Court and despite the fact that the appellant had implemented the order even though there was no time schedule to do so, the Tribunal has chosen to depict the apology tendered by the appellant as one without contrition. *Suresh Chandra Poddar* v. *Dhani Ram*, AIR 2002 SC 439 : (2002) 1 SCC 766 : JT 2001 (10) SC 365.

[10320] ● *Scandalising authority of Court.*—The respondent, who is stated to be an author of name and fame, has landed herself in the dock of the Court, apparently by drifting away from the path on which she was traversing by contributing to the art and literature. During whole of the proceeding she has not shown any repentance or remorse and persistently and consistently tried to justify her action which, *prima facie*, was found to be contemptuous. To frustrate the present proceedings, the respondent has resorted to all legal tactics and pretences. In view of this we have no option but to deal with the case on its merits, not being influenced by any other factor or circumstance except our commitment to protect the dignity and respect of the institution of judiciary so that the confidence of the common man is not shaken in the institution. *In re : Arundhati Roy*, AIR 2002 SC 1375 : (2002) 3 SCC 343 : 2002 CrLJ 1792 : JT 2002 (2) SC 508 : 2002 (2) SCJ 281 : 2002 (2) SCR 213.

[10321] ● *Deliberately and wilfully violating order of status quo.*—The inference drawn by the High Court, we are constrained to observe, is not based on any discussion of material on record nor has any such material been placed before us. The further assumption of the High Court in paragraph-6 of the order that the time being the essence of the matter, the petitioner must have brought this Court's order to the notice of the opposite party as early as possible to protect his interest, does not, in our view, lend support to the case of the respondent herein. Indeed the respondent brought the order of the High Court to the notice of the party concerned at the earliest inasmuch as the certified copy of the order was obtained on 18.5.90 and by the time it could have been sent to Bhubneshwar the usual office hour was over. On 19.5.90 the communication was placed on the office table of appellant no. 2, as fairly stated by Sri Patta. In the circumstances, we have no hesitation to hold that on the facts and the circumstances of the case emerging from the records the finding of the High Court that appellant no. 2 committed contempt of Court by deliberately and wilfully violating the order of *status quo* passed on 17.5.90 is clearly insupportable. *Steel Authority of India Ltd.* v. *R.K. Enterprises*, JT 2002 Supp (1) SC 130 : (2003) 1 Crimes 74 (SC).

[10322] ● *Tendering of apology after lapse of 12 years.*—The respondent was deprived of his personal liberty despite grant of bail by the Sessions Judge. The appellant has tendered the apology only now after lapse of nearly 12 years. This appeal was admitted in the year 1993. The case has been on board for quite some time. The apology has been tendered only on 30th November, 2002. The apology has to be sincere and not merely to escape the punishment. In our view, it is not a fit case where the apology tendered at this belated stage ought to be accepted. In a matter of this nature, where a Police Officer, disregarding the bail order, arrests a person because case against him is of alleged assault on one of a police official, we do not think that mere sentence of fine would meet the ends of justice. No inference is called for in the judgment and order of the High Court. *Bijay Kumar Mahanty* v. *Jadu*, (2003) 1 SCC 644 : JT 2002 (10) SC 349.

[10323] ● *Criminal contempt—Statements in question made spontaneously due to emotional outburst—Apology not accepted.*—The news report was based on the speech delivered by Rajendra Sail and the subsequent interview given to the correspondent. The correspondent has asserted that the news report was based on the speech delivered by Rajendra Sail and the subsequent interview. Rajendra Sail has, however, denied having made the statement or having given interview to the correspondent. There are *preponderant circumstances,* which objectively compel us to conclude that the said statements were in fact made by Rajendra Sail and the news report has reported the same. Whether Rajendra Sail gave interview to the correspondent or not, the speech itself, seen in the light of the audio and video recording of the speech and the transcript of the speech, speaks for itself and has the effect of lowering the dignity and authority of the Court and is an affront to the majesty of justice.

The contention that no opportunity was given to rebut the contents of the audio and video recording of the speech cannot be accepted because the High Court had, in fact, directed supply of copies of transcript of the speech prepared from the audio and video recording and had given opportunity to file objections to it, which has not been availed by Rajendra Sail.

Having regard to the aforesaid facts of the case, the High Court has refused to accept the apology tendered by Rajendra Sail. The contention that statements should be understood in the context in which they have been made as he was emotionally disturbed because of the judgment of the High Court cannot be accepted. It is borne out from the record that Rajendra Sail is a law graduate and has been in public life for considerable time and has in fact approached the Court on several occasions by filing public interest litigations in different matters. With this background, he should have been cautious and moderate and should have known the limits up to which he could go while criticising the judgment of the High Court. The contemptuous statements cannot be regarded as an ill-tempered or emotional outburst of an uninformed person. Having given the serious and anxious consideration to the facts of the case and submissions made, we feel that the acceptance of apology and sympathy in a case like this would be uncalled for. *Rajendra Sail* v. *M.P High Court Bar Association*, AIR 2005 SC 2473 :

(2005) 6 SCC 109 : 2005 SCC (Cri) 1401 (1419) : 2005 CrLJ 2585 : 2005 (2) Crimes 230.

[10324] ● ***Apology rejected.***—Where the contemnors tender apology finding that the Court is going to be punished for contempt, such apology would be rejected. *T.N. Govindaraman Thirunmulpad*, AIR 2006 SC 2007 : (2006) 5 SCC 1 : 2006 CrLJ 2773.

[10325] ● ***Taking undue advantage.***—Taking undue advantage of the observations made by the Supreme Court also amounts to interference with the order passed by the Court in imparting justice. *Ram Preeti Yadav* v. *Mahendra Pratap Yadav*, AIR 2007 SC 3156 : (2007) 12 SCC 385 : 2007 CrLJ 4685 (8687).

[10326] ● ***Apology by contemnor.***—By an order dated 04.01.2005, a learned Single Judge passed an interim order to the effect that the respondent-authorities will be at liberty to process the applications in respect of grant of licenses for excise shops but no final selection in respect of such shops shall be made without obtaining specific leave of the Court. The High Court made it clear that the respondent-authorities will not hold any lottery for the purpose of final selection of the excise shops in question without obtaining further orders from the High Court. The said order dated 04.01.2005 was passed after hearing and in the presence of the learned advocate for the respondents. The said interim order dated 04.01.2005 was extended by the order dated 19.01.2005 until further orders by the High Court. Thereafter, on 28.01.2005 a learned Single Judge gave direction for filing the affidavit and the said interim order was further extended until further orders and the said interim order is still continuing.

It is not in dispute that an injunction order was passed on 04.01.2005 and on subsequent extension is still subsisting. Respondent Nos. 1-4 admittedly are highly qualified and highly placed Government officials. Admittedly, by advocate's letter dated 15.03.2005, it was pointed out to them that the injunction order dated 04.01.2005 and its subsequent extensions are still subsisting. They have also acknowledged the receipt of the communication dated 15.03.2005. Under such circumstances, the High Court is not justified in holding that the highly qualified and well placed Government officials did not understand the implication and/or consequence of prohibitory order in an independent proceedings and by sheer misconception though that there is no bar to issue excise licenses as was held by the learned Judge in the impugned order. A party to the litigation cannot be allowed to take an unfair advantage by committing breach of an interim order and escape the consequences thereof. By pleading misunderstanding and thereafter retaining the said advantage gained in breach of the order of the Court and the wrong perpetrated by the respondent-contemnors in contumacious disregard of the order of the High Court. The High Court has committed a grievous error of law in holding that failure to understand the implication and consequences of the order passed by the High Court by highly placed Government officers cannot be construed as an act of contempt. The High Court has failed to understand that the highly educated and highly placed Government officials have competent legal advisors and it was not open to them to allege and contend that the respondent-contemnors did not understand the implication of the order dated 04.01.2005. In our opinion, such officers are required to be dealt with effectively to uphold the dignity of the High Court and the efficiency of the system itself. The High Court committed a grave error of law by not taking into consideration the most important fact that in the course of the hearing of the contempt application the matter was adjourned in order to enable the contemnor to consider whether they were prepared to cancel the lottery held on 20, 21 and 22.03.2005 and on the adjourned date, the respondents did not agree to cancel the lottery. In such view of the matter, the significant stand being the plea of mistake of understanding cannot, in our opinion, prevail in the instant case, instead of cancelling the lottery, the respondents have justified their conduct from which the determined declination of obeying the order is clearly proved. In other words, if there was a doubt about the implication of the order of the Court, the respondents should have approached the Court and should have clarified their alleged confusion. But in the instant case, the respondents have not only violated the order but when the contempt application was moved and opportunity was given by the Court to cancel the lottery they refused to cancel the said lottery from which it is proved that they deliberately held the lottery in clear violation of the order dated 04.01.2005 having regard to the admissions made on behalf of the contemnors that there is violation of the order dated 04.01.2005 and also having regard to the learned Single Judge's own finding that "*there is no doubt that the alleged contemnor disobeyed the specific directions passed earlier by this Bench*". The High Court should have directed the contemnor to cancel the lottery held on these dates. The High Court also failed to consider the effect of the appellant's learned advocate's letter dated 15.03.2005 whereby it was clearly pointed out about the subsistence of the order dated 04.01. 2005 and its subsequent extension. The judgment and order passed by the High Court are bad in law and is liable to be set aside. *All Bengal Excise Licensees Association* v. *Raghavendra Singh*, AIR 2007 SC 1386 : (2007) 11 SCC 374 : 2007 CrLJ 2147 (2149, 2150, 2154, 2155) : 2007 (3) SCR 816.

[10327] ● ***Section 12, Contempt of Courts Act—Apology.***—Under Explanation to Section 12(1) of the Act, the Court may reject an apology if the Court finds that it was not made *bona fide*. Under Section 12 it has been made very clear that the apology must be to the satisfaction of the Court. Therefore, it is not incumbent upon the Court to accept the apology as soon as it is offered. Before an apology can be accepted, the Court must find that it is *bona fide* and is to the satisfaction of the Court. However, Court cannot reject an apology just because it is qualified and conditional provided the Court finds it *bona fide*. *Ranveer Yadav* v. *State of Bihar*, 2010 CrLJ 3431 (3434, 3435) (SC).

[10328] ● ***Section 12, Contempt of Courts Act—Belated Apology.***—An apology in a contempt proceedings must be offered at the earliest possible opportunity. A belated apology hardly shows the "contrition" which is essence of the purging of a contempt. Even if it is not belated, where apology is without real contrition and remorse and was merely tendered as a weapon of defence, the Court may refuse to accept it. *Ranveer Yadav* v. *State of Bihar*, 2010 CrLJ 3431 (3435) (SC).

9. SECTION 13

[10329] ● ***Contempt of Court—Punishment.***—Section 13 of the Contempt of Courts Act, 1971 postulates no punishment for contemptuous conduct in certain cases and the language used therein seems to be with utmost care and caution when it records that unless the Court is satisfied that contempt is of such a nature that the act complained of substantially interferes with the due course of justice, question of any punishment would not arise. The statement cannot be termed to be a mere denial though reflected in the affidavit as such positive assertion of a fact in an affidavit known to be false cannot just be ignored. It is a deliberate act. By mere tendering of unconditional apology to this Court would not exonerate the contemner in the contextual facts but having regard to the nature of the act of contempt we deem it fit of to impose a fine Rs. 2,500 each so as to subserve the ends of justice against the respondent-contemnors in default of payment of which they (each of them) will suffer simple imprisonment for one month. *Murray & Co.* v. *Ashok Kr. Newatia,* AIR 2000 SC 833 (838, 839) : (2000) 2 SCC 367 : 2000 SCC (Cri) 4730 : 2000 CrLJ 1394.

[10330] ● ***Contempt petition—Procedural flaws in.***—It is mandatory that the places of residence of both the petitioners and the respondent are given. Yet each of the five persons named as petitioners has given the Bar Library or the Lawyers Chamber as his address. The non-compliance with R. 4(a) of the Contempt of Courts Rules, is more shocking when it comes to the respondents. The respondent No. 1's address has been given as his chamber. The respondent No. 2 has been described as "Leader Narmada Bachao Andolan" and the respondent No. 3 as "the Booker Prize Winner". Both, their addresses have been given as C/o the respondent No. 1 at his legal chamber in the premises of this Court. A more serious flaw is the verification of the petition. R. 49 (b) requires that the petition shall be supported by an affidavit. There are five named petitioners, yet except for the petitioner No. 1, no one else has either signed the petition or affirmed it. The procedural flaws in the petition are not mere technicalities. They are as vital to the acceptability of the petition and its contents. Where there is no other legally admissible evidence before the Court and the only material which the Court can take into account are the statements contained in the petition, the petition assumes a particular importance. Apart from the defective nature of the petition, the unexplained reluctance on the part of the four petitioners to affirm an affidavit verifying the facts contained in the petition, the failure to even attempt to obtain the consent of the Solicitor-General and most importantly the refusal of the Police Station to record an FIR on the basis of the complaint lodged by the petitioner No. 1, are telling circumstances against the case in the petition. *J.R. Parashar* v. *Prashant Bhushan,* AIR 2001 SC 3395 : (3401, 3402) : (2001) 6 SCC 735 : 2001 SCC (Cri) 1242 : 2001 CrLJ 4207.

10. SECTION 14

[10331] ● ***Contempt in face of Court—Need of issuing notice to contemnors.***—In the instant case the contemnors started shouting and used every offensive, intemperate and abusive language and even one had gone to the extent of saying that the Judges should be jailed for having initiated proceedings against them and not interfering with orders by various Judges of the Bombay High Court. Even one of them threw a chappal at the Judges. This happened in the presence of the Solicitor General of India, two

Additional Solicitor Generals and a large number of counsels including the President of the Supreme Court Advocate-on-Records Association. *Held* (Per ARIJIT PASAYAT J.). This conduct was contemptuous. There was no need for issuing notice as the contemnor stated in open Court that they stood by what they did and said in the Court.

(Per ASHOK KUMAR GANGULY J.) It is clear from a perusal of Section 14(1) of the Contempt of Courts Act that in initiating a contempt proceedings and when contempt is already committed in the face of the Court, the Court has to inform the alleged contemnors in writing the charge of contempt and then afford them an opportunity to make their defence to the charge and thereafter on taking such evidence as may be necessary or as may be offered by the persons and, after hearing them, proceed either henceforth or after adjournment to determine the matter of the charge. Under Section 14(4) of the Contempt of Courts Act may temporarily take the alleged contemnor in custody but it cannot imprison him/her by way of punishment without following the safeguards under sub-section 14(1) of the Act.

The safeguards statutorily engrafted under Section 14 of the Act are basically reiterating the fundamental guarantee given under Article 21 of the Constitution. [Three Judge Bench in *L.P. Mishra* v. *State of Uttar Pradesh*, 1998 AIR SCW 3278 : (1998) 7 SCC 379 **ref. to**] *Leila David* v. *State of Maharashtra*, AIR 2009 SC 3272.

[10332] ● ***Criminal Contempt in face of Court.***—Although, Section 14 of the Contempt of Courts Act, 1971, lays down the procedure to be followed in cases of criminal contempt in the face of the Court, it does not preclude the Court from taking recourse to summary proceedings when a deliberate and willful contumacious incident takes place in front of their eyes and the public at large, including Senior Law Officers, such as the Attorney-General for India who was then the Solicitor-General of India. While, as pointed out by Mr. Justice Ganguly, it is a statutory requirement and a salutary principle that a person should not be condemned unheard, particularly in a case relating to contempt of Court involving a summary procedure, and should be given an opportunity of showing cause against the action proposed to be taken against him/her, there are exceptional circumstances in which such a procedure may be discarded as being redundant. The incident which took place in the Court room presided over by Dr. Justice Pasayat was within the confines of the Court room and was witnessed by a large number of people and the throwing of the footwear was also admitted by Dr. Sarita Parikh, who without expressing any regret for her conduct stood by what she had done and was supported by the other contemnors. In the light of such admission, the summary procedure followed by Dr. Justice Pasayat cannot be faulted. *Leela David* v. *State of Maharashtra*, AIR 2010 SC 862 : (2009) 10 SCC 337 : 2010 CrLJ 455 (459, 460).

[10333] ● ***Criminal Contempt Shoe thrown on presiding officer in Court.***—When an object, such as a footwear, is thrown at the Presiding Officer in a Court proceeding, the object is not to merely scandalize or humiliate the Judge, but to scandalize the institution itself and thereby lower its dignity in the eyes of the public. In the instant case, after being given an opportunity to explain their conduct, not only have the contemnors shown no remorse for their unseemly behaviour, but they have gone even further by filing a fresh writ petition in which apart from repeating the scandalous remarks made earlier, certain new dimensions in the use of unseemly and intemperate language have been resorted to further denigrate and scandalize and over-awe the Court. This is one of such case where no leniency can be shown as the contemnors have taken the liberal attitude shown to them by the Court as licence for indulging in indecorous behivour and making scandalous allegations not only against the judiciary, but those holding the highest positions in the country. The writ proceedings have been taken in gross abuse of the process of Court, with the deliberate and willful intention of lowering the image and dignity not only of the Court and the judiciary, but to vilify the highest constitutional functionaries. *Leela David* v. *State of Maharashtra*, AIR 2010 SC 862 : (2009) 10 SCC 337 : 2010 CrLJ 455 (460, 461).

11. SECTION 15

[10334] ● ***High Court competent to take action for contempt.***—Under Section 15(1) it is competent for the High Court to take action for contempt of Court not only on a motion being made by Advocate-General but also on a motion being made by any other person with the consent in writing of Advocate-General. *U.N. Rao* v. *Shanmugavel,* AIR 1977 SC 639 : 1977 (1) SCC 741 : 1977 SCC (Cri) 172 : 1977 CrLJ 382 : 1977 CrLR (SC) 17.

[10335] ● ***Criminal contempt of subordinate Court—Suo-motu cognizance of.***—If the High Court is directly moved by petition by a private person feeling aggrieved, (not being the Advocate-General), the High Court, has, in such a situation, a discretion to refuse to entertain the petition, or to take cognizance on its own motion on the basis of the information supplied to it in that petition. If the petitioner is a responsible member, of the legal profession, it may act *suo-motu*, mere so, if the petitioner responsible advocate prays at the Court should act *suo motu*. This mode of taking *suo motu* cognizance of contempt of a subordinate Court, should resorted to sparingly where the contempt concerned is of a grave and serious nature. Harmoniously construed, Section 15(2) does not restrict the power of the High Court take cognizance of and punish contempt of a subordinate Court, on its own motion. *S.K. Sarkar member, Board of Revenue* v. *Vinay Mishra*, AIR 1981 SC 723 : (1981) 1 SCC 436 : 1981 SCC (Cri) 175 : 1981 CrLJ 283 : 1981 CrLR (SC) 72 : 1981 CurLJ (Cri) 73 : 1981 Cr App R (SC) 86 : (1981) 1 SCJ 415.

[10336] ● ***Contempt petition motivated.***—The filing of this contempt petition appears to be motivated. Besides, the learned Solicitor General on being approached by the petitioner, to seek consent to file this contempt petition as required by Rule 3(c) of the Rules to regulate proceedings for contempt of the Supreme Court declined to give his consent on 7th April 1998 on the ground that is was not a fit case for initiating contempt proceedings. The petitioner despite the opinion of the Solicitor-General filed this petition undeterred by the order of this Court. Even when the petitioner was told so, he persisted and did not even maintain proper discipline in the Court. Recourse to such contempt proceedings is an abuse of the process of the Court when the Apex Court finds that the petitioner appears to be an advocate. The registry is directed not to entertain any other petition concerning the same cause from the petitioner in future. *Vishal Jeet* v. *Union of India,* AIR 1998 SC 2366 : (1998) 5 SCC 400 : 1998 CrLJ 3638 (SC) : JT 1998 (4) SC 232 : 1998 (5) SLT 269 : 1998 (3) Scale 662 : 1998 (5) Supreme 201.

[10337] ● ***Written consent of Advocate General/ Attorney General/Solicitor General mandatory.***—Requirement that motion should be accompanied by written consent of Advocate-General/Attorney–General/ Solicitor General is mandatory obtaining consent subsequent to making of motion does not care the initial defect. The said law appears are expected to examine whether the averments in the proposed motion of a criminal contempt are made vindicating public interest or personal vendetta and accused to decline consent postulated in the said provision. If a motion of criminal contempt in the High Court/ Supreme Court is not accompanied by the written consent of Advocate General/ Attorney General/ Solicitor General, the very purpose of the requirement of prior consent will be frustrated. For a valid motion, compliance with the requirements of Section 15 of the Contempt of Courts Act is mandatory. A motion under Section 15 of the Contempt of Courts Act not in conformity with the provisions of Section 15 of the Contempt of Court Act, is not maintainable. *State of Kerala* v. *M.S. Mani*, AIR 2001 SC 3315 : (2001) 8 SCC 82 : 2001 SCC (Cri) 1412 : 2001 CrLJ 4284.

[10338] ● ***Slap on face of Judicial Officer slap on face of—Justice delivery system.***—The slap on the face of the Judicial Officer is in fact a slap on the face of the justice delivery system in the country and as such question of acceptance of any apology or an undertaking does not and cannot arise, neither there can be any question of any leniency as regards the sentence. *Prem Surana* v. *Additional Munsif and Judicial Magistrate*, AIR 2002 SC 2956 : 2002 SCC 722 : (2002) 6 SCC (Cri) 1502 : 2002 CrLJ 4092.

[10339] ● ***Initiation of contempt proceedings by High Court on its own motion.***—The High Court could initiate proceedings on its own motion under the contempt of Courts Act against the appellants. On the facts of this case apart from the report sent by the 5th Additional District and Sessions Judge of the incident, Young Lawyers' Association had also filed a writ petition. The Presidents of the three Bar Associations and the Advocate General were present and heard before initiating the proceedings for the criminal contempt.

It has been noted by the High Court that "all the three Presidents of the High Court Associations and the Advocate General arrived at the conclusion that a *prima facie* case of criminal contempt was made out against the condemners". This shows that the Advocate General of the State was also of the opinion that *prima facie* a case for initiation of proceeding for criminal contempt was made out and he was a consenting party to the initiation of the proceedings. *Daroga Singh* v. *B.K. Pandey*, (2004) 5 SCC 26 : 2004 SCC (Cri) 1521 (1537) : 2004 CrLJ 2084 : JT 2004 (4) SC 608 : (2004) 2 Crimes 423.

[10340] ● ***Contempt of Court special jurisdiction.***—The contempt of Court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice or which tends to impede its course or tends to shake public confidence in the judicial institutions. This jurisdiction may also be exercised when the act complained of adversely affects the majesty of law or dignity of the Courts. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the Courts of law. See *Supreme Court Bar Asson.* v. *Union of India*, (1998) 4 SCC 409. The contempt proceedings should not be initiated lightly. *Prodip Kumar Biswas* v. *Subrata Das*, (2004) 4 SCC 573 : 2004 SCC (Cri) 1341 (1347) : JT 2004 (4) SC 363 : (2004) 2 JCC 684.

[10341] ● ***Power of High Court to punish for contempt.***—Every High Court besides powers under the Act has also the power to punish for contempt as provided in Article 215 of the Constitution. Repealing the Contempt of Courts Act, 1952, the Act was enacted, *inter alia*, providing definition of civil and criminal contempt and also providing for filtering of criminal contempt petitions. The act lays down "contempt of Court" to mean civil contempt or criminal contempt. We are concerned with criminal contempt. "Criminal contempt" is defined in Section 2(c) of the Act. It, *inter alia*, means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which scandalises or tends to scandlise, or lowers to tends to lower the authority of any Court. The procedure for initiating a proceeding of contempt when it is committed in the face of the Supreme Court or High Courts has been prescribed in Section 14 the Act. In the case of criminal contempt, other than a contempt referred to in Section 14 the manner of taking cognizance has been provided for in Section 15 of the Act. *Bal Thackrey* v. *Harish Pimpal Khute*, AIR 2005 SC 396 : (2005) 1 SCC 254 : 2005 SCC (Cri) 307 (311) : 2005 CrLJ 659.

The contempt jurisdiction enables the Court to ensure proper administration of justice and maintenance of the rule of law. It is meant to ensure that the Courts are able to discharge their functions properly, unhampered and unsullied by wanton attacks on the system of administration of justice or on officials who administer it, and to prevent wilful defiance of orders of the Court or undertakings given to the Court. *Bal Thackrey* v. *Harish Pimpal Khute*, AIR 2005 SC 396 : (2005) 1 SCC 254 : 2005 SCC (Cri) 307 (311) : 2005 CrLJ 659.

[10342] ● ***Obtaining consent in writing of Advocate General for making motion mandatory.***—The whole object of prescribing procedural mode of taking cognizance in Section 15 of the contempt of Courts Act, 1971 is to safeguard the valuable time of the Court from being wasted by frivolous contempt petitions underlying rationale of clauses (a), (b), and (c) of Section 15(1) appears to be that when the Court is not itself directly aware of the contumacious conduct, and the actions are alleged to have taken place outside its precincts, it is necessary to have the allegations screened by the prescribed authorities so that the Court is not troubled with frivolous matters. It is well settled that the requirement of obtaining consent in writing of the Advocate General for making motion by any person is mandatory. A motion under Section 15 is not in conformity with the requirements of that section is not maintainable. In these matters, the question is not about compliance or non-compliance with the principles of natural justice by granting adequate opportunity to the appellant but is about compliance with the mandatory requirements of Section 15 of the act. As already noticed the procedure of Section 15 is required to be followed even when petition is filed by a party under Article 215 of the Constitution, though in these matters petitions filed were under Section 15 of the act. From the material or record, it is not possible to accept the contention of the respondents that the Court had taken *suo motu* action. Of course, the Court had the proper and jurisdiction to initiate contempt proceedings *suo motu* and for that purpose consent of the Advocate General was not necessary. at the same time, it is also to be borne in mind that the Courts normally take *suo motu* action in rare cases. In the present case, it is evident that he proceedings before the High Court were initiated by the respondents by filing contempt petitions under Section 15. The petitions were vigorously pursued and strenuously argued ad private petitions. The same were never treated as *suo motu* petitions. In absence of compliance with the mandatory requirement of Section 15 the petitions were not maintainable. *Bal Thackrey* v. *Harish Pimpal Khute*, AIR 2005 SC 396 : (2005) 1 SCC 254 : 2005 SCC (Cri) 307 (315) : 2005 CrLJ 659.

[10343] ● ***Obtaining consent of Advocate General in writing for making motion mandatory.***—It is well settled that the requirement of obtaining consent in writing of the Advocate. General for making motion by an person is mandatory. A motion under Section 15 is not in conformity with the requirements of that section is not maintainable. *Bal Thackery* v. *Harish Pimpal Khunte*, AIR 2005 SC 396 : (2005) 1 SCC 254 : 2005 SCC (Cri) 307 (315) : 2005 CrLJ 659.

[10344] ● ***Invocation of criminal contempt jurisdiction of Court by Private party.***—Under the Contempt of Courts Act, the petition seeking the punishment for contempt can be invoked by a party only with the prior written consent of the

Advocate General of the State under Section 15 of the said Act. This position in law is now well settled by judgments of this Court in the cases of *State of Kerala* v. *M.S. Mani*, (2001) 8 SCC 82 : 2001 SCC (Cri) 1412 and *Bal Thackrey* v. *Harish Pimpalkhute*, AIR 2005 SC 396 : (2005) 1 SCC 254 : 2005 CrLJ 659 : 2005 (1) Crimes 24 wherein it is held that prior written sanction of the Advocate General under Section 15 of the Contempt of Courts Act is a mandatory requirement for invoking the contempt jurisdiction of the Court by a private party.

In the instant appeals, it is not disputed that the complainants before the High Court did not obtain such prior permission from the Advocate General. It is also not disputed that contempt proceedings have not been initiated by the High Court *suo motu* either under the provisions of the Contempt of Courts Act or under Article 215 of the Constitution. This is clear from the following facts :

(a) The contempt petitions nowhere state that such a sanction has been obtained by the complainants.

(b) The show-cause notice issued by the High Court though contained an alternate clause as to invoking of *suo motu* contempt jurisdiction by the High Court, the same has been struck off indicating that the cognizance of contempt complaint was taken at the instance of a private party.

(c) Nowhere in the body of the impugned judgment the High Court has indicated that it was exercising *suo motu* jurisdiction in regard to the alleged contempt by the appellants.

In the said factual background, and there being no dispute raised from any side that the initiation of contempt was at the instance of the private party and there being no prior consent of the Advocate General, these appeals are liable to be allowed on that sole ground. *Bijayini Dash* v. *Loknath Mishra*, (2005) 9 SCC 194 : 2005 SCC (Cri) 1212 (1213).

12. SECTION 16

[10345] ● ***Magistrate making order under Section 144, CrPC restraining peon from executing warrant.***—Where a First Class Magistrate, misconceiving his powers and exercising a jurisdiction not vested in him by law and without any justifying circumstances, made an order under Section 144 of the Criminal Procedure Code by which a civil Court peon was restrained from executing a warrant of arrest issued by an Additional Munsiff in connection with the execution of a money decree, but the Magistrate was not influenced by any extraneous consideration or dishonest motive in making the order. The Magistrate cannot be found guilty of contempt of the Court of the Additional Munsiff, because there is nothing to suggest any wilful culpability on his part. *S.S. Ray* v. *State of Orissa*, AIR 1960 SC 190 : 1960 CrLJ 282.

[10346] ● ***Contempt by subordinate Court.***—Before the subordinate Court would be held guilty for contempt, it must be shown that the contempt was intentional. There is no room for inferring intention unless the subordinate Courts had knowledge of the order. *B.K. Kar* v. *Chief Justice Orissa*, AIR 1961 SC 1367 : 1961(2) CrLJ 438 : 1962 (1) SCR 319 : 1961(2) SCJ 6335. **TO THE SAME EFFECT :** (1) *H.P. Singh* v. *Thakar Prasad Tewari*, AIR 1953 SC 436 : 1953 CrLJ 1837.

[10347] ● ***Judge—His duty not to get involved in political issues.***—It will not be proper for any Judge to accept the invitation and hospitality of any business or commercial organisation or of any political party or any club or organisation run on sectarian, communal or parochial lines. If a Judge addresses on a political problem or controversies he exposes himself to discussion by the public. If public criticises him for his views no offence of contempt of Court is committed. *Ram Pratap* v. *Devanand*, AIR 1977 SC 809 : (1977) 1 SCC 150 : 1977 SCC (Cri) 44 : 1977 CrLJ 579.

[10348] ● ***Judges power to make binding decision.***—The Judge's Bench is a seat of power. Not only do Judges have power to make binding decision, their decisions legitimate the use of power by other officials. The Judges have the absolute and unchallengeable control of the Court domain. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses. We concede that the Court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct". *A.M. Mathur* v. *Pramod Kr. Gupta*, (1990) 2 SCC 533 at 539 : (1990) 2 SCC 533 : JT 1990 (1) SC 545 : 1990 (1) UJ 595 : 1990 (1) Scale 527 : 1990(2) SCR 110 (*per* K. JAGANNATHA SHETTY).

[10349] ● ***Issuance of notice misconceived as order of reference to Division Bench by Chief Justice his prerogative.***—The issuance of a notice to show cause why contempt proceedings be not initiated against respondent No. 2, the Chief Justice of the High Court, in the facts and circumstances of this case is thus wholly illegal, unwarranted and without jurisdiction. Issuance of such a notice is also misconceived since by no stretch of imagination can it be said that there was any interference in the administration of justice by the Chief Justice in exercising his statutory powers to allocate work to puisne Judges and to the division benches. The order of reference of the part-heard writ petition to the Division Bench for its disposal, as already noticed, was legally sound and statutorily valid. Such an action on the part of a Chief Justice could never become a cause for issuance of contempt notice to him. To expect the Chief Justice to say so in response to the show cause notice before the single Judge would be adding insult to injury. The direction to issue show cause notice to the Chief Justice, respondent No. 2 being totally misconceived, illegal and without any jurisdiction and is wholly unsustainable. *State of Rajasthan* v. *Prakash Chand*, AIR 1998 SC 1344 : (1998) 1 SCC 1 : 1998 CrLJ 2012 (2026)(SC).

13. SECTION 17

[10350] ● ***Criminal PC not applicable in procedure.***—Criminal Procedure Code does not apply in the procedure. *Sukhdev Singh* v. *Teja Singh*, AIR 1954 SC 186 : 1954 SCR 454 : 1954 SCJ 67 : 9 DLR (SC) 120.

[10351] ● ***Contempt—Violation of order of Court.***—In case of charge of contempt for violation of order of Court it is not necessary that the order should be officially served. But those assert the knowledge of contemnors are to prove the same. *Aligarh Municipality Board* v. *Ekka Tonga Mazdoor Union*, AIR 1970 SC 1767 : (1970) 3 SCC 98 : 1970 CrLJ 1520.

[10352] ● ***Standard of proof.***—Standard of proof is like one in a criminal case. Particularly when the act complained of is done by one acting under the colour of his office as a judicial officer strict proof is necessary. Wrong order or even an act of usurpation of jurisdiction committed by a judicial officer owing to an error of Judgment or miscomprehension of correct legal position does not fall within the definition of criminal contempt. *S. Abdul Karim* v. *M.K. Prakash*, AIR 1976 SC 859 : (1976) 1 SCC 975 : 1976 SCC (Cri) 217 : 1976 CrLJ 641 : 1976 Cur LJ (Cri) 50 : 1976 KerLJ 184.

[10353] ● ***Petition for withdrawal of proceedings for contempt.***—While considering the request for withdrawal of the proceedings initiated for taking action for contempt of the Court, the Court would generally be guided by the broad facts of the case and more particularly whether respect for judicial process would be enhanced or dwindled by either granting or refusing to grant the request. Section 15 of the Contempt of Courts Act, 1971 confers power on the Supreme Court as well as on the High Court to take *suo motu* action or on a motion made by, amongst others, the Solicitor General. The petitioner who has moved for taking action in contempt is not entitled as a matter of right to withdraw the petition whenever it suits his purpose. Once the act which *prima facie* shows that contempt of the Court has been committed is brought to the notice of the Court, it is the Court which has to decide whether contempt has been committed or whether it is appropriate to take action, or at a later date whether to drop the proceedings. The matter is primarily between the Court and the contemnor. *Amrit Nahata* v. *Union of India*, AIR 1986 SC 791 : (1985) 3 SCC 382 : 1986 CrLJ 806 : 1985 CrLR (SC) 362 : 1985 Cur CrLJ (SC) 366 : 1985 Mad LJ (Cri) 321 : 1985 Cr App R (SC) 227.

[10354] ● ***Summary procedure.***—The special feature of the procedure to be followed in a contempt proceeding is the summary procedure which is recognized not only in India but also abroad. This has long been practiced in India also. *Pritam Lal* v. *High Court of M.P., Jabalpur through Registrar*, AIR 1992 SC 904 : 1992 CrLJ 1269 : 1992 CrLR (SC) 244 : 1992 (1) Crimes 1012.

[10355] ● ***Procedure under CrPC or Evidence Act not attracted.***—It has repeatedly been held by this Court that the procedure prescribed either under the Code of Criminal Procedure or under the Evidence Act is not attracted to the proceedings initiated under Section 15 of the Contempt of Courts Act. The High Court can deal with such matters summarily and adopt its own procedure. The only caution that has to be observed by the Court in exercising this inherent power of summary procedure is that the procedure followed must be fair and the condemners are made aware of the charges levelled against them and given a fair and reasonable opportunity. *Daroga Singh* v. *B.K. Pandey*, AIR 2004 SC 2579 : (2004) 5 SCC 26 : 2004 SCC (Cri) 1521 (1538) : 2004 CrLJ 2084 : JT 2004 (4) SC 608 : (2004) 2 Crimes 423.

[10356] ● ***Impleading private party in contempt petition subject matter between Court and***

contemnor.—In the instant case the Supreme Court held : "The High Court was clearly in error in impleading a private party in a contempt petition which is subject-matter between the Court and the contemnor we are also of the view that the impugned order of directing demolition of the alleged unauthorised construction of the temple on the land could not have been passed by the High Court without deciding the question whether any contempt was committed by the contemnors, and was required to be purged. For the aforesaid reasons, we allow the appeals. Both the impugned orders are set aside. The contempt petition is pending before the High Court. We remit the matter to the High Court for taking a decision in the pending contempt petition in accordance with law and as expeditiously as possible." *B.K. Savithri* v. *B.V.S. Anand*, (2005) 10 SCC 207 : 2005 SCC (Cri) 1502.

14. SECTION 18

[10357] ● ***Contemnor entitled to notice and opportunity.***—However gross the contemnor may be the contemnor is entitled to a notice and an opportunity of hearing before holding him guilty and passing an order of imprisonment. *Deepak Kumar Prahladka* v. *Prabha Shankar Mishra*, AIR 2004 SC 3227 : (2004) 5 SCC 217 : 2004 CrLJ 2847 (2849) : 2004 (3) Crimes 22.

[10358] ● ***Presiding Judge respondent in contempt petition not to hear petition.***—Where the presiding Judge is respondent in the contempt petition, the contempt petition should not be heard and disposed of by there Judges. The Judges should not only be done but should also appear to have been done. *Deepak Kumar Prahladka* v. *Prabha Shankar Mishra*, AIR 2004 SC 3227 : (2004) 5 SCC 217 : 2004 CrLJ 2847 (2849) : 2004 (3) Crimes 22.

[10359] ● ***Section 18—Scope.***—Under Section 15 of M.R.T.P. Act, the Act, action for criminal contempt, other than a contempt referred to in Section 14 of the Act, can be taken. Under Section 14, action can be taken if the contempt has been committed in the presence of or hearing of the Court. Section 18 lays down that every case of criminal contempt under Section 15 shall be heard and determined by a Bench of not less than two Judges which would obviously show that in the case of the Commission, a proceeding for criminal contempt has to be heard and determined by a Bench of not less than two members. Commission to be established under Section 5 of the M.R.T.P. Act shall comprise a Chairman and not less than two and not more than eight members to be appointed by the Central Government which shows that the Commission would consist of a Chairman and at least two members. Language of Section 18 of the Act that 'criminal contempt under Section 15 shall be heard and determined by a Bench of not less than two Judges' is very clear and unequivocal and in case of criminal contempt, the contempt proceedings has to be heard and determined by a Bench of not less than two Judges. As the Commission consists of Chairman and at least two members, the contempt proceeding for punishing the appellant for criminal contempt ought to have been heard by the Chairman along with another member or the Chairman could have assigned the matter for hearing to any two members of the Commission but he alone was not justified in hearing and determining the proceeding which was in violation of the provisions of Section 18 of the Act. Therefore, the impugned order passed by the Chairman is liable to be set aside on this ground alone and the matter has to be remitted to the Commission for disposal of the contempt proceeding in terms of Section 15 of the Act. *J.K. Gupta* v. *D.G. Investigation and Registration*, 2005 CrLJ 678 (681) : 2004 (4) Crimes 362.

15. SECTION 19

[10360] ● ***Order refusing to initiate contempt proceeding.***—Order of the High Court refusing to initiate proceedings on motion for contempt is not appealable even though the Supreme Court may interfere with the order by granting special leave to appeal against such order. *Baradakanta Mishra* v. *Mr. Justice Gatikrushna Misra, C.J. of Orissa High Court*, AIR 1974 SC 2255 : (1975) 3 SCC 535 : 1975 CrLJ 1 : 1975 (1) SCR 524.

[10361] ● ***No statutory or common law right entitling order for acquittal.***—It is a settled law that no one has a statutory or common law right to say that he is entitled as a matter of course to an order for committal because the alleged contemnor is guilty of contempt. *Baradakanta Mishra* v. *Mr. Justice Gatikrushna Misra, C.J. of Orissa High Court*, AIR 1974 SC 2255 : (1975) 3 SCC 535 : 1975 SCC (Cri) 99 : 1975 CrLJ 1 : 1975 (1) SCR 524.

[10362] ● ***Appreciation of evidence—Inconsistent versions of occurrence.***—The present is a case wherein the prosecution witnesses have come out with two inconsistent versions of the occurrence. One version is contained in the evidence of witnesses before the Court while the other is contained in their statements made before the police. In view of the contradictory versions, the conviction of the accused cannot be sustained. *State of Haryana* v. *Gurdial Singh*, AIR 1974 SC 1871 : (1974) 4 SCC 494 : 1974 SCC (Cri) 530 (536) : 1974 CrLJ 1286 : 1974 CrLR (SC) 417 : (1974) 3 SCR 657.

[10363] ● ***False evidence.***—The fact that Karar Ahmad stated at one place in the course of his deposition that he did not know the appellants and stated at another place that he knew them for about two or three years, would not go to show that Karar Ahmad's evidence was false. *Dharamvir* v. *State of Madhya Pradesh*, AIR 1974 SC 1156 : (1974) 4 SCC 150 : 1974 SCC (Cri) 352 (353) : 1974 CrLJ 812.

[10364] ● ***Failure of defence to cross-examine eye witnesses about omission in statement before Police.***—Section 145 of the evidence Act is not intended to exclude from evidence what is relevant and admitted, and, therefore, a proved omission having due effect in the assessment of probabilities. This section applies only to contradiction. If there are omissions in the previous statement which do not amount to contradictions but throw some doubt on the veracity of what was omitted, the uncertainty or doubt may be capable of removal by questions in re-examination. It is not possible to lay down a general rule as to what effect a particular omission from a previous statement should have on the probative value of what was so omitted by a witness. The effect will depend upon the totality of proved facts and circumstances in which the omission might have taken place. It will often be determined by the importance of what was omitted. *Laxman* v. *State of Maharashtra*, AIR 1974 SC 308 : (1974) 3 SCC 704 : 1974 SCC (Cri) 228 : 1974 CrLJ 369.

[10365] ● ***Admission substantive evidence.***—Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. *Biswanath Prasad* v. *Dwarka Prasad*, AIR 1974 SC 117 : (1974) 1 SCC 78.

[10366] ● ***Failure of Court to confront witness with his previous statement.***—Court when examined one witness as CW, but failed to confront him with his previous statement to police, it was held there is no irregularity because the language of Section 162 though wide is not explicit or specific enough to extend the prohibition to the use of wide and special powers of the Court to question a witness expressly and explicitly given by Section 165, Evidence Act. *Raghunandan* v. *State of U.P.*, AIR 1974 SC 463 : (1974) 4 SCC 186 : 1974 CrLJ 453.

[10367] ● ***Prosecution witnesses can be contradicted by reference to their previous statement.***—Court witnesses cannot be contradicted by reference to their previous statement to police under Section 161, Criminal Procedure Code; only prosecution witnesses can be contradicted.*Shakila Khader* v. *Nauser Gama*, AIR 1975 SC 1324 : (1975) 4 SCC 122 : 1975 SCC (Cri) 379 : 1975 CrLJ 1105 : (1975) 2 SCWR 130 : (1975) 2 Andh Pr LJ (SC) 9.

[10368] ● ***Appreciation of evidence.***—Where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case. *Ram Narain Jaggar Singh* v. *State of Punjab*, AIR 1975 SC 1727 : (1975) 4 SCC 497 : 1975 SCC (Cri) 571 (581) : 1975 CrLJ 1500 : 1975 CrLR (SC) 447 : 1975 Cr App R (SC) 264 : (1976) 1 SCR 27.

[10369] ● ***Statement made under Section 161, CrPC during investigation not admissible.***—In the first place the statement of witness is absolutely inadmissible because it was a statement made under Section 161 of the Code of Criminal Procedure during investigation of the cross-case which was not at all admissible in the present case. Secondly, before the attention of the Investigating Officer could be drawn to the statement it should have been put to the witness which was not done. In these circumstances, therefore, this statement must be excluded from consideration. *Gajendra Singh* v. *State of U.P.*, AIR 1975 SC 1703 : (1975) 4 SCC 241 : 1975 SCC (Cri) 499 (503, 504) : 1975 CrLJ 1494 : 1975 CrLR (SC) 388.

[10370] ● ***Statement recorded under Section 161, CrPC not admissible in evidence.***—Statements recorded under Section 161 Criminal Procedure Code is not admissible in evidence. It can be used only to contradict the author thereof. The procedure used to contradict is to confront the witness with the contradiction and to ask the IO about the contradiction. *Poddanarayan* v. *State of A.P.*, AIR 1975 SC 1252 : (1975) 4 SCC 153 : 1975 SCC (Cri) 427 : 1975 CrLJ 1062 : 1975 All Cr C 201.

[10371] ● ***Interlocutory order pertaining purely to procedure of Court—Not appealable.***—An order which is not a decision punishing for contempt but pertaining purely to the procedure of the Court directing that all points arising would be heard together is an interlocutory order. Appeal against such an order is not maintainable. *Baradakanta Mishra* v. *Mr. Justice Gatikrushna Misra, C.J. of Orissa High Court*, AIR 1976 SC 1206 : (1977) 3 SCC 345 : 1976 SCC (Cri) 532 : 1976 CrLJ 944.

[10372] ● ***Order merely initiating contempt proceeding.***—An order merely initiating the proceedings without anything further does not decide anything against the alleged contemnor and cannot be repealed against as a matter of right under Section 19. In a given case special leave may be granted under Article 136 of the Constitution from an order initiating the proceeding. But that is entirely a different matter. *Purshottamn Das Goyal* v. *Mr. Justice B.S. Dhilon*, AIR 1978 SC 1014 : 1978 CrLJ 772 : (1978) 3 SCR 510. **TO THE SAME EFFECT :** (1) *Union of India* v. *Marion Cabral*, AIR 1982 SC 691 : (1982) 3 SCC 262 : (1978) 2 SCC 370 : 1982 CrLJ 187 : 1982 CrLR (SC) 51 : 1982 Cr App R (SC) 31.

[10373] ● ***Contempt—Conviction—Appeal against.***—Ordinarily, it is true that this Court while hearing an appeal against a conviction for contempt of Court would confine its attention to the material which has received consideration of the High Court while adjudging the contemner guilty. However, there would be no lack of jurisdiction to take into consideration the passages in respect of which notice for contempt was issued and served upon the contemner. But the wider question of law apart, we propose to confine ourselves only to the material which has received the consideration of the High Court. *Rama Dayal Markarha* v. *State of Madhya Pradesh,* AIR 1978 SC 921 : (1978) 2 SCC 630 : 1978 SCC (Cri) 327 : 1978 CrLJ 917 : 1978 CrLR (SC) 167.

[10374] ● ***Appeal against order dropping proceedings.***—Appeal against the order dropping the proceedings is not maintainable. The complainant may in appropriate cases invoke the jurisdiction of Supreme Court under Article 136 of the Constitution in the larger interest of administration of justice. *State of Maharashtra* v. *Mahbood S. Allibhoy*, AIR 1996 SC 2131 : (1996) 4 SCC 411 : 1996 SCC (Cri) 675 : 1996 CrLJ 2879.

[10375] ● ***Appeal against order dropping proceeding for contempt or refusing to initiate proceeding.***—No appeal is maintainable against an order dropping proceeding for contempt or refusing to initiate a proceeding for contempt. But even if no appeal is maintainable on behalf of the person at whose instance a proceeding for contempt had been initiated and later dropped or whose petition for initiating contempt proceedings has been dismissed, is not without any remedy. In appropriate cases he can invoke the jurisdiction of this Court under Article 136 of the Constitution. *State of Maharashtra* v. *Mahboob S. Allibhoy*, AIR 1996 SC 2131 : 1996 SCC (Cri) 675 : 1996 CrLJ 2879 : (1996) 4 SCC 411 : JT 1996 (6) SC 151.

[10376] ● ***Appeal against order of Single Judge acquitting contemner—Maintainability.***—Appeal to Division Bench against the order of Single Judge acquitting the alleged contemnor from the charge of contempt is not maintainable. *J.S. Parihar* v. *Garpat Duggar*, AIR 1997 SC 113 : (1996) 6 SCC 29 : JT 1996 (9) SC 608 : 1996 (7) AC (SC) 710 : 1996 (6) SLR 723.

[10377] ● ***Interference by Appellate Court when.***—The Appellate Court will not interfere unless the order is totally perverse. The contempt jurisdiction is not to be invoked to enable the appellant to wreck personal vengeance against the alleged contemners. *N.C. Das* v. *M.A. Mohsin*, AIR 1997 SC 3805 : (1997) 7 SCC 438 : 1997 CrLJ 4410.

[10378] ● ***Jurisdiction and power of Supreme Court and High Court under Articles 129 and 215 of Constitution.***—The jurisdiction contemplated by Articles 129 and 215 of the Constitution is inalienable. It cannot be taken away or whittled down by any legislative enactment subordinate to the Constitution. *I. Sudhakar Prasad* v. *Government of A.P.*, (2001) 1 SCC 516. The provisions of the Contempt of Courts Act, 1971 are in addition to and not in derogation of Articles 129 and 215 of the Constitution. The provisions of Contempt of Courts Act, 1971 cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the said two Articles.

[10379] ● ***Power of CATS to punish for contempt.***—Administrative Tribunals set up under the provisions of Administrative Tribunals Act do have power to punish for the contempt. Any order or decision of the Tribunal punishing for contempt shall be appealable under Section 19 of the Act only to the Supreme Court. *T. Sudhakar Prasad* v. *Government of Andhra Pradesh*, 2000 Supp (5) SCR 610 : (2001) 1 SCC 516.

[10380] ● ***Rightness or wrongness of order cannot be urged in contempt proceedings.***—If any part concerned is aggrieved by the order which in its opinion is wrong or against rules or its implementation is neither practicable nor feasible, it should always either approach to the Court that passed the order to invoke jurisdiction of the Appellate Court. Rightness or wrongness of the order cannot be urged in contempt proceedings. Right or wrong the order has to be obeyed. Flouting an order of the Court would render the party liable for contempt. While dealing with an application for contempt the Court cannot traverse beyond the order, non-compliance of which is alleged. In other words, it cannot say what should not have done or what should have been done. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible. *State of Bihar* v. *Rajendra Singh*, AIR 2004 SC 4419 : (2007) 15 SCC 688 : 2004 CrLJ 4187 (4188, 4189).

[10381] ● ***Contempt proceeding against person not party in original writ proceedings.***—The question as to whether a person although not a party in the original writ proceedings, could be proceeded against is a debatable. Such a question, therefore, was required to be determined at threshold. If *prima facie* two views are possible and unless its is firmly held that the respondent No. 1 not only was bound by the direction issued by the High Court but he had also defied it wilfully and deliberately he cannot be punished for commission of the contempt. *Parents Association of Students* v. *M.A. Khan*, (2009) 2 SCC 641 : 2008 (17) SCR 735 : JT 2009 (1) SC 128.

[10382] ● ***Appeal—Maintainability.***—Appeal is maintainable against an order which has been passed adverse to the interest of contemnor, particularly where the judgment has been passed by a Court beyond its jurisdiction. *Tamilnadu Mercantile Bank Share Holders Welfare Association* v. *S.C. Sarkar*, (2009) 2 SCC 784 : 2008 (17) SCR 85.

16. SECTION 20

[10383] ● ***Limitation for initiating proceedings for contempt.***—The heading of Section 20 of the Contempt of Courts Act, 1971 is "limitation for actions for contempt". Strictly speaking, this section does not provide limitation in the sense in which the term is understood in the Limitation Act. Section 5 of the Limitation Act also does not, therefore, apply. Section 20 strikes at the jurisdiction of the Court to initiate any proceedings for contempt. *Om Prakash Jaiswal* v. *D.K. Mittal*, AIR 2000 SC 1136 (1140) : (2000) 3 SCC 171 : 2000 CrLJ 1700 : JT 2000 (2) SC 293.

[10384] ● ***Filing of application for initiating proceedings for contempt.***—Filing of an application or petition for initiating proceedings for contempt or a mere receipt of such reference by the Court does not amount to initiation of the proceedings by Court. On receiving any such document it is usual with the Courts to commence some proceedings by employing an expression such as "admit", "rule", "issue notice" or "issue notice to show cause why proceedings for contempt be not initiated." In all such cases the notice is issued either in routine or because the Court has not yet felt satisfied that a case for initiating any proceedings for contempt has been made out and, therefore, the Court calls upon the opposite party to admit or deny the allegations made or to collect more facts so as to satisfy itself if a case for initiating the proceedings for contempt was made out, such a notice is certainly anterior to initiation. The tenor of the notice is itself suggestive of the fact that in spite of having applied its mind to the allegations and the material placed before it, the Court was not satisfied of the need for initiating proceedings for contempt; it was still desirous of ascertaining facts or collecting further material whereon to formulate such opinion. It is only when the Court has formed an opinion that a *prima facie* case for initiating proceedings for contempt is made out and that the respondents or the alleged contemnors should be called upon to show cause why they should not be punished then the Court can be said to have initiated proceedings for contempt. *Om Prakash Jaiswal* v. *D.K. Mittal*, AIR 2000 SC 1136 (1139) : (2000) 3 SCC 171 : 2000 CrLJ 1700 : JT 2000 (2) SC 293.

17. SECTION 21

[10385] ● ***Contempt conviction—Appeal against.***—Ordinarily, it is true that this Court while hearing an appeal against a conviction for contempt of Court would confine its attention to the material which has received consideration of the High Court while adjudging the contemner guilty. However, there would be no lack of jurisdiction to take into consideration the passages in respect of which notice for contempt was issued and served upon the contemner. But the wider question of law apart, we propose to confine ourselves only to the material which has received the consideration of the High Court. *Rama Dayal Markarha* v. *State of Madhya Pradesh*, AIR 1978 SC 921 : (1978) 2 SCC 630 : 1978 SCC (Cri) 327 : 1978 CrLJ 917 : 1978 CrLR (SC) 167.

[10386] ● ***Contempt—Punishment.***—State Bank of India has intimated the 1st respondent on

7-9-1994 that the total sum of Rs. 24,41,821.74 has been credited to his Deposit Account. It was transferred to the Personal account of the 1st respondent on 8-9-1994. From 8-9-1994 till 14-9-1994 no step was taken to expedite the refund to be made. A casual statement is made that on 14-9-1994 the letter of the petitioner's advocate was endorsed to the Cash Department. On a perusal of the material on record and in particular the counter affidavit filed by the first respondent in this contempt petition itself, it is clear that the first respondent was absolutely careless and indifferent to give effect to the orders passed by this Court till the learned Single Judge of the Calcutta High Court made the order on September 2, 1994. The first respondent would appear to have thought that delay is a safe route to tide over the devil and deep sea forsaking constitutional duty cast on him under Article 142 of the Constitution, as an arm of the Court, to effectuate the order passed by this Court dated August 16, 1994. His reprehensible conduct and indifference to implement the order of this Court calls for strong condemnation and in our opinion, he is unworthy to hold any office of responsibility. The same need to be entered in his confidential character rolls. The Hon'ble Chief Justice of the High Court of Calcutta would look into his conduct to take action as is appropriate in this behalf. However, no one shall be left in lurking doubt that by maneuver or otherwise one would get over non-implementation of the order of the Court and was successful in its avoidance or seem to be defeated. The arm of the Court is long enough to reach injustice wherever it is found, which should be dealt with appropriately. The learned Single Judge passed final order or review application on December 23, 1994, setting aside the order of the Division Bench to which he was a member. *Abhijit Tea Company Pvt. Ltd.* v. *Terai Tea Co. (P) Ltd.*, (1996) 1 SCC 589 : 1996 CrLJ 895.

[10387] ● ***Allahabad High Court Rules, Rr. 5, 6—Contempt proceedings—Procedure.***—While initiating contempt proceeding, the Court has to frame the charges and serve the same alongwith other relevant material upon the alleged contemnor. This is a mandatory requirement under the Rules, 1952. *Sahdeo* v. *State of U.P.*, (2010) 3 SCC 705 : 2010 CrLJ 2034 (2041) (SC) : (2010) 1 Crimes 195.

CONTEMPT OF SUPREME COURT AND HIGH COURT

[10388] ● ***Nature and extent of punishment.***—Parliament by virtue of Entry 77 List I is competent to enact a law relating to the powers of the Supreme Court with regard to contempt of itself and such a law may prescribe the nature of punishment which may be imposed on a contemnor by virtue of the provisions of Article 129 read with Article 142(2) of the Constitution. Since, no such law has been enacted by Parliament, the nature of punishment prescribed under the Contempt of Courts Act, 1971 may act as a guide for the Supreme Court but the extent of punishment as prescribed under that Act can apply only to the High Courts, because the 1971 Act *ipso facto* does not deal with the contempt jurisdiction of the Supreme Court, except that Section 15 of the Act prescribes procedural mode for taking cognizance of criminal contempt by the Supreme Court also. Section 15, however, is not a substantive provision conferring contempt jurisdiction. The judgment in *Sukhdev Singh Sodhi* v. *Chief Justice and Judges of the Pepsu High Court* as regards the extent of "maximum punishment" which can be imposed upon a contemnor must, therefore, be construed as dealing with the powers of the High Courts only and not of this Court in that behalf. *Zahira Habibullah* v. *State of Gujarat*, AIR 2006 SC 1367 : (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8 (24 & 25) : 2006 CrLJ 1694 : 2006 (2) Crimes 36.

CONTINUING OFFENCE

[10389] ● ***Non-payment of employers contribution to PF before due date continuing offence.***—The non-payment of employers contribution to the provident fund before the due date was a 'Continuing offence' and, therefore, the period of limitation prescribed by Section 468 of the Code could not have any application and it would be governed by Section 472 of the Code, according, to which a fresh period of limitation began to run at every moment of the time during which the offence continued. Each day the accused failed to comply with the obligation to pay their contribution to the fund, they committed fresh offence. *State of Bihar* v. *Deokaran Nenshi*, AIR 1973 SC 908 : (1972) 2 SCC 890 : 1973 SCC (Cri) 114 : 1973 CrLJ 347 : 1972 Cr App R (SC) 466. TO THE SAME EFFECT : (1) *Bhagirath Konoria* v. *State of M.P.*, AIR 1984 SC 1688 : (1984) 4 SCC 222 : 1984 SCC (Cri) 590 : 1984 CrLR (SC) 391 : (1984) 2 Crimes 441; (2) *Baldev Krishna Sahi* v. *Shipping Corporation of India*, AIR 1987 SC 2245 : (1987) 3 SCC 674 : JT 1987 (3) SC 121 : (1987) 2 UJ (SC) 399; (3) *Amrit Lal Dhum* v. *Devo Prasad Dutta Roy*, AIR 1988 SC 733 : (1988) 2 SCC 269 : 1988 SCC (Cri) 339 : 1988 CrLR (SC) 122 : JT 1988 (1) SC 218 : (1988) 1 Crimes 596 : 1988 Cr AppR (SC) 61.

[10390] ● *Distinction between offence which taken place when act or omission committed once and for all and continuing offence.*— Continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. In the case of continuing there is the ingredient of continuance of the offence which is absent in the case of an offence which takes place when act or commission is committed once and for all. Reg. 3 of the Indian Metalliferous Mines Regulation, 1926 read with S. 66 of the Mines Act makes failure to furnish annual returns for the preceding year by the January 21, of the succeeding year, an offence. The infringement, therefore, occurs on January 21 of the relevant year and is complete on the owner failing to furnish the annual returns by that day. The Regulation does not lay down that the owner, manager, *etc.* of the mine concerned would be guilty of an offence if he continues to carry on the mine without furnishing the returns or that the offence continues until the requirement of Regn. 3 is complied with. In other words Regn. 3 does not render a continued disobedience or non-compliance of it an offence. *State of Bihar* v. *Deokaran Nenshi*, AIR 1973 SC 908 : (1972) 2 SCC 890 : 1973 SCC (Cri) 114 : 1973 CrLJ 347 : (1973) 1 SCR 1004 : 1972 Cr AppR (SC) 466.

[10391] ● *Distinctive feature of continuing wrong.*—The distinctive nature of a continuing wrong is that the law that is violated makes the wrong-doer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. It is reasonable to take the view that the Court should not be eager to hold that an act or omission is continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the legislature. *State of Bihar* v. *Deokinandan Nenshi*, AIR 1973 SC 908 : (1972) 2 SCC 890 : 1973 CrLJ 347 : (1973) 1 SCWR 66.

[10392] ● *Failure to pay employer's contribution to P.F. continuing offence.*—The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offences, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence turning to the matters before use the offence of which the appellants are charged is the failure to pay the employer's contribution before the due date. Considering the object and purpose of this provision, which is to ensure the welfare of workers, it is impossible to hold that the offence is not of a continuing nature. The appellants were unquestionably liable to pay their contribution to the provident fund before the due date and it was within their power to pay it, as soon after the due date had expired as they willed. The late payment could not have absolved them of their original guilt but it would have snapped the recurrence. Each day that they failed to comply with the obligation to pay their contribution to his fund they committed a fresh offence. It is putting an incredible premium on lack of concern for the welfare of workers to hold that the employer who has not paid his contribution of the employees to the provident fund can successfully evade the penal consequences of his act by pleading the law of limitation. Such offences must be regarded as continuing offences to which the law of limitation cannot apply. *Bhagirath Kanoria* v. *State of M.P.* and *Bahadur Singh* v. *Provident Fund Inspector* and *Raja Bahadur Singh* v. *Provident Fund Inspector*, AIR 1984 SC 1688 : (1984) 4 SCC 222 : 1984 SCC (Cri) 590 (597) : 1984 CrLR (SC) 391 : (1985) 1 SCR 626.

[10393] ● *Continuing offence—Meaning.*— The continuing offence means "type of crime which is committed over span of time". The expression continuing offence has not been defined in the Code. The question whether a particular offence is a 'continuing offence' or not must, therefore, necessarily depend upon the language of the statute which creates the offence, the nature of the offence and the purpose intended to be achieved by constituting the particular act as an offence. The offence under Section 630 of the Companies Act is not such as can be said to have been consummated once for all.

Wrongful withholding, or wrongfully obtaining possession and wrongful application of the company's property, that is, for purposes other than those expressed or directed in the articles of the company and authorised by the Companies Act, cannot be said to be terminated by a single act or fact but would subsist for the period until the property in the offender's possession is delivered up or refunded. It is an offence committed over a span of time and the last act of the offence will control the commencement of the period of limitation and need be alleged. The offence consists of a course of conduct arising from a singleness of thought, purpose of refusal to deliver up or refund which may be deemed a single impulse. Considered from another angle, it consists of a continuous series of acts which endures after the period of consummation on refusal to deliver up or refund the property. It is not an instantaneous offence and limitation begins with the cessation of the criminal act, i.e. with the delivering up or refund of the propriety. It will be a recurring or continuing offence until the wrongful possession, wrongful withholding or wrongful application is vacated or put an end to. The offence continues until the property wrongfully obtained or wrongfully withheld or knowingly misapplied is delivered up or refunded to the company. For failure to do so sub-section (2) prescribes the punishment. This, in our view, is sufficient ground for holding that the offence under Section 630 of the Companies Act is not one time but a continuing offence and the period of limitation must be computed accordingly, and when so done, the instant complaints could not be said to have been barred by limitation. *Gokal Patel Volkart Ltd.* v. *Dudayya Guru Shiddrat Hirenath*, (1991) 2 SCC 141 : 1991 SCC (Cri) 315 (327, 328) : JT 1991 (1) SC 376.

[10394] ● ***Conspiracy—Continuing offence.***—Conspiracy is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or sense of acts. So long as its performance continues it is a continuing offence. *Ajay Agarwal* v. *Union of India*, AIR 1993 SC 1637 (1647) : (1993) 3 SCC 609 : JT 1993 (3) SC 203.

[10395] ● ***Living in adultery—Continuing matrimonial offence.***—Living in adultery on the part of the husband is a continuing matrimonial offence. The offence does not get frozen or wiped out merely on passing of a decree for judicial separation which merely suspends certain duties and obligations of the spouses in connection with their marriage and does not snap the matrimonial tie. *Hirachand Srinivas Managaonkar* v. *Sunanda*, AIR 2001 SC 1285 (1292) : (2001) 4 SCC 125.

[10396] ● ***Cruelty under Section 498A, IPC.***—In a case for cruelty under Section 498A, IPC offence cannot be held to be continuing only because the complainant was forced to leave her matrimonial home. *Manish Ratan* v. *State of Madhya Pradesh*, (2007) 1 SCC 262 : 2007 (1) SCC (Cri) 336 : (2006) 4 Crimes 291.

CONTRACT

[10397] ● ***Wagering contract.***—*Section 23, 30, Contract Act, 1872.*—Wagering Contracts cannot be said to be normal. *Gherulal Parakh* v. *Mahadeodas Maiya,* AIR 1959 SC 781 : 1959 SCJ 878 : (1959) 2 Mad LJ (SC) 81.

[10398] ● ***Doctrine of Public policy.***—The doctrine of public policy is extended not only to harmful cases but also to harmful ten tendencies, this doctrine of public policy is only a branch of common law, and just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public. *Gherulal Parakh* v. *Mahadeodas Maiya*, AIR 1959 SC 781 : 1959 SCJ 878 : (1959) 2 Mad LJ (SC) 81.

[10399] ● ***Wagering contracts not opposed to public policy.***—*Section 23, Indian Contract Act, 1872.*—The common law of England and that of India have never struck down contract of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. The moral prohibitions in Hindu Law texts against gambling were not only legally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, if has not been declared illegal and there is no law declaring wagering illegal. There is no definite head or principle of public policy evolved by Courts or laid down by precedents which would directly apply to wagering contracts. *Gherulal Parakh* v. *Mahadeodas Maiya*, AIR 1959 SC 781 : 1959 SCJ 878 : 1959 Supp (2) SCR 406 : (1959) 2 Mad LJ (SC) 81.

[10400] ● ***Maxim—In part delicto potior est conditio defendantis—Applicability of.***—The maxim *In part delicto potior est conditio defendantis* does not apply where the parties do not show that there was any conspiracy to defraud third person. *Kedar Nath* v. *Prahlad Rai*, AIR 1960 213 : (1960) 1 SCR 861 : 1960 SCJ 1072.

[10401] ● ***Defendants not to perpetrate new fraud.***—Defendants should not be allowed to perpetrate new fraud. *Kedar Nath* v. *Prahlad Rai*, AIR 1960 SC 213 : (1960) 1 SCR 861 : 1960 SCJ 1072.

[10402] ● ***Contract law applicable.***—*Section 1, Indian Contract Act, 1872.*—Whether the proper law is the *lex loci contractus or lex loci solutionis*, in the absence of any expressed intention is a matter of presumption. If Courts of a particular country are chosen, it is expected, unless there be either expressed intention or evidence, that they would apply their own law to the case. Where the arbitration clause indicated an arbitration in India, this leads to an inference that the parties have adopted the law of the country in which arbitration is to be made. This inference can be drawn even in a case where the arbitration clause is void according to the law of the country, where the contract is made and to be performed. *Dhanrajmal Govindram* v. *Shamji Kalidas and Co.*, AIR 1961 SC 1285 : (1961) 3 SCR 1020.

[10403] ● ***Doctrine of undue influence.***—The first sub-section of S. 16 of the Contract Act lays down the principle in general terms. By sub-s. (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled. Sub-s (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in the third sub-section is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence. *Ladli Prashad Jaiswal* v. *Karnal Distillery Co. Ltd., Karnal*, AIR 1963 SC 1279 : (1964) 2 SCJ 12 : (1964) 1 SCR 270.

[10404] ● ***Undue influence shifting of burden of proof.***—*Section 16, Indian Contract Act, 1872.*— A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other. It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction; he has to prove (a) that the other party to a transaction was in a position to dominate his will and (b) that the other party had obtained an unfair advantage by using that position. There may arise cases in which even though the burden lies on such a person to prove his case of undue influence he may establish it from admissions made by the other party or his witnesses or from other evidence, and without giving his own 'testimony'. *Ladli Prashad Jaiswal* v. *Karnal Distillery Co. Ltd., Karnal,* AIR 1963 SC 1279 : (1964) 2 SCJ 12 : (1964) 1 SCR 270.

[10405] ● ***Arbitration agreement between parties in consideration of withdrawal of prosecution.***—*Section 23, Indian Contract Act, 1872.*— Arbitration agreement between parties in consideration of withdrawal of prosecution regarding non-compoundable offence is invalid as being offered to public policy. *V. Narasimharaju* v. *V. Gurumurthy Raju*, AIR 1963 SC 107 : (1965) 2 SCJ 539.

[10406] ● ***Agreement of contract as one for stifling prosecution.***—*Section 23, Indian Contract Act, 1872.*—The party challenging the validity of the impugned transaction must show that it was based upon an agreement to stifle prosecution. If it is shown that there was an agreement between the parties that a certain consideration should proceed from the accused person to the complainant in return for the promise of the complainant to discontinue the criminal proceedings that clearly is a transaction which is opposed to public policy. *Ouseph Paulo* v. *Catholic Union Bank Ltd.*, AIR 1965 SC 166 : (1964) 7 SCR 745.

[10407] ● ***Validity of agreement opposed to public policy.***—Where the validity of an agreement is impeached on the ground that it is opposed to public policy under S. 23 of the Act, the party setting up the plea must be called upon to prove that plea by clear and satisfactory evidence. Reliance on a mere sequence of events may tend to obliterate the real difference between the motive for the agreement and the consideration for it. *Ouseph Paulo* v. *Catholic Union Bank Ltd.*, AIR 1965 SC 166 : (1964) 7 SCR 745.

[10408] ● ***Undue influence—Presumption as to.***—*Section 16, Indian Contract Act, 1872.*—No presumption of undue influence can arise merely because parties were nearly related to each other or merely because donor was old or of weak character. The relations of solicitor and client, trustee and *cestui que* trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. *Subhas Chandra* v. *Ganga Prosad*, AIR 1967 SC 878 : (1967) 2 SCJ 159 : (1967) 1 SCR 331.

[10409] ● ***Maxim "in pari delicto potior est conditio defendantis"—Applicability of.***—*Section 23, 24, Indian Contract Act, 1872.*—The maxim "*in pari delicto potior est conditio defendantis*" does not apply (a) where the illegal purpose has not yet been substantially carried into effect before it sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in *pari delicto* with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim. Where the parties are not in *pari delicto*, the less guilty party may be able to recover money paid, or property transferred, under the contract. *Sita Ram* v. *Radha Bai*, AIR 1968 SC 534 : (1968) 2 SCJ 231 : (1968) 1 SCR 805.

[10410] ● *Document executed by mentally infirm person—Burden to prove.*—Where in a case it was set up as a defence to the plaintiffs claim that the document was executed by mentally infirm person, burden to prove that the document was obtained voluntarily lies heavily on the defendant. *Nilambar Thakur* v. *Singheswar Thakur*, (1969) 2 SCWR 654 : (1970) UJ (SC) 51.

[10411] ● *Contract to withdraw prosecution or to give no evidence.*—*Section 23, Indian Contract Act, 1872.*—It is well settled rule on the soundness of which there can be no doubt that a contract to withdraw a prosecution or to give no evidence against an accused charged with an offence of a public nature is one founded on an unlawful consideration and, therefore, void. *State of U.P.* v. *Kapil Deo Shukla*, AIR 1973 SC 494 : (1972) 3 SCC 504 : 1972 SCC (Cri) 597 (602) : 1972 CrLJ 1214.

[10412] ● *Agreement collateral to void or prohibited contracts.*—*Section 23, Indian Contract Act, 1872.*—Agreements collateral to void or prohibited contracts are not enforceable. *Firm of Pratapchand Napaji* v. *Firm of Kartike Venkata Setty and Sons*, AIR 1975 SC 1223 : (1975) 2 SCC 208.

[10413] ● *Agreement to commit criminal acts.*— *Section 224, Indian Contract Act, 1872.*—Agreement to commit criminal acts are expressly and specifically excluded by s. 224 from the scope of any to any indemnity-Agent authorised to enter into forward contracts for dealing in oil seeds-Entering into such contracts made a criminal offence under Bombay Forward Contracts Control Act (64 of 1947) and the Oil Seeds (Forward Contracts Prohibition) Order, 1943-Agent incurring losses on such contracts cannot claim indemnification from principal under S. 222. *Firm of Pratapchand Nopaji* v. *Firm of Kotrike Venkata Setty and Sons*, AIR 1975 SC 1223 : (1975) 2 SCC 208.

[10414] ● *Separate pleading about undue influence necessary.*—*Section 16, Indian Contract Act, 1872.*—Separate pleading about undue influence is necessary. General allegation that plaintiff is simple old man and imposed confidence in defendant cannot spell out undue influence. *Afsar Shaikh* v. *Suleman Bibi*, AIR 1976 SC 163 : (1976) 2 SCC 142 : (1976) 2 SCR 327.

[10415] ● *One who approbates cannot reprobate.*—If person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbate non reprobate,* (one who approbates cannot reprobate). This principle, though originally borrowed from *Scots Law* is now firmly embodied in English common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction. The aforesaid inhibitory principle squarely applied to the cases of those petitioner who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned condition 13 on the ground that this condition is violative of Arts. 19(1)(g) and 14 of the Constitution. In this connection it will bear repetition here that the impugned conditions though bear a statutory complexions, retain their basic contractual character also. It is true that a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest is different from the doctrine of estoppel or waiver. *New Bihar Biri Leaves Co.* v. *State of Bihar*, AIR 1981 SC 679 (692, 693) : (1981) 1 SCC 537 : (1981) 2 SCR 417.

[10416] ● *Doctrine of stifling of prosecution.*—*Section 23, 24 Indian Contract Act, 1872.*—The essence of the doctrine of stifling of prosecution is that no private person should be allowed to take the administration of criminal justice out of the hands of the Judges and place it in his own hands. In the instant case private party is not taking administration of law in its own hands. It is the Union of India, as the Dominus Litis, that consented to the quashing of the proceedings. What was purported to be done was not a compounding of the offences. The arrangement which purported to terminate the criminal case was one of a purported withdrawal not forbidden by any law but one which was clearly enabled. More importantly, the distinction between the "motive" for entering into agreement and the "consideration" for the agreement must be kept clearly distinguished. Where dropping of the criminal proceedings is a motive for entering into the agreement - And not its consideration—The doctrine of stifling of prosecution is not attracted. Where there is also a pre-existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability The contention that a part of the consideration for the payment of 470 million U.S. Dollars was the stifling of the criminal prosecution which is opposed to public policy and it vitiates the agreement on which the settlement is based cannot be conceded to. The settlement is not hit by Section 23 or 24 of the Indian Contract Act. *Union Carbide Corpn.* v. *Union of India*, AIR 1992 SC 248 : (1991) 4 SCC 584 : JT 1991 (6) SC 8 : 1992 (1) UJ (SC) 360.

[10417] ● ***Suit for cancellation of sale deed.***—Plaintiff claiming herself to be illiterate Harijan childless widow employed in Railway on compassionate ground on death of her husband cannot be compared to be a pardanashin lady, as there is nothing on record to show that she was suffering from ignorance or illiteracy or mental deficiency. *Hans Raji* v. *Yasodana*, AIR 1996 SC 761 : (1996) 7 SCC 122 : JT 1995 (8) SC 515.

CONTRADICTION

[10418] ● ***Evidence before committing Court—Use of.***—The evidence before Committing Court not to be used in Court of sessions unless confronted with prior statement. *Tara Singh* v. *State*, AIR 1951 SC 441 : 1952 CrLJ 1491 : 1951 SCR 729 : 1951 SCJ 518.

[10419] ● ***Witness to be questioned about each separate fact point by point and passage by passage.***—The witness should be questioned about each separate fact point by point and passage by passage. When the pervious statement is long one and the only one or two small passages in it are used for contradiction, a mere reading out of the whole statement may confuse a witness and may not be a fair method. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214 : 1952 CrLJ 1131 : 1952 SCR 812 : 1952 SCJ 284.

[10420] ● ***Witness be afforded opportunity of explaining contradictions.***—There is no hard and fast rule, all that is required is that the witness must be treated fairly and be afforded reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. The matter is one of substance and not of mere form. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214 : 1952 SCR 812.

[10421] ● ***Resort to Section 145 of Evidence Act when necessary.***—Resort to Section 145 of the Evidence Act is necessary only if a witness denies that he made the former statement. When the witness admits the former statement all that is necessary is to look to the former statement on which no further proof in necessary because of the admission that it was made. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214 : 1952 CrLJ 1131 : 1952 SCR 812.

[10422] ● ***FIR not to be used against maker at trial.***—FIR cannot be used as evidence against the maker at the trial, if he himself becomes an accused, not to contradict or corroborate other witnesses. It may be put in evidence under Section 157, Evidence Act, and corroborate only the testimony of the person who gave the information incorporated the General Diary of the FIR and not for corroborating the evidence of any one else. *Nisar Ali* v. *State of U.P.*, AIR 1957 SC 366 : 1957 CrLJ 550 : 1957 SCJ 392.

[10423] ● ***Statements made in enquiry— Admissibility of.***—As held in *Ram Kishna Dalmia* v. *Justice Tendulkar*, AIR 1958 SC 538, the statements made in enquiry under the said Act are wholly inadmissible when they are sought to be proved in any civil or criminal proceeding against the maker. But where such a person appears as witness, Section 6 of the Commission of Enquiry Act does not rule out the applicability of Section 145, Evidence Act. *R.K. Dalmia* v. *Justice Tendulkar*, AIR 1958 SC 538 : 1959 SCR 279.

[10424] ● ***Contradicting witness by confronting him with his previous statement.***—To contradict with the statement under Section 162, CrPC, the attention of the witness can be drawn to that part of the statement made before the police officer which contradicts his statement in the witness box. If he admits his previous statement, no further proof is necessary, if he does not admit, the practice generally followed is to admit it subject to proof by the investigating officer. *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012 : 1959 CrLJ 1231.

[10425] ● ***Defence witness not to be contradicted under Section 145 Evidence Act.***—A defence witness cannot be contradicted under Section 145 with his statement before the investigation officer. *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012 : 1959 CrLJ 1231.

[10426] ● ***Contradicting witness by confronting him with his previous statement.***—Section 145, Evidence Act is in two parts : the first part enables the accused to cross-examine a witness as to previous statement made by him in writing or reduced to writing without such writing being shown to him; the second part deals with a situation where the cross-examination assumes the shape of contradiction; in other words, both parts deal with cross-examination; the first part with cross-examination other than by way of contradiction, and the second with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to Section 152 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by Section 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of Section 145 of the Evidence Act. Nor one can be impressed by the argument that it would not be possible to invoke the second part of Section 145 of the Evidence Act without putting relevant question under the first part thereof. The difficulty is more imaginary than real. The second part of Section 145 of the Evidence Act clearly indicates the simple procedure to be followed. To *illustrate* : *A* says in the witness-box that *B* stabbed *C*; before the police he had stated that *D* stabbed *C*. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer. *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012 : 1959 CrLJ 1231 : 1959 Mad LJ (Cri) 759 : 1959 SCJ 1042 : (1959) 2 Mad LJ (SC) 201 : (1959) 2 Andh WR (SC) 201 : 1959 All Cr R 447 : 1959 All WR (HC) 532.

[10427] ● ***Omission when not treated as contradiction.***—An omission unless by necessary implication can be deemed to be part of an express statement cannot be treated as contradiction. There are three possible situations on which an omission could by fiction amount to contradiction. These are as follows :

(a) Where a recital is necessarily implied from the recital or recitals found in the statement. *Illustration* : On the recorded statement before the police the witness states that he saw *A* stabbing *B* at a particular point of time, but in the witness-box he says that he saw *A* and C stabbing *B* at the same point of time; in the statement to police the word 'only' can be implied *i.e.* witness said he only saw *A* stabbing *B*.

(b) A negative aspect of a positive recital in a judgment. *Illustration* : In the recorded statement before the police when witness says that a dark man stabbed *A* : The earlier statement must be deemed to contain the recital not only that the culprit was of dark complexion but also that he was not of fair complexion.

(c) When the statement before the police and the Magistrate cannot stand together. *Illustration* : The witness says in the recorded statement before the police that *A* after stabbing *B* ran away by a northern lane but in the witness-box he says the accused immediately after stabbing ran away through southern lane. *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012 : 1959 CrLJ 1231.

[10428] ● ***Statement reduced into writing—Meaning.***—Only those omissions which by necessary implication must be deemed to be part of the express statement which has been reduced to writing by a police officer can be used for the purpose of contradicting the evidence given in Court, because they alone are included within the meaning of the expression "statement reduced into writing" in Section 162.

No other omission in the previous police statement of a witness can be permitted to be used for the purpose of contradicting the evidence given by a witness in Court, however important it may be in the eyes of the Court, and even though in the opinion of the Court, the fact omitted to be stated is such, as in the normal course, a witness is expected to state, or a police officer is expected to record. To hold otherwise is not in accord with the plain meaning of the word "statement" in Section 162, and would stretch its meaning beyond what is clearly justified. *Tahsildar Singh* v. *State of U.P.*, AIR 1959 SC 1012 : 1959 CrLJ 1231 : 1959 SCJ 1042 : 1959 MLJ (Cri) 759.

[10429] ● ***Evidence given at preliminary enquiry.***—Where in a criminal trial a previous statement is put to a witness in cross-examination under Section 145 Evidence Act, its primary purpose is to contradict the witness by reference to the evidence he gives at the trial. Hence in a trial with jury it cannot be said that the Sessions Judge is wrong in law in telling the jury that the pervious statement on which the defence relied may help the defence to contend that the girl prosecutrix, in the trial for an offence under Section 376, Penal Code, is not a straight forward witness and is changing her story from time to time, but the said previous statement cannot be treated as substantive evidence at the trial. *Chittaranjan Dass* v. *State of West Bengal*, AIR 1963 SC 1696 : (1963) 2 CrLJ 534.

[10430] ● ***Omission in earlier statement when to be relied upon to contradict subsequent state-***

ment.—Witnesses in their statements before the police attributed a clear intention to the accused to commit murder, but before the Court they stated that the accused was insane and therefore, he committed the murder. In the circumstances it was necessarily implied in the previous statements of the witnesses before the police that the accused was not insane at the time he committed the murder. In this view the previous statement of the witnesses before the police can be used to contradict their version in the Court. *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563 (1569) : 1964 (2) CrLJ 472 : (1964) 7 SCR 361.

[10431] ● ***Court to permit party calling witness to put questions in the nature of cross-examination.***—The Court can permit a person who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief. In the present case, what happened was that some of the witnesses faithfully repeated what they had stated before the Police in the examination-in-chief, but in the cross-examination they came out with the story of insanity of the accused. The Court, at the request of the Advocate for the prosecution, permitted him to cross-examine the said witnesses. It is not suggested that the Advocate appearing for the accused asked for a further opportunity to cross-examine the witnesses and was denied of it by the Court. The procedure followed by the learned Judge does not conflict with the express provisions of Section 154 of the Evidence Act. *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563 : 1964 (2) CrLJ 472 : (1964) 7 SCR 361.

[10432] ● ***Admission to be clear if used against person making them.***—Admissions must be clear if they are to be used against the person making them. They are substantive evidence by themselves in view of Sections 17 and 21 of the Evidence Act, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness-box or not and whether such party when appearing as witness was confronted with those statements in case it has made a statement contrary to those admissions. *Bharat Singh* v. *Bhagirathi*, AIR 1966 SC 405 : 1966 SCD 153 : (1996) 1 SCR 606 : (1996) 2 SCJ 53.

[10433] ● ***Previous inconsistent statement when amounts to admission.***—When the previous inconsistent statement amounts to an admission duly proved, it can be used without being put to the witness for explanation. *Bharat Singh* v. *Bhagirathi*, AIR 1966 SC 405 : (1966) 1 SCR 606.

[10434] ● ***Previous statement used to contradict witness not substantive evidence.***—A previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. *Bhagat Singh* v. *Bhagirathi*, AIR 1966 SC 405 : (1996) 2 SCJ 53.

[10435] ● ***Previous statement not to be used either to contradict by corroborate.***—When a person is not examined as a witness in the case, his previous statement cannot be used either to contradict his evidence or corroborate it even if it is to be held that it is a statement coming under Section 154, CrPC. *Mohar Rai* v. *State of Bihar*, AIR 1968 SC 1281 : 1968 CrLJ 1479 : 1968 SCD 584 : 1968 SCJ 1 : (1968) 3 SCR 525.

[10436] ● ***No cross-examination permissible of previous witness.***—No cross-examination is permissible under Indian law of a defence witness in respect of his previous statement to the police under Section 162, CrPC. *Laiman Kalu* v. *State of Maharashtra*, AIR 1968 SC 1390 : 1968 CrLJ 1647 : 1969 SCD 364 : (1968) 3 SCR 634.

[10437] ● ***Person when subsequent by accused of offence.***—Where a person who made statement during investigation of a complaint is subsequently accused of the offence his statement cannot be used either to contradict or corroborate him or other accused. *Mohar Rai* v. *State of Bihar*, AIR 1968 SC 1281 : 1968 CrLJ 1479.

[10438] ● ***Approver testimony and its corroboration.***—When the approver gave his police statement he did not know that he would be granted pardon and possibly for that reason had not come out with all the facts known to him and he did so while he was making his statement before the Magistrate as he knew by then that he would be tendered pardon on condition that he would disclose all the facts known to him. The omission in the police statement, therefore, by itself would not necessarily have rendered his evidence unreliable. In considering whether the approver's evidence passed the test of reliability, the Court would have to consider whether taken as a whole and in the light of the facts and circumstances of the case, it was a credible version or not. *Madan Mohan Lal* v. *State of Punjab*, AIR 1970 SC 1006 : (1970) 2 SCC 733 : 1970 SCC (Cri) 509 : 1970 CrLJ 898.

[10439] ● ***Witness admitting record true but statement false given under Police pressure.***—The witness denied her statement before the committal Court when she came to the Court of Session she was declared hostile and was allowed to be cross-examined by the Public Prosecutor. The Public Prosecutor read to her the whole of her statement before the committal Court and asked her whether it was her statement. She admitted that it was true record of what she had stated before the committal Court, but she said that it was a false statement given under "Police pressure". The objection taken to the admissibility of the statement was that every single passage which differed from her testimony in the Court of Session was not put to her with a view to affording her an opportunity of explaining why she had made a contrary statement. No doubt, if there were some passages here and there which differed from her later version, that procedure would have been necessary. Here the witness admitted that her statement was truly recorded in the committal Court. She only denied that it was a true statement because she was made to depose that way by the Police. It would have been useless to point out the discrepancies between the two statements because her explanation would have been the same. In these circumstances, the requirements of Section 145 of the Indian Evidence Act were fully complied with and the earlier statement could be read as evidence in the Sessions trial. *State of Rajasthan* v. *Kartar Singh*, AIR 1970 SC 1305 : (1970) 2 SCC 61 : 1970 SCC (Cri) 297 (301) : 1970 CrLJ 1144 : (1970) 1 SCR 56.

[10440] ● ***Tape recorded statement neither statement in writing nor reduced in writing.***—A tape recorded statement is neither a statement in writing nor reduced to writing. In Supreme Court it was contended that such statement can be utilized only for corroboration and not for contradiction. Rejecting the contention the Supreme Court held that tape recording of a former statement of a witness can be admitted in evidence to shake the credit of the witness under Section 155 (3) of the Evidence Act. It is clear that a previous statement made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three matters mentioned under Section 146(1), Exception 2 to Section 153 and Section 155(3) of the Evidence Act. Therefore it is not possible to accept the contention that the previous statement can be used only for the purpose of corroboration but not for the purpose of contradicting the evidence before the Court. If a previous statement made by a person can be used to corroborate his evidence given before the Court, on principle there is no reason why such previous statement cannot be used to contradict and also for the other purpose referred to above. And to contradict the witness with reference to earlier tape-recorded statement, resort should be taken to Section 145, Evidence Act. *N. Rama Reddi* v. *V.V. Giri,* AIR 1971 SC 1162 : (1970) 2 SCC 340 : (1971) 1 SCR 399 : (1971) 1 SCA 394 : (1971) 1 SCJ 483 : 1970 SCD 546 : 1971 Law Week (Cri) 75 : 1970 Ker LT 390.

[10441] ● ***Previous statement to contradict present one.***—The previous statement can be used only to contradict the present one. *Somnath* v. *Union of India*, AIR 1971 SC 1910 : (1971) 2 SCC 387 : 1971 CrLJ 1422.

[10442] ● ***Statement in panchnama not substantive evidence.***—Similarly statement made in *panchnama* too is not substantive evidence. It can be used for contradiction only. *Kanu Ambu Vish* v. *State of Maharashtra*, AIR 1971 SC 2256 : (1971) 1 SCC 503 : 1971 SCC (Cri) 211.

[10443] ● ***Witness whom confronted by previous statement.***—The witness confronted by previous statement should be afforded an opportunity to explain that part of statement. *K.A. Vaish* v. *State of Maharashtra*, AIR 1971 SC 2256 : (1971) 1 SCC 503 : 1971 SCC (Cri) 211 : 1971 CrLJ 1547.

[10444] ● ***Witness when admitted having signed previous statement.***—When a witness has admitted having signed his previous statement that is enough to prove that some statement of his was recorded and he has appended his signature. Even to this his attention has to be drawn. *Major Som Nath* v. *Union of India*, AIR 1971 SC 1910 : (1971) 2 SCC 387 : 1971 SCC (Cri) 559 : 1971 CrLJ 1422 : 1971 SCD 1126.

[10445] ● ***FIR not substantive evidence.***—First information report being not a substantive evidence the attention of the author thereof is to be drawn to the contents of FIR to discredit him with respect to the statement in FIR. *Hasib* v. *State of Bihar*, AIR 1972 SC 283 : 1972 CrLJ 233 : (1972) 1 SCWR 926.

[10446] ● ***Prosecution witness not allowed to be cross-examined by defence.***—Where a prosecution witness was not allowed to be cross-examination by the defence on a material point with reference to his earlier statement made before the police, his evidence stands untested by cross-examination and cannot be accepted as corroborating the evidence of other witness. AIR 1976 SC 560 : (1976) 1 SCC 442 : 1976 CrLJ 496 : 1976 CrLR (SC) 678 : 1976 UJ (SC) 940.

[10447] ● ***Notes on site plan use of.***—The notes on the site plan prepared by the investigating officer in accordance with the various situations pointed out to him by the witnesses are statements recorded by the police officer in the course of investigation and are hit by Section 162. These notes can be used only for the purpose of contradicting the concerned prosecution witness in accordance with the provisions of Section 145 and for no other purposes. *Jit Singh* v. *State of Punjab*, AIR 1976 SC 1421 : 1976 CrLJ 1162 : 1976 2 SCC 836.

[10448] ● ***Previous contradictory statement of wittiness—Use of.***—A previous contradictory statement of witness can be used only to contradict and discredit him. It cannot be used to impeach or undermine the credit of other witnesses. The trial Court was, therefore, in error in using the previous inconsistent statement of such a witness as a circumstance against the credit of these witnesses. Where the previous statement of such a witness made in the committal Court had not been transferred to the Sessions record, under Section 288, CrPC (1898), it could not be used as substantive evidence in the case. *Jit Singh* v. *State of Punjab*, AIR 1976 SC 1421 : (1976) 2 SCC 836 : (1976) SCC (Cri) 341 : 1976 CrLJ 1162.

[10449] ● ***Evidence of eye-witnesses falsification of.***—The evidence of the witnesses shows that the deceased had received 4 to 5 *lathi* blows at the hands of his assailants but the medical evidence of Dr. Jaiswal shows that he had only one lacerated wound on the scalp, a swelling and a few scratches. In view of the ocular evidence we should have expected many more *lathi* injuries on the person of deceased rather than just one swelling and a few scratches apart from the lacerated wound. Thus, this is also a very important suspicious circumstance which negatives the truth of the prosecution. *Lakshmi Singh* v. *State of Bihar*, AIR 1976 SC 2263 : (1976) 4 SCC 394 : 1976 SCC (Cri) 671 (680) : 1976 CrLJ 1736 : 1977 CrLR (SC) 76 : 1977 Cr App R (SC) 28.

[10450] ● ***Contradictions—Illiterate and ignorant women eye-witnesses.***—No doubt some minor contradictions here and there have been pointed out, but such contradictions are bound to appear when ignorant and illiterate women are giving evidence. Even in case of trained and educated persons, memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence. *Boya Ganganna* v. *State of Andhra Pradesh*, AIR 1976 SC 1541 : (1976) 1 SCC 584 : 1976 SCC (Cri) 102 (105) : 1976 CrLJ 1158 : 1976 CrLR (SC) 3.

[10451] ● ***Medical evidence contradictory of ocular evidence.***—The Medical Officer (PW 1) found that there were two incised wounds on the person of the deceased. One of them was a cut of the frontal and left parietal bones and the other was a cut of the left parietal bone. The ocular evidence on the record was to the effect that accused were all armed with axes and inflicted injuries on the head of the deceased with them. The presence of only two incised injuries was, therefore, a fact which did not corroborate the evidence of the witnesses. Medical evidence being contradictory of the ocular version, the finding cannot be recorded beyond all reasonable doubts. *Kasturi Lal* v. *State of Haryana*, AIR 1976 SC 2042 : (1976) 3 SCC 570 : 1976 SCC (Cri) 467 (469) : 1976 CrLJ 1574 : 1976 CrLR (SC) 275.

[10452] ● ***Prosecution evidence manifestly unbelievable and contradictory.***—Both the eye-witnesses radically changed the story that they had originally stated to the Police during investigation. Before the Police PW had denounced three persons as assailants. At the trial he has named two more persons. The eye-witnesses sharply contradict each other with regard to the identity of the person who dealt the fatal blow on the abdomen of the deceased with a *bhalla*. According to PW 1, it was the appellant who had caused, this injury. Directly contradicting PW 1, the other eye-witness PW 2 stated that this injury was caused by Rajeshwar who was assaulting with a *bhalla*, while his brothers were causing injuries to the deceased with *farsas*. From the above it is clear that these witnesses, have unscrupulously spoken the untruth on all vital points, which has polluted their testimony to the core. *Ramasray Pandey* v. *State of Bihar*, AIR 1976 SC 2147 : 1977 SCC (Cri) 374 (376-377) : 1976 CrLJ 1704 : 1976 CrLR (SC) 414.

[10453] ● ***Admission if proved in accordance with provision of Evidence Act.***—Even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, it is sound that if a witness is under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. *Sita Ram* v. *Ram Chandra*, AIR 1977 SC 1712 : (1977) 2 SCC 49.

[10454] ● ***Statement of witness—Contradiction or omission in.***—One curious practice not known to law adopted by him was that whenever a witness was asked about an omission with reference to the statement of the witness recorded by the investigating officer under Section 161, CrPC, the learned Public Prosecutor would make a statement whether the statement referred to in evidence was to be found or was not to be found in the statement under Section 161, CrPC and no attempt was made to prove the omission. Such concession for proof of contradiction or omission lacks support of law and is likely to be unfair to the witness in that when the investigating officer is questioned with regard to the contradiction or omission, a further opportunity will be available to him to explain the contradiction or omission. *Muthu Naicker* v. *State of Tamil Nadu*, AIR 1978 SC 1647 : (1978) 4 SCC 385 : 1979 SCC (Cri) 14 : 1978 CrLJ 1713 : 1978 CrLR (SC) 378.

[10455] ● ***Omission to state important fact in FIR contradiction.***—Omission to state an important fact in FIR is contradiction. It is also relevant under Section 11, Evidence Act. It is, however, worthy of notice that FIR is not an encyclopedia which is expected to contain all the details of the prosecution case; it may often be sufficient if broad facts constituting the prosecution case alone appear. *State of Haryana* v. *Harpal Singh*, AIR 1978 SC 1530 : (1978) 4 SCC 465 : 1979 SCC (Cri) 86 (90) : 1978 CrLJ 1603.

[10456] ● ***Statement to Police to be brief—Omission amounts to contradiction.***—Statement to police are meant to be brief. Omission amounts to contradiction when it is in respect of a vital point. *Matadin* v. *State of U.P.*, AIR 1979 SC 1234 : 1980 Supp SCC 157 : 1979 SCC (Cri) 627 : 1979 CrLJ 1027 : 1979 CrLR (SC) 452.

[10457] ● ***Statement of witness—Omission in as his mind not working properly.***—In his statement to the Police PW 9 did not mention what he stated before the Court that appellant Yaqoob assaulted him with a knife and appellant Bhagwan assaulted with as "tami". The reason for the omission according to him was that at that time his mind was not working properly. However, he does not say when his mind started functioning properly and when exactly the memory of the incident came flooding back to him to enable him to narrate the story in such detail before the Court. The explanation that the mind was not working properly does not also seem to be correct. *Bhagwan* v. *State of Madhya Pradesh*, AIR 1980 SC 1750 : 1980 Supp SCC 336 : 1981 SCC (Cri) 253 (254, 255) : 1980 CrLJ 1269.

[10458] ● ***Previous statement contradiction in.***—"Be that as it may, Mahabir's earlier statement which he had made before the committing Magistrate could be used to contradict him when he appeared as a witness at the trial. In fact it was so used to show that the witnesses had deliberately resiled from a part of his previous statement to favour Tej Ram. Mahabir was confronted with that portion of his previous statement in which he had deposed to the participation of Tej Ram in the assault on the deceased. He did not give any satisfactory explanation, but at the same time, in a casual fashion, admitted having made that statement before the committing Magistrate. This contradiction shows that the subsequent statement in which he had tried to exculpate Tej Ram, was not true. There were other reliable evidence on the record, also confirming this conclusion." *State of Haryana* v. *Tej Ram*, AIR 1980 SC 1496 : 1981 SCC (Cri) 257 (262) : 1980 CrLJ 1057 : 1980 CrLR (SC) 514 : 1980 Cr App R (SC) 375.

[10459] ● ***FIR—Not to contain all details stated in Court.***—FIR may not contain all the details stated in Court. *Nawratan* v. *State of Bihar*, AIR 1980 (NOC) 1 (SC) : (1979) 2 SCC 488 : 1979 SCC (Cri) 665 : 1979 CrLJ 1295 : 1979 CrLR (SC) 605. **TO THE SAME EFFECT :** *State of Haryana* v. *Harpal Singh,* AIR 1978 SC 1530 : (1978) 4 SCC 465 : 1979 SCC (Cri) 86 (90) : 1978 CrLJ 1603.

[10460] ● ***Statements by witnesses made during investigation not to be used as substantive evidence.***—Section 162 bars use of any statement made by any person to a police officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for contradicting the witness in the manner provided by Section 145, Evidence Act. Any part thereof may also be used in re-examination to explain any matter referred to in cross-examination. Exceptions to this embargo relate to statements falling within the provisions of Section 32(1) and Section 27, Evidence Act. Otherwise statements falling under Section 162 cannot be used as substantive evidence. Definition of 'proved' in Section 3 does not enable a Court to take into consideration matters, including statements, whose use is statutorily barred. *Hazari Lal* v. *State (Delhi Admn.)*, AIR 1980 SC 873 : (1980) 2 SCC 390 : 1980 CrLJ 564.

[10461] ● *Statements of witnesses read in extenso to then.*—The requirements of Section 288, CrPC would be fully complied with if statements of witnesses are read *in extenso* to them and they admit that they have made those statements in the committal Court. *Dhanabal* v. *State of Tamil Nadu*, AIR 1980 SC 439 : (1980) 2 SCC 465 : 1980 SCC (Cri) 340 (345) : 1980 CrLJ 368 : 1980 CrLR (SC) 90 : (1980) 2 SCR 491.

[10462] ● *Witness making two inconsistent statements.*—It is true that PW 2 tried to give a go by to his previous statement in the committing Court but at the same time he admitted most of the statements made by him before the committing Court to be correct. The witness has not alleged that his statement before the committing Court was given under pressure of the Police. Normally, a witness who makes two inconsistent statements is not reliable but where the Court is satisfied that the earlier statement was true that would not debar the Court from acting on such evidence. Moreover both the Courts had been impressed by the evidence of PW 20 before the committing Court and have held that the said statement was true. *Zile Singh* v. *State (Delhi Administration)*, 1980 Supp SCC 690 : 1981 SCC (Cri) 622 (623) : 1979 CrLR (SC) 703 : 1979 UJ (SC) 891.

[10463] ● *Statements of witness omission in.*—Shrinarayan, a 45 years old school teacher has made a categorical admission in his evidence that he had no talk with the appellant at all. In fact the claim of Shrinarayan Sharma that he called out the appellant and that the appellant said that he would not open the door, seems to us a clear improvement over what he narrated to the Police immediately after the incident. He did not tell the Police anything of the kind. When his attention was drawn to this significant omission, his explanation was that he could not say why the Police did not record that part of his statement. We have no doubt that Shrinarayan Sharma did not tell the Police during the course of his statement, which was recorded immediately after the incident that he called out for the appellant and that the appellant stated that he would not open the door. This was far too important a happening which the witness would have failed to disclose to the Police. *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*, AIR 1981 SC 765 : (1981) 2 SCC 35 : 1981 SCC (Cri) 315 (320) : 1981 CrLJ 325 : 1981 CrLR (SC) 616 : (1981 2 SCR 384.

[10464] ● *Omission to mention incidental facts.*—Regarding the failure of PW 2 to mention in her statement to police about her clothes becoming stained with blood when they were protecting the deceased is only an omission and cannot be said as contradiction. *Gurnam Kaur* v. *Bakshish Singh*, AIR 1981 SC 631 : 1981 SCC (Cri) 496 (500) : 1981 CrLJ 34 : 1980 CrLR (SC) 686 : 1981 Cr App R (SC) 328.

[10465] ● *FIR not to contain details of occurrence.*—The FIR need not contain the details of the occurrence. The omission to mention in the FIR that PW 3 had informed the villagers about the occurrence. *State of Haryana* v. *Sher Singh*, AIR 1981 SC 1021 : (1981) 2 SCC 300 : 1981 SCC (Cri) 421 (426) : 1981 CrLJ 714 : 1981 CrLR (SC) 230 : (1981) 3 SCR 1.

[10466] ● *Statement made by one contradicted by another.*—If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under Section 145. In other words, where the statement made by a person or witness is contradicted not by his own statement, but by the statement of another prosecution witness, the question of the application of Section 145 does not arise. If it is assumed that when a statement of a witness is contradicted by another the former witness should be cross-examined to explain the contradiction then it will be extremely difficult for an accused or a party to rely on the *inter se* contradiction of various witnesses and every time when the contradiction is made, the previous witness will have to be recalled for the purpose of contradiction. This is neither the purport nor the object of Section 145, Evidence Act. *Mohanlal Gangaram Gehone* v. *State of Maharashtra*, AIR 1982 SC 839 : (1982) 1 SCC 700 : 1982 SCC (Cri) 334 : 1982 (2) CrLJ 630 : 1982 Mad LJ (Cri) 431.

[10467] ● *Trap witnesses—Absence of contradiction.*—It was urged that both the witnesses in their respective statements in the course of investigation have not refused that they pointed out that the currency notes were kept under the pillow. A further omission was pointed out that while Mahavir Prasad has stated that accused started quarrelling with him which necessitated summoning additional police help, both the witnesses while refusing to the quarrel picked up by the appellant so as to support the evidence of Mahabir Prasad have failed to refer to this aspect in their statements in the course of investigation. These are omissions of trivial details and have hardly any bearing on the main part of the prosecution case. The so-called inner variations between the evidence of these two witnesses and omissions of trivial details would not cause any dent in the testimony of these two witnesses. *Kishan Chand Mangal* v. *State of Rajasthan*, AIR 1982 SC 1511 : (1982) 3 SCC 466 : 1983 SCC (Cri) 92 (101) : 1982 CrLJ 1 : 1983 CrLR (SC) 477 : (1983) 1 SCR 569 : 1982 UJ (SC) 885 : (1983) 1 Crimes 20.

[10468] ● ***Appreciation of evidence.***—The infirmities referred to by the High Court consisted in according to the High Court, improvements made by the witnesses and variations in their earlier and latter statements. On that ground alone, the testimony of PWs 1, 2, 3 and CW 1 cannot be held to be infirm. It is the duty of the Court to remove the grain from the chaff.

There four witnesses are the injured witnesses having received the injuries during the course of the incident. Their presence at the time and place of the occurrence cannot be doubted, in fact it has not been challenged by defence.

As both the parties were inimical for a long time, it will be prudent to convict only those persons whose presence and participation in the occurrence have been proved by the prosecution beyond reasonable doubt. *Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126 : (1983) 1 SCC 218 : 1983 SCC (Cri) 176 (180) : 1983 CrLJ 218 : (1983) 2 SCR 45 : 1983 UJ (SC) 175.

[10469] ● ***Material omissions in statement.***—PW 1 did depose at the trial that it was accused 2 and 3 who had held the deceased and thereafter accused 1 gave a blow with weapon MO-3 on the neck of the deceased. He did not mention these details either in Ex P-1 or in the statement recorded under Section 164, CrPC. In view of material omissions the High Court can be said to have rightly acquitted the accused. *Rajagopal* v. *Sadaya Gounder*, 1984 Supp SCC 619 : 1983 SCC (Cri) 128 (129) : 1983 CrLR (SC) 116.

[10470] ● ***Evidence in Court when inconsistent with earlier statements made before Police.***—Even the statements made before the Police were recorded four months after the occurrence. Copies of these statements were not made available to the defence on the spacious plea that the prosecution did not seek to rely on these statements. The Trial Court was wholly wrong in taking the view that it was not necessary to make available these statements to the defence for the purposes of cross-examination in as much as the prosecution did not wish to rely on these statements. The defence cannot be deprived of or denied the right to avail of these statements in order to test the evidence of the concerned witness or confront him with his earlier version in case the evidence in Court is inconsistent with the earlier statements made before the Police. *Lalchand* v. *State of Haryana*, AIR 1984 SC 226 : (1984) 1 SCC 686 : 1984 SCC (Cri) 355 (358) : 1984 CrLJ 164 : (1984) 1 Crimes 337.

[10471] ● ***Statement made to Police after during investigation—Proper procedure to confront witness with contradictions.***—A statement recorded by the Police Officer during investigation is inadmissible in evidence and the proper procedure is to confront the witness with the contradictions when they are examined and then ask the Investigating Officer regarding the contradictions. Statement made to a police officer during the investigation can be used only for the purpose of contradicting the prosecution witness under Section 145 Evidence Act. It cannot be used for the purpose of cross-examination. It may be pointed out that the trial Court has marked large portions of the statements recorded by the police without confirming to the actual contradiction. If attention had been bestowed at the appropriate stage, this situation would not have arisen. *State (Delhi Administration)* v. *Laxman Kumar and Indian Federation of Women Lawyers* v. *Shakuntala*, AIR 1986 SC 250 : (1985) 4 SCC 476 : 1986 SCC (Cri) 2 (26) : 1986 CrLJ 155 : 1985 CrLR (SC) 501.

[10472] ● ***Benefit of doubt.***—The injured witness PW 6 sustained 21 incised wounds. This cannot be disputed. However, his subsequent conduct and various statements made by him during investigation and trial render the entire prosecution story suspect. He is only eye-witness to the incident. He made a statement on June 3, 1976, which is marked as Ex D-3. In this he gives a version different from the one given to the Police. As per this statement, he has said that he went alongwith Prahlad and Jiwan from Delhi in order to recover the girl, in relation to whom the offence took place. At the time of cross-examination, he gave an affidavit (Ex D-4) dated June 29, 1976, which purports to bear his thumb-impression according to which he is reported to have said that the Police were getting statements by him recorded at their pleasure and were trying to protect the real culprits, namely, Jiwan and Prahlad. He is alleged to have put his thumb-impression upon an application of the same date addressed to the Judicial Magistrate offering to give statement before the Court. This application is Ex D-5 which was also produced when he was cross-examined. Ex D-6, dated July 1, 1976 in another affidavit to the same effect. He engaged a lawyer examined as DW-3 who filed a complaint against Jiwan & Prahlad which is Ex D-7. This complaint was ultimately dismissed for default on

August 4, 1976. We find that the prosecution has not come to the Court with the true story and the conduct of PW-6 leaves considerable doubt in our minds as to what really happened. The appellants are entitled to the benefit of doubt. *Chhita* v. *State of Rajasthan*, 1987 Supp SCC 639 : 1988 SCC (Cri) 133 (134) : 1988 CrLR (SC) 254.

[10473] ● ***Contradiction in evidence of witness.***—It is true that there are many contradictions in the evidence of witness. He has not attributed overt acts to individual accused in his statement before the Police whereas he has attributed such overt acts in his evidence before the Court. But that is no ground to reject his entire testimony. It must not be forgotten that he was a victim of the assault. Fortunately, he has survived. He must, therefore, be considered as the best eye-witness. The Court must not attach undue importance to minor discrepancies. The version of the prosecution case may be discarded. *Appabhai* v. *State of Gujarat*, AIR 1988 SC 696 : 1988 SCC (Cri) 559 (565) : 1988 CrLJ 848 : 1988 CrLR (SC) 178 : JT 1988 (1) SC 247 : 1988 UJ (SC) 27.

[10474] ● ***Statement made by witness before commission—Use of, to contradict him or impeach his credit—Not permissible.***—A perusal of Sections 145, 155 and 151 of the Evidence Act clearly indicates that there are two purposes for which a previous statement can be used. One is for cross-examination and contradiction and the other is for corroboration. The first purpose is to discredit the witness by putting to him the earlier statement and contradicting him on that basis. So far as corroboration is concerned, it could not be disputed that it is none of the purposes of the defence to corroborate the evidence on the basis of the previous statement. Section 145, therefore, is the main section under which relief was sought by the accused. The use for which the previous statement was asked for was to contradict him if necessary and if it was a contradiction then the earlier statement was necessary so that the contradiction be put to the witness and that part of the statement can be proved. These purposes for which the precious statements are required could not be said to be purposes which were not against the witness. The two aspects of the restrictions which Section 6 of the Commission of Inquiry Act contemplates are the only two aspects which could be the result of the use of these statements. It is, therefore, clear that without going into the wider questions even a plain reading of Section 6 will prohibit the use of the previous statements at the trial either for the purposes of cross-examination to contradict the witness or to impeach his credit. *Kehar Singh* v. *State (Delhi Admn.)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 (748, 749) : 1989 CrLJ 1 : 1988 CrLR (SC) 536 : JT 1988 (3) SC 191 : (1988) 3 Crimes 209.

[10475] ● ***Dowry death—Contradiction in evidence.***—The evidence of the Investigating Officer, Sub-Inspector Bansi Dhar undoubtedly is to the effect that when he went to the residence of Wazir Chand for the first time for investigation, the stove was lying on the slab. However, the evidence of the photographer who went to the residence of Wazir Chand alongwith the Investigating Officer is to the effect that when he went there, said stove was lying on the kitchen floor. In view of this contradiction, it is not impossible to hold that the stove was placed on the slab when Veena was preparing tea for the family and, hence, an accident was highly unlikely. *Wazir Chand* v. *State of Harayana*, AIR 1989 SC 378 : (1989) 1 SCC 244 : 1989 SCC (Cri) 105 : 1989 CrLJ 809 : 1989 CrLR (SC) 124 : JT 1988 (4) SC 558 : (1988) 1 Crimes 173.

[10476] ● ***Evidence of prosecution witnesses unacceptable and untrustworthy.***—In the instant case, according to PW-12, he recorded the statement of PWs-7 and 10 only on December 13, 198[illegible], *i.e.*, to say nearly 21 days after the occurrence. But it is surprising to note that PW-7 swears that PW-12 met him on the second or third day of the offence and recorded his statement and thereafter PW-12 did not contact him at all. PW-10 has deposed that the Police recorded her statement on the very next day of the occurrence and thereafter she did not meet any Police. Thus we find that the evidence of PW-12 on the one hand and the evidence of PW-7 and PW-10 on the other hand are irreconcilably in conflict even with reference to the dates of examination of PWs-7 and 10. If the evidence of PW- 7 and PW-10 is to be accepted with regard to the dates of their examination we have to hold that even earlier to the registration of the case, these two witnesses were contacted by the Police and not afterwards. *Kewal Krishan* v. *State of Punjab*, AIR 1989 SC 950 : 1989 SCC (Cri) 698 (700) : 1989 CrLJ 1248 : 1989 CrLR (SC) 250 : JT 1989 (1) SC 155 : (1989) 1 Crimes 389.

[10477] ● ***Illegal gratification proof.***—In the instant case, from PW 10 it is elicited that she during the investigation stated to the Police that her husband with appellant came to her house even at 8 p.m. while the case of the prosecution is that the appellant came to the house of PW 10 only at about 10.30 p.m. or 11 p.m. DW 1 who was then the writer in the Police Station (M.H.C.) states that the appellant was at the Police Station at 10.05 p.m. If it is so as rightly pointed out by the learned defence Counsel, the appellant could not have accompanied PW 7 at 10.30 or 11.00 p.m. to his house to get the illegal gratification. Thus, a scrutiny of the evidence of PW 7 and 10 reveals that their version is nothing but a conglomeration of contradiction. *Kewal Krishan* v. *State of Punjab*, AIR 1989 SC 950 : 1989 SCC (Cri) 698 (701) : 1989 CrLJ 1248 : 1989 CrLR (SC) 250 : JT 1989 (1) SC 155 : (1989) 1 Crimes 389.

[10478] ● ***Police resorting to violence while pouring investigation.***—Immediately after the incident the earliest version is the report (application given by Indal) on 16-30-1967. But during the cross-examination this witness stated that in the report he has mentioned certain facts which were noticed by him, certain facts about which he had heard and certain facts he omitted to mention. He said that incident of inserting chilies in the private part of Ramdei was seen by him but then admitted that in this report made by him it has not been mentioned. It is correct to say that I got written on the application some facts which I saw myself, some of them which I heard. The insertion of chillies in the vagina of Ramdei was seen by my own eyes. I have not stated that I have seen the insertion of chillies in the vagina. This statement by Indal who is alleged to have made the application which is the foundation of the prosecution makes it clear that he had not stated in that application what he personally saw. This part of omission is an important aspect of the prosecution version……

As regards the incident of Ramdei, neither the Sub-Inspector nor any of the Constables was alleged to have been responsible for the alleged story of introduction of powdered chillies in her private part. According to her, Maiku Chowkidar took the chillies in powder form and Mullu put the chillies in the Vagina. In her cross-examination she herself admitted that she did not tell about the incident to anyone. She told about it to the CID Inspector after 1½ years or 2 years after the incident. She also said that she had no injury mark and that she was not medically examined. On the basis of this evidence coupled with what Indal stated in his application, no one could be convicted for the alleged offence against the appellants. *Maiku* v. *State of U.P.*, AIR 1989 SC 67 : 1989 Supp (1) SCC 25 : 1989 SCC (Cri) 117 (122) : 1989 CrLJ 860 : 1989 CrLR (SC) 10 : JT 1988 (4) SC 73 : (1988) 3 Crimes 638.

[10479] ● ***Evidence of witness tainted with interestedness and unsafe to act upon.***—"After careful reading of evidence of PW-1, we are not much impressed. Firstly, PW 1 admittedly was not well disposed towards the respondents on account of various criminal proceedings which he has admitted in his cross-examination and so his evidence is highly interested and biased. Secondly, PW-1 who claims to have been standing at the scene throughout and witnessing the entire occurrence has not been attacked by any of the respondents and there was not even a scratch on his body. Thirdly, though he claims to be a full occurrence witness, his evidence before the Court is an exaggeration over his earlier version made in his first report in which he has not stated that the respondent 4 was armed with a gun. Fourthly, in the first information report PW 1 has stated that all the respondents barring respondents 1 and 6 also fired and indulged in attacking the prosecution party with spears, pharsas and lathis. Fifthly, though PW 4, the Investigating Officer, has categorically stated that PW 1 assisted him in the investigation and pointed out the places from where various material objects were seized, PW 1 emphatically denies of PW 4 visiting the place of occurrence in his presence and also his helping PW 4 in preparing the site plan. Sixthly, in the first information report he has mentioned that the incident was witnessed by Khacheru Singh, Shailendra Singh, Niranjan Singh *etc.* residents of Badarakha, but none of the witnesses mentioned in the report has been examined by the prosecution before the Court. Seventhly, he pleads totally ignorant of any of the respondents sustaining injuries. Lastly, he denies knowledge of the vendees filing a declaratory suit and obtaining a decree. All the above points which are in the nature of omissions, contradictions and exaggerations compel this Court to arrive to a conclusion that the evidence of PW 1 tainted with interestedness and that it is unsafe to act upon his evidence and that he is not coming forward with the entire truth." *Biri Singh* v. *State of Uttar Pradesh*, 1992 SCC (Cri) 915 (931-932) : 1992 Supp (2) SCC 264 : 1992 CrLJ 1510 : JT 1992 (2) SC 229.

[10480] ● ***Contradiction on non-material point.***—We are at a loss to understand how the High Court has found contradiction in the statement of PW 26 and FIR when none exists. Even if there is any contradiction on a non-material point that is no ground to reject the whole of the testimony of the witnesses.

Appeal against acquittal was allowed. *State of Karnataka* v. *Lakshmanaiah*, AIR 1993 SC 100 : 1993 Supp (20 SCC 420 : 1992 SCC (Cri) 755 (758) : 1992 CrLJ 3997 : JT 1992 (4) SC 326 : (1992) 2 UJ (SC) 565 : (1992) 2 Crimes 1130.

[10481] ● ***Benefit of doubt given to accused because of contradiction relating to his complicity.***—The High Court noted that one of the eye-witnesses stated that Devi Dutt was armed with the spear and participated in the act of assault but another witness Ram Prasad, stated that Devi Dutt had no weapon in his hand. Since Ram Prasad was not declared as a hostile witness and as there was no reason to reject his evidence, so far as Devi Dutt was concerned, the High Court was of the view that it was quite probable that Devi Dutt did not take part in the act of assault but he arrived at the time of occurrence only out of anxiety, particularly when he had no weapon in his hand an he could not have participated in the assault. It appears that the High Court has taken into consideration the facts and circumstances of the case quite dispassionately and has given the benefit of doubt to the accused Devi Dutt because of the contradiction relating to his complicity. The High Court has taken a very reasonable view. *Annaporna Dutt* v. *State of U.P.*, AIR 1993 SC 1207 : 1993 Supp (2) SCC 246 : 1993 SCC (Cri) 502 (508, 509) : 1993 CrLJ 490 : JT 1992 (5) SC 614 : (1992) 3 Crimes 793.

[10482] ● ***No conflict between direct evidence and medical evidence.***—"Now coming to the head injury, which resulted in death, all the eye-witnesses have stated that Babu Lal (A 1) gave a blow with the blunt portion of axe on the head, which caused only a depression. It is quite possible that first two Doctors, who examined the deceased, did not notice this depression. Only after X-ray examination was taken, the head injury was found and after death during the post-mortem examination, the Doctor clearly found that there was a fracture of the parietal bone and there was haemotoma. Therefore, it cannot be said that there is any conflict between the direct evidence and the medical evidence." *Babu Lal* v. *State of Madhya Pradesh*, AIR 1993 SC 1941 : 1993 SCC (Cri) 1026 (1028) : 1993 CrLJ 2667.

[10483] ● ***Contradiction in two statements—No explanation as to.***—In the chief examination PW 2, the mother of the deceased stated that there were domestic quarrels between her daughter, the deceased and the accused and coming to know of the occurrence she and her husband went and questioned the deceased who told them that the accused beat her, poured Kerosene and set her on fire. Having stated so in the Chief Examination, in the cross-examination she introduced a different version that her daughter was conscious and on being questioned by them she told them that she got annoyed with her husband and she herself poured Kerosene on her person and that if she survived, she would be held responsible for the act and therefore, she falsely gave the name of her husband as the person who poured Kerosene and set fire. Then in the re-examination the witness was asked as to why she gave two statements for which she gave an evasive answer by stating that she did not want to offer any explanation concerning the contradiction involved in the two statements. This aspect has been considered by the Courts below and it has been rightly *held* that in view of her evasive answer in the re-examination, the only inference is that certain circumstances like her affection for the grand-children must have compelled her to give such a version. In any event the version given by her in cross-examination is not entitled to any weight. *Ganpat Mahadeo Mane* v. *State of Maharashtra*, AIR 1993 SC 1180 : 1993 Supp (2) SCC 242 : 1993 SCC (Cri) 491 (495) : 1993 CrLJ 298 : JT 1992 (6) SC 177 : (1993) 1 UJ (SC) 213 : (1992) 3 Crimes 633.

[10484] ● ***Contradiction by prosecutrix when naming only one person.***—When the prosecutrix laid claim in the FIR and to which she stuck to at the trial, that Somanna and Venkataswamy had committed rape on her, the High Court viewed that there was a contradiction made by the prosecutrix when naming only one person as her ravisher to Dr. Reeta, PW 3. Surprisingly the prosecutrix's statement to Dr. Reeta about her naming one person to have committed rape on her was not put to the prosecutrix during cross-examination. In the absence of the same being put to her it cannot be said that their was a contradiction for there might have been an omission which the prosecutrix could supply and render a plausible acceptable explanation. *Narayanamma* v. *State of Karnataka*, (1994) 5 SCC 728 : 1994 SCC (Cri) 1573 (1576).

[10485] ● ***Witness not confronted with alleged inconsistent statement.***—In the instant case PW 1 was not confronted with the alleged inconsistent statements contained in the FIR or in his case diary statement under Section 161, CrPC, yet the High Court relied on these statements which is not permissible under the law, unless inconsistent statements were put to the witnesses. *State of U.P.* v. *Babul Nath*, (1994) 6 SCC 29 : 1994 SCC (Cri) 1585 (1590).

[10486] ● ***Witness not confronted with his case diary statement.***—The witness was not confronted with his case diary statement at all nor there is any material before the Court to accept the contention that the witness had not disclosed this fact to the Police particularly when the witnesses with an emphatic denial stated that it is not a fact that he did not disclose to the Police that he had seen the appellant and the deceased moving towards their village. *Laxman Naik* v. *State of*

Orissa, AIR 1995 SC 1387 : (1994) 3 SCC 381 : 1995 CrLJ 2692.

[10487] ● *Vital contradictions in evidence of eye-witnesses.*—The evidence of the eye-witnesses shows that not only the appellants but others also inflicted injuries on the head with *lathis*. The Doctor, who examined the deceased found three lacerated injuries on the head of the deceased and he opined that those could have been caused by a hard and blunt object like an iron rod, shovel or *lathi, etc*. The case of the appellants was singled out only on the ground that they used the iron rod and shovel. In their earlier statements, the alleged eye-witnesses stated that all the accused including the two appellants inflicted blows with their respective weapons on different parts of the body, as can be seen from the cross-examination of the Investigating Officer. These are all vital contradictions in the evidence of the alleged eye-witnesses and it cannot definitely be said that these two appellants alone are responsible for causing the death. *Phani Bhushan Das* v. *State of West Bengal*, AIR 1995 SC 70 (72) : 1995 CrLJ 551.

[10488] ● *Statement to be used to contradict maker.*—A statement made to a Police Officer, when he is investigating into an offence in accordance with Chap. XII of the CrPC cannot be used to even corroborate the maker thereof in view of the embargo in Section 162(1), CrPC appearing in that Chapter and can be used only to contradict him (the maker) in accordance with the proviso thereof, except in those cases where subsection (2) of the section applies. *Jagdish Narain* v. *State of Uttar Pradesh*, AIR 1996 SC 3136 : (1996) 8 SCC 199 : 1996 SCC (Cri) 565 (569) : JT 1996 (3) SC 89.

[10489] ● *No contradiction or variation in deposition of witness from what she stated in FIR.*—It was argued that PW 5 was categoric in the first information report that Sham Singh fired from his pistol at Balbir Singh which struck his chest on the left side and he fell down. Thereafter, the other accused attacked the deceased with Barchha and inflicted injuries which resulted in the death of Balbir Singh instantaneously. At the trial, PW 5, however, deposed that Sham Singh fired from the pistol at Balbir Singh, but Balbir Singh was not hit. Balbir Singh fell down and bundles of wheat fell on his head and the other accused inflicted various injuries on other parts of the body of Balbir Singh like thigh, chest, back, *etc*. There is no discrepancy between FIR and the deposition of PW 5 in Court. We should remember that FIR was given within two hours of the incident and PW 5, a lady, would have been in an agitated mind then. In FIR, PW 5 only stated that Sham Singh fired from his pistol at her husband which struck his chest. That could only be what she inferred. She did not state that her husband died as a result of the above pistol shot. It is because of the various injuries inflicted by the other accused, Balbir Singh, died. And as PW 5, she stated that Balbir Singh was not hit when the accused-Sham Singh fired from the pistol at Balbir Singh, but Balbir Singh fell down. Bundles of hay fell on his hand and the other accused inflicted various injuries on other parts of the body. Really, there is no contradiction or variation in the deposition of PW 5 from what she stated in FIR. *Baldev Singh* v. *State of Punjab*, AIR 1996 SC 372 (375) : (1995) 6 SCC 593 : 1995 SCC (Cri) 1132 : JT 1995 (7) SC 286.

[10490] ● *Statement of witness to be used at trial only for contradictions omissions.*—The Court should not come to the conclusion on the basis of Section 161 statements which are not evidence. It can be used at the trial only for contradictions or omissions when the witness was examined. *Omkar Namdeo Jadhao* v. *Second Additional Sessions Judge, Buldana*, AIR 1997 SC 331 : (1996) 7 SCC 498 : 1996 SCC (Cri) 488 (489) : JT 1996 (1) SC 247.

[10491] ● *Impeachment of credit of witness.*—The credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in Court. This principle is delineated in Section 155(3) of the Evidence Act and it must be borne in mind when reading Section 145 which consists of two limbs. It is provided in the first limb of Section 145 that a witness may be cross-examined as to the previous statement made by him without such writing being shown to him. But the second limb provides that if it is intended to contradict him by writing his attention must before the writing can be proved be called to those parts of it which are to be used for the purpose of contradicting him there is thus a distinction between the two vivid limbs though subtle it may be. The first limb does not envisage impeaching the credit of a witness but it merely enables the opposite party to cross-examine the witness with reference to the previous statements made by him. He may at that stage succeed in eliciting materials to his benefit through such cross-examination even without resorting to the procedure laid down in the second limb. But if the witness disowns having made any statement which is inconsistent with his present stand his testimony in Court on the score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145. *Binay Kumar Singh* v. *State of Bihar*, AIR 1997 SC 322 : (1997) 1

SCC 283 : 1997 SCC (Cri) 333 : 1997 CrLJ 363 (SC).

[10492] ● ***Contradictions in deposition of witness.***—According to the learned Sessions Judge both the said eye-witnesses have deposed that the deceased was on foot when he was shot at but Munshi Ram a panch witness to inquest report has stated that the deceased had stated in the hospital that he was sitting on a rickshaw when he was fired at the back side. The other witness to the inquest report Sohan Ram has also supported Munshi Ram, who is stated to be brother of the deceased. The learned Sessions Judge has indicated that although the incident had taken place in the main bazaar at 2 p.m. but no shopkeeper or disinterested witness has been examined. PW 19 is a relation of the deceased and is inimical to the accused and he is a resident of a place which is about 14 miles away from the place of occurrence. The learned Sessions Judge has rightly indicated that there are contradictions in the depositions of PW 19 and PW 20 but such contradictions are not very material for which their depositions are to be discarded. Both the said witnesses have clearly stated that the accused had fired a shot from the pistol from a close range. Such deposition gets corroboration from the medical evidence as to the nature of the injuries suffered by the deceased and also from the dying declaration given by the deceased. *Bhagirath* v. *State of Haryana*, AIR 1997 SC 234 (243) : (1997) 1 SCC 481 : 1997 SCC (Cri) 345 : 1997 CrLJ 81 : JT 1996 (9) SC 654.

[10493] ● ***Contradiction in earlier statements to be considered when.***—The previous statement cannot be treated as substantive evidence. The contradiction with earlier statement should be considered only if these have been brought on record by confronting the witnesses. *Chinnamal* v. *State of Tamil Nadu*, AIR 1997 SC 145 : (1996) 7 SCC 489 : 1997 (4) Crimes 211 (SC).

[10494] ● ***Attention of witness not drawn to statement attributed to him.***—Attention of the witness was not drawn to the statement attributed to him as recorded by a member of the Board of Revenue of the State of Bihar who conducted an official enquiry into the administrative lapses involved in the incident. The evidence of the witness that he gave statement at the venue of occurrence and that he had not given any other statement earlier thereto, cannot be rejected. *Binay Kumar Singh* v. *State of Bihar*, AIR 1997 SC 322 : (1997) 1 SCC 283 : 1997 CrLJ 362 : 1997 (100) Bom LR 159.

[10495] ● ***Witness contradicted with his previous statement.***—PW 5 was sought to be contradicted with his previous statement recorded by the Police by generally putting to him that there was no mention in that statement of his having seen accused-Ayub inside the House. He denied that he was telling for the first time in the Court that the accused was seen inside the room. It is true that this witness had not specifically stated that accused-Ayub was seen in the room. PW 11, PSI Ved Pathak, has proved that omission. In fact, the witness had stated in his police statement that when the door was broken open and when he and Aslam had seen inside they had noticed that Ayub had killed his wife by strangulation and his children by axe blows. Instead of saying the two things what he had seen and what he had inferred separately, he had stated that Ayub had killed his wife and children. It is therefore, not correct to say that this witness had for the first time stated before the Court that Ayub was seen inside the room when the door was broken open and he had gone inside that room. Both the Courts below had rightly appreciated the evidence of PW 4 and PW 5. *Shaikh Ayub* v. *State of Maharashtra*, AIR 1998 SC 1285 (1288) : (1998) 9 SCC 521 : 1998 CrLJ 1656 : JT 1998 (7) SC 115.

[10496] ● ***Evidence of eye-witnesses not believed as they contradicted by their Police statement.***—It was contended by the learned Counsel for the appellant that the evidence of eye-witnesses ought not to have been believed as all of them stood contradicted by their Police statements wherein they had stated that both the shots were fired by the appellant whereas before the Court they deposed that the first shot was fired by Thambi and second shot was fired by the appellant. They had changed their version in view of the report of the Ballistic Expert which shows that the two shots were fired from two different guns. It is true that the witnesses had stated like that before the Police and even the Investigating Officer had carried on investigation on that basis till the report of the Ballistic Expert was received. What the Sessions Court had failed to consider and what the High Court has accepted is the explanation given by the witnesses that when the first shot was fired, it was dark and the witnesses had not seen who had fired it but when PW 2 flashed his torch light, the appellant was seen pointing his gun towards them and, therefore, they had believed that the previous shot was also fired by him. In view of this explanation, it was not proper for the Trial Court to discard their evidence on the ground that their evidence stood contradicted by their previous statements and that indicated that they were trying to implicate falsely both those accused. Neither before the Trial Court nor before the High Court identity of the accused including the appellant was challenged. PWs 1 to 4 being the inmates of the house were bound to be present in the house at the time of the incident. PWs 1, 3 and 4 were also injured by the second shot which was fired by the appellant. Therefore, there was no good reason for discarding their evidence. *Chacko* v. *State of Kerala*, AIR 1998 SC 2250 (2251) : (1998) 5 SCC 602 : 1998 SCC (Cri) 1363 : 1998 CrLJ 3281 : 1998 CrLR (SC) 426 : JT 1998 (4) SC 220 : (1998) 2 Crimes 336.

[10497] ● ***Omission in FIR.***—The evidence of PW 1, so far as it relates to identification of A 1, cannot also be relied upon for even though he claimed to have known A 2 from before, in the FIR he did not mention the name of A 2. When he was confronted with his such material omission, he asserted that he mentioned the name of A 2 but he could not assign any reason why it did not find place in his report. The evidence of PW 1, therefore, does not come in aid of the prosecution to prove that A 2 was the other miscreant. *Raju alias Rajendra* v. *State of Maharashtra and Rajya alias Raju* v. *State of Maharashtra*, AIR 1998 SC 275 : (1998) 1 SCC 169 : 1998 SCC (Cri) 296 (299) : 1998 CrLJ 493.

[10498] ● ***Contradictions and improvements.***—The witness in his statement under Section 161, CrPC unequivocally stated that the three persons came on the scooter and one got down and took out a box and picked up a bomb and threw it to the office of the PW 1 which exploded loudly and it further stated that of three persons who ran away one among whom was Sayeed but in Court gave a totally different picture and on being confronted with his earlier version makes a clean denial. In this state of unsatisfactory prosecution evidence, it is difficult for us to sustain the conviction of the appellant of a serious charge of murder and we have no hesitation to hold that the learned Sessions Judge as well as the High Court committed serious error by relying upon such untrustworthy witnesses. *Ahmed Bin Salam* v. *State of Andhra Pradesh*, AIR 1999 SC 1617 : (1999) 4 SCC 111 : 1999 SCC (Cri) 493 (498) : 1999 CrLJ 2281 : JT 1999 (3) SC 107.

[10499] ● ***Omission in statements under Section 161, CrPC whether amounted to contradiction.***—Seeing the statement under Section 161, CrPC we are of the view that the omission cannot be regarded as being a contradiction. According to the *Explanation* to Section 162, CrPC, an omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. *S. Kaur* v. *Baldev Singh*, AIR 1999 SC 1581 (1583) : (1997) 11 SCC 292.

[10500] ● ***Inconsistent statement when amount to contradiction.***—A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted" would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of the Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the CrPC) for the only limited purpose, *i.e.,* to "contradict" the witness. *Rammi alias Rameshwar* v. *State of Madhya Pradesh*, AIR 1999 SC 3544 : (1999) 8 SCC 649 : 2000 SCC (Cri) 26 (33) : 1999 CrLJ 4561 : JT 1999 (7) SC 247.

[10501] ● ***Cross-examination of witness with reference to his previous statement to establish contradiction.***—A perusal of Section 145 Evidence Act shows that this section permits the cross-examination of the witness in any level with reference to his previous statement to establish a contradiction and the manner is which such contradiction can be established, Section 155 of the Evidence Act provides that the previous statement of a witness can be made use of during the cross-examination of that witness for the purpose of impeaching the credit of the witness. Thus, it is seen it is the right of a party in a trial to use the previous statements of a witness either for the purpose of establishing a contradiction in his evidence or for the purpose of impeaching the credit of the witness. This right given to a party in a trial under Section 145 is somewhat controlled in criminal trials by the provisions made in the Code. The statement recorded by a police officer under Section 161, CrPC even though is a previous statement for the purpose of Section 145, Evidence Act, such statement can be used for the purpose of establishing a contradiction or impeaching the credit of the witness only in the manner provided for in Section 162 of the Code. *State of Kerala* v. *Babu*, AIR 1999 SC 2161 : (1999) 4 SCC 621 : 1999 SCC (Cri) 611 : 1999 CrLJ 3491 : 1999 (3) Crimes 27.

[10502] ● *Discrepancy to be distinguished from contradiction.*—Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incidence, there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot like statements are disfavoured by the Courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. *State of Himachal Pradesh* v. *Lekh Raj*, AIR 1999 SC 3916 : (2000) 1 SCC 247 : 2000 SCC (Cri) 147 (157) : 2000 CrLJ 44 : 2000 CrLR (SC) 7 : JT 1999 (9) SC 43.

[10503] ● *No witness to be contradicted by citing another witness.*—The general rule of evidence is that no witness shall be cited to contradict another witness if the evidence is intended only to shake the credit of another witness. The said rule has been incorporated in Section 153 of the Evidence Act.

Illustration (*d*) cited in Section 153 is to amplify the aforesaid exception No. 2.

The basic requirement for adducing such contradictory evidence is that the witness, whose impartiality is sought to be contradicted with the help of such evidence, should have been asked about it and he should have denied it. Without adopting such a preliminary recourse, it would be meaningless, if not unfair, to bring in a new witness to speak something fresh about a witness already examined. *State of Karnataka* v. *K. Yarappa Reddy*, AIR 2000 SC 185 (189-190) : (1999) 8 SCC 715 : 2000 CrLJ 400 : 1999 CrLR (SC) 723.

[10504] ● *Testimony of eye-witness not to be rejected on strength of wrong information.*—Learned Counsel for the appellants made an unsuccessful attempt to create a dent on the concurrent findings regarding culpability of the appellants. He mainly relied on an affidavit signed by PW 1. The endeavour was to show that PW-1 had gone to the extent of saying that the murderers killed even Shantibai, her daughter-in-law (wife of Darshan Singh) by burning her. True, such a version is found in the affidavit prepared in English. It is also stated in the affidavit that she recognized Mannu and Jagga among the killers who dragged her sons out and set them ablaze. In fact Shantibai was not attacked by the killers. She is alive even now. Evidently that part of the affidavit is wrong. Incorporation of such a wrong information in the affidavit is hardly sufficient to throw the testimony of PW 1 overboard. Even in the Court she was not able to vouchsafe to the truth of what all things inscribed in the affidavit because apart from the fact that she affixed her signature in the affidavit, she did not know what all were written therein. Neither the person who drafted the affidavit nor the typist who typed it, has been examined as witness. We are therefore, not persuaded to reject the testimony of PW 1 mother merely on the strength of the aforesaid wrong information crept in the affidavit. *Manohar Lal* v. *State (N.C.T. of Delhi)*, AIR 2000 SC 420 (422) : (2000) 2 SCC 92 : 2000 SCC (Cri) 333 : 2000 CrLJ 581 : 2000 Cr App R (SC) 91.

[10505] ● *Omissions and contradictions between statement made by prosecution witnesses.*—In the absence of any explanation as to how three persons belonging to the accused party died, the testimony of four eye-witnesses became vulnerable. The omissions and contradictions between the statement made under Section 161, CrPC and the statement made in Court makes the witnesses unreliable. *Padam Singh* v. *State of U.P.*, AIR 2000 SC 361 : (2000) 1 SCC 621 : 2000 SCC (Cri) 285 (290) : 2000 CrLJ 489 : 2000 CrLR (SC) 133.

[10506] ● *Evidence of two other witnesses PWs 6 and 8 found to be unreliable.*—According to his evidence in Court, PW 8 mentioned the name of Satnam Singh as the person driving the truck but in his statement recorded by the Police under Section 161, CrPC, the same does not find place. He admits that he disclosed this fact to any person in hospital that Satnam Singh was driving the truck. He also admits that he did not disclose any information to the Police even on the next day. On going through the evidence of these two witnesses, we have no hesitation to hold that the learned Sessions Judge rightly did not rely upon PWs 6 and 8. *Satnam Singh* v. *State of Rajasthan*, AIR 2000 SC 423 (425, 426) : (2000) 1 SCC 662 : 2000 SCC (Cri) 296 : 2000 CrLJ 584.

[10507] ● *Testimony of PW-5 in Court contradicted by prosecution.*—It is true that all those witnesses have said that the deceased told her that she herself committed the act of lighting the match-stick but all those witnesses were confronted with their earlier version recorded by the Investigating Officer under Section 161 of the CrPC. The version of those witnesses in Court stands discredited by such earlier statements and the two Courts below have rightly declined to place any reliance on the testimony of those witnesses out of these witnesses.

In this case, PW 5, was not declared hostile formally. But that does not matter because she too was confronted with her first version recorded by the Police and thereby her testimony in Court was contradicted by the prosecution. *Kalu Ram* v. *State of Rajasthan*, AIR 2000 SC 3630 : (2000) 10 SCC 324 : 2000 CrLR (SC) 18.

[10508] ● ***Contradiction when elicited in course of cross-examination.***—If any contradiction is elicited in the course of the cross-examination, it cannot be stated that it is the duty of the Court to get the same clarified. *Jagdish* v. *State of M.P.*, AIR 2000 SC 2059 : (2000) 9 SCC 155 : 2000 SCC (Cri) 1188 : 2000 CrLJ 2955 : JT 2000 (6) SC 247 : 2000 Cr App R (SC) 338.

[10509] ● ***Omissions and contradictions by PW-7 from his earlier version.***—The witness PW-7 also made several omissions and contradictions from his earliest version under Section 161, CrPC and has been duly confronted also while in the cross-examination. Only explanation is that the earliest version is wrong. In the aforesaid premises, we have no hesitation to come to the conclusion that the evidence of this witness is tainted one and no reliance can be placed on the same. When the evidence of PW 7, the sole eye-witness, is excluded from consideration, on the residue of evidence no conclusion in a charge of murder can be based and it must be held that the prosecution has failed to establish the charge beyond reasonable doubt. *Mohan Lal* v. *State of Rajasthan*, AIR 2000 SC 3441 (3442).

[10510] ● ***Contradictions in testimony of witnesses.***—The portion of the earlier statements put to the witnesses, do not, in fact show any contradiction much less in material particulars. Most of the alleged improvements are in fact the details and description of the facts already stated by PW 2 in his confessional statements or before the Police during investigation. The witness is stated to have improved by using the words "due to that" for the reason to his coming to Pune for further education and employment. Omission of the aforesaid words in the earlier statement cannot, in any way, be termed as material on facts. Some alleged omissions in relation to his statement before the Court, during the trial, are referred to his statement before the Police. It may be kept in mind that what was stated by him on 15-10-1994 was not the statement of PW 2 in terms of Section 161, CrPC but was only the substance of the interrogation recorded by the Investigating Officer. The aforesaid statement cannot, in any way, be termed to be a statement recorded under Section 161 which could be used for the purpose of contradiction of the witness under Section 162, CrPC. Similarly, the alleged contradiction of not mentioning the "eyes" and instead mentioning the "mouth" of the victims for the purposes of sprinkling of the chilly powder cannot be termed to be a major contradiction or improvement particularly when the witness himself says that by "mouth" he meant "eyes" as well. It may be worthwhile to notice that wherever any alleged contradiction or improvement was confronted to the witness, the learned Trial Court has made a note of it in the statement, at the time of recording of the deposition of the witness. The notes unambiguously indicate that the alleged improvement made by PW 2 in his deposition at the trial, are no way in material particulars. *Narayan Chetanram Chaudhary* v. *State of Maharashtra*, AIR 2000 SC 3352 : (2000) 8 SCC 457 : 2000 SCC (Cri) 1546 (1569, 1570) : 2000 CrLJ 4640 : 2000 CrLR (SC) 700.

[10511] ● ***Omissions in earlier statement.***—It is no doubt true that there have been certain omissions in her earlier statement given to the Police, but those omissions cannot be held to be material omissions amounting to contradiction so as to impeach her version in any matter. *Laljit Singh* v. *State of U.P.*, AIR 2000 SC 3594 : 2000 SCC (Cri) 1501 (1503).

[10512] ● ***Non-compliance of Section 145—Evidence Act.***—If the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act. Bearing in mind the proposition and on scrutinizing the evidence the Magistrate who is supposed to have exhibited the document in his cross-examination categorically admitted that neither any signature nor seal of either of the Chief Judicial Magistrate or of his office on the statement. If according to the Magistrate on recording the statement of Satyanarain he had sent the same to the Chief Judicial Magistrate, it is inconceivable to how the document would not bear the signature nor seal of either of the Chief Judicial Magistrate or of his office. The Magistrate in his examination-in-chief also does not state as to who identified Satyanarain in the hospital before recording his statement. It is under these circumstances it is difficult to hold that has been legally proved to be the former statement of Satyanarain who has been examined. Then again on scrutiny of the evidence it is crystal clear that the witness has not been confronted with that part of his alleged former statement which the defence want him to be contradicted. The witness has merely been asked is to whether he stated before the Magistrate that accused Surendra has as saluted Kameshwar to which he had replied he does not recall as to what he stated before the Magistrate. In this State of affairs it is difficult to hold that the provisions of Section 145 has been complied with in the case in hand. Then again, so far as accused Rajendra is concerned, there has been no variance in his so-called former statement and his statement in Court when he was examined clearly asserting that Rajendra assaulted the deceased by means of Bhala. *Rajendra Singh* v. *State of Bihar*, AIR 2000 SC 1779 (1783) : AIR 2000 SCW 1314 : (2000) 4 SCC 298 : 2000 SCC (Cri) 796 : 2000 CrLJ 2199 : 2000 (3) Scale 137 : 2000 (4) Supreme 435 : 2000 (3) Crimes 21.

[10513] ● ***Witness during trial if intended to be contradicted by his previous statement.***—It is no doubt true that on 4-7-1977, Satyanarain who has been examined as PW 8 in course of trial had been examined by a Magistrate as he had been seriously injured and that statement has been exhibited as Ex B and in fact the Magistrate who had recorded the statement has been examined by the defence as DW 1. This statement of Satyanarain recorded by the Magistrate may be a former statement by Satynarain relating to the same fact at about a time when the fight took place and when Satyanarain was examined as PW 8 during trial it would be open for a party to make use of the former statement for such purpose as the law provides. But if the witness during trial is intended to be contradicted by his former statement then his attention has to be drawn to those parts of the statement which are required to be used for the purpose of contradicting him before the said statement in question can be proved as provided under Section 145 of the Evidence Act. *Rajendra Singh* v. *State of Bihar*, AIR 2000 SC 1779 : (2000) 4 SCC 298 : 2000 SCC (Cri) 796 (802) : 2000 CrLJ 2199 : JT 2001 (4) SC 293.

[10514] ● ***Appreciation of evidence—Omission regarding making of dying declaration.***—In the instant case witness was confronted by her complaint wherein she had not stated that Chandrakanta was telling the persons present there that her husband had burnt her by pouring kerosene oil. She has admitted in her cross-examination that Asha Kumari was present when she reached there. She admitted that she had not stated in her complaint that her sister Asha Kumari had gone to Ranchi alongwith her sister Chandrakanta. She admitted that the appellant's both hands and nose had received burns and his moustache and some hair on the front side of the head were also burnt. She further stated that she did not know where the things which were removed from the Puja room were kept. This witness had not gone to the Police Station as, according to her, a threat was given to her by the appellant. It is proved that she had not stated in her complaint given at about 5 p.m. that Chandrakanta had made any dying declaration before her. She had also not stated so in her statement subsequently recorded under Section 161, CrPC. The Trial Court and the High Court have brushed aside the omission on the ground that the complaint/FIR is not expected to be a complete document and certain every minor details of occurrence. It is difficult to appreciate how this omission can be said to be a minor one. It was not a cryptic complaint. She has referred to various other details in her complaint and, therefore, this omission regarding Chandrakanta having made a dying declaration could not have been brushed aside as an omission on a minor point. *Ramesh Prasad* v. *State of Bihar*, AIR 2000 SC 398 (399) : (1999) 9 SCC 433 : 1999 CrLR (SC) 694.

[10515] ● ***No serious contradiction between statement of eye-witness and evidence of doctor.***—The question whether the ocular evidence of PWs 1 and 2 is against the medical evidence in the case has been answered by the High Court in affirmative going by the statement of the two eye-witnesses that Hanuman gave three blows on the head of the deceased-Panchu with the axe but the Doctor, PW 5, found only one injury on the head of the deceased. From the evidence of PW 5, it is clear that the injury found on the head of the deceased was possible if the blow was struck with the blunt side of the axe and the said injury was sufficient in ordinary course to cause death. The learned Sessions Judge adverting to the contention of the defence regarding improbability of the version of the eye-witnesses observed that their statement to the effect that three blows with the axe dealt on the head of the deceased cannot be correct and it appears that only a single blow was given on the head. It is relevant to note here that other injuries have also been found by the Doctor on the face and shoulder of the deceased. Reading the statement of the eye-witnesses and the evidence of the Doctor, we do not find any serious contradiction between the two which may form the basis for discarding the testimony of the eye-witnesses. *State of Rajasthan* v. *Hanuman*, AIR 2001 SC 282 : (2001) 1 SCC 337 : 2001 SCC (Cri) 143 (145) : 2001 CrLJ 485 : 2001 CrLR (SC) 1.

[10516] ● ***Evidence led by prosecution contradictory and unreliable.***—In all material particulars, PW 4 stands contradicted by PWs 1 and 2 who are admittedly the Panch witnesses. The prosecution also failed to associate three Constables who accompanied S.N. Tripathi (PW 4) as the witnesses. The Trial Court appears to have omitted to note the glaring contradictions in the testimony of prosecution witnesses. PW 4 in his testimony in the Court submitted that : "........ he received the information that accused-Bholaram Kushwaha was having brown sugar in the pocket of his trouser. He recorded that information in the Sanha. That is Ex P 13".

However, a perusal of Ex P 13 showed that no entry was made therein regarding the appellant having brown sugar in his pocket. We feel that the appellant cannot be convicted on the basis of evidence led which is contradictory and not reliable. *Bhola Ram Kushwaha* v. *State of Madhya Pradesh*, AIR 2001 SC 229 (230) : (2001) 1 SCC 35 : 2001 CrLJ 116 : 2001 CrLR (SC) 52.

[10517] ● ***Contradiction on material aspect pertaining to complicity of other co-accused.***—In the present case, there is a contradiction on a material aspect pertaining to the complicity of other co-accused persons, and therefore the evidence of eye witnesses cannot be held sufficient to convict accused under Section 302, IPC with the aid of Section 34, IPC. *Mahabir Singh* v. *State of Haryana*, AIR 2001 SC 2503 : (2001) 7 SCC 148 : 2001 SCC (Cri) 1262 : 2001 CrLJ 3945.

[10518] ● ***Entries in Police diary not to be used to explain contradiction.***—A reading of the sub-sections (2) and (3) of Section 172, CrPC makes the position clear that the discretion given to the Court to use such diaries is only for aiding the Court to decide on a point. It is made abundantly clear in sub-section (2) itself that the Court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the Court uses the entries in a case diary for contradicting a Police Officer, it should be done only in the manner provided in Section 145 of the Evidence Act, *i.e.*, by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the Court for perusal of the diary under Section 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the Code, debars the Court from using the power under Section 172 of the Code for the purpose of explaining the contradiction. *Mahabir Singh* v. *State of Haryana*, AIR 2001 SC 2503 : (2001) 7 SCC 148 : 2001 SCC (Cri) 1262 (1270).

[10519] ● ***Variation between FIR and deposition made in Court.***—The incident stated in FIR, being the first version of the occurrence has to be given due weight. The trial Court does not appear to have committed any glaring irregularity in disbelieving the alleged eye-witnesses whose testimony was concededly contrary to the case of the prosecution as projected in the FIR. It is true that the statements of PWs-1, 4, 5 and 6 cannot be thrown out merely on the ground that they are partisan witnesses or have any enmity with some of the accused persons. However, the testimony of such witnesses require to be judged with more circumspection. The case of prosecution, as sought to be proved at the trial, appears to be different than the one as narrated in the FIR. When the testimony of eye-witnesses is totally different from the story set out in the FIR, the trial Court cannot be held to have taken a view which was not at all possible. The view taken by the trial Court could have been disturbed only if there were compelling reasons. *Kalyan* v. *State of U.P.*, AIR 2001 SC 3976 : (2001) 9 SCC 632 : 2002 SCC (Cri) 780 : 2001 CrLJ 4677 : JT 2001 (8) SC 200 : (2001) 4 Crimes 57 (SC).

[10520] ● ***Mere improvements and omissions not contradictions.***—Mere some improvements and omissions cannot be held to be the contradictions. The omissions and improvements pointed out by the learned Counsel for the appellant are of very minor nature and do not affect the merits of the case in any manner. *Kalpesh Kumar @ Bhajiyu Gunvantlal Seni* v. *State of Gujarat*, AIR 2002 SC 1089 : (2002) 3 SCC 388 : JT 2002 (1) (Supp) SC 101 : (2002) 3 Crimes 197 (SC).

[10521] ● ***Contradictions and improvements in deposition of eye-witnesses.***—Keeping in view the facts and circumstances of the case, particularly the variance between the FIR and the depositions made in the Court, the mention of gun shot injuries in the panchanama and their absence in the FIR, the conflict between the statements of eye-witnesses and the medical evidence and major contradictions and improvements in the depositions of the eye-witnesses, we are of the view that the prosecution failed to prove their case against the appellants beyond all shadows of doubt. The appellants are, therefore, held entitled to the benefit of reasonable doubt. To form an opinion giving the appellants-accused the benefit of doubt we have kept in mind the defence as projected and suggested by them to the witnesses during their cross-examination. *Kalyan* v. *State of U.P.*, AIR

2002 SC 3976 : (2001) 9 SCC 632 : 2001 CrLJ 4677 : JT 2001 (8) SC 200 : (2001) 4 Crimes 57 (SC).

[10522] ● ***Witness disowning to have made statement inconsistent with his present stand.***—If the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act. *Raj Kishore Jha* v. *State of Bihar*, AIR 2003 SC 4664 : (2003) 11 SCC 519 : 2004 SCC (Cri) 212 (219) : 2003 CrLJ 5040 : (2003) 4 Crimes 248.

[10523] ● ***Section 145 Evidence Act not applicable where witness sought to be contradicted.***—Section 145 of the Indian Evidence Act, 1872 (in short "the Evidence Act") applies when the same person makes two contradictory statements. It is not permissible in law to draw adverse inference because of alleged contradictions between one prosecution witness *vis-a-vis* statement of other witnesses. It is not open to the Court to completely demolish the evidence of one witness by referring to the evidence of other witnesses. Witness can only be contradicted in terms of Section 145 of the Evidence Act by his own previous statement and not with the statement of any other witness. As was held in the said case, Section 145 applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under Section 145 of the Evidence Act only. Section 145 has no application where a witness is sought to be contradicted not by his own statement but by the statement of another witness. *Choudhari Ramjibhai Narasangbhai* v. *State of Gujarat*, 2004 SCC (Cri) 269 (275).

[10524] ● ***Mere inconsistencies not contradictions or omissions.***—Mere seemingly inconsistencies which are not contradictions or omissions or are of trivial nature do not affect substratum of the prosecution version. *Bikau Pandey* v. *State of Bihar*, AIR 2004 SC 997 : (2003) 12 SCC 616 : JT 2004 (6) SC 47 : (2004) 1 Crimes 36.

[10525] ● ***Contradiction.***—Of course during the course of his cross-examination he has elaborated the nature of enmity that his father had with these accused persons but then that cold hardly be a reason to contend that what is stated in the complaint is either different from what is stated in the evidence in regard to the motive or the witness has made improvement in regard to the motive of the accused to commit the crime. Apart from the above challenge to the evidence of this witness, counsel for the accused pointed out certain contradictions, omissions and improvements found in his cross-examination but then this again will have to be considered as considered by the Courts below, in the background of the fact that the cross-examination of this witness was also spread over a period of nearly 6 months and he was subjected to nearly 480 questions. In this background for the reasons already stated above, as held by the two Courts below, these contradictions, improvements and omissions would affect the credibility of this witness either. *Jaishree Yadav* v. *State of U.P.*, AIR 2004 SC 4443 : (2005) 9 SCC 788 : (2006) 1 SCC (Cri) 160 (171) : 2004 CrLJ 4826 : 2004 (3) Crimes 286.

[10526] ● ***Minor variations in medical evidence and ocular version irrelevant.***—Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses the testimony of eye-witness cannot be thrown out. Minor variations in medical evidence and ocular version are irrelevant. *Kamaljit Singh* v. *State of Punjab*, AIR 2004 SC 69 : 2004 CrLJ 28.

[10527] ● ***Every omission not contradiction.***—Every omission is not a contradiction. Merely because of the fact that there were some minor omissions, which are but natural, considering the fact that the examination in Court took place years after the occurrence, the evidence does not become suspect. Necessarily there cannot be exact and precise reproduction in any mathematical manner. What needs to be seen is whether the version presented in the Court was substantially similar to what was stated during investigation. It is only when exaggerations fundamentally change the nature of the case, the Court has to consider whether the witness was telling the truth or not. *Sunil Kumar* v. *State Govt. of NCT of Delhi*, AIR 2004 SC 552 : (2003) 11 SCC 369 : 2004 SCC (Cri) 1055 (1059) : 2004 CrLJ 819.

[10528] ● ***Medical evidence where totally improbabilities ocular version.***—Though ocular evidence has to be given importance over medical evidence, where the medical evidence totally improbabilises the ocular version that can be taken to be a factor to effect credibility of the prosecution version. *State of Rajasthan* v. *Bhanwar Singh*, AIR 2004 SC 4660 : (2004) 13 SCC 147 : 2005 SCC (Cri) 73 (75) : 2004 CrLJ 4886.

[10529] ● *Dying declaration recording of supported by Judicial Magistrate.*—"Learned Senior Counsel further submitted that dying declaration was recorded by the Judicial Magistrate on the date of occurrence itself at 3.35 p.m. wherein names of all the four accused persons who were sent up for trial in the present case were enumerated, whereas in the first information report which was lodged on the next day at 9.30 a.m., names of the two appellants were mentioned and names of other accused persons were not disclosed. In our view, this was a point which could have been relevant for considering conviction of the other accused persons but since they have been already acquitted, it is not necessary for us to go into the same. The appellants cannot take advantage of the fact that the names of other accused were not enumerated in the first information report. So far as they are concerned, their names were very much there in the dying declaration as well as in the first information report and recording of dying declaration has been supported by the Judicial Magistrate, PW-11 in the presence of the doctor, PW-7" *Ravi* v. *State of T.N.*, 2005 SCC (Cri) 576.

[10530] ● *Omission to mention in seizure memo—Whether cartridges wet or dry not ground to doubt veracity of prosecution case.*—The High Court was not right in drawing adverse inference against the prosecution from the fact that though it was raining but the fact, whether the cartridges seized by the investigation officer from the place of occurrence were wet or dry, was not mentioned in the seizure memo. In our view, it was not necessary for the investigating officer to mention in the seizure memo about the same. Moreover, omission to mention this fact in the seizure memo cannot in any manner affect the veracity of the prosecution case. The other ground taken by the High Court for doubting the prosecution case was that though PW-2 had stated that during the night he and PW-3 had covered the dead body with a cloth but in the inquest report, the investigating officer had nowhere mentioned that he found that the dead body was covered with a cloth. *Held*, it was a mere omission and could not be a ground for throwing out the prosecution case. *State of Punjab* v. *Mela Singh*, AIR 2004 SC 257 : 2005 SCC (Cri) 625 : 2004 CrLJ 368 : 2003 (4) Crimes 412.

[10531] ● *Deliberate charge by all witnesses to suit medical evidence.*—There was no dispute that their deposition in Court was consistent, but what was observed by the trial Court was that their version as to the manner of occurrence as deposed to by them was at variance with what was stated in the first information report by PW-5, and in the statements of PWs-6 and 7 recorded under Section 161, CrPC. When confronted with their earlier statements, they could not give a satisfactory explanation, with the result that their credibility was sufficiently impeached. The change of version by each one of them, and to the same effect, was deliberate and not merely accidental or on account of lapse of memory. It cannot be disputed that this was a very significant change. It cannot also be disputed that the change was deliberately made by all the witnesses, so that the prosecution case became consistent with the medical evidence on record. *Shingara Singh* v. *State of Haryana*, AIR 2004 SC 124 : 2005 SCC (Cri) 870 : 2004 CrLJ 828 : 2003 (4) Crimes 446.

[10532] ● *Discrepancies between ocular and medical evidence.*—"……Learned counsel for the respondents strenuously urged that PW-6 opined that injuries 7 to 11 could not have been caused if the deceased was lying on the ground with his face upwards, and since PW-1 testified that his father fell down with his face upwards, his presence at the place of incident is doubtful. According to the learned counsel, these injuries could not have been caused while Hari Singh was lying on the ground with his face upwards. The learned counsel, therefore, submits that these discrepancies in the ocular and medical evidence make the presence of Billu Singh doubtful. We are unable to accept this submission. PW-1 categorically stated in examination-in-chief that these injuries were caused by the assailants when Hari Singh was running or standing. He further stated that rest of the injuries were given to Hari singh by the three accused on his face and neck while he was lying on the ground. The witness was not put to cross-examination on this part of the evidence. This witness also stated in the cross-examination that Hari Singh kept his face upwards, but he was moving about on sides. PW-6 opined that all the injuries were ante-mortem. It is quite natural that he must be tossing around trying to evade the strike blows dealt by the accused with their weapons and in this process he must have received various injuries which had not been witnessed by PW-1 as he hurriedly ran away on his bicycle after seeing the first incident. It must be remembered that PW-1 was following his father on a bicycle and witnessed the incident at a distance of about 10-12 karams. Having seen the accused armed with weapons and dealing blows to his father, being unarmed it could have been the sudden reaction of PW-1 to run for safety and lodge a report to the police. PW-6 in his cross-examination had stated that Injuries 2 to 11 were individually sufficient to cause the death in the ordinary course of nature. He also stated that if

Injuries 1 to 11 were caused when the victim was in the standing posture, he was likely to fall. PW-6 further opined that if any of injuries 1 to 11 was inflicted when the victim was lying on the ground he was likely to lose his senses. We have already held that Injuries 9, 10 and 11 were inflicted while in the standing posture. We do not see any discrepancies between ocular and medical evidence, which would make the presence of PW-1 at the place of incident doubtful." *State of Punjab* v. *Hardam Singh*, AIR 2003 SC 4343 : 2005 SCC (Cri) 834 : 2003 CrLJ 5048 : 2003 (4) Crimes 300.

[10533] ● ***Medical evidence not completely ruling out injuries taking place.***—Unless the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by the eye-witnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. *Jai Karan* v. *State of U.P.*, AIR 2004 SC 1148 : 2005 SCC (Cri) 812 (817) : 2004 CrLJ 403 : 2003 (4) Crimes 503.

[10534] ● ***Material contradiction in evidence of witness regarding time and date of incident.***—The IO, in his evidence has stated that he recorded the statement of this witness on 17.3.1984 during the inquest proceedings but this witness in her evidence before the Court has stated that her evidence was recorded a day after the inquest proceedings were conducted. This is a material contradiction in regard to which the prosecution has not taken any step to clarify this part of her evidence when PW-3 was in the witness box by way of re-examination, therefore, if PW-3's evidence is to be accepted then the inquest proceedings must have taken place on 16.3.1984 itself but that is not the case of the prosecution. Since the time and date of the incident are very material fact in this case, the contradiction in the evidence of PW-3 in this regard cannot be brushed aside. *State of Tamil Nadu* v. *Sundar*, AIR 2004 SC 1216 : 2004 CrLJ 913 : 2005 SCC (Cri) 844 (848) : 2004 (1) Crimes 141.

[10535] ● ***Contradictions in evidence of eye-witnesses.***—The original case of the eyewitnesses was that they were all sleeping together when the attack in question took place and the intention of the attackers was clear from what was stated during the attack which was to kill all. Thereafter, during the course of evidence these witnesses conveniently changed the said part of their evidence by stating that PWs-1 and 3 slept on the roof of the pump house while the deceased slept on a cot under a tree. Apart from this, these witnesses have stated that immediately on seeing the attack on the deceased they ran away and hid themselves until next day morning being afraid of the assailants. But then there is so much contradiction in regard to the direction and the place the witnesses ran away that it creates a suspicion as to their presence. This apart, assuming they did hide themselves, there is absolutely no explanation why these witnesses till about 8 o'clock in the morning did not try to seek any help from sources available to them. It has come in evidence that near about the thrashing yard of PW-4 where the incident took place, there were other thrashing yards where people were sleeping, therefore, they could have easily sought help from them which was not done. Then again we notice that the incident in question has taken place in the month of April, and being summer month, we can take judicial notice, of the fact which has been done by the Courts below that the sunrise would have been around 6 o'clock in the morning. If that be so, we find no explanation whatsoever why these witnesses did not go to their house or contact anybody up to 8 o'clock in the morning to inform them of the incident in question. This act of PWs-1 and 3 in informing the relatives and the villagers of the attack only at 8 o'clock in the morning was obviously to explain the delay in filing the Fir, which was lodged in the police station which was about 3 km away from the place of incident only at 8.15 o'clock in the morning. Here again, in regard to the lodging the complaint there is direct contradiction in evidence of PWs-1 and 3. While one of the witnesses states that they went straight from the place of incident to the police station, the other states, they went to the village first to inform the relatives and then went to the police station. If the evidence of these eyewitnesses was otherwise believable for good reasons, some of the contradictions referred to hereinabove might not have damaged the veracity of their evidence. But in the background of the defence as to the falsity of PWs' presence, the existence of these contradictions makes a lot of difference, more so when the prosecution has failed to explain the delay in filing the complaint. This is because of the fact that according to the defence the incident in question must have taken place without their being eye-witnesses, and when noticed in the morning a complaint was lodged after due deliberation involving these accused persons. *State of M.P.* v. *Kriparam*, 2005 SCC (Cri) 830 : 2003 (4) Crimes 232.

[10536] ● ***Minor variations not effect credibility of evidence.***—The minor variations which do not have any effect on the credibility of the evidence cannot be the basis to discard intrinsic value of the evidence. *Shamsuddin* v. *State of M.P.*, 2005 SCC (Cri) 842 (844) : 2004 (1) Crimes 158.

[10537] ● ***Two murders committed in state of shock minor variations probable.***—Where before a young person two murders were committed, it is quite natural to create a sense of shock and minor variations in his evidence did not affect testimony which was otherwise credible. *Jai Karan* v. *State of U.P.*, 2005 SCC (Cri) 812 (815, 816).

[10538] ● ***Some improvements or omissions in statements of eye-witnesses.***—"The main argument in this is that in the cross-examination of the eye-witnesses PWs-3, 6 and 7 have made some improvements or there are omissions in the statements given by them to the investigating officer under Section 161, CrPC. We have noticed that the so-called omissions and improvements, all pertain to sequence of attack on the deceased. In a situation like the one in this case it will be humanly very difficult to remember each and every act of the accused persons, therefore, there will be some likelihood of variation in the evidence of different witnesses. Therefore, the Courts will have to consider these differences in the context of the case as a whole and in the instant case the Courts have done exactly the same. Having perused the evidence ourselves, we are satisfied that the two Courts below are justified in coming to the conclusion that the incident as projected by the prosecution had taken place and the accused are guilty of causing death of the deceased and injuries to others. Hence we find no reason to differ with the said findings of the two Courts below." *State of Maharashtra* v. *Manjurrya*, 2005 SCC (Cri) 857 (861).

[10539] ● ***Evidence of eye-witness when reliable—Omission on part of investigating agency ipso facto not affect genuineness of evidence.***—Once the Court is satisfied that the evidence of the eye-witness is reliable and acceptable, some omission on the part of the investigating agency *ipso facto* would not affect the genuineness of the evidence of the said witness. *Bishan Kumar* v. *State of Delhi*, 2005 SCC (Cri) 850 (852, 853).

[10540] ● ***Minor discrepancies or contradictions in testimony of prosecution witnesses.***—Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. *Kamalanantha* v. *State of Tamil Nadu*, AIR 2005 SC 2132 : (2005) 5 SCC 194 : 2005 SCC (Cri) 1121 (1141) : 2005 (3) Crimes 240.

[10541] ● ***Witness not reliable on whom implicit reliance be pieced.***—"From the deposition of this witness it appears that in the course of the investigation he had stated that his father had been assaulted only by Ishwar, and not by others. In the course of deposition he sought to involve all the accused persons. Having considered the evidence of this witness in its entirety, we are satisfied that he is also not a reliable witness on whom implicit reliance can be placed and his credibility has been sufficiently impeached in his cross-examination. In fact so far as this witness is concerned, he named Raj Kumar and Prem Singh for the first time in the course of his deposition, and it appears that he had not even mentioned their names in the course of the investigation."

"Learned counsel also drew our attention to the other material on record which, according to them, probabilises the defence of the appellants that the occurrence took place in a different manner and the appellants herein were not at all involved. In that occurrence, Ishwar (co-accused) had received injuries which the prosecution had failed to explain."

"Other witnesses named in the FIR who could have thrown some light on the occurrence as it took place, have not been examined. One of the injured persons, namely, Dharamvir has been kept out deliberately, and was not examined at the trial. There was a deliberate attempt on the part of the informant PW-2 to keep him out of the picture by not naming him in the FIR, though in her supplementary statement she mentioned that Prem Singh had assaulted her son Dharamvir inside her house. So far as PW-1 is concerned, his cross-examination reveals that he had a different story to tell in the course of the investigation involving only Ishwar. In these facts and circumstances, we hold that neither of the two eye-witnesses examined by the prosecution can be relied upon. If their evidence is discarded, there is no other evidence which can sustain the conviction of the appellants." *Pahlu* v. *State of Haryana*, 2005 SCC (Cri) 1496 (1501, 1502).

[10542] ● ***Minor contradictions or insignificant discrepancies not grounds for throwing out reliable prosecution case.***—It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not be fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. It is also noticed that the Court while acquitting the accused on benefit of doubt should be cautious to see that the doubt should be a reasonable doubt and it should not reverse the findings of the guilt on the basis of irrelevant circumstances or mere technicalities. *State of M.P.* v. *Dayal Sahu*, AIR 2005 SC 3576 : (2005) 8 SCC 122 : 2005 SCC (Cri) 1988 (1994) : 2005 CrLJ 4375 : 2005 (4) Crimes 92.

[10543] ●. ***Medical evidence and oral evidence, contradiction between.***—Contradictions between medical evidence and oral evidence would not be of much consequence when the eye-witness could not be in a position to specifically say as to which portion of the weapon was used when there was a sudden attack by a group of persons. *Balbir Singh* v. *State of Punjab*, (2005) 9 SCC 299 : 2005 SCC (Cri) 1245 (1947-48).

CONTROL

[10544] ● ***Control.***—The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal in a criminal case, the Police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the Police Officers in every case where it has taken cognizance. *Basava Kom Dyamogouda Patil* v. *State of Mysore*, AIR 1977 SC 1749 (1751) : (1977) 4 SCC 358 : 1977 SCC (Cri) 598 : 1977 CrLJ 1141 : 1977 CrLR (SC) 257.

CONTROL ORDER

[10545] ● ***Control order.***—In this case the Haryana Milk and Milk Products Control Order, 1975 itself was for a short period and the prosecution could not be completed before expiry of the period.

The trial in respect of an offence committed when the control order is in force, cannot be expected to be completed within that short period. The offence committed has to be tried in spite of the expiry of the period. Mere expiry of the period does not make any difference. As Section 7 of the Essential Commodities Act stood, on the date of offence the minimum sentence of 3 months was, no doubt, there but there was a proviso under which the Court may for any adequate and special reasons to be mentioned in the judgment, impose a sentence for a terms less than 3 months. This proviso was omitted in the year 1981 for a period of 5 years. *Isher Dass* v. *State of Haryana*, AIR 1992 SC 1595 : 1993 Supp (1) SCC 644 : 1992 CrLJ 2327.

CONTROL ORDER, VIOLATION OF—CONFISCATION OF COMMODITY

[10546] ● ***Control order, violation of—Confiscation of commodity.***—*Sections 3, 6 A, Essential Commodities Act, 1955*—In the facts and circumstances of the present case, it cannot be doubted for a moment that the Deputy Commissioner acted in the public interest to direct confiscation of the entire consignment of the ground-nut oil, as it was being transported from one place to another without furnishing the requisite declaration in Form II. Sub-section 2(a) and (b) of clause (3) of the Karnataka Edible Oil, Edible Oil Seeds and Oil Cakes (Declaration of Stocks) order, 1976 enjoin that the stock holder shall make a declaration in Form II in relation to movement of edible oil, edible oil seeds and oil cakes, to the Tahsildar incharge of the taluka of the place from where such edible oil, edible oil seeds or oil cakes, are transported before such edible oil, edible oil seeds or oil cakes leave the place. The whole purpose is to maintain a control over the stock of such essential commodities at a place with a view to secure their equitable distribution and availability at fair prices. The requirements of sub-sections(2)(a) and (b) of clause (3) of the said order are clearly mandatory. *State of Karnataka* v. *Krishna Bhima Walvakar*, AIR 1981 SC 1468 (1471) : (1981) 3 SCC 301 : 1981 SCC (Cri) 714 : 1981 CrLJ 867 : 1981 CrLR (SC) 468.

CONTROL, *VIRES OF*

[10547] ● ***Mustard Oil (Price Control) Order—Validity.***—On a plain reading of Article 31-B the Protective umbrella of the Ninth Schedule takes in its ever-widening wings only the Acts and Regulations specified therein but not Orders and Notifications issued under those Acts and Regulations. The Article affords protection to Act and Regulations specified in the Ninth Schedule. Therefore, whenever a challenge to the constitutionality of a provision of law on the ground that it violates any of the fundamental rights conferred by Part 11 C is sought to be repelled by the State on the plea that the law is placed in the Ninth Schedule, the narrow question to which one must address oneself is whether the impugned law is specified in that schedule. It is no answer to say that though the particular law, as for example a Control Order, is not specified in the Ninth Schedule, the parent Act under which the Order is issued is specified in that Schedule. Since the Essential commodities Act of 1955 has been placed in the

Ninth Schedule none of its provisions, including Section 3 (1), is open to attack on the ground that it ever was or is inconsistent with or takes away or a bridges any of the rights conferred by any provision of Part 111 of the Constitution. But there is no justification for extending the protection of that immunity to an Order passed under Section 3 of the Act like the Mustard Oil (Price Control) Order. The upholding of laws by the application of the theory of derivative immunity is foreign to the scheme of our Constitution and accordingly Orders and Notifications issued under Acts and Regulations which are specified in the North Schedule must meet the challenge that they offend against the provisions of Part 111 of the Constitution. It is therefore open to the petitioners to invoke the writ jurisdiction of the Supreme Court for determination of the question whether the provisions of the Price Control Order violate Articles 14, 19(1)(f) and 19(1)(9) of the Constitution. *Prag Ice Oil Mills* v. *Union of India*, AIR 1978 SC 1296 : (1978) 3 SCC 459 : 1978 CrLJ 1281.

CONVERSATION

[10548] ● ***Conversation.***—Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly there is identification of the voice; and thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is *res gestae.* It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore, a relevant fact and is admissible under Section 7 of the Evidence Act. *R.M. Malkani* v. *State of Maharashtra*, AIR 1973 SC 157 : (1973) 1 SCC 471 : 1973 SCC (Cri) 399 (407) : 1973 CrLJ 228.

[10549] ● ***Tape-recorded conversation—Admissibility.***—The tape-recorded conversation is contemporaneous relevant evidence and, therefore, it is admissible. It is not tainted by coercion a unfairness. There is no reason to exclude this evidence. *R.M. Malkani* v. *State of Maharashtra*, AIR 1973 SC 157 : (1973) 1 SCC 471 : 1973 SCC (Cri) 399 (407) : 1973 CrLJ 228.

[10550] ● ***Telephonic conversation.***—The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or highhanded interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the Police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the Police to proceed by unlawful or irregular methods. In the present case, there is no unlawful or irregular method in obtaining the tape recording of the conversation. *R.M. Malkani* v. *State of Maharashtra*, AIR 1973 SC 157 : (1973) 1 SCC 471 : 1973 SCC (Cri) 399 (407) : 1973 CrLJ 228 : (1973) 2 SCR 417 : 1973 Cr App R (SC) 31.

[10551] ● ***Bribe—Amount offered near about equal to amount that complaint required to pay legally.***—Taking the unsatisfactory character of the prosecution evidence in regard to the conversation preceding the passing of currency notes and the feature that for waiver of Rs. 102, the bribe of Rs. 100.00 was given, we are inclined to take the view that to prove its case beyond reasonable doubt. *Bal Kishan Sayal* v. *State of Punjab*, AIR 1987 SC 689 : (1987) 2 SCC 647 : 1987 SCC (Cri) 408 (409) : 1987 CrLJ 533 : 1987 CrLR (SC) 197 : (1987) 1 UJ (SC) 479.

[10552] ● ***Secret talks regarding planning of offence of murder.***—As far as the incident on 17th, October is concerned, Bimla Khalsa in clear terms stated that Kehar Sing and Beant Singh had secret talks. She wanted to know it, but she was not given to understand. This kind of secret talk with Beant Singh which Kehar Singh had, is a very significant circumstance. Apparently Kehar Singh being an elderly person did not indicate to her about their plan. If the attempt of Kehar Singh was to dissuade Beant Singh, there was no occasion for him to keep the matter secret from his wife. On the contrary, he should have indicated to his wife also what Beant Singh was planning. These talks, therefore, as proved by Bimla Khalsa go a long way in establishing Kehar Singh being a party to the conspiracy. *Kehar Singh* v. *State (Delhi Administration*, AIR 1988 SC 1883 : 1988 SCC (Cri) 711 : 1989 CrLJ 1 : 1988 (3) Crimes 209 : JT 1988 (3) SC 191.

CONVICT

[10553] ● ***Term "life"—Meaning.***—"By the term "life" as here used something more is meant than mere animal existence. The interaction against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision (Article 21) equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world." *Kharak*

Singh v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 CrLJ 329 : (1964) 1 SCR 232.

[10554] ● ***Convicts not denuded of all fundamental rights.***—Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison. house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to "practice" a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law. *D.B. Mohan Patnaik* v. *State of A.P.*, AIR 1974 SC 2092 : (1975) 3 SCC 185 : 1975 SCC (Cri) 803 (804, 805) : 1975 CrLJ 556 : (1975) 2 SCR 24. TO THE SAME EFFECT : (1) *State of Maharashtra* v. *Prabhakar Pandurang Sangzgiri*, AIR 1964 SC 424 : 1964 CrLJ 311 : (1966) 1 SCR 702.

[10555] ● ***Convicts not wholly denuded of fundamental rights.***—Convicts are not wholly denuded of their fundamental rights. The imposition of any major punishment within the prison system is conditional upon the observance of procedural safeguards. *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675 : (1978) 4 SCC 494 : 1978 CrLJ 1741.

[10556] ● ***Section 56—Prisons Act—Constitutional validity.***—Article 21 of the Constitution forbids deprivation of personal liberty except in accordance with the procedure established by law and curtailment of personal liberty to such an extent as to be a negation of it would constitute deprivation bar fetters make a serious inroad on the limited personal liberty which a prisoner is left with and therefore, before such erosion can be justified it must have the authority of law. The provision in Para 399 of the Punjab Jail Manual of putting dangerous prisoners in bar fetters is neither referable to a statutory rule under Section 59 or Section 60, Prisons Act, nor can it be held to be statutory in the absence of sanction referred to in Section 56 and therefore has not the authority in law. Under Section 56, Prison Act the Superintendent may put a prisoner in bar fetters (i) when he considers it necessary; (ii) with reference either to the state of the prison or character of the prisoner; and (iii) for the safe custody of the prisoner. Two basic considerations in the context of prison discipline are the security of the prison and safety of the prisoner. These being the relevant consideration, the necessity of putting any particular prisoner in bar fetters must be relatable to them. Therefore, the power under Section 56 can be exercised only for reasons and considerations which are *germane* to the objective of the statute, *viz.*, safe custody of the prisoner, which takes in considerations regarding the character and propensities of the prisoner. These and similar considerations bear direct nexus with the safe custody of prisoners as they are aimed primarily at preventing their escape. The determination of the necessity to put a prisoner in bar fetters has to be made after application of mind to the peculiar and special characteristics of each individual prisoner. The nature and length of sentence or the magnitude of the crime committed by the prisoner are not relevant for the purpose of determining that question. There are sufficient guidelines in the Prison Act and State Jail Rule (here Punjab Jail Manual). The legislative policy behind enacting Section 56 is clear and discernible and the guidelines prescribed by the section have the effect of limiting the application of the provision to a particular category of persons. In such a situation the discretion circumscribed by the requirement vested in the prison authority charged with the duty to manage the internal affairs of the prison for the selective application of Section 56 would certainly not infringe Article 24, Constitution of India. The treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14. Now, putting bar fetters for an unusually long period without due regard for the safety of the prisoner and the security of the prison would certainly be not justified under Section 56, Prison Act. *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155 : 1978 CrLJ 1741 : (1979) 1 SCR 392.

[10557] ● ***Right of detainee to minimal—Freedom of movement.***—It is implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the State is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safe keeping. There is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International convent on civil and Political Rights. This right to live which is comprehended within the broad connotation of the right to life can concededly be abridged, according to procedure established by law and, therefore, when a person is lawfully imprisoned, this right to live is bound to suffer attenuation to the extent to which it is incapable of enjoyment by reason of incarceration. The prisoner or detenue obviously cannot move about freely by going outside the prison wall nor can he socialise at his free-will with persons outside the jail. *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, AIR 1981 SC 746 : (1981) 1 SCC 608 : 1981 SCC (Cri) 212 (222) : 1981 CrLJ 306 : 1981 CrLR (SC) 437.

[10558] ● ***Right of defence to have interview with lawyer.***—A prison regulation may regulate the right of a detenue to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does so, it would be violative of Articles 14 and 21 of the Constitution. *Frances Coralie Mullin* v. *Administrator, Union Territory of Delhi*, AIR 1981 SC 746 : (1981) 1 SCC 608 : 1981 SCC (Cri) 212 : 1981 CrLJ 306 : (1981) 2 SCR 516.

[10559] ● ***Right of detenu to have interviews with members of family and friends.***—As part of the right to live with human dignity and, therefore, as a necessary component of the right to life, he would be entitled to have interviews with the members of the family and friends and no prison regulation or procedure laid down by prison regulation, regulating the right to have interviews with the members of the family and friends can be upheld as Constitutionally valid under Articles 14, and 21 unless it is reasonable, fair and just. There can therefore, be no doubt that "personal liberty" would include the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Articles 14 and 21, such prison regulations must be reasonable and non-arbitrary. *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, AIR 1981 SC 746 : (1981) 1 SCC 608 : 1981 SCC (Cri) 212 (222) : 1981 CrLJ 306 : 1981 CrLR (SC) 437.

[10560] ● ***Right of detenu to have interview with legal advisor of his choice.***—Sub-clause (i) of clause 3 (b) of (Delhi) conditions of Detention Order, 1975 regulating the right of a detenue to have interview with a legal advisor of his choice is violative of Article 14 and 21 and must be held to be unconstitutional and void. It would be quite reasonable if a detenue were to be entitled to have interview with his legal advisor at any reasonable hour during the day after taking appointment from the Superintendent of the jail, which appointment should be given by the Superintendent without any avoidable delay. Interview need not necessarily take place in the presence of a nominated officer or Custom/Central Excise/Enforcement but in the presence of such officer can be conveniently secured at the time of interview without involving any postponement of the interview, then such officer and if his presence cannot be so secured, then any other jail official may if thought necessary watch the interview but not so as to be within hearing distance of the detenue and the legal adviser. *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, AIR 1981 SC 746 : (1981) 1 SCC 608 : 1981 SCC (Cri) 212 (224) : 1981 CrLJ 306 : 1981 CrLR (SC) 437.

[10561] ● ***Handcuffing of under-trial prisoners.***—"We are satisfied that the petitioners are educated persons and selflessly devoting their service to the public cause. They are not the persons who have got tendency to escape from the jail custody. In fact, petitioners 1 and 2 even refused to come out on bail, but chose to continue in prison for a public cause. The offence for which they were tried and convicted under Section 186 of Indian Penal Code is only a bailable offence. Even assuming that they obstructed public servants in discharge of their public functions during the 'dharna' or raised any slogan inside or outside the Court, that would not be sufficient cause to handcuff them. Further, there was no reason for handcuffing them while taking them to Court from jail. One judicial order by a competent Court, that person comes within the judicial custody of the Court. Therefore, the taking of a person from a prison to the Court or back from Court to the prison by the escort party is only under the judicial orders of the Court. Therefore, even if extreme circumstances necessitate the escort party to bind the persons in fetters, the escort party should record the reasons for doing so in writing and the Court is to approve or disapprove the action of the escort party and issue necessary directions. It is most painful to note that the petitioners 1 and 2 who staged a 'dharna' for public cause and voluntarily submitted themselves for arrest and who had no tendency to escape had been subjected to humiliation by being handcuffed which act of the escort party is against all norms of decency and which is in utter violation of the principle underlying Article 21 of the Constitution of India." *Sunil Gupta* v. *State of M.P.*, (1990) 3 SCC 119.

[10562] ● ***Handcuffing of under-trial prisoner.***—The attitude of judicial Magistrate is not taking any action against handcuffing of under-trial prisoner who were fighting for unliftment of Adivasis is severely condemned. During the transit between prison house and Court house no under-trial prisoner can be put under handcuffs. The judicial officers before whom the prisoner is produced to interrogate the prisoner, as a rule, whether he has been subjected to handcuffs or other 'irons' treatment and if he has been, the official concerned shall be asked to explain the action forthwith in the light of this judgment. *Citizens for Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1996 CrLJ 3247. To the same effect : (1) *Prem Shankar Shukla* v. *Delhi Administration,* AIR 1980 SC 1535 : (1980) 3 SCC (Cri) 815 : 1980 CrLJ 930 : 1980 CrLR (SC) 740 (2) : (1980) 3 SCR 855 : (1980) 18 DLT 180.

[10563] ● ***No authority of Police and Jail authorities to direct hand cuffing.***—As to hand cuffing a prisoner the Supreme Court : "We declare, direct and lay down as a rule that handcuffs or other fetters shall not be forced on a prisoner-convicted or undertrial-while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to Court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to Court and back. *Citizens for Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1995 SCC (Cri) 600 : 1996 CrLJ 324.

[10564] ● ***Magistrate may grant permission to handcuff prisoner.***—Where the police or the jail authorities have well-grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous/desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner. *Citizens for Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1995 SCC (Cri) 600 : 1996 CrLJ 324.

[10565] ● ***Person not to be handcuffed unless special orders obtained.***—In all the cases where a person arrested by police is produced before the Magistrate and remanded to judicial or non-judicial custody-is given by the Magistrate the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistrate at the time of the grant of the remand. *Citizens for Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1995 SCC (Cri) 600 : 1996 CrLJ 324.

[10566] ● ***Person arrested in execution of warrant not to be handcuffed.***—When the police arrests a person in execution of a warrant of arrest obtained from a Magistrate, the person so arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested. *Citizens for Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1995 SCC (Cri) 600 : 1996 CrLJ 324.

[10567] ● ***Person arrested without warrant—handcuffing of.***—Where a person is arrested by the police without warrant the police officer concerned may if he is satisfied, on the basis of the guidelines given by us in para above, that it is necessary to handcuff such a person, he may do so till the time he is taken to the police station and thereafter his production before the Magistrate. Further use of fetters thereafter can only be under the orders of the Magistrate as already indicated by us. *Citizens for Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1995 SCC (Cri) 600 : 1996 CrLJ 324.

[10568] ● ***Violation of direction regarding handcuffing punishable under contempt of Court Act.***—The apex Court direct all ranks of police and the prison authorities to meticulously obey the above mentioned directions. Any violation of any of the directions issued by us by any rank of police in the country or member of the jail establishment shall be summarily punishable under the Contempt of Courts Act apart from other penal consequences under law. *Citizens for Democracy* v. *State of Assam*, AIR 1996 SC 2193 : (1995) 3 SCC 743 : 1995 SCC (Cri) 600 : 1996 CrLJ 324 : JT 1995 (4) SC 475 : 1995 (3) CCR 7 (SC). To the same effect : (1) *M.P. Dwivedi In Re,* AIR 1996 SC 2299 : (1996) 4 SCC 152 : 1996 CrLJ 1670 (SC).

[10569] ● ***Right of executive to suspend, remit or commute sentence of convict.***—The distinction of the convicts under the NDPS Act and under other statutes, in so far as it relates to the exercise of the executive powers under Sections 432 and 433 of the CrPC is concerned, cannot be termed to either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the Executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. It is not contended on behalf of the petitioners that the procedure prescribed under the Act for holding the trial is not reasonable, fair and just. The offending section, in so far as it relates to the Executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. The procedure prescribed for holding the trial under the Act cannot be termed to be arbitrary, whimsical or fanciful. There is, therefore, no vice of unconstitutionality in the section in so far as it takes away the powers of the Executive conferred upon it under Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict under the Act. *Dadu* v. *State of Maharashtra*, AIR 2000 SC 3203 : (2000) 8 SCC 437 : 2000 SCC (Cri) 1528 (1539) : 2001 CrLR (SC) 138.

[10570] ● ***Right to life available to prisoners.***—Right to life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that right. A prisoner, be he a convict or under-trial or a detenue, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his Fundamental Rights including the right to life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of Constitutional rights. *State of Andhra Pradesh* v. *Challa Ramkrishna Reddy*, AIR 2000 SC 2083 : (2000) 5 SCC 712.

[10571] ● ***Prisoners do not lose fundamental rights.***—According to the definition under the Prisoners Act, there is a convict, there is an under-trial and there is a civil prisoner, who may be a detenue under Preventive Detention Law. None of the three categories of prisoners lose their Fundamental Rights on being placed inside a prison. The restriction placed on their right to movement is the result of their conviction or involvement in the crime. *State of Andhra Pradesh* v. *Challa Ramkrishna Reddy*, AIR 2000 SC 2083 (2089) : (2000) 5 SCC 712.

CONVICTION

[10572] ● ***Conviction for offence not charged.***— In the present case, the facts proved against the accused were that he had inflicted on the person of another a large number of serious injuries, including fractures of the bones of several fingers. He was charged under Section 307, Penal Code, but the jury returned a verdict of guilty under Section 326, and accepting that verdict the Sessions Judge convicted him under that section. On appeal, the High Court upheld the conviction. The accused appealed to the Supreme Court. It was contended that inasmuch as there was no charge under Sections 263 and an offence under that section was not a minor offence with reference to an offence under Section 307, Section 238, CrPC did not apply and therefore conviction under Section 326 was illegal. This argument overlooked the provisions of Section 236 and 237, CrPC which clearly applied to a case like the present. On the facts of the case it was open to the Sessions Judge to charge the accused alternatively under Sections 307 and 326 of the Penal Code, and hence the case was covered by Section 237, CrPC, though it might not be covered by Section 238. That being so, conviction under Section 326 was proper even though there was no charge under that section. *Bijoy Chand Patra* v. *State*, AIR 1952 SC 105 : 1952 CrLJ 644 : 1952 SCR 202 : 1952 SCJ 17.

[10573] ● ***Charge of murder—Conviction for offence under Section 201, IPC.***—In a case in which the accused is charged only of the offence of murder under Section 302, Penal Code, and no alternative charge under Section 201 for the disposal of the dead body of the murdered person has been framed, if the charge of murder fails, it is permissible under Section 237, CrPC to record a conviction against the accused under Section 201, provided that, on the facts of the case, it is proved that the death of the deceased was brought about by a crime and that the accused was associated in the disposal of the dead body. Similarly, if in such a case the Sessions Court has convicted the accused on the charge of murder under Section 302, and that conviction is set aside on appeal, it is open to the High Court or the Supreme Court to convict the accused under Section 201 if it finds that an offence under that section has been established by the evidence in the case, even though there is no charge against him under that section. Section 237, CrPC completely covers such a case. *Kashmira Singh* v. *State* *of M.P.*, AIR 1952 SC 159 : 1952 CrLJ 839 : 1952 SCR 526.

[10574] ● *Conviction under Section 302 read with Section 149, IPC.*—If the facts of the case are such that the accused could have been alternatively charged with the aid of Section 34, then even though there may have been an omission to frame a charge under Section 302 read with Section 34, it is open to the Court to convict the accused on that charge, provided that it is satisfied that the offence was jointly committed by several accused in furtherance of the common intention of all of them. Further, if in such a case the Sessions Court has convicted the accused under Section 149/302 and the High Court acquits some of them after giving them the advantage of doubt, and the number of the accused whose guilt is accepted being less than five, their conviction under Section 149/302 cannot stand, it is open to the High Court to convict the remaining accused under Section 302 read with Section 34, provided the facts and circumstances of the case are such that they could have been originally charged under the section, and the omission to frame such a charge has not occasioned any prejudice to the accused in their defence. *Lachman Singh* v. *State*, AIR 1952 SC 167 : 1952 CrLJ 863 : 1952 SCJ 230 : 1952 SCA 491.

[10575] ● *Proof of conspiracy.*—In a case in which the only evidence against the accused is that they were present and standing together at the time when one of them fired a fatal shot at the deceased, the possibility remains that the one who fired did so without the others having shared with him the intention to cause death, and unless that possibility is eliminated by some evidence indicative of a meeting of the minds between them all, the mere presence of the other accused on the spot cannot be sufficient to hold them guilty with the aid of Section 34. Before conviction with the aid of Section 34 can be sustained there must be some evidence from which a reasonable inference can be drawn that the accused shared the intention of the one who fired the shot to kill the deceased, but such evidence may be either of a pre-arranged plan to murder, or may be of some act or circumstance on the spot which is indicative of the common intention. In the absence of any such evidence the mere fact all the accused were seen by witnesses at the place and at the time of the firing, is not sufficient to prove common intention. In such a case if it cannot be proved, who fired the fatal shot, none of the persons present can be convicted of murder and all of them would be entitled to the benefit of doubt and must be acquitted. In such a case if the evidence as to previous conspiracy between the accused has been rejected and the accused are acquitted under Section 120 B, that evidence must be held to be equally insufficient to establish the charge of common intention under Section 34. *Ram Nath Madhoprasad* v. *State of M.P.*, AIR 1953 SC 420 : 1953 CrLJ 1772.

[10576] ● *Conviction of accused not to be based on his own statement.*—Conviction of an accused person cannot be based upon his own statement recorded under Section 342. In the absence of any other evidence on record which establishes the guilt of the accused, conviction cannot rest merely on the answers given by an accused when examined under that section, because such answers are not "evidence" and cannot take the place of evidence on which alone conviction can legally be based. An admission made by an accused person under Section 342 can be used and relied upon only for the purpose of lending corroboration to the prosecution evidence, when it exists. In the present case the accused was charged under Section 66 (b) of the Bombay Prohibition Act on the ground that he was found in possession of rectified spirit without a permit as required by law. The prosecution case rested on the evidence of witnesses that the goods were recovered from a particular godown and that the accused was in possession of that godown. When examined under Section 342, CrPC, the accused admitted that he was in charge of the godown but denied that the goods were found in the godown and said that they were found outside it. The Magistrate relied on the admission of the accused that the godown was in his possession and holding the evidence on record established that the goods were recovered from the godown, rejected his statement that the goods were not recovered from the godown as false. Under these circumstances it could not be said that the conviction of the accused was based solely on his statement recorded under Section 342. The Magistrate had only used that statement as supporting the prosecution evidence concerning the possession of the godown, which had not been challenged in the cross-examination of the prosecution witness, and the Magistrate was fully justified in doing this. If the conviction of the accused had been based solely on his statement recorded under Section 342, he would have been justified in his contention that the conviction was bad because in the absence of any evidence as to his possession of the godown, it would have been wrong to hold that the admission of the accused was "evidence" on which his possession of the godown was established. Conviction was confirmed and the appeal was dismissed. *Vijendrajit Ayodhyaprasad*

Goel v. *State of Bombay*, AIR 1953 SC 247 : 1953 CrLJ 1097 : 1953 SCJ 328.

[10577] ● ***Conviction under Section 302 read with Section 34, IPC validity.***—Although there is substantial difference between Section 34 and Section 149, but they also to same extent overlap and if the common object which is the subject matter of charge under Section 149 does not necessarily involve a common intention, then substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not to be permitted. But if facts to be proved the evidence to be adduced with reference to the charge under Section 149 would be the same, if the charge were under Section 34 then the failure to charge the accused under Section 34 could not result in any prejudice and is permissible. *Karnail Singh* v. *State of Punjab*, AIR 1954 SC 204 : 1954 CrLJ 580 : 1954 SCR 904.

[10578] ● ***Omission to frame charge.***—Omission to frame a charge for a specific offence of which the accused is convicted is a clear breach of the mandatory requirements of Section 233 (now Section 218). The effect of such omission is that the conviction will be set aside if the omission has caused a prejudice to the accused by misleading him in his defence. *Suraj Pal* v. *State of U.P.*, AIR 1955 SC 419 : 1955 CrLJ 1004 : 1954 SCJ 351 : 1955 SCR 1332.

[10579] ● ***Unlawful assembly—Accused if given benefit of doubt.***—The constructive liability under Section 149 can arise only against a man proved to have been a member of an unlawful assembly, and if any accused is given the benefit of doubt, and is acquitted on the charge under Section 143 or 147, his conviction with the aid of Section 149 for an offence committed by another member of that assembly is illegal. It cannot be contended, that Section 149 does not create, a specific offence and does not provide any punishment for that offence. Merely because the section prescribes a punishment which is not uniform but is made dependant upon the punishment prescribed for the offence committed by another member of the assembly it cannot be said that the section does not prescribe any punishment. *Nanakchand* v. *State of Punjab*, AIR 1955 SC 274 : 1955 CrLJ 721 : 1955 SCJ 241.

[10580] ● ***Conviction of accused under Section 302 read with Section 34, IPC.***—In the present case the accused was convicted under Section 302/34, and not under Section 302. The trial Court found that though the accused did not himself inflict any blow on the deceased, he had shared the common intention to kill him and had intentionally participated in the attack by being present on the spot armed with a lathi so as to keep guard and give support to his brother who attacked the deceased with a gandasa. The trial Judge convicted the accused under Section 302 read with Section 34 and sentenced him to death. In the eye of the law, the accused was as much guilty of the offence of murder as the co-accused who actually dealt the fatal blows, and on the facts of the case the sentence of death imposed on him could not be held to be improper and had to be maintained. *Rishi Deo Pande* v. *State of U.P.*, AIR 1955 SC 331 : 1955 CrLJ 873.

[10581] ● ***Accused taking active part in murder.***—In a case in which the charge framed against the accused was only under Section 302/34 or Section 302/149, and no substantive charge under Section 302 was framed, if the accused is convicted under Section 302 itself, the effect of the contravention of the requirements of Section 233, CrPC, is the same whether the charge framed against the accused which has failed was under Section 302/149 or was under Section 302/34. In either case, the question which arises is the same, namely, was the accused prejudiced in his defence as a result of the omission to frame the required charge, or was he not, and if the Court comes to the conclusion that such prejudice was in fact occasioned, conviction must be set aside, whether the charge framed was under Section 302/149 or Section 302/34.

However, there is one difference between a case in which the charge as framed is only under Section 149/302 and a case in which it is under Section 302/34. In the former case, the charge as framed tells the accused that it was not he who committed the murder and that he is only constructively liable for it, while in the latter case the accused is told that the murder was committed by several persons jointly and that he was one of them. Therefore, when the charge is only under Section 302/149, the likelihood of prejudice is very much higher. In such a case the Court may well take such prejudice as established from the fact that the cross-examination of eye-witnesses had not been as thorough as it might have been if the accused had known that the accusation against him was that it was *his* hand which caused the death. On the other hand, when the charge is under Section 302/34, the accused knows that it is alleged that he had participated in the commission of murder, and merely on the strength of the omission to frame a charge under Section 302 substantive, he cannot say that he did not know that the prosecution case was that he took an active part in the murder. In such a case, therefore, the burden of proof of prejudice is much heavier than what it is when the charge is only under Section 302/149. *Wilhe (William) Slaney* v. *State of M.P.*, AIR 1956 SC 116 : 1956 CrLJ 291 : 1956 SCJ 182 : 1956 SCA 183.

[10582] ● ***Conviction of accused with aid of Section 34, IPC.***—When, the whole gravamen of the charge and of the evidence is that an accused *A* committed an offence jointly with specified and known persons who are co-accused at the trial, and not with some others who are unknown, and all the other accused are acquitted, the element of sharing a common intention, which is of the very essence of a charge under Section 34, disappears, and the charge must fail.

On the other hand, when the other accused are acquitted, not because there is any doubt, as to their participation in the commission of the offence, but because there is no doubt as to their identity as the actual assailants, the conviction of even a single accused under Section 34 would be justified, because in such a case there is no doubt that he shared the common intention with other offenders, though it cannot be proved beyond doubt who they were. *Prabhu Babaji Navle* v. *State of Bombay*, AIR 1956 SC 51 : 1956 CrLJ 147.

[10583] ● ***Alteration of conviction.***—The appellate Court can alter conviction under Section 302 read with Section 34, IPC to one under Section 326 read with Section 149, IPC. *Tilakeswar Singh* v. *State of Bihar*, AIR 1956 SC 238 : 1956 CrLJ 441.

[10584] ● ***Conviction of accused under Section 420, IPC.***—When an accused person has been charged under Section 420 read with Section 34 and there is no substantive charge under Section 420, if the facts established in the case show that he had himself committed the whole offence with the aid of some companions, it is open to the Court to convict him under Section 420 substantive, because in such a case the omission to frame a charge under Section 420 could not cause to the accused any possible prejudice in his defence. *Mobarik Ali Ahmad* v. *State of Bombay*, AIR 1957 SC 857 : 1957 CrLJ 1346 : 1957 SCJ 209.

[10585] ● ***Conviction of accused under Section 409, IPC.***—The combined effect of Section 423(1)(b), CrPC and Section 26, General Clauses Act provisions is that when an accused is charged before a trial Court for offences under two different Acts and is convicted of one of them, it is open to the High Court in appeal to acquit him on the charge of which he has been convicted, and to convict him on the charge of which he has been acquitted, provided the offence under that charge has been established by the evidence on record. In the present case, the accused, a public servant, was charged of offences under Section 409, Penal Code, and under Section 5 (2) of the Prevention of Corruption Act read with Section 5 (1) (*c*) thereof. The trial Court convicted him only under Section 5 (2) read with Section 5 (1) (*c*) of the Act. On appeal by the accused it was urged before the High Court that the trial was incompetent for want of the requisite sanction for prosecution under Section 6 of the Act. The High Court upheld the contention and accordingly acquitted him on that charge. However, the High Court found that on the evidence on record an offence under Section 409, Penal Code, had been established against the accused and that on the facts of the case the offence committed was not such as to require the sanction for prosecution under Section 197, CrPC. On these findings, the High Court convicted the accused under Section 409, Penal Code. Under these circumstances, there was nothing illegal in the order of the High Court because, on the findings arrived at, the High Court was competent to convict the accused as it had done. Conviction was upheld. *State of M.P.* v. *Veereshwar Rao Agnihotri*, AIR 1957 SC 592 : 1957 SCC 317 : 1957 CrLJ 892 : 1957 SCJ 519.

[10586] ● ***Conviction by application of Section 34, IPC.***—Although there is a difference in common object and common intention, they both deal with combination of persons who become punishable as sharers in an offence, and a charge under Section 149, Penal Code, is no impediment to a conviction by the application of Section 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all. *B.N. Srikantiah* v. *Mysore State*, AIR 1958 SC 672 : 1958 CrLJ 1251.

[10587] ● ***Omission to mention Section 34, IPC in charge.***—An accused charged with the substantive offence can be convicted with that offence read with Section 34 even though there is no mention of Section 34 in the charge. The trial is not vitiated unless accused is shown to be prejudiced by such non-mention in the charge. *B.N. Srikantiah* v. *State of Mysore*, AIR 1958 SC 672 : 1958 CrLJ 1251.

[10588] ● ***Alternative of conviction from Section 299 to Section 300 of Calcutta Municipal Act.***—If the Court is satisfied after scrutinizing the evidence on record that the substance of the accusation remains the same, and all that has occurred is an omission in the charge to state the appropriate section, Sections 236 and 237 of the Code apply, and the Court has the power to convict the accused under the appropriate section applicable to the facts proved. In the present case the accused was prosecuted for having erected a compound wall which encroached upon a public road, he was charged under Section 299 of the Calcutta Municipal Act, 1923, which applied only to offending structures which were part and parcel of the main building. The appropriate section applicable to unauthorized structures unattached to any building was Section 300. The accused was convicted by the trial Court under Section 299 but on appeal the High Court converted the conviction to one under Section 300 and the question was whether such conviction was valid. The case falls under Section 237 of the Code. Since the alteration is not in the substance of the charge, but only as to the section more properly applicable to the facts found, the conviction under Section 300 of the Calcutta Municipal Act, 1923 is perfectly justified, though, there is an omission to frame a charge under that section. *Nani Gopal Biswas* v. *Municipality of Howrah*, AIR 1958 SC 141 : 1958 CrLJ 271 : 1958 SCA 417 : 1958 SCR 774.

[10589] ● ***Appellate Court itself to dispose of appeal instead of ordering retrial.***—In the present case, three accused of whom *S* and *T* were Supervisors in the Excise Department and *O* was a tobacco dealer, have charged and convicted in the Sessions Court as under : *S* and *T* under Section 467 and *O* under Section 467/471 of the Penal Code. The case against the accused was that with the intent to defraud the Government and evade the payment of excise duty, the accused *S* and *T* had prepared fictitious transport permits on which false entries of sale notes in favour of fictitious persons were recorded, and it was mentioned that excise duty had been paid by those persons. On the strength of these permits, accused *O* transported a large quantity of tobacco without paying the requisite excise duty. The High Court Judge is of the opinion that the offence committed by *S* and *T* might have fallen under Section 477A, and the one committed by *O* might have fallen under Section 477A read with Section 109, but without going into the merits of the evidence in the case the High Court directed a re-trial since no charge under these sections had been framed.

This is a case to be tried on the question whether the entries made in the permits are false and thereby contravened the latter part of Section 477A. The case clearly falls under Sections 236 and 237, CrPC, and hence the High Court has erred in ordering a re-trial and in not deciding for itself whether, on the evidence before it, any offence had been committed by the accused. The order of the High Court directing the re-trial is set aside, and the case is remanded to the High Court for rehearing the appeal and disposing it of on the evidence on record. *G.D. Sharma* v. *State of U.P.*, AIR 1960 SC 400 : 1960 CrLJ 541.

[10590] ● ***Unlawful assembly—Constitution of.***—In such a case, even if the accused cannot be convicted under Sections 302 and 307 read with Section 149 because of their number being less than five, the charge can be converted into one under Sections 302 and 307 read with Section 34, Penal Code. *Kartar Singh* v. *State of Punjab*, AIR 1961 SC 1787 : 1961 (2) CrLJ 857.

[10591] ● ***Undue emphasis on mere technicalities not desirable.***—For deciding the question of prejudice the Court is not to be guided by technicalities but by a broad vision and must look to the substance and not from where the provisions prescribed by the law of procedure are intended to be mandatory, the legislature indicates its intention in that behalf clearly and contravention of such mandatory provisions may introduce a serious infirmity in the proceeding themselves, but where the provisions made by the law of procedure are not a vital importance but are nevertheless, intended to be observed their breach may not necessarily vitiate the trial unless it is shown that the contravention in question has caused prejudice to the accused. *Chittaranjan Dass* v. *State of West Bengal*, AIR 1963 SC 1696 : 1963 (2) CrLJ 534 (538) (SC) : 1964 (2) SCJ 311 : (1964) 1 SCA 654 : 1963 SCD 815. **TO THE SAME EFFECT :** (1) *Gurbachan Singh* v. *State of Punjab*, AIR 1952 SC 623 : 1952 CrLJ 1009.

[10592] ● ***Conviction under Section 302 read with Section 34, IPC—Pre-requisite.***—In the present case, the High Court has given conflicting findings. While it acquitted accused 1, 3 and 4 under Section 302/34, it convicted accused 2 under Section 302/34 for having committed the offence jointly with the acquitted persons. This is a legally impossible position. Whether the other accused are acquitted on the ground, that the evidence was not acceptable, or whether they are acquitted by giving them the benefit of doubt, in law, the result is the same, namely, that they did not take part in the offence. The effect of the acquittal of the other accused is that they did not conjointly act with accused 2 in committing the murder, and that accused 2 had not acted conjointly with them. In the circumstances, the conviction of accused 2 under Section 302 read with Section 34 for having committed offence jointly with the acquitted accused persons was bad in law, and cannot stand the appeal is allowed, and the order of the High Court convicting the appellant under Section 302 read with Section 34 is set aside.

Krishna Govind Patel v. *State of Maharashtra*, AIR 1963 SC 1413 : 1963 (2) CrLJ 351 : (1963) 2 SCJ 718.

[10593] ● *Acquittal of person in one case.*—In spite of the acquittal of a person in one case, it is open to the Court in another case to proceed on the basis, of course, if the evidence warrants it that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the latter case that the person tried in it was guilty of an offence under Section 34 by virtue of having committed offence along with the acquitted person. There is nothing in principle to prevent this being done. The principle of *Sambasivam's case,* 1950 AC 458 has no application here because the two cases we are concerned with, are against two different persons, though for the commission of the same offence. Furthermore, as we have already said each case has to be decided on the evidence laid in it and this irrespective of any view of the same act that might have been taken on different evidence led in another case. *Karan Singh* v. *State of M.P.*, AIR 1965 SC 1037 : 1965 (2) CrLJ 142 : (1965) 2 SCJ 181.

[10594] ● *Conviction under Section 420, IPC though charged for offence under Section 409, IPC.*—It is permissible to convict a person under Section 420, IPC though he is charged for an offence under Section 409, IPC and not under Section 420, IPC. *Sunil Kumar Paul* v. *State of West Bengal*, AIR 1965 SC 706 : (1965) 1 CrLJ 630.

[10595] ● *Order of conviction if challenged by convicted person.*—If an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal. In exercising the powers conferred by Section 423(1)(b) the High Court cannot therefore convert the order of acquittal into one of conviction and that result can be achieved only by adopting procedure prescribed under Section 439 of the Criminal Procedure Code. It must accordingly be held that the High Court acted without jurisdiction in altering the finding of acquittal of Lakhan on the charge under Section 302, Indian Penal Code and convicting him on the charge under Section 326, Indian Penal Code and imposing a sentence of imprisonment on that charge. *Lakhan Mahto* v. *State of Bihar*, AIR 1966 SC 1742 : 1966 CrLJ 1349.

[10596] ● *Plea of guilty—Recording of.*—Before the accused is convicted on his plea of guilt, the plea of guilt should be recorded as nearly as possible in the words used by him. *Kaushalya* v. *State of Madras*, AIR 1966 SC 22 : 1966 CrLJ 66 : (1966) 1 SCR 229.

[10597] ● *Recording of plea of accused in his own words salutary rule.*—The rule that the plea of the accused shall be recorded as nearly as possible in his words is very salutary rule being necessary for the protection of the accused and the proper administration of justice. *Kaushalya* v. *State of Madras*, AIR 1966 SC 22 : 1966 CrLJ 66 : (1966) 1 SCR 229.

[10598] ● *Non-recording of plea of accused in his own words—Effect.*—By not recording the plea of the accused as nearly as may be possible in his own words but merely recording the Magistrate's own conclusion from the statement deprives the superior Court of the opportunity of examining the validity of his conclusion. *Kaushalya* v. *State of Madras*, AIR 1966 SC 22 : 1966 CrLJ 66 : (1966) 1 SCR 229.

[10599] ● *Provisions of Section 252, CrPC dealing with conviction mandatory.*—The provisions of Section 252, CrPC dealing with conviction or plea of guilty pleaded by accused are mandatory and the record of the Court must show that they were complied with. *Kaushalya* v. *State of Madras*, AIR 1966 SC 22 : 1966 CrLJ 66 : (1966) 1 SCR 229.

[10600] ● *No locus standi of private party to file revision.*—Private party has no *locus standi* to move in revision against an order passed in case instituted on police report. *Thakur Ram* v. *State of Bihar*, AIR 1966 SC 911 : 1966 CrLJ 700.

[10601] ● *Second conviction by virtue of Section 25 of—Suppression of Immoral Traffic in Women and Girls Act.*—When the provisions of Suppression of Immoral Traffic in Woman and Girls came into force the corresponding provisions of the Madras Act (Suppression of Immoral Traffic Act, 1930) stood repealed. When Suppression of Immoral Traffic in Women and Girls Act, 1956 came into force provisions of the Madras Act Suppression of Immoral Traffic Act, 1930 stood repealed, by virtue of sub-section (7) of Section 25 of the Suppression of Immoral Traffic Women and Girls Act, 1956. By virtue of sub-section (2), the conviction of the appellant under Section 5(1) of the Madras Act, would be deemed to be conviction under Section 3(1) of the Act, an Act deemed to be in force at the time the conviction took place. It follows that the present conviction of the appellant will have to be taken as a second conviction, within the meaning of the express provision in sub-section (1) of Section 3 of the Act, and the appellant would be liable to suffer enhanced punishment under that sub-section. *Krishnamurthy* v. *Public Prosecutor, Madras*, AIR 1967 SC 567 : 1967 CrLJ 544 (545) : (1967) 1 SCR 586.

[10602] ● ***Charge under Section 302 read with Section 149, IPC—Conviction under Section 302 read with Section 34, IPC.***—An accused charged with having committed an offence read with Section 149, IPC can be convicted for that offence read with Section 34, IPC without a charge under Section 34 being framed. *Jagir Singh* v. *State of Punjab*, AIR 1968 SC 43 : 1968 CrLJ 89 : (1967) 3 SCR 256 : (1968) 1 SCJ 244.

[10603] ● ***Prejudice to accused by framing alternative charge to be proved.***—Where, though alternative charges were framed against the accused, evidence was led only in support of the charge for which he was convicted, and no prejudice was shown to have been caused to them by the alternative charge, the accused cannot succeed by merely showing that the charges framed were defective. A mere defect in the charge is no ground for setting aside a conviction. *Kalian Singh* v. *State of Haryana*, AIR 1971 SC 983 : (1971) 3 SCC 226 : 1971 CrLJ 806 : 1971 UJ (SC) 422.

[10604] ● ***Prosecution evidence not justifying conviction under Section 302, IPC simpliciter.***—Where the prosecution evidence does not justify the conviction of the appellant under Section 302 simpliciter and the state has not appealed against the acquittal of the co-accused under Section 302/34, IPC, the Court cannot consider whether the appellant is guilty under these sections with the result, that he will have to be acquitted of the charge of murder. *Sohan Lal* v. *State of U.P.*, AIR 1971 SC 2064 : (1971) 2 SCCrR 260 : 1971 CrLJ 1458 : 1971 UJ (SC) 334 : 1971 Cr App R (SC) 138.

[10605] ● ***Benefit of doubt.***—It cannot be overemphasised that in cases of the present nature where not only the liberty of a citizen is involved but also his whole career—on conviction a person in service is bound to be dismissed—great care and attention should be devoted by the Courts to all questions of law and fact which unfortunately has not been done in the present case. That has led to miscarriage of justice. The appellant is entitled to the benefit of doubt and he is hereby acquitted. *Pabitar Singh* v. *State of Bihar*, AIR 1972 SC 1899 : (1972) 3 SCC 354 : 1972 SCC (Cri) 524 (529) : 1972 CrLJ 1172 : (1972) 3 SCR 948.

[10606] ● ***Charges under Section 148 and Section 302 read with Section 149, IPC—Conviction under Section 302 read with Section 34, IPC.***—Where the accused were charged under Sections 148 & 302, read with Section 149, IPC, but they were convicted under Section 302, r/w. Section 34, IPC, though there was no specific charge under Section 34 against them, there was no irregularity vitiating the trial, as all the circumstances showing concert and participation in the joint criminal action by all the three appellants were duly put to them in their examination under Section 342, CrPC. (now Section 313). Thus they were fully aware of the matter with which they were charged and no question of prejudice arises. *Bhorri Singh* v. *State of Punjab*, AIR 1974 SC 1256 : 1974 SCC (Cri) 664 : 1974 CrLJ 1929.

[10607] ● ***Conviction and sentence before coming into force of new CrPC.***—When accused has been convicted prior to enforcement of the new CrPC, and his sentence is still running, he would be entitled to set-off of the period of detention undergone by him during investigation, enquiry or trial of the case against the term of imprisonment imposed and he would be required to undergo only the remainder of the term. *B.P. Andre* v. *Supdt. of Central Jail*, AIR 1975 SC 164 : (1975) 1 SCC 192 : (1975) SCC (Cri) 70 : 1975 CrLJ 182 : 1975 Mah LJ 1 : 1975 MPLJ 110.

[10608] ● ***Benefit of set off pre-conviction detention period.***—It matters little whether he was convicted under the old CrPC or not he is entitled to set-off under Section 428, CrPC. *B.P. Andre* v. *Supdt. of Central Jail*, AIR 1975 SC 164 (1975) 1 SCC 192 : 1975 CrLJ 182. **TO THE SAME EFFECT :** (1) *Hardev Singh* v. *State of Punjab*, AIR 1975 SC 179 : (1975) 3 SCC 731 : 1975 CrLJ 243; (2) *Suraj Bhan* v. *Om Prakash*, AIR 1976 SC 648 : (1976) 1 SCC 886 : 1976 CrLJ 577; (3) *Mer Dhana Sida* v. *State of Gujarat*, AIR 1985 SC 386 : (1985) 1 SCC 200 : 1985 SCC (Cri) 54 : 1985 CrLJ 660 : 1985 CrLR (SC) 60 : 1985 All Cr R 489 : (1985) 1 Cr LC 242.

[10609] ● ***Witness convicted in murder case 43 years ago.***—In the present case, it was suggested that no reliance should be placed on the evidence of PW-3 because he was an accused in a murder case and was convicted. It appears from the statement of PW-3 in re-examination that the murder case was tried as far back as 1932 about 43 years ago. In view of the huge lapse of time between his conviction and the present occurrence, it is difficult to discard the testimony of this witness on this ground alone. *Arumuga Nadar*

v. *State of Tamil Nadu*, AIR 1976 SC 2588 : (1977) 1 SCC 466 : 1976 SCC (Cri) 124 (127) : 1976 CrLJ 1998 : 1976 CrLR (SC) 463.

[10610] ● ***Charge disclosing only named person as co-accused.***—Where the charge disclosed only the named persons as co-accused and the PWs confined their evidence to them, even then it will be permissible to come to the conclusion that others named or unnamed, besides those mentioned in the charge or the evidence of the PWs, acted conjointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise. *State of A.P.* v. *K.V. Reddy*, AIR 1976 SC 2207 : (1976) 3 SCC 454 : 1976 SCC (Cri) 448 : 1976 CrLJ 1723 : 1976 CrLR (SC) 210 : 1976 SCCrR 277 : 1976 Cr App R (SC) 298.

[10611] ● ***Participation of 12 named accused in commission of murder not established.***—Excepting A7, the participation of the other 12 named accused in the commission of murder was not established. The effect of their acquittal was that, they would be deemed to have never participated in the criminal enterprise which resulted in the death of the deceased and there was nothing on record as to who out of them, dealt the fatal blows to the deceased. The question that fell to be determined was : could A7, in such circumstances, be held vicariously liable by invoking Section 149/34, IPC, for the murder in question. The evidence on record was sufficient to base a firm finding that apart from the accused named in the charge, there were at least one or more unidentified persons who participated in the criminal action against the deceased conjointly with A 7. It could safely be said that apart from the 13 named in the charge, there were some more confederates of A 7 in the crime. A 7 could, therefore, be safely convicted under Section 302/34, IPC. His acquittal is therefore, reversed and he is convicted accordingly. *State of A.P.* v. *K.V. Reddy*, AIR 1976 SC 2207 : (1976) 3 SCC 454 : 1976 SCC (Cri) 448 : 1976 CrLJ 1723.

[10612] ● ***Interpretation of—"Hear the accused on the question of sentence".***—The hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions but it is also intended to give an opportunity to the prosecution and the accused to place before the Court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. Care should be taken by the Court to see that such hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. The claim of due and proper hearing would have to be harmonised with the requirement of expeditious disposal of proceedings. Noncompliance with the provision will *ex-facie* vitiate the order. *Santa Singh* v. *State of Punjab*, AIR 1976 SC 2386 : (1976) 4 SCC 190 : 1976 SCC (Cri) 546 : 1976 CrLJ 1875 : 1976 CrLR (SC) 375.

[10613] ● ***Testimony of previous convict.***—It is true that PW-6 was once convicted in a criminal case, but there is nothing brought out in cross-examination to show when he was convicted or for what offence and in the absence of any such details we cannot reject his evidence merely on the ground that he was once convicted in the past. *Varghese Thomas* v. *State of Kerala*, AIR 1977 SC 701 : (1976) 4 SCC 348 : 1976 SCC (Cri) 643 (645) : 1977 CrLJ 343 : 1977 CrLR (SC) 86.

[10614] ● ***Co-accused convicted under Section 326/34, IPC.***—In the present case, the main accused could have been convicted under Section 302 read with Section 34, but unfortunately the State has not been vigilant in enforcement of the criminal law and regrettably it has not preferred an appeal against the acquittal of main accused under Section 302 read with Section 34 with the result that his conviction under Section 326 read with Section 34 must stand. And if, that be so, consistency compels us to reach the conclusion that the other accused, appellant, also must, on the same basis, be convicted under section 326 read with Section 34 instead of Section 302 read with Section 34. *Ashok Kumar* v. *State of Punjab*, AIR 1977 SC 109 : (1977) 1 SCC 746 : 1977 SCC (Cri) 177 (180) : 1977 CrLJ 164 : 1976 CrLR (SC) 473.

[10615] ● ***Appeal against conviction.***—The fact that a convicted person has already undergone the sentence or is otherwise entitled to be set at liberty because of the length of the period during which he has been under detention during the course of investigation, inquiry and trial cannot prevent the said person from challenging his conviction. *Retti Deenbandhu* v. *State of A.P.*, AIR 1977 SC 1335 : (1977) 1 SCC 742 : 1977 SCC (Cri) 173 (174) : 1977 CrLJ 1004 : 1977 CrLR (SC) 93.

[10616] ● ***Object of Section 235(2), CrPC.***—In a case of conviction under Section 302, if the minimum sentence is imposed, the question of giving opportunity under Section 235(2) would not arise. *Where* the accused was not given an opportunity in terms of Section 235 (2), the appellate Court may give an opportunity to the parties in terms of Section 235(2) to produce the materials they wish to adduce, instead of going through the exercise of sending back the case to the trial Court, to save time of and help produce prompt justice. The failure to give such an opportunity under Section 235(2) will not affect the conviction under any circumstances. When it is a case of conviction under Section 302, IPC, if the minimum sentence is imposed, the question of providing an opportunity under Section 235 would not *arise*. *Tarlok Singh* v. *State of Punjab*, AIR 1977 SC 1747 : 1977 SCC (Cri) 490 : 1977 CrLJ 1139 : 1977 CrLR (SC) 335.

[10617] ● ***Common intention.***—After acquittal of Shingara Singh, the words said to have been spoken of by him could not be made use of and had not been used by the High Court for finding the element of common intention. The only fact then remained that Chain Singh gave a spear blow near the chest of the deceased, which according to the opinion of the doctor, was sufficient in the ordinary course of the nature to cause his death. Hence, he was guilty under Section 302 simpliciter. As regards Surat Singh he was guilty only under Section 324, IPC. The appeal was partly allowed. *Surat Singh* v. *State of Punjab*, AIR 1977 SC 1335 : (1976) 4 SCC 311 : 1976 SCC (Cri) 605 : 1977 CrLJ 347 : 1977 CrLR (SC) 53.

[10618] ● ***Furnishing of free manuscript of judgment while sentencing person to prison.***—Court shall forthwith furnish a free manuscript of the judgment while sentencing a person to prison term. In the event of any such copy being sent to jail authorities for delivering to the prisoner, by the appellate, revisional or other Court, the official concerned shall, with quick despatch, get it delivered to the sentence and obtain written acknowledgement from him. *Madhav* v. *State of Maharashtra*, AIR 1978 SC 1548 : (1978) 3 SCC 544 : 1978 SCC (Cri) 468 : 1978 CrLJ 1678 : 1978 CrLR (SC) 362 : 1978 UJ (SC) 847.

[10619] ● ***Appeal against acquittal.***—As the previous conviction was 7 years' old and today it will about 15 years old, we do not think that we should take those facts into consideration while imposing the sentence on the respondent. *Ramdas Bhikaji Chandhari* v. *Jadanand*, AIR 1980 SC 126 : (1980) 1 SCC 550 : 1980 SCC (Cri) 268 (272) : 1980 CrLJ 111 : 1980 CrLR (SC) 41.

[10620] ● ***Conviction under Section 304, Part II—Propriety.***—Trial Court convicted the appellants under Section 325 r/w Section 34, IPC. On appeal by the State, the High Court convicted the appellants under Section 304, Part II, r/w Section 34, IPC. The deceased received three contused lacerated wounds on the head, extensive subdural haematoma due to head injuries. Even accepting doctor's opinion, that injuries were not sufficient in the ordinary course of nature to cause death, they were clearly of a nature likely to cause death. However, as there is no State appeal to the Supreme Court, acts of the appellants resulting in injuries to the deceased were done with knowledge that they would cause such bodily injury as was likely to cause death. High Court was correct in convicting the appellants under the above sections. *Jayappa Dattu* v. *State of Maharashtra*, AIR 1982 SC 1183 : (1982) 2 SCC 453 : 1982 SCC (Cri) 476 : 1982 CrLJ 1394 : 1982 CrLR (SC) 282 : 1982 SCCrR 183 : 1982 ACrC 186 : 1982 Cr App R (SC) 182 : 1982 Mah LR (SC) 492 : 1982 UJ (SC) 482 : 1982 ACrR 387.

[10621] ● ***Life convicts not to claim benefit of set off.***—Life convicts cannot claim benefit of set off contemplated by Section 428, CrPC. *Kartar Singh* v. *State of Haryana*, AIR 1982 SC 1439 : (1982) 3 SCC 2 : 1982 CrLJ 1772 (SC) : 1982 CrLR (SC) 414 : 1982 UJ (SC) 621 : 1982 All Cr Cas 274 (SC).

[10622] ● ***Expression "Appropriate Government" in Section 432(7), CrPC.***—"Appropriate Government" in Section 432(7) means Government of the State where the offender was sentenced and not where the offence was committed. Where a case was transferred from a Court within the territorial jurisdiction of the High Court of H.P. to a Court within the territorial jurisdiction of the High Court of Punjab, there was sufficient compliance of law if notice was given to the Public Prosecutor, *viz.*, the Advocate-General of Punjab. *Hanumant Dass* v. *Vinay Kumar*, AIR 1982 SC 1052 : (1982) 2 SCC 177 : 1982 SCC (Cri) 379 : 1982 CrLJ 977 : 1982 CrLR (SC) 267 : (1982) 1 SCJ 372.

[10623] ● ***Offence under Section 307, IPC—Ingredients.***—To justify a conviction under Section 307, IPC it is not essential that body injury capable of causing death should have been inflicted. Although, the nature of the injury actually caused might often give considerable assistance in coming to a finding, as to the intention of the accused, such intention might also be deduced from other circumstances, and might even, in some cases, be ascertained without any reference at all to actual wounds. The section made a distinction between an act of the accused and its result, if any. Such an act might not be attended by any result so far as the person assaulted was concerned, but still there might be cases in which the culprit would be liable under that section. It was not necessary, that injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court had to see was whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. An attempt in order to be criminal need not be penultimate act. It was sufficient in law, if there was present an intent coupled with some overt act in execution thereof. The High Court was, therefore, not correct in acquitting the accused of the charge under Section 307, IPC merely because the injuries inflicted on the victims were in the nature of a simple hurt. That portion of the judgment of the High Court was set aside. *State of Maharashtra* v. *Balram Bama Patil*, AIR 1983 SC 305 : (1983) 2 SCC 28 : 1983 SCC (Cri) 320 : 1983 CrLJ 331 : 1983 CrLR (SC) 151.

[10624] ● ***Conviction of accused—Dead body with latter purported to be written by deceased found after 13 years at another plea.***—In this case a person by name Kunwar Bahadur was murdered on July 18th, 1971. The appellants were convicted for the murder and were sentenced to suffer imprisonment for life. On June 2, 1983 a dead body was found in a different place. A letter purported to have been written by one Kunwar Bahadur was recovered from the person of the deceased. On the next day, a Hindi daily carried a news item, that the said dead body was found in suspicious circumstances and that the letter which was recovered from the person of the deceased showed that he was repentant. The said news item was alleged to have come to the notice of the relatives of the appellants. The contention of the appellants was that Kunwar Bahadur, for whose murder they were convicted in 1971, was alive for 12 years thereafter and that his dead body was found on June 2, 1983. By the present appeal, they prayed for an order of acquittal, or rather, for an order setting aside their 12 year old conviction on the ground that they were convicted for a murder that never was. Since the above appeal raised a question of serious concern to the administration of justice, an order was passed by the Supreme Court directing the District Magistrate concerned to hold an inquiry into the allegation, as to whether the person called Kunwar Bahadur who was alleged to have been murdered in 1971, was found alive after the alleged murder and was thereafter murdered in some other incident which took place in 1983. The District Magistrate submitted a report leading to the conclusion that the person whose body was found on June 2, 1983 was not the person who was murdered in 1971 and for whose murder the appellants were sentenced to life imprisonment. The report revealed that the letter recovered from the person of the dead body on June 2, 1983 was a forged and fictitious one manufactured for the purpose of getting over the order convicting the appellants. The age of Kunwar Bahadur who was murdered in 1971 did not tally with the age of Kunwar Bahadur whose dead body was found on June 2, 1983. The close relatives of the real Kunwar Bahadur who was murdered in 1971 stated, that the hand writing of the letter was not that of the Kunwar Bahadur. The two photographs of Kunwar Bahadur who died in 1971 and that of Kunwar Bahadur's dead body found in 1983 differed and there was no resemblance between the two. In the result the appeal was dismissed. *Lallu Ram* v. *State of U.P.*, AIR 1984 SC 1886 : 1984 Supp SCC 424 : 1985 CrLJ 354.

[10625] ● ***Gift of land by accused to victim's widow—Acquittal on that ground illegal.***—In a murder case, the accused was convicted by Sessions Court. High Court acquitted him on the ground that the accused gifted land to victims widow. It can only be said that the judgment of the High Court has left the Court shocked and perplexed. This Court is at a total loss to understand it. The entire system of administration of criminal justice has been reduced to a mockery. If the judgment of the High Court is upheld, it is as if a person who can afford to make gifts of land or money to the heirs of the victim might get away even with a charge of murder. Courts are to dispense justice, not to dispense with justice. And, justice to be dispensed is not palm-tree justice or idiosyncratic justice. The judgment cannot stand a second's scrutiny. It is accordingly set aside and the matter is remanded to the High Court so that the criminal appeals and revision may be reheard. *Ramesh Kumar* v. *Ram Kumar*, AIR 1984 SC 1029 : (1984) 3 SCC 90 : 1984 CrLJ 832 (SC).

[10626] ● ***Notice to enhance sentence—Appeal.***—In an appeal under Article 136 when a notice to enhance the sentence is issued, the case would be wide open and the appellants are entitled to challenge the correctness of the order of conviction. *Sodha Singh* v. *State of Punjab*, AIR 1985 SC 1130 : (1985) 3 SCC 225 : 1985 CrLJ 1361.

[10627] ● ***Conviction on circumstantial evidence.***—Conviction on circumstantial evidence alone but circumstances not completing the chain so as to leave the only conclusion that accused is guilty-High Court convicted-Supreme Court reappreciated evidence and acquitted. *Ramesh Chand* v. *State of U.P.*, AIR 1985 SC 766 : (1985) 1 SCC 464 : 1985 SCC (Cri) 100 : 1985

CrLJ 530 : 1985 CrLR (SC) 70 : 1985 Cr App R (SC) 65 : 1985 All Cr C 75.

[10628] ● ***Conviction of accused prior to coming into force of new CrPC—Benefit of set off.***— Where the accused was convicted prior to the coming into force of the new Code and appeal was filed after the Code came into force, the accused is entitled to the benefit of set off under Section 428. It was wrong for the High Court to hold that as the trial had ended in a conviction prior to the coming into force of the Code of 1973 the appeal would be governed by the repealed Code of 1898 and therefore in such an appeal the benefit of a provision introduced for the first time in the Code of 1973 cannot be extended to the accused because if such a thing is done it would not only give retrospective operation to the Code of 1973 but also it will introduce a dichotomy inasmuch as the appeal would be governed by the repealed statute and the sentence would be governed by the repealing statute. Decision of Gujarat High Court reversed. *Mer Arjan Sida* v. *State of Gujarat*, AIR 1985 SC 386 : (185) 1 SCC 200 : 1985 CrLJ 660 (SC).

[10629] ● ***No power of High Court to alter conviction to grave offence.***—Where two incidents occurred on a particular day and in one of them the accused were convicted under Section 325, IPC, and acquitted of an offence under Section 307, IPC, and in a second case they were acquitted on the charge under Section 302/149, IPC, there was no appeal by the State against the acquittal of the accused under Section 307/149 and convicting them under Section 325/149, IPC. The State preferred an appeal to the High Court against the acquittal of the accused under Section 302/149, IPC, in respect of the second incident. But the High Court altered the conviction under Section 325/149, IPC into one under Section 307/149, IPC. The said alteration by the High Court is illegal and the original conviction under Section 325/149 was restored. *Amar Singh* v. *State of Rajasthan*, AIR 1987 SC 2023 : 1987 SCC (Cri) 670 : 1988 CrLJ 198 : 1987 CrLR (SC) 620.

[10630] ● ***Power of Court to award compensation to victim while passing judgment of conviction.***—Section 357(3), CrPC empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto.

This power was intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally as to meet the ends of justice in a better way." The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The Court may enforce the order by imposing sentence in default. *Hari Singh* v. *Sakhbir Singh*, AIR 1988 SC 2127 : (1988) 4 SCC 551 : 1989 CrLJ 116.

[10631] ● ***Appeal against conviction by co-accused.***—Co-accused not appealed—conviction of another accused set aside on appeal—finding interdependent and inextricably integrated—the non-appealing co-accused is also entitled to acquittal. *Harinath* v. *State of U.P.*, AIR 1988 SC 345 : (1988) 1 SCC 14 : 1988 SCC (Cri) 14 : 1988 CrLJ 422 : (1987) 3 Crimes 667 : 1987 All Cr C 582 : 1988 BLJ 55.

[10632] ● ***Murder—Only one blow with knife.***—In this case the accused started abusing certain organisers of a chit fund who had no connection with the deceased, in front of the house of the deceased. The deceased came out of his house and asked the accused to go away and cautioned him not to indulge in abusive language as the ladies were present. Both were remonstrating with each other when the accused took out knife from his waist and stabbed the deceased and pushed him to some distance and went away. He was convicted of an offence under Section 302, IPC, and sentenced to suffer imprisonment for life. In the circumstances of this case, no malice is alleged to have been entertained by the accused towards the deceased and the accused gave only one blow with a knife on the spur of the moment; the requisite intention to commit murder cannot be attributed to him. In such a situation he is guilty of committing an offence under Section 304, Part II, IPC. *Thelan* v. *State of Tamil Nadu*, AIR 1989 SC 759 : (1984) 2 SCC 133 : 1984 CrLJ 478.

[10633] ● ***Question of prejudice decision as to.***—In order to arrive at a conclusion whether prejudice has been caused it is to be found out as to whether the accused had a fair trial whether he knew what he was being tried for whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. *State of West Bengal* v. *Raisal Haque*, AIR 1989 SC 129 : (1989) 3 SCC 166 : 1989 CrLJ 865.

[10634] ● ***Alteration of conviction by High Court.***—Where there is an alternative charge under Section 302, IPC of which the accused has not been acquitted expressly or implicitly, it is competent for the appellate Court to alter the conviction from under Section 396 to 302, IPC. *Ram Deo* v. *State of Bihar*, AIR 1990 SC 1180 : (1990) 2 SCC 675 : 1993 CrLJ 37.

[10635] ● ***Challenging conviction and sentence by third party.***—A third party has no *locus standi* to challenge the conviction and sentence awarded to certain convicts even on the averments of violation of their fundamental rights. *Simarnjit Singh Mann* v. *Union of India*, AIR 1993 SC 280 : (1992) 4 SCC 653 : 1993 SCC (Cri) 22 (26, 27) : 1993 CrLJ 37.

[10636] ● ***Third party stranger not to question correctness of conviction and sentence.***—Ordinarily, the aggrieved party which is affected by any order has the right to seek redress by questioning the legality, validity or correctness of the order, unless such party is a minor, an insane person or is suffering from any other disability which the law recognises as sufficient to permit another person, *e.g.*, next friend, to move the Court on his behalf. Unless an aggrieved party is under some disability recognised by law, it would be unsafe and hazardous to allow any third party to question the decision against him. Take for example a case, where a person accused under Section 302, IPC is convicted for a lesser offence under Section 324, IPC. The accused is quite satisfied with the decision but a third party questions if under Article 32 and succeeds. The conviction set aside and a fresh trial ends up in the conviction of the accused under Section 302, IPC. The person to suffer for the unilateral act of the third party would be the accused. We are therefore satisfied that neither under the provisions of the Code nor under any other statute is a third party stranger permitted to question the correctness of the conviction and sentence imposed by the Court. *Simarnjit Singh Mann* v. *Union of India*, AIR 1993 SC 280 : (1992) 4 SCC 653 : 1993 SCC (Cri) 22 (26, 27) : 1953 CrLJ 37.

[10637] ● ***Murder—Conviction under Section 307, IPC.***—Originally, there were four accused charged for the murder of the victim Kulwant Singh. The present appellant was one of four accused. He was charged for the offence under Section 302 read with Section 34 as well as under Section 307 read with Section 34, IPC. The rest three accused were charged for the offence under Section 302 read with Section 34, IPC as well as under Section 307 read with Section 34, IPC. Since the victim was alone only Kulwant Singh for whose death the accused were charged under Section 302, IPC, we have not understood the charge framed by the learned Sessions Judge under Section 307, IPC also in connection with the same murder. *Jagtar Singh* v. *State of Punjab*, AIR 1993 SC 2448 (2448) : 1994 Supp (1) SCC 65 : 1993 CrLJ 2886.

[10638] ● ***Article 311(2) of constitution—Applicable on ground of conduct which led to his conviction.***—Article 311(2)(a) second proviso speaks of the conduct which has led to his conviction on a criminal charge. Taking proceeding for and passing order of dismissal, removal and reduction in rank of a Govt. servant convicted by a criminal Court is not barred merely because the sentence or order is suspended by the Appellate Court or on the ground that the said government servant-accused has been released on bail pending the appeal. The order can always be raised and if the government servant is reinstated, he will be entitled to all benefits to which he would have been entitled to had he continued in service. The other course to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a criminal Court. *Deputy Director of Collegiate Education (Administration) Madras* v. *S. Nagar Meena*, AIR 1995 SC 1364 : (1995) 3 SCC 377 : JT 1995 (3) SC 32.

[10639] ● ***No locus standi of third party to challenge conviction and sentence.***—A third party has no *locus standi* to challenge conviction and sentence awarded to certain convicts. *Satvir Singh* v. *Baldev*, AIR 1997 SC 169 : (1996) 8 SCC 593 : 1997 CrLJ 66 : (1996) 2 Crimes 138 (SC).

[10640] ● ***Basic constituents of two offences one of distinct and different categories.***—Having acquitted the appellant of the charge under Section 302, IPC which was the only charge framed against him—the High Court could not have convicted him of the offence under Section 306, IPC. It is true that Section 222, CrPC entitles a Court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306, IPC cannot be said to be a minor offence in relation to an offence under Section 302, IPC within the meaning of Section 222, CrPC for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302, IPC is homicidal death, those of Section 306, IPC are suicidal death and abetment thereof. *Sangaraboina Sreenu* v. *State of Andhra Pradesh*, AIR 1997 SC 3233 : (1997) 5 SCC 348 : 1997 SCC (Cri) 690 (691) : 1997 CrLJ 3955 : JT 1997 (5) SC 47 : (1997) 2 Crimes 55.

[10641] ● ***High Court in exercise of revisional power not to convert acquittal into conviction.***—The High Court in exercise of its revisional power cannot convert an Order of acquittal into Order of conviction. *Vimal Singh* v. *Khuman Singh*, AIR 1998 SC 3380 : (1998) 7 SCC 223 : 1999 CrLJ 16.

[10642] ● ***Awarding sentence on conviction judicial function.***—Awarding sentence upon conviction is concededly a judicial function to be discharged by the Courts of law established in the country. It is always a matter of judicial discretion, however, subject to any mandatory minimum sentence prescribed by the law. The award of sentence by a Criminal Court wherever made subject to the right of appeal cannot be interfered or intermeddled with in a way which amounts to not only interference but actually taking away the power of judicial review. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under the peculiar circumstances of each case, pending the disposal of the appeal. Not providing atleast one right of appeal, would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statute and when conferred, a substantive right. Providing a right of appeal but totally disarming the Court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. *Dadu* v. *State of Maharashtra*, AIR 2000 SC 3203 : (2000) 8 SCC 437 : 2000 SCC (Cri) 1528 (1539) : 2001 CrLR (SC) 138.

[10643] ● ***Mentioning section in judgment not requirement of law.***—Mention of section in the judgment is not the requirement of law to convict a person. If the ingredients of the offence are present, conviction can be made. It is not material to bring the case under Section 34, IPC as to who, in fact, inflicted the fatal blow. *Narinder Singh* v. *State of Punjab*, AIR 2000 SC 2212 : (2000) 4 SCC 603 : 2000 SCC (Cri) 855 (865) : 2000 CrLJ 3462.

[10644] ● ***Limitation for taking cognizance for offence in Section 468(3), CrPC.***—The language of Section 468(3), CrPC makes it imperative that the limitation provided for taking cognizance in Section 468 in respect of the offence charged and not in respect of offence finally proved. This being the position, in the case in hand, when the respondents were charged under Section 468 read with Section 120-B for which impossible punishment is seven years and Section 5(2) of the Prevention of Corruption Act, 1947 which is punishable with imprisonment for a term which may extend to seven years and for such offences no period of limitation having been provided for in Section 468, the cognizance taken by the learned Special Judge cannot be said to be barred by limitation. *State of H.P.* v. *Tara Dutt*, AIR 2000 SC 297 : (2000) 1 SCC 230 : 2000 SCC (Cri) 125 (128) : 2000 CrLJ 485 : 2000 CrLR (SC) 156.

[10645] ● ***Juvenile accused splitted and tried separately.***—One error has been committed by the High Court by converting the conviction from Section 396 read with Section 149, IPC to one under Section 396 in aid of Section 34, IPC. It is in the evidence of PW-16 that the juvenile accused—Majnunath had disclosed to him that all the five accused participated in the murder of deceased—Vittal Shetty and Paul. As already noticed the trial of juvenile accused—Majnunath has been splitted. The trial Court, therefore, was right in convicting the appellants under Section 396, IPC read with Section 149, IPC. *Anthony D'Souza* v. *State of Karnataka*, AIR 2003 SC 258 : (2003) 1 SCC 259 : 2003 SCC (Cri) 292 : 2003 CrLJ 434.

[10646] ● ***Charge under Section 304-B, IPC established—Conviction held proper.***—Where the deceased married to the appellant died within one year and two months of the marriage, there was evidence of dowry demand and ill-treatment by the appellant, injuries found on the neck of the deceased remained unexplained, held the charge under Section 304-B against the appellant was found established. The conviction of the appellant was sustained. *Kamesh Panjiyar* v. *State of Bihar*, AIR 2005 SC 785 : (2005) 2 SCC 388 : 2005 CrLJ 1418 (1422) : (2005) 1 Crimes 277.

CONVICTION OF MORE THAN ONE : NEED

[10647] ● ***Conviction of more than one : need.***— The second situation is where two or more persons (*e.g. A* and *B* or *A*, *B* and *C*) are charged in the same indictment with conspiracy together (but not with others), and all but one of them (*e.g. A*) are acquitted, as can happen for example where evidence is admissible against one conspirator but not against another. At common law, A could nevertheless be convicted if he was tried separately from *B* (or *B* and *C*) but not if he was tried together with them. However, Section 5 (8) of the English Criminal Law Act, 1977 does not provide that the fact that the person or persons who, so far as appears from the indictment on which any person has been convicted of conspiracy, were the only other parties to the agreement on which his conviction was based have been acquitted of that conspiracy (whether after being tried with the person convicted or separately) is not ground for quashing his conviction unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other person or persons. So, the Indian and English Law on the point is alike. It may be recalled as stated by Kenny : though there must be a plurality of conspirators, it is not necessary that all should be brought to trial together. On person may be indicted, alone for conspiring with other persons, who are not in custody, or who are even unknown to the indictors. Indeed some of the conspirators may be unknown to the rest, provided all be acting under the directors of one leader. Kenny on *Outlines of Criminal Law,* 9th edn. p. 428 para 450.

[10648] ● ***Conviction of single person on charge of criminal conspiracy under Section 120-B, IPC.***—It is settled law that when several persons are charged of the offence of criminal conspiracy under Section 120-B of the Penal Code and all the accused except one are acquitted, the conviction of the remaining one accused on that charge is illegal. The reason is that the definition of conspiracy requires that there must be an agreement to commit the act complained of between two or more persons, and one person cannot conspire with himself. However, the principle laid down in *Topandas's* case will apply only when the prosecution case is that the conspiracy was committed between the accused before the Court and none else, and that no person other than the accused, known or unknown, was concerned in the offence. The Principle cannot apply when according to the prosecution, persons other than the accused before the Court were also concerned in the conspiracy which is the subject-matter of the charge under Section 120-B. In other words, conviction of two or more persons is not always necessary for a charge under Section 120-B, and the conviction of a single accused on that charge is perfectly legal when the Court is satisfied that two or more persons of whom the accused is one were actually concerned in the conspiracy. In the present case, accused *A* who was a Government servant was charged under Section 120-B read with Sections 409 and 177-A and also for substantive offences under Sections 409 and 477-A, along with four other accused who were his subordinates. The prosecution case was that they all, and one other overseer who was made an approver in the case, entered into a conspiracy to misappropriate Government funds placed at their disposal, and that in pursuance of that conspiracy they misappropriated the money and falsified official records to cover up their actions. The Sessions Judge acquitted those four subordinates, by giving them the benefit of doubt, but convicted *A* on all the charges. On appeal, the High Court acquitted him of the substantive charges but confirmed his conviction under Section 120-B. The present case was clearly distinguishable from the decisions in *Topandas* v. *State of Bombay,* and the cases cited in that judgement, because in this case besides the four accused who were acquitted, there was also one other person who was clearly implicated in the conspiracy, namely the approver, and his evidence had been accepted by the High Court. Under these circumstances, the conviction of *A* alone on the charge under Section 120-B was perfectly legal and justified, even when all the other co-accused had been acquitted. *Bimbadhar Pradhan* v. *State of Orissa*, AIR 1956 SC 469 : 1956 CrLJ 831 : 1956 SCA 857 : 1956 SCJ 441 : ILR (1956) Cut 409 : 1956 AWR (Sup) 89 : 1956 (2) MLJ (SC) 93.

[10649] ● ***Conviction of one person for conspiracy.***—When all the accused except one are acquitted of the charge under Section 120-B and the prosecution case has been that the offence was committed by them alone, conviction of the remaining single accused on that charge is illegal even though he may have made a confession of conspiracy with the co-accused, or he may have pleaded guilty to the charge when questioned in Court. In the present case four accused were charged before a Magistrate under Section 120-B read with Sections 471 and 420 and also with substantive offences under those sections. The prosecution case was that they conspired to use forged documents and thereby induced the Controller of Imports to grant import licences. The Magistrate acquitted all the accused on all the charges. On appeal by the State, the High Court confirmed the acquittal of Accused Nos. 2, 3 and 4 but reversed the acquittal of Accused No. 1 and convicted him not only of the substantive offences of which he was charged, but also under Section 120-B. In view of the fact that the charge under Section 120-B as framed was levelled against four named individuals who were the four accused in the case, and was not a charge against them and other persons unknown, the conviction of Accused No.1 alone on that charge was clearly illegal. Conviction under Section 120-B was set aside, though his conviction for the substantive offences under Sections 471 and 420, Penal Code, was not interfered with. *Topan Das* v. *State of Bombay*, AIR 1956 SC 33 : 1956 CrLJ 138 : 1956 SCA 74 : 1956 SCJ 86.

[10650] ● *Conviction of single accused—Evidence and proof.*—It is not essential that more then one person should be convicted of the offence of criminal conspiracy. It is enough if the Court is in a position to find that two or more persons were actually concerned in the criminal conspiracy. If the Courts below had come to the distinct finding that the evidence led on behalf of the prosecution was unreliable, then certainly no conviction could have been based on such evidence and all the accused would have been equally entitled to acquittal. But it cannot be held that the accused having been acquitted by the trial Court, the particular accused should not have been convicted because the evidence against all them was the same, when the Court is not satisfied that the acquittal of the other accused persons was entirely correct.. *Bimbadhar Pradhan* v. *State of Orissa*, AIR 1956 SC 469 : 1956 CrLJ 831 : 1956 SCA 857 : 1956 SCJ 441 : 1956 (2) MLJ (SC) 93.

[10651] ● *Nothing illegal in conviction of single person under Section 120-B-IPC.*—The offence of criminal conspiracy consists in the agreement to commit an offence, irrespective of whether the offence in respect of which, the conspiracy is hatched, is in fact committed or not. The very fact of the agreement constitutes the offence and nothing more needs to be proved to have been done in pursuance of the criminal agreement. If an accused has been charged under Section 120-B and also with a substantive offence and he has been acquitted of the charge in respect of the substantive offence, he cannot contend merely on that account, that he should also be acquitted of the charge under Section 120-B. In the present case *A* and four others were jointly tried for offences under Section 120-B read with Sections 409 and 477-A, and also under Sections 409 and 477-A substantively. The trial Court gave the benefit of doubt to all the other co-accused and acquitted them on all the charges, but convicted *A* on the same charges. On appeal the High Court acquitted him of the charges under Sections 409 and 477-A on technical grounds, but confirmed his conviction under Section 120-B. There is nothing illegal in the conviction of the accused either because he alone has been convicted under Section 120-B or because the charges for the substantive offences have failed. *Bimbadhar Pradhan* v. *State of Orissa*, AIR 1956 SC 469 : 1956 CrLJ 831 : 1956 SCA 857 : 1956 SCJ 441 : ILR (1956) Cut 409 : 1956 AWR (Sup) 89 : 1956 (2) MLJ (SC) 93.

[10652] ● *Offence of conspiracy can not survive acquittal of alleged co-conspirators.*—The offence of conspiracy cannot survive the acquittal of the alleged co-conspirators. Fakhruddin cannot be convicted unless there be proof that he had conspired with person or persons other than his co-accused. If all the other accused have been acquitted of the charge of conspiracy, Fakhruddin alone cannot be held guilty. *Fakhruddin* v. *State of Madhya Pradesh*, AIR 1967 SC 1326 : 1967 CrLJ 1197 : 1967 SCD 495 : (1967) 1 SCWR 449 : (1967) 2 SCA 135 : (1967) 2 SCJ 885 : 1967 AWR (HC) 322 : 1967 ALJ 303 : 1967 ACrR 222 : (1967) 2 ALT 38 : 1967 BLJR 318 : 1967 JabL J 441 : 1967 MPLJ 473 : 1967 Mah LJ 571 : 1967 MLJ (Cri) 925.

1. PERSON NEED NOT PARTICIPATE IN CONSPIRACY FROM START TO FINISH

[10653] ● *Person need not participate in conspiracy from start to finish.*—It is not necessary that a person should be a participant in a conspiracy from start of finish. Conspirators may appear and disappear from stage to stage in the course of a conspiracy. *Raghuvir Singh* v. *State of Bihar*, AIR 1987 SC 149 (158) : 1987 CrLJ 157.

COPIES OF DOCUMENTS

[10654] ● *Copies of documents.*—The Code has expressly conferred upon the accused the valuable right to demand from the prosecutor copies of statements recorded by the police during investigation, and to use such statements for the purpose of contradicting the evidence in Court of the witnesses whose statements have been so recorded by bringing on record the contradiction between the evidence in Court and the earlier statement to the police officer. The denial of the accused of such a valuable right is a serious irregularity which would vitiate the entire trial if the appellate Court is satisfied that the accused was prejudiced in his defense by such denial. *Purshottam Jethanand* v. *State of Kutch*, AIR 1954 SC 700 : 1954 CrLJ 1751.

[10655] ● *Refusal to supply copies of statements—Effect.*—The right of an accused person to copies of the statements by prosecution witnesses to the police is derived from Sections 173(4), 207-A(3) and 251-A(1) of the Code as amended by Act 26 of 1955 (old Section 162). The very language of Section 173(4) and its being linked to Sections 207-A(3) and 251-A(1), makes it clear that the right extends only to statements which have been recorded in the *same* case only, and that the accused has no statutory right to police statements recorded in the investigation of *another* case. However, even though the accused has no right to demand a copy of the police statement of a witness who is examined in the case against him if such a statement has been recorded in another case yet, if at the time of such examination the accused is in possession of such a statement, there is nothing in law to prevent him from using that statement for the purpose of contradicting that witness in the manner provided by Section 145 of the Evidence Act. In such a case it cannot be pleaded by the prosecution that Section 162 of the Code operates as a bar to such use. Section 162 bars every use of a recorded police statement of a witness *other than* the use which can be made of it for the purpose of contradiction, and if that is the use to which such statement is being put, it is immaterial whether such statement was furnished to the accused in the same or in a different case. All that is denied to the accused is to demand, while he is under-trial in one case, the police statements of prosecution witnesses which have been recorded in another case. In the present case the accused who was a Police Jamadar was being tried for an offence under Section 384, Penal Code, for extorting moneys from certain villagers whose passports he had been checking. Previously to that the accused had lodged a charge-sheet against certain persons in the same village in respect of a complaint of robbery, and during the investigation of that case, his superior had recorded statements of those very persons who were prosecution witnesses in the present case. During the trial of the present case the accused demanded copies of those statements but his demand was turned down, and the trial proceeded without the accused getting an opportunity to contradict those witnesses whose statements recorded in the other case he did not possess. The trial resulted in conviction. There was nothing in the trial involving any irregularity or contravention of the rules of procedure, in the refusal to furnish the accused the record of the statements taken in the other case, since the only statutory right which the accused had was to obtain copies of statements recorded only in very case under trial. However if he had possessed those statements, he would have been perfectly entitled to utilize them for the purpose of contradiction. *Purshottam Jethanand* v. *State of Kutch*, AIR 1954 SC 700 : 1954 CrLJ 1751.

[10656] ● *Objection to furnish copier of Police statement of witnesses.*—Though there is no statutory obligation to furnish the accused copies of police statements of witnesses recorded in another case even if it be a connected case, it is desirable to furnish to him such copies in the interest of justice. However, even assuming that the omission to do so is a material irregularity, the effect of such omission, at worst, could only be the same as the effect of a similar omission as to furnishing the statements recorded in the same case, and no more. *Gurbachan Singh* v. *State of Punjab*, AIR 1957 SC 623 : (1957) SCC 359 : 1957 CrLJ 1009 : 1957 SCJ 539 : 1957 SCA 856 : (1957) 1 MLJ (Cri) 488 : 1957 AWR (HC) 651.

[10657] ● *Copies of statement recorded by Police not furnished.*—The language of the new Section 173(4), in contrast with the language of the old Section 162, clearly shows that now the accused is entitled to be furnished copies of statements recorded by the police as of right, and it is no longer necessary for him to request the Court to furnish him with these copies. The obvious object of the amendment is to put the accused on full notice at the very commencement of the inquiry or trial of the prosecution case which he has to meet in the proceeding against him, and with that in view, it is further provided in Sections 207-A(3) and 251-A(1) that the Magistrate before whom the accused is brought shall satisfy himself before commencing the proceeding that the provisions of Section 173(4) have been duly complied with and that the accused has been furnished with all the documents to which he is now entitled to as of right. The combined effect of these three provisions is that ample provision is now made in the Code to see that the accused is put in possession of all the relevant police record before the very commencement of the proceedings against him. Therefore when in a particular case, the appellate Court finds that during the trial the accused has not been furnished copies of the statements of the prosecution witnesses recorded by the police, that fact in itself cannot vitiate the trial. The Court must go into the further question as to whether the accused was in fact prejudiced in his defence as a result of the denial of his right to him. For that purpose the Court must look into all the facts and circumstances of the case, and must call for the police record and itself peruse the police statements of those witnesses. Thereafter, if the Court finds that there are discrepancies between those statements and the depositions of the witnesses at the trial and that these discrepancies are of a serious nature, prejudice must be held to have been established, because in such a case the accused has been denied the opportunity of discrediting those witnesses by bringing on record the contradictions which exist between their evidence in Court and their earlier statements recorded by the police. On the other hand, if on such perusal of the police record, it is found that there are no such contradictions between the two statements as would warrant an inference that the accused was prejudiced by the omission to furnish him copies of the police record, it must be held that though a grave irregularity occurred during the trial as a result of the non-observance of a mandatory rule of procedure, such irregularity has not occasioned any such failure of justice as would demand the setting aside of the conviction and an order for a re-trial. In such a case the irregularity, though grave, must be held to have been cured by Section 537 of the Code. As said above, in the ultimate end, the matter turns upon the question whether the accused did or did not have a fair trial. Applying these principles, and after perusing the police record, this Court refuses to interfere with conviction, because it is found that there were no such material contradictions between it and the evidence given at the trial as would warrant a finding that the accused had been prejudiced as a result of the omission to furnish him the copies of the police statements of the witnesses on whose evidence in Court the conviction is based. *Gurbachan Singh* v. *State of Punjab*, AIR 1957 SC 623 : 1957 CrLJ 1009 : 1957 SCJ 539 : 1957 SCA 856 : (1957) 1 MLJ (Cri) 488 : 1957 AWR (HC) 651.

[10658] ● ***Propositions of Section 173(4) and Section 207A not mandatory.***—Introduction of the new Section 207-A into the Code is meant to simplify committed proceedings so that the Magistrate can frame a charge straightaway after perusing the documents on which the prosecution relies and examining such witnesses as the prosecution may produce. As against this the accused is given the right to show that the documents produced by the police and on which they rely do not disclose any ground for an order of committal. It is for the purpose of enabling the accused to exercise this right adequately that new Sections 173(4) and 207-A(3) have been added to the Code so that the accused can now obtain possession of the whole police record on which the prosecution relies for its case against him, at the very commencement of the inquiry proceeding, and for this purpose a duty is cast upon the Magistrate himself to see to it that the provisions of these sections have been duly complied with by the prosecution and the accused is not denied any opportunity of contesting the case against him for want of the documents on which the prosecution relies. Therefore, even when it is found by the Court of Appeal in any case that the accused had not been furnished at his trial with the copies of the police statements of the prosecution witnesses to which he is entitled under the Code, it cannot be said straightaway that the entire trial was vitiated by such omission. It has further to be considered whether the omission to supply to the accused the copies to which he was entitled has in fact occasioned a prejudice to him in his defence. For that purpose, the Court must scrutinize the police record for itself, and if it is found that the contradictions of which the accused has lost advantage by reason of his ignorance of their existence were material, then it must be held that the omission has occasioned a failure of justice by denying to him the opportunity to bring those contradictions on the record. In such a case, conviction must be set aside, and a fair re-trial after furnishing to the accused all the copies to which he is entitled must be ordered. On the other hand, if the scrutiny of the police record does not reveal any such material as could have been of substantial use of the accused for the purpose of contradicting the prosecution witnesses, it must be held that the omission to supply the police statements to the accused at the trial has not occasioned any prejudice to him in his defence, and the irregularity must be treated as cured by Section 537 of the Code. *Narayan Rao* v. *State of A.P.*, AIR 1957 SC 737 : 1957 CrLJ 1320 : 1957 SCA 932 : 1957 SCJ 727 : 1958 ALJ 121 : (1957) 2 MLJ (SC) 139 : (1957) 1 MLJ (Cri) 690 : 1957 AWR (Supp) 109 : 1958 ALT 100 : 1958 MPC 1 : 1957 (2) AWR (SC) 139.

[10659] ● ***Supply of copies of Police record to accused.***—Sections 173(4), 207-A(3) and 251-A(1), are the only provisions in the Code which relate to the supply of copies of the police record to the accused. The right conferred on the accused is confined to the documents enlisted in Section 173(4), and his right to obtain copies does not extend to any other documents. By its very language Section 173(4) applies only to statements recorded in the *same* case, and not to statements recorded in *another* case, even though that case be a connected case. Therefore, if during his trial the accused has demanded copies of the statements of the prosecution witnesses recorded by the police in *another* case which is connected with the case under trial, and such copies have not been furnished to him, and then the trial results in conviction, it is not open to the accused to plead before the appellate Court that there has been any illegality or irregularity at the trial, and hence the question of prejudice does not at all arise. However, there is nothing in the Code which forbids the furnishing of such copies to the accused, and it is desirable in the interest of justice that he should be furnished, on demand by him, copies of statements of prosecution witnesses recorded even in another case if it is a case connected with the case under trial; this is particularly so, when the statements of those witnesses have *not* been recorded at all in the case under trial. But apart from a consideration of these statutory provisions, even on general principles, the same conclusion has to be reached. The filing of a certified copy has a definite purpose. The copy has to be considered by the appellate Court or the purpose of founding a judicial decision thereon, and it is obvious that any decision of a Court has to be based on authentic material only, and the only way in which the authenticity of a copy furnished to the appellate Court can be guaranteed is by requiring a copy carefully compared with the original and duly certified by a responsible officer of the Court. For all these reasons it must be held that the "copy" contemplated by Section 419 of the old Code is a "certified copy", and not merely a plain copy or transcript of the original, and that the requirements of Section 419 are not complied with if the copy attached to the petition of appeal is only a plain copy. *State of U.P.* v. *C-Tobit*, AIR 1958 SC 414 : 1958 CrLJ 809 : 1958 SCR 1275 : 1958 MLJ (Cri) 562.

[10660] ● ***Charge-sheet hardly complete thesis of prosecution case.***—The charge-sheet is hardly a complete or accurate thesis of the prosecution case. Clause (a) of sub-section (1) of Section 173, CrPC requires the officers in charge of the police station to forward to the Magistrate empowered to take cognizance of the offence on a police report, the report in the prescribed form setting forth the names of the parties, the nature of the information, and the names of the persons who appear to be acquainted with the circumstances of the case. Nothing further need be said on this point. *R.K. Dalmia* v. *Delhi Administration*, AIR 1962 SC 1821 : 1962 (2) CrLJ 805.

[10661] ● ***Failure to supply copies of statements of witnesses to accused.***—These provisions contained in Sections 161, 162, 173(4) and 207A(3) provide a valuable safeguard to the accused and denial thereof may be justified only in exceptional circumstances. The provisions relating to the recording of the statements of the witnesses and supply of their copies to the accused so that they may be utilized by him at the trial for effectively defending himself cannot normally be permitted to be whittled down. Where the circumstances are such that the Court may reasonably infer that a prejudice has resulted to the accused from the failure to comply with these provisions, the Court would be justified in directing that the conviction be set aside, and in a proper case to direct that the defect be rectified in such manner as the circumstance may warrant. Failure to supply copies will not by itself render the trial illegal. The Court must in each case consider the nature of the defect, and the circumstances which lead to an inference of prejudice, and the strength of the inference of prejudice must always be adjudged having regard to the circumstances of each case. *Noor Khan* v. *State of Rajasthan*, AIR 1964 SC 286 : 1964 (1) CrLJ 167 : 1964 SCD 395.

[10662] ● ***Failure to furnish statements of witnesses recorded in course of investigation not to vitiate trial.***—Failure to furnish statements of witnesses recorded in the course of investigation may not vitiate the trial on that account alone. The failure does not affect the jurisdiction of the Court to try the case put up before it, nor is the failure by itself a ground which affects the power of the Court to record a conviction, if the evidence before it warrants such a course. *Noor Khan* v. *State of Rajasthan*, AIR 1964 SC 286 : 1964 (1) CrLJ 167.

[10663] ● ***Making available copies of statement to accused of grant importance.***—The provisions relating to the making of copies of statements recorded in the course of investigation available to the accused are undoubtedly of great importance, but a breach thereof cannot in itself vitiate the trial. The effect of the breach has to be considered by the Court in the light of the prejudice caused to the accused by reason of the breach of these provisions in the Code. Section 537 of the Code expressly provides for the consequences of such a breach. It says that subject to the provisions contained in the Code, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in any proceeding before or during the trial, unless it has in fact occasioned a failure of justice. *Noor Khan* v. *State of Rajasthan*, AIR 1964 SC 286 : 1964 (1) CrLJ 167.

[10664] ● ***Trial protracted for 20 years—Copies of statements recorded during investigation in 1946 not furnished.***—Statements recorded during investigation in 1946 were not traceable and the copies thereof admittedly could not be furnished to the respondent. That meant that a statutory right, unquestionably the most valuable to an accused, was denied to the respondent, a right, the exercise of which alone, could have been given to him an effective opportunity to test the veracity of the evidence led by the prosecution. The denial of such a right gains considerable significance in view of the long lapse of time due to which the respondent would, if furnished with copies of the witnesses' police statements, have probably been in a position to establish that in some cases at least the witnesses' memory of the alleged events which took place as early as 1946 had failed, or in any event, was not such as could be relied upon for the success of the prosecution case. *State of U.P.* v. *Kapil Deo Shukla*, AIR 1973 SC 494 : (1972) 3 SCC 504 : 1972 SCC (Cri) 597 (602) : 1972 CrLJ 1214.

[10665] ● ***Omission to supply copies of statement of prosecution witnesses.***—The trials were separate. It was open to Bajid accused to inspect the record of Rao's case (the other case) if necessary, with the permission of the Court, and copy out those statements or secure certified copies in accordance with law and use them, if necessary, in cross-examination of those witnesses who also appeared against him. There is no question of any violation of any provision of law or of any settled principle for not supplying the copies of other file, with the result that in our opinion the High Court was wrong in holding Bajid's defence to have been prejudiced by the omission on the part of the prosecution to supply him copies of statements of prosecution witnesses in the other case (Rao's case). *State of Assam* v. *Krishna Rao*, AIR 1973 SC 28 : (1973) 3 SCC 227 : 1973 SCC (Cri) 222 (235, 236) : 1973 CrLJ 169 : 1973 CrLR (SC) 304 : 1973 Cr App R (SC) 48 : (1973) 2 SCR 239.

[10666] ● ***No form prescribed for representation by detenu.***—Under Article 22(5) no proforma for representation has been prescribed and a request for release of detenue, therefore, has to be deemed a representation, so also a request to supply copies of documents *etc.* Opportunity to make a representation comprehends a request for supply of translated copies. *Shalini Soni* v. *Union of India*, AIR 1981 SC 431 : (1980) 4 SCC 544 : 1981 SCC (Cri) 38 : 1980 CrLJ 1487. **TO THE SAME EFFECT :** (1) *Kubic Dureisz* v. *Union of India*, AIR 1990 SC 605 : (1990) 1 SCC 568 : 1990 CrLJ 796.

[10667] ● ***Accused entitled to get copies of statements of witnesses.***—An accused is undoubtedly entitled to have copies of the statements recorded by the Police. This is very valuable right because without having the statements recorded by the Police in possession, it would be difficult, if not impossible for an accused to defind himself effectively. If an accused is not supplied either the statements recorded by the Police or the statements of witnesses recorded at the inquiry or the trial, how can he possibly defend himself and instruct his lawyer to cross-examine the witnesses successfully and effectively so as to disprove the prosecution case. We, therefore, think that Section 14 of the Official, Secrets Act could never have intended to take away or deprive an accused of this valuable right which has been conferred on him by the criminal law of the land. The said Section 14 does not prohibit the giving of copies of statement as referred to above to the accused. The lawyer is not prohibited from taking the statements in extenso and has a duty to show the same to the Court. *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Satyen Bhowmick*, AIR 1981 SC 917 : (1981) 2 SCC 109 : 1981 SCC (Cri) 342 (351, 352) : 1981 CrLJ 341 : 1981 CrLR (SC) 136.

[10668] ● ***Refusal to supply copies of documents forming basis of detention.***—In the instant case, the person detained under Section 3(1) of COFEPOSA applied for the supply of copies of the documents forming the material on which the order of detention had been made but they were refused to be supplied to him. Nor were the grounds supplied to the detenue accompanied by the copies of documents forming the basis thereof. The detention is bad in law. *Gurdeep Singh* v. *Union of India*, (1981) 1 SCC 419 : 1981 SCC (Cri) 168 : 1981 CrLJ 2.

[10669] ● ***Failure to supply copies of documents vitiate detention.***—This Court has repeatedly held in several decisions that the failure to supply copies of the documents referred to and relied upon in the grounds of detention for the purpose of detention under conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 vitiates the detention itself. *Union of India* v. *Haji Mastan Mirza*, AIR 1984 SC 681 : (1984) 2 SCC 427 : 1984 SCC (Cri) 271 (276, 277) : 1984 CrLJ 610 : 1984 CrLR (SC) 117 : (1984) 1 Crimes 651.

[10670] ● ***Non-supply of documents not substitute for copies of documents.***—The explanation was the non-supply of the documents cannot be a substitute for the copies of the documents without which the respondents could not have made any effective representation against his detention. *Union of India* v. *Haji Mastan Mirza*, AIR 1984 SC 681 : (1984) 2 SCC 427 : 1984 SCC (Cri) 271 (276) : 1984 CrLJ 610 : 1984 CrLR (SC) 117 : (1984) 1 Crimes 651.

[10671] ● ***Non-supply of copies of statements made before Police.***—"…….even the statements made before the Police were recorded four months after the occurrence. Copies of these statements were not made available to the defence on the spacious plea that the prosecution did not seek to rely on these statements. The Trial Court was wholly wrong in taking the view that it was not necessary to make available these statements to the defence for the purposes of cross-examination inasmuch as the prosecution did not wish to rely on these statements. The defence cannot be deprived of or denied the right to avail of these statements in order to test the evidence of the concerned witness or confront him with his earlier version in case the evidence in Court is inconsistent with the earlier statements made before the Police." *Lalchand* v. *State of Haryana*, AIR 1984 SC 226 : (1984) 1 SCC 686 : 1984 SCC (Cri) 355 (358) : 1984 CrLJ 164 : 1984 Cr App R (SC) 113 : (1984) 1 Crimes 337.

[10672] ● ***Failure to supply copies to defence.***—In this case the High Court did not, realise that the defence has been wrongly deprived of a very valuable right, even though a grievance was made in this behalf. The High Court might well have directed the prosecution to make available the copies of the statement to the defence. Failing compliance, the High Court could have drawn an adverse inference. In case the copies were furnished, the High Court upon a request being made in this behalf could have directed the learned Sessions Judge to record additional evidence by recalling PW-5 for cross-examination in the light of the said statements if the High Court was satisfied that the ends of justice so demanded. *Lalchand* v. *State of Haryana*, AIR 1984 SC 226 : (1984) 1 SCC 686 : 1984 SCC (Cri) 355 (358) : 1984 CrLJ 164 : 1984 Cr App R (SC) 113 : (1984) 1 Crimes 337.

[10673] ● ***Asking for copies of documents amounted to representation.***—"…….. the detenu's representation asking for copies of documents must be held to have amounted to a representation and it was mandatory on the part of the appropriate Government to consider and act upon it at the earliest opportunity and failure to do so would be fatal to the detention order." *Kubic Dariusz* v. *Union of India*, AIR 1990 SC 605 : (1990) 1 SCC 568 : 1990 SCC (Cri) 227 (238) : 1990 CrLJ 796 : 1990 CrLR (SC) 178 : JT 1990 (1) SC 38 : (1990) 1 SCR 98.

[10674] ● ***Detenues entitled to documents taken into consideration while formulating grounds of detention.***—In the instant case, it is specifically mentioned that "these documents were not placed before the detaining authority nor the detaining authority has relied upon these documents while issuing the detention order. The detenues would have been entitled to any document which was taken into consideration while formulating the grounds of detention but mere mentioning the fact that certain searches were carried out in the course of investigation which have no relevance to the detention of the detenus, cannot cast an obligation on the detaining authority to supply copies of these documents. Much less can an obligation be cast on the detaining authority to supply copies of these documents in Tamil Language. *Kamrunnissa* v. *Union of India*, AIR 1991 SC 1640 : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 (101, 102) : 1991 CrLJ 2058.

[10675] ● ***Detenus not supplied copies of documents in time on demand.***—It is not sufficient to say that the detenus were not supplied the copies of the documents in time on demand but it must further be shown that the non-supply has impaired the detenu's right to make an effective and purposeful representation. Demand of any or every documents, however irrelevant it may be for the concerned detenu, merely on the ground that there is a reference thereto in the grounds of detention cannot vitiate an otherwise legal detention order. No hard and fast rule can be laid down in this behalf but what is essential is that the detenu must show that the failure to supply the documents before the meeting of the Advisory Board had impaired or prejudiced his right, however slight or insignificant it may be. In the present case, except stating that the documents were not supplied before the meeting of the Advisory Board, there is no pleading that it had resulted in the impairment of his right nor could Counsel for the petitioners point out any such prejudice. *Kamarunnissa* v. *Union of India*, AIR 1991 SC 1640 : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 (102) : 1991 CrLJ 2058.

CORPUS DELICTI

[10676] ● ***Proof—Necessity.***—Sometimes there may not be any distinction between proof of the fact of the crime and the proof of actor of it. The evidence of the *corpus delicti* and the guilt of the person charged of an offence many a time is so interconnected that one cannot be separated from the other. The same evidence often applies to both the fact of the crime and the individuality of the person who committed it. *Prithi* v. *State of Haryana*, (2010) 8 SCC 536 : 2010 (3) Crimes 225.

CORROBORATION

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1. ACCOMPLICE'S EVIDENCE : RULE OF NON-ACCEPTANCE WITHOUT CORROBORATION

[10677] ● ***Accomplice's evidence : Rule of non-acceptance without corroboration.***—Detailing the development the Supreme Court in a case *Balwant Kaur* v. *Union Territory*, AIR 1988 SC 139 (142) : 1988 CrLJ 398 (401) states : Historically, in the background of the political trials since the time of Henry VIII where 'King's Evidence was the main dependence of the crown in its prosecutions, the question of the very admissibility of the evidence of the accomplice loomed large. In the 17th and the 18th centuries, it was ruled repeatedly by the English Courts that an accomplice was a competent witness. His 'credit' of the sufficiency of his evidence as a quantitative conception, however, remained in the background. These were days when 'form' predominated over the 'substance' and the oath had a dead weight of its own. It was for this reason that struggle was made to keep out this evidence even at threshold. On the further development in the law which slowly began to recognise the distinction between 'competency' and 'credit', WIGMORE says on *Evidence*, 3rd Ed., Vol-VII, Para 2054 : As time went on, and the modern conception of testimony developed, the possibility of admitting a witness and yet discriminating as to the qualitative sufficiency of his testimony became more apparent; and the way was open for the consideration of this question. In a few instance, as the 1700s were on, and even before then, judicial suggestions are found as to feasibility of such a discrimination. But not until the end of that century does any Court seem to have acted upon such a suggestion in its directions to the jury. About that time there comes into acceptance a general practice to discourage a conviction founded solely upon the testimony of an accomplice uncorroborated. But was this practice founded on a rule of law? Never, in England, until modern times. It was recognised constantly that the judge's instruction upon this point was a mere exercise of his common law function of advising the jury upon the weight of the evidence, and was not a statement of a rule of law binding upon the jury. An accomplice, by long tradition, is a notoriously infamous witness, one who being *particeps criminis*, purchases his immunity by accepting to accuse others. Section 114, Illustration (b) of the Evidence Act envisages the presumptive uncreditworthiness of an accomplice. But then Section 133 provides that a conviction is not illegal merely because it rests upon an accomplice's uncorroborated testimony. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 CrLJ 547 : 1952 SCJ 46 : 1952 SCR 377 : 1952 SCA 40 (SC) : (1952) 1 Mad LJ 440 : 65 Mad LW 351 : 1952 Mad WN 150 : 1952 Mad WN (Cri) 26.

2. APPRECIATION OF EVIDENCE OF APPROVER

[10678] ● ***Appreciation of evidence of approver.***—It is impossible, indeed it would be dangerous, to formulate the kind of evidence which should or would be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 CrLJ 547.

[10679] ● ***Evidence of accomplice corroboration.***—First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says : "Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case; it would be merely confirmatory of other and independent testimony." *Rameshwar* v. *State of Rajasthan (Baskerville case)*, AIR 1952 SC 54 : 1952 CrLJ 547 : All ER p. 42 B-C.

[10680] ● ***Evidence of accomplice corroboration.***—But, it is clear that—

(1) there need not be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice should in itself be sufficient to sustain conviction; all that is required is, that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it;

(2) the independent evidence must not only make it safe to believe that the crime was committed, but must, in some way, reasonably connect, or tend to connect, the accused with it by confirming, in some material particular, the testimony of the accomplice or complainant that the accused committed the crime;

(3) the corroboration must come from independent sources; ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another;

(4) the corroboration need not be made by direct evidence that the accused committed the crime, which is sufficient, if it is merely circumstantial, establishing his connection with the crime. *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 CrLJ 547. **To the same effect :** (1) *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, AIR 1990 SC 658 : (1990) 1 SCC 550 : 1990 CrLJ 889 (SC); (2) *Abdul Sattar* v. *Union Territory, Chandigarh*, AIR 1986 SC 1438 : 1985 Supp SCC 599 : 1986 CrLJ 1072; (3) *Tribhuvan Nath* v. *State of Maharashtra*, AIR 1973 SC 450 : 1972 CrLJ 1277 : (1972) 3 SCC 511; (4) *G.S. Bakshi* v. *State (Delhi Admn.)*, AIR 1979 SC 569 : (1978) 4 SCC 482 : 1979 CrLJ 476.

[10681] ● ***Approver—Testimony of—Tests of credibility.***—"The problem posed by the evidence given by an approver has been considered by the Privy Council and Courts in India on several occasions. It is hardly necessary to deal at length with the true legal position in this matter. An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted, it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated the particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. But it must never be forgotten that before the Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is, whether even as an accomplice, the approver is a reliable witness. If the answer to the question is against the approver, then there is an end of the matter, and no question, as to whether evidence is corroborated or not, falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of an approver. *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCJ 699. **To the same effect :** (1) *Lacchi Ram* v. *State of Punjab*, AIR 1967 SC 792 : (1967) 1 SCR 243; (2) *Sheshamma Bhumanna* v.

State of Maharashtra, AIR 1970 SC 1330 (1333) : 1970 CrLJ 1158 : (1971) 2 SC Cr R 9 : (1971) 1 SCR 617 : 1971 SCD 115 : (1971) 1 SCJ 556 : 1971 MLJ (Cri) 274 : 73 Bom LR 806 : 1970 KLT 669; (3) *Piara Singh* v. *State*, AIR 1969 SC 961 (965) : (1969) 1 SCC 379 : 1970 SC Cr R 112 : (1969) 3 SCR 236 : (1969) 2 SCR 318 : 1969 SCD 919 : 1969 MLJ (Cri) 871.

[10682] ● ***Accomplice witnesses—Corroboration.***—As regards corroboration of accomplice witnesses, it is not necessary that there should be independent corroboration of every material circumstance. All that is required is that there must be some additional evidence, rendering it probable that the story of the accomplice or the complainant is true, and that it is reasonably safe to act upon it. The corroboration need not be direct evidence. It is sufficient, if it is merely circumstantial evidence of the connection of the accused with the crime. *Ramanlal* v. *State of Bombay*, AIR 1960 SC 961 : 1960 CrLJ 1380.

[10683] ● ***Approver's evidence—Admissibility.***—"This Court could not have intended to lay down that the evidence of an approver and the corroborating pieces of evidence should be treated in two different compartments, that is to say, the Courts shall have first to consider the evidence of the approver *de hors* the corroborated pieces of evidence and reject it if it comes to the conclusion that his evidence is unreliable, but if it comes to the conclusion that it is reliable then it will have to consider whether that evidence is corroborated by any other evidence. This Court did not lay down any such proposition. In that case, it happened that the evidence of the approver was so thoroughly discrepant that the Court thought that he has a wholly unreliable witness. But, in most of the cases, the said two aspects would be so interconnected that it would not be possible to give a separate treatment, for as often as not the reliability of an approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidence. We must also make it clear that we are not equating the evidence of Lawrence with that of an approver; nor did the Special Judge or the High Court put him exactly on that footing. The learned Special Judge in his judgment observed : "He (Lawrence) is obviously decoy or spy and agent provocateur and his evidence will have, therefore, to be approached with great caution and much weight cannot be attached to it unless it is corroborated by other independent evidence and circumstances in the case………. . Not being tainted evidence, it would not suffer from a disability of being unworthy of acceptance without independent corroboration. But being interested evidence, caution requires that there should be corroboration from an independent source before its acceptance. To convict an accused on the tainted evidence of an accomplice is not illegal but it is imprudent; to convict an accused person upon the partisan evidence of a person, at whose instance a trap is laid by the police, is neither illegal nor imprudent but inadvisable……… . Shri Lawrence's evidence can, therefore, be accepted and relied upon, only if it is corroborated by other independent evidence and circumstances in the case." The learned Judges of the High Court practically adopted the same attitude in the manner of their approach to the evidence of Lawrence. The learned Judges observed : "To convict an accused person upon the partisan evidence of a person at whose instance a trap is laid by the police is neither illegal nor imprudent, because it is just possible that in some cases an accomplice may give evidence because he may have a feeling in his own mind that it is a condition of his pardon to give that evidence, but no such consideration obtains in the case of the evidence of a person who is not a guilty associate in crime but who invites the police to lay a trap. All the same, as the person who lodges information with the police for the purpose of laying a trap for another, is a partisan witness interested in seeing that the trap succeeds, it would be necessary and advisable to look for corroboration to his evidence before accepting it. But the degree of corroboration in the case of a tainted evidence of an accomplice would be higher than that in the case of a partisan witness. In our opinion, all these decisions would clearly establish that it would not be safe to rely on the evidence of Lawrence who is admittedly a decoy or trap witness, without his testimony being corroborated from independent sources." Even Mr. Amin, learned Special Counsel, on behalf of the State, asked the Courts to proceed to examine the evidence of Lawrence on the basis that he was a decoy or trap witness. We are definitely of opinion that both the Courts had approached the evidence of Lawrence from a correct standpoint. Though Lawrence was not an approver, he was certainly as interested witness in the sense that he was interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon such evidence without corroboration. It would be equally clear that the evidence was not a tainted one, but it would only make a difference in the degree of corroboration required rather than the necessity for it. *Major E.G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762 (1780) : (1961) 2 CrLJ 828.

[10684] ● *Accomplice's evidence—Court not to accept unless corroborated in material particulars.*—Reading Section 133 and III(b) to Section 114 together, the Courts in India have held that, whilst it is not illegal to act upon the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respect so as to implicate the accused : and further ordinarily that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. But an exception can arise. The Supreme Court has held that if several accomplices, simultaneously and without previous concert, give a consistent account of the crime implicating the accused, the Court may accept the several statements as corroborating each other. *Mohd. Hussain Umar* v. *K.S. Dalipsinghji*, AIR 1970 SC 45 : (1969) 3 SCC 429 : 1970 CrLJ 9 : (1970) 1 SCJ 149 : (1970)) 1 SCR 130.

[10685] ● *Approver's evidence—Reliability.*—When the approver gave his police statement he did not know that he would be granted pardon and possibly for that reason had not come out with all the facts known to him and he did so while he was making his statement before the Magistrate as he knew by then that he would be tendered pardon on condition that he would disclose all the facts known to him. The omission in the police statement, therefore, by itself would not necessarily have rendered his evidence unreliable. In considering whether the approver's evidence passed the test of reliability, the Court would have to consider whether taken as a whole and in the light of the facts and circumstances of the case it was a credible version or not. *Madan Mohan Lal* v. *State of Punjab*, AIR 1970 SC 1006 : (1970) 2 SCC 733 : 1970 SCC (Cri) 509 : 1970 CrLJ 898.

[10686] ● *Corroboration to connect accused with crime.*—The nature of corroboration is that it is confirmatory evidence and it may consist of evidence of a second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect the accused with the crime. It is not enough if a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. *Bhumanna* v. *State*, AIR 1970 SC 1330 : 1970 CrLJ 1158 : (1971) 1 SCJ 556 : (1971) 1 Mad LJ (Cri) 274 : (1971) 1 SCR 617 : 73 Bom LR 806.

[10687] ● *Evidence of accused when hold to be as accomplice evidence.*—Statement of approver that he did not disclose to anyone about his participation in offence before he was arrested is quite natural for he is not expected to make it public. No adverse inference from this conduct can be drawn. Approver making application for obtaining pardon three months after his arrest-no adverse inference can be drawn. Evidence of accomplice is required to be reliable and the Court should also see if it has been corroborated in material particulars by other independent evidence either direct or circumstantial. *Tribhuban Nath* v. *State of Maharashtra*, AIR 1973 SC 450 : (1972) 3 SCC 511 : 1972 CrLJ 1277 : 1972 SCD 571 : 1972 Cr App R 257 (SC) : (1972) 38 Cut LT 683. **TO THE SAME EFFECT :** (1) *Abdul Sattar* v. *Union Territory, Chandigarh*, 1985 Supp SCC 599 : (1985) SCC (Cri) 505 : 1986 CrLJ 1072 (SC) : (1986) 1 Supreme 214 : 1985 All Cr C 427 : 1985 All Cr R 522.

[10688] ● *Court to seek corroboration of approver's is evidence.*—Courts should seek corroboration of the testimony of accomplice as a rule of prudence. The corroborating evidence must connect the accused with the offence charged. *Ram Narayan* v. *State of Rajasthan*, AIR 1973 SC 1188 : (1973) 3 SCC 805 : 1973 CrLJ 914 : 1973 CrLR (SC) 228 : 1973 SCR 463.

[10689] ● *Approver unworthy friend.*—An approver is a most unworthy friend and he having bargained for his immunity must pass two tests in proving his credibility in Court, namely, that the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. Secondly, the story given by the approver so far as the accused on trial is concerned must implicate him in such a manner as to give rise to a conclusion of guilt beyond doubt. *Ravinder Singh* v. *State of Punjab*, AIR 1975 SC 856 : (1975) 3 SCC 742 : 1975 CrLJ 765.

[10690] ● *Approver or accomplice evidence—Test of reliability.*—The first test of reliability of approver or accomplice evidence is for the Court to be satisfied that there is nothing inherently impossible in the evidence after that corroboration becomes necessity. *Sarwan Singh* v. *State of Punjab*, AIR 1975 SC 637 : 1975 CrLJ 1014. **TO THE SAME EFFECT :** (1) *Lachiram* v. *State of Punjab*, AIR 1967 SC 792 : 1967 CrLJ 671.

[10691] ● *Approver evidence when adequately corroborated.*—When approver's evidence is adequately corroborated, conviction in murder case can be given. But so far as approver's evidence is concerned there is always a tendency to minimise one's own part and shift and assign the dominant role in the commission of the offence to accused. There death sentence may be reduced to life sentence. *Subramaniam* v. *State of T.N.*, AIR 1975 SC 139 : (1975) 3 SCC 414 : 1974 SCC (Cri) 40 : 1975 CrLJ 226.

[10692] ● ***Approver evidence to be corroborated.***—Ordinarily approver's evidence is to be corroborated in material particulars bridging closely the distance between the crime and criminal, yet in rare cases conviction is not illegal merely because it proceeds on uncorroborated testimony of accomplices. *Ravinder* v. *State of Haryana*, AIR 1975 SC 856 : (1975) 3 SCC 742 : 1975 CrLJ 765.

[10693] ● ***Approver evidence—Guidelines.***—In regard to the evidence of an approver the guidelines are : (1) according to Section 133 of the Indian Evidence Act, an approver is a competent witness and conviction shall not be illegal if based upon an uncorroborated testimony of the approver; (2) according to the illustration (b) of Section 114, Evidence Act, the Court may presume that an approver is a man of untrustworthiness unless he is corroborated in material particulars; (3) Court should not ordinarily convict unless the evidence of the approver is corroborated in material particulars *qua* the accused, and if more than one, *qua* each accused; (4) such corroboration can be direct and circumstantial; (5) if the evidence of an approver is intrinsically or inherently impossible or is otherwise unreliable or unacceptable, it should be rejected straightway without caring to seek corroboration; (6) there are several circumstances by which the reliability of an approver has to be adjudged; one important test of reliability is that he is corroborated by other evidence in material particulars; and (7) the approver should be *particeps criminis* on his own admission or appear to be so by evidence. *Data Ram* v. *State of Rajasthan*, 1977 CrLJ 1428 (All Supreme Court cases upto the time reviewed.)

[10694] ● ***Approver evidence—Evidentiary value of.***—Approver's evidence when is exculpatory and contains intrinsic infirmities, no conviction thereon can be sustained. *Jaga Gola* v. *State of Gujarat*, AIR 1982 SC 1227 : 1981 Supp SCC 66 : 1982 SCC (Cri) 141 : 1982 CrLJ 1579.

[10695] ● ***Accomplice turning an approver.***—When an accomplice turns to be an approver about 20 months after the offence being committed and he is sought to be corroborated by the victim (here a lady involved in a cheating) who even in her FIR omitted to mention the names of the accused persons despite knowing their role in the conspiracy to cheat her, conviction cannot be sustained. *Lalchand* v. *State of Haryana*, AIR 1984 SC 226 : (1984) 1 SCC 686 : 1984 CrLJ 164 : (1984) 1 Crimes 337.

[10696] ● ***Approver competent witness.***—An approver is a competent witness, but on his uncorroborated testimony it would be risky to base conviction particularly in respect of serious charge like murder. *Abdul Sattar* v. *Union Territory of Chandigarh*, AIR 1986 SC 1483 : (1986) 2 SCC 86 : 1986 SCC (Cri) 104 : 1986 CrLJ 1072 : 1986 CrLJ 180 (SC) : 1986 (2) Crimes 253.

[10697] ● ***Evidence of approver—Corroboration.***—The approver's evidence must show that he is a reliable witness. This test is common to all the witnesses. If this test is fulfilled, his evidence should be corroborated in material particulars to connect each of the accused persons with the commission of the offence. If the testimony of the approver is itself uninspiring and unacceptable justifying its outright rejection, it would be futile and unnecessary to look for corroborative evidence. It is only when the approver's evidence is considered otherwise acceptable that the Court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused persons with the commission of the crime charged. An approver is a most unworthy friend, if at all and he having bargained for his immunity, must prove his worthiness for credibility in the Court. An approver's evidence is to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by the approver pertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which the conviction may be based. Every approver comes to give evidence seeking to purchase his immunity and that is why, to start with, he is an unreliable person and the rule of caution calling for material corroboration is constantly kept in mind by the Court by time-worn judicial practice. The approver is a person of low morals for the reasons that being a co-participator in the crime, he has let down his companions. It is for this reason that a rule of caution has grown whereby the Court has to see if his evidence is corroborated in material particular connecting the accused with the crime. The evidence of an approver must be corroborated in material particulars and *qua* each accused. *Balwant Kaur* v. *Union Territory of Chandigarh*, AIR 1988 SC 139 : (1988) 1 SCC 1 : 1988 SCC (Cri) 1 : 1988 CrLJ 398. **TO THE SAME EFFECT :** (1) *State (Delhi Admn.)* v. *V.C. Shukla*, AIR 1980 SC 1382 : 1980 CrLJ 965; (2) *G.S. Bakshi* v. *State (Delhi Admn.)*, AIR 1979 SC 569 : 1977 CrLJ 476; (3) *Ravinder Singh* v. *State of Haryana*, AIR 1975 SC 856 : 1975 CrLJ 765; (4) *Ram Narain* v. *State of Rajasthan*, AIR 1973 SC 1188 : 1973 CrLJ 914; (5) *Piara Singh* v. *State of Punjab*, AIR 1969 SC 961 : 1969 CrLJ 1435; (6) *Bhiva Doulu Patil* v. *State of Maharashtra*, AIR 1963 SC 599 : (1963) 1 CrLJ 489; (7) *Janendra Nath Ghosh* v. *State of West Bengal*, AIR 1959 SC 1199 : 1959 CrLJ 1492; (8) *Sarwan Singh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 CrLJ 1014; (9) *Suresh Chandra Bahri* v. *State of Bihar*, 1995 SCC (Cri) 60.

[10698] ● ***Evidence of approver—Plenty of corroboration on record.***—The weapon of offence was recovered at the instance of the accused, which lent reassurance by way of corroboration to the evidence of the approver. There was other plenty of evidence on the record which corroborated the testimony of the approver. The two accused were held guilty on charge of murder of eight persons and were sentenced to death. *Ranjeet Singh* v. *State of Rajasthan*, AIR 1988 SC 599 : (1988) 1 SCC 633 : 1988 CrLJ 845.

[10699] ● ***Approver evidence in regard to complicity of accused in conspiracy lacking corroboration.***—Where the approver's evidence in regard to the complicity of the accused in the conspiracy lacks corroboration on certain material points necessary to connect the accused, the accused is entitled to the benefit of doubt. *Balwant Kaur* v. *Union Territory of Chandigarh*, AIR 1988 SC 139 : (1988) 1 SCC 1 : 1988 CrLJ 398.

[10700] ● ***Accomplice unworthy of credit unless corroborated.***—The presumption that an accomplice is unworthy of credit unless corroborated in material particulars, has become a rule of practice of almost universal application. *Balwant Kaur* v. *Union Territory of Chandigarh*, AIR 1988 SC 139 : (1988) 1 SCC 1 : 1988 CrLJ 398. **TO THE SAME EFFECT :** (1) *Chandan* v. *State of Rajasthan*, AIR 1988 SC 599 : (1988) 1 SCC 696 : (1988) 1 SCC 696; (2) *Abdul Sattar* v. *Union Territory of Chandigarh*, AIR 1986 SC 1438 : 1985 Supp SCC 599 : 1986 CrLJ 1072; (3) *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, AIR 1990 SC 658 : (1990) 1 SCC 550 : 1990 CrLJ 889 (SC).

[10701] ● ***Not proper to reject case for want of corroboration by independent witnesses.***—The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. It is not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishment added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. *State of U.P.* v. *Anil Singh*, AIR 1988 SC 1998 (2002) : 1989 CrLJ 88 : 1989 CrLR (SC) 49 : JT 1988 (3) SC 491 : (1988) 3 Crimes 367.

[10702] ● ***Accomplice competent witness.***—Under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not illegal although in view of Section 114, illustration (b), Courts do not as a matter of practice do so and look for corroboration in material particulars. *State of Maharashtra* v. *Chandra, Prakash Kewalehand Jain*, AIR 1990 SC 658 : (1990) 1 SCC 550 : 1990 CrLJ 889 : 1990 East Cr C 341 (348) (SC). **TO THE SAME EFFECT :** (1) *Suresh Chandra Bahri* v. *State of Bihar*, AIR 1994 SC 2420 : 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60 : (1994) CrLJ 3271 : 1994 CrLR (SC) 725.

[10703] ● ***Approver's evidence acceptable if corroborated by independent evidence.***—The settled law is that an approver is a competent witness against the accused person. But the Court to satisfy its conscience insists as caution and prudence to seek, as a rule, corroboration to the evidence of the approver, a *particeps criminis* from independent evidence ocular or circumstantial, of general particulars regarding the story spoken of by the approver of the commission of the crime and the part played by the accused therein to find whether it is true and worthy of acceptance. The reliability of the evidence of an approver should be considered from totality of the facts and circumstances. In the trial of Athiappan murder there is no dispute that such a corroborative evidence connecting both the appellants is available..... The evidence of the approver received corroboration from independent evidence on general prosecution case, namely, PW-

16 spoke that the deceased was brought by the accused and stayed in the lodge. PWs 2 to 4 spoke of A 1 working in their shop, previous thefts by A 1 and MO 1 being missing, their attempt to take back the deceased and MO 1, the dead body was found in the well and was taken out as spoken to by PWs 7 to 10. The medical evidence establishes the stabbing with the knife and death was due to it. PW-24 corroborates A 1 of selling MO 1 chain and taking the money. The canopy of the material evidence from independent sources sufficiently corroborates the approver's evidence. PW-1 is a reliable witness. No infirmity has been pointed out to disbelieve his evidence. *Sevaka Perumal* v. *State of Tamil Nadu*, AIR 1991 SC 1463 : (1991) 3 SCC 471 : 1991 SCC (Cri) 724 (731, 732) : 1991 CrLJ 1845 : JT 1991 (2) SC 546.

[10704] ● ***Evidence of approver—Amply corroborated in regard to one accused.***—The deceased, an old lady was not in good terms with her daughter-in-law, Accused No. 2. There was constant nagging vitiating the life of A 2. PW-1 was a way ward boy and used to indulge in thefts and therefore he was driven out of home and thus he was a wayward youth. He become friendly with the first accused who suggested that PW-1 may come along with him to Madras. The first appellant told PW-1 about the second appellant and the ill-treatment meted out to her by the deceased. According to the prosecution, the ill-treatment of the second appellant continued and the second appellant began saying openly that her life was being ruined by the deceased. The accused No. 1 and PW-1 having conspired to murder the old lady came from Madras to Avadi where the deceased lived, equipped with a rope and two sets of gloves. At the house A 1 opened the door and PW-2 sprang upon the old lady closed her mouth and A 2 roped her neck and cut it by a razor and then decamped with some ornaments *etc.* PW-1 turned an approver. He was found to be reliable and his version true and thus satisfied the double tests. Now coming to the corroboration part of it. So far as A 1 is concerned, the prosecution relied on the evidence of medical witnesses. The doctor (PW-22) who conducted the autopsy found a clear-cut would running from left side to right side and as per PW-1's version, the first appellant cut the neck of the deceased with the razor. PW-22 further opined that MO 1, the razor, could have caused such injuries. The prosecution also relied on the evidence of PW-10 a pan broker of Bangalore who deposed that A 1 and PW1 visited his shop and sold out a chain for Rs. 2,200/-. Though in certain aspects this witness gave answers which did not support the prosecution case, but, so far as pleading part is concerned, his evidence is believed by both the Courts below. Another Pan broker of Bangalore spoke about his purchasing jewellery from A 1 and PW-1. Thus the testimony of approved so far as the culpability of accused No. 1 stood sufficiently corroborated and he was convicted. As to the role of Accused No. 2 there was no corroboration and she was acquitted. *Gajalami* v. *State of T.N.*, AIR 1996 SC 3373 : (1996) 5 SCC 174 : 1995 CrLJ 3231 (SC).

[10705] ● ***Omnibus statement by approver that accused assaulted deceased.***—We have also gone through the evidence of Gurjant Singh (PW-3) the approver and what we find from his evidence is an *omnibus* statement that Amrik Singh, the accused and the other accused also assaulted Harnek Singh (deceased). Only from this omnibus statement, in the absence of any corroboration to the evidence of Gurjant Singh (PW-3) on record we are unable to sustain the conviction of the appellant under Section 302, IPC. The High Court did refer to the law on this topic but, however, this circumstances does not appear to have been well projected before the High Court and, therefore, there is no discussion on this aspect of the case in the impugned judgment. In these circumstances we are unable to sustain the conviction of the appellant for an offence punishable under Section 302, IPC and consequently the conviction and sentence of the appellant on that count is set aside. *Niranjan Singh* v. *State of Punjab*, AIR 1996 SC 3254 : 1996 SCC (Cri) 939 : 1996 CrLJ 2506 : 1996 (2) Crimes 251 (SC).

[10706] ● ***Evidence of eye-witness truthful and corroborated.***—".......according to PW-1, Rajender, while he was returning to his village, he had met one Krishna Kumar and on enquiry by him he had told him that the father and uncle had been murdered but the said Krishna Kumar had not been examined by the prosecution in order to lend credence to the deposition of Rajender that when he had been returning weeping, on being asked by Krishna Kumar, he told about the said incident shortly after the incident........ We do not think that prosecution case is to be disbelieved only because Krishna Kumar was not examined. Law does not receive corroboration of the evidence like that of Rejender." *Vijai Singh* v. *State of Rajasthan*, AIR 1996 SC 3016 : 1996 SCC (Cri) 745 (750) : 1996 CrLJ 1993 : JT 1996 (3) SC 299.

[10707] ● ***Evidence of eye witness—Appreciation of.***—It is of course true that when a witness is said to have exaggerated in his evidence at the stage of trial and has tried to involve many more accused and if that part of the evidence is not found acceptable, the remaining part of evidence has to be scrutinised with care and the Court must try to see whether the acceptable part of evidence get corroborated from other evidence on record so that the acceptable part can be safely relied upon. *Hari Chand* v. *State of Delhi*, AIR 1996 SC 1477 : (1996) 9 SCC 113 : 1996 SCC (Cri) 950 (962) : 1996 CrLJ 1701 : JT 1996 (2) SC 140.

[10708] ● ***Number of injuries found on person of eye-witness corroborating their claim.***—The presence of injuries on the person's of prosecution witnesses goes a long way to corroborate their claim that alongwith their parents they were the victims of attack. *Major Singh* v. *State of Punjab*, 1996 SCC (Cri) 1189 (1192) : 1996 CrLJ 4162.

[10709] ● ***Deposition of approver about injuries caused on person of deceased corroborated by medical evidence.***—The deposition of the approver PW-12 about the injuries caused on the person of the deceased is substantially corroborated from the medical evidence and absence of any injury caused by the blunt weapon of lathi on the person of the deceased cannot be held to be such a contradiction in the deposition of PW-12 for which such deposition is liable to be discarded. We have already indicated that five persons were seen by PWs 4 and 5. Such evidence tallies with the deposition of PW-12 that besides the approver, there were other four accused. The deposition of PW-12 also stands corroborated that PWs 4 and 5 could identify Mohan and Yashin and had enquired of them as to from where they had been coming then. Such deposition fully lends support to the deposition given by PW-12.

There is no reason to interfere with the concurrent findings made by the Courts below against the appellants. *Balbir Singh* v. *State of Rajasthan*, AIR 1997 SC 1704 : 1997 SCC (Cri) 972 : 1997 CrLJ 1179 : 1997 CrLR (SC) 352 : 1997 (1) Crimes 67 (SC).

[10710] ● ***Evidence of witnesses if supported corroborated by reliable witnesses.***—The three eye-witnesses have implicated all the accused uniformly of the offence charged while their presence at the place of incident cannot be doubted, it would be difficult to accept the fact that these three witnesses could have noticed and identified all the accused numbering 64 out of nearly 500 participants in the incident out of nearly 500. If evidence of PWs 1 to 3 is supported/corroborated by one or more reliable witnesses, then a conviction can be safely based on the appellants in regard to the charge of which they stand convicted. *Kamaksha Rai* v. *State of U.P.*, AIR 2000 SC 153 : (1999) 8 SCC 701 : 2000 CrLJ 178.

[10711] ● ***Corroboration to version of eye-witnesses by independent witnesses.***—The Courts below considered it prudent to look for corroboration to the version of the eye-witnesses from other independent witnesses. Testing the evidence on such touchstone, it has been held that the involvement of the appellants in the incident as deposed by PWs 2 to 6 and PW-23 has been corroborated by PW-8 who is admittedly not a resident of village where the occurrence took place. *Nelabothu Sundararamaiah* v. *State of Andhra Pradesh*, AIR 2001 SC 288 (289) : (2001) 9 SCC 223 : 2001 CrLJ 509 : 2001 CrLR (SC) 4 : 2001 Cr App R (SC) 46.

[10712] ● ***Accomplice evidence—Corroboration.***—All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it. Secondly, the independent evidence must not make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identification must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that : "A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all...... It would not at all tend to show that the party-accused participated in it." Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one compliance would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an independent source. Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, "many crimes which are usually committed between accomplices in secret, such as incest, offences with females" (or unnatural offences) "could never be brought to justice". *Hashim* v. *State of T.N.*, 2005 SCC (Cri) 292 (303-04).

3. CONDUCT

[10713] ● ***Complainants' conduct.***—Who complainants' conduct of narrating the occurrence to three of her colleagues, when corroborated by those three witnesses is clearly admissible under Section 157, Evidence Act. *Chander Kala* v. *Ram Kishan*, AIR 1985 SC 1268 : 1985 SCC (Cri) 491 : 1985 CrLJ 1490 : 1985 (2) Crimes 642.

4. CORROBORATION, NECESSITY OF

[10714] ● ***Corroboration, necessity of.***— Requirement of corroboration is a question of fact in every case which depends upon the circumstances of each case. The requirement of corroboration is a rule of prudence and not a rule of law. *Rameshwar S/o Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 CrLJ 547 : 1952 SCR 377.

[10715] ● ***Approver's evidence corroboration.***— However, it must never be forgotten that before the Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether, even as an accomplice, the approver is a reliable witness. If the answer to this question is against the approver, then there is an end of the matter, and no question, as to whether his evidence is corroborated or not, falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test, namely, that—

(1) his evidence must show that he is a reliable witness, and

(2) the approver's evidence must receive sufficient corroboration. *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCR 953.

[10716] ● ***Accomplice evidence corroboration need not be direct.***—A Court should be circumspect and look for corroboration in material particulars by reliable testimony, direct or circumstantial, before accepting the testimony of a partially unreliable witness. The Court should shift, from the evidence before it, parts which are wholly reliable and parts which are wholly unreliable and those which are partly reliable and partly unreliable. Even a partly unreliable part of evidence may form the basis of a conviction, where it is corroborated in material particulars by some reliable evidence. It is always a question of fact, whether a particular piece of evidence is sufficiently reliable to be used, or even if it appears unreliable, whether it ought not to be accepted in view of some other independent and reliable corroborative evidence. Their Lordships pointed out that a question appertaining to shifting or weighing of individual items of evidence, about which no fixed and rigid rules can possibly be laid down, must be distinguished from the general rule that a piece of evidence which is found to be partly unreliable, after such a shifting and weighing, needs to be corroborated by reliable evidence before it is acted upon. *Vadivelu Thevar* v. *State of Madras*, AIR 1957 SC 614 : 1957 CrLJ 1000 : 1957 SCJ 527 : 1957 SCA 793.

[10717] ● ***Accomplice evidence credibility—Corroboration—Necessity and expert of.***—It is not necessary that there should be independent corroboration of every material circumstance. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplices or the complainant is true and that it is reasonably safe to act upon it and the corroboration need not be direct evidence. It is sufficient if it is merely circumstantial evidence of the connection of the accused with the crime. *Ramanlal Mohanlal Pandya* v. *State of Bombay*, AIR 1960 SC 961 : 1960 CrLJ 1380.

[10718] ● ***Evidence of accomplice when uncorroborated.***—If the essential part of the prosecution story in respect of a charge really rests on the evidence of the accomplice uncorroborated by any other evidence, it should be held as not proved. *R.R. Chari* v. *State of U.P.*, AIR 1962 SC 1573 : (1962) 2 CrLJ 510.

[10719] ● ***Approver's evidence—Corroboration.***—Ordinarily, a Court seeks for corroboration of the evidence of an approver before convicting an accused on that evidence. Generally speaking, this corroboration is of two kinds, namely—

(1) the Court has to satisfy itself that statement of the approver is credible in itself, and there is evidence other than the statement of the approver that the approver himself had taken part in the crime; and

(2) after the Court is satisfied that the approver's statement is credible and that his part in the crime is corroborated by other evidence, the Court seeks for corroboration of the approver's evidence with respect to the part of other accused persons in the crime, and this evidence has to be of such a nature as to connect the other accused with the crime. *Saravana-*

bhavan v. *State of Madras*, AIR 1966 SC 1273 : (1996) 1 SCA 730 : (1966) 1 SCWR 840.

[10720] ● ***Approvers evident to be considered as a whole.***—The evidence of an approver has not to be dealt within two water-tight compartments. It must be considered as a whole along with other evidence. Even so, the Court has to consider whether the approver's evidence is credible in itself; and, in doing so, it may refer to such corroborative pieces of evidence as may be available.

If the evidence of the approver is so thoroughly discrepant, and so inherently incredible, that the Court considers him wholly unreliable, the Court has to discard his evidence. *Saravanabhavan* v. *State of Madras*, AIR 1966 SCC 1273 : 1966 CrLJ 949. **TO THE SAME EFFECT :** (1) *E.C. Barsay* v. *State of Bombay*, AIR 1961 SC 1762 : (1962) 2 SCR 195; (2) *Suresh* v. *State*, 1991 CrLJ 859.

[10721] ● ***Evidence of approver and accomplice—Necessity of corroboration.***—An accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice.

The primary meaning of accomplice is any party to the crime charged and someone who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated.

That evidence must, confirm that part of the testimony which suggests that the crime was committed by the accused. The first test of reliability of approver and accomplice evidence was for the Court to be satisfied that there was nothing inherently impossible in evidence. After that conclusion is reached as to reliability corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime. *Sheshanna Bhumanna Yadav* v. *State of Maharashtra*, AIR 1970 SC 1330 : (1970) 2 SCC 122 : 1970 CrLJ 1158 : 1971 (1) SCR 617.

[10722] ● ***Circumstantial evidence—Appreciation of.***—It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. Of course, the evidence on basic or primary facts has to be approached in the ordinary practical way but the conclusions in the case of circumstantial evidence must necessarily point only to the guilt of the accused excluding any reasonable possibility of his innocence. We are not satisfied that the evidence against the appellant in this case satisfies this test. *Subedar* v. *State of U.P.*, AIR 1971 SC 125 : (1970) 2 SCC 445 : 1970 SCC (Cri) 474 : 1971 CrLJ 25 : 1971 (1) SCR 826.

[10723] ● ***Approver's testimony when to be accepted.***—Approver's testimony can be accepted if he involves him in the crime and gives a natural account of the events implicating the accused in clear manner. Ordinarily his testimony would require corroboration. *Ravindra Singh* v. *State of Haryana*, AIR 1975 SC 856 : (1975) 3 SCC 742 : 1975 SCC (Cri) 202 : 1975 CrLJ 765 : 1975 CrLR (SC) 27.

[10724] ● ***Approver evidence—Evidentiary value.***—So far as PW-5, Bhimal, is concerned, it must be realised that on his own admission he is a person who has no compunction in betraying an illiterate woman (Smt. Ghogari) who had engaged him to look after her affairs and had placed implicit trust in him, PW-5 has brazenly stated that he had joined hands with the other conspirators in order to practice a fraud on Smt. Ghogari with a view to deprive her of her land as he was promised a share in the booty. According to his own admission he was paid Rs. 5,000 for betraying Smt. Ghogari. By the very nature of things, therefore, the evidence of such a witness deserves to be scrutinised closely and carefully and in the absence of corroboration in regard to material aspects of the case, the Court would be reluctant to accept his testimony apart from the fact that he being an approver his evidence calls for corroboration even otherwise. The other point of criticism which requires to be borne in mind in regard to his testimony is that while the offence was committed on November 18, 1968, he made an application for becoming an approver about twenty months thereafter on July 21, 1970. *Lalchand* v. *State of Haryana*, AIR 1984 SC 226 : (1987) 1 SCC 686 : 1984 SCC (Cri) 355 (358) : 1984 CrLJ 164 : (1984) 1 Crimes 337.

[10725] ● ***Approver—Suspect witness.***—The reasons for taking usual precautions before accepting the evidence of an approver are not far to seek. An approver is an accused converted as a prosecution witness. In order to escape the possible consequences of the charges against him he is one likely to swear falsely. He is an immoral person having participated in the crime. Consequently he cannot have much regard for the sanction of oath. The thought of pardon always makes him lean towards the prosecution. His inclination is always to make his own share in the transaction as slight as possible and to place the serious blame on others. If there is other independent evidence about the crime the testimony of an accomplice is superfluous. Therefore in practice police usually invites a party to become an approver only after they have failed in every other way to supply the missing links. For all these reasons an approver is a suspect witness and his evidence can be accepted only if it is materially corroborated. In view of this inclination of an approver the Supreme Court has impressed upon the need of Court's being satisfied about the approver's truthfulness. The Supreme Court lays down that unless he is found to be a reliable witness the worth of his evidence is lost and even by seeking corroboration such evidence cannot be the foundation for conviction. *Abdul Sattar* v. *Union Territory, Chandigarh*, 1995 Supp SCC 599 : 1985 SCC (Cri) 505 : 1986 CrLJ 1072 (SC) : 1985 CrLR (SC) 485 : 1985 All Cr R 522 : 1985 All Cr C 427 : (1986) 1 Supreme 214 : 1985 SCC Supp 599.

[10726] ● ***Independent corroboration in respect of material particulars of evidence of accomplice needed.***—In indictments, particularly of serious crimes, the counsel of caution and the rule of prudence enjoin that it is unsafe to rest a conviction on the evidence of a guilty partner in a crime without independent corroboration on the material particulars. *Balwant Kaur* v. *Union Territory of Chandigarh*, AIR 1988 SC 139 : (1988) 1 SCC 1 : 1988 SCC (Cri) 1 : 1988 CrLJ 398.

[10727] ● ***Evidence of approver reliability.***—The reliability of the evidence of an approver should be considered from the totality of the facts and circumstances. *Sevaka Perumal* v. *State of Tamil Nadu*, AIR 1991 SC 1463 : (1991) 3 SCC 471 : 1991 CrLJ 1845 : 1961 (2) Crimes 515.

[10728] ● ***Testimony of Food Inspector—Corroboration by Panch witnesses***—It is not the law that the evidence of Food Inspector must necessarily need corroboration from independent witnesses. The evidence of the Food Inspector is not inherently suspected, nor be rejected on that ground. He discharges the public function in purchasing an article of food for analysis and if the article of food so purchased in the manner prescribed under the Act is found adulterated, he is required to take action as per law. He discharges public duty. His evidence is to be tested on its own merits and if found acceptable the Court would be entitled to accept and rely on to prove prosecution case. If in a given case where the factum of the very purchase is put in question and any personal allegations are made against the Food Inspector, perhaps it may be necessary for the prosecution to dispel the doubt and to examine the Panch witnesses seeking corroboration to the evidence of the Food Inspector. *State of U.P.* v. *Hanif*, AIR 1992 SC 1131 : 1993 Supp (1) SCC 510 : 1992 CrLJ 1429.

[10729] ● ***Uncorroborated testimony of approver—Credibility.***—The provisions of Section 133 of the Evidence Act which deal with the testimony of an accomplice. It contemplates that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The first part envisages that an accomplice, in other words, a guilty companion in crimes, shall be a competent witness while the second part states that conviction is not illegal merely because it is based on the uncorroborated testimony of an accomplice. But if we read Section 133 of the Evidence Act with illustration (b) of Section 114 of the Evidence Act it may lead to certain amount of confusion and misunderstanding as to the real and true intention of the Legislature because quite contrary to what is contained in Section 133 illustration (b) to Section 114 of the Evidence Act lays down "that an accomplice is unworthy of credit, unless he is corroborated in material particulars". A combine reading of the two provisions that in Section 133 and illustration (b) of Section 114 of Evidence Act go to show that it was considered necessary to place the law of accomplice evidence on a better footing by stating in unambiguous terms that according to Section 133 a conviction is "not illegal or in other words not unlawful" mealy because it is founded on the uncorroborated testimony of an accomplice while accepting that on accomplice is a competent witness. But at the same time the Legislature intended to invite attention to the illustration (b) of Section 114 of the Evidence Act with a view to emphasis that the rule contained therein as well as in Section 133 are parts of one and the same subject and neither can be ignored in the exercise of judicial discretion except in cases of very exceptional nature. However, the difficulty in understanding the combined effect of the aforementioned two provisions arises largely due to their placement at two different places of the same Act. It may be noticed that illustration (b) attached to Section 114 is placed in Chapter VII of Evidence Act while Section 133 is inserted in Chapter IX of the Act. The better course was to insert the illustration (b) to Section 114 as an explanation or in any case as a proviso to Section 133 of the Act instead of their insertion at two different places and that too in different Chapters of Evidence Act. In any case since an approver is guilty companion in crime and, therefore, illustration (b) to Section 114 provides a rule of caution to which the Courts should have regard. It is now well settled by a long series of decisions that except in circumstances of special nature it is the duty of the Court to raise the presumption in Section 114 illustration (b) and the Legislature requires that the Courts should make the natural presumption in that section as would be clear from the decisions which we shall discuss hereinafter.

Thus it is clear that a definite rule has been crystallized to the effect that though a conviction can be based on uncorroborated evidence of an accomplice but as a rule of prudence it is unsafe to place reliance on the uncorroborated testimony of an approver as required by illustration (b) of Section 114 of the Evidence Act. *Suresh Chandra Bahri* v. *State of Bihar*, AIR 1994 SC 2420 : 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60 : 1994 CrLJ 3271 : 1994 (2) Crimes 1027.

[10730] ● ***Approver planted witness.***—Once we have found that the approver is a planted witness and his testimony is not worthy of credence and is uninspiring and unacceptable justifying its rejection outright, it will be futile and wholly unnecessary to look for corroboration of his testimony. It is only when the approver's evidence is considered otherwise acceptable that the Court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused with the crime charged. *Rampal Pithwa Rahidas* v. *State of Maharashtra*, 1994 SCC (Cri) 851 (870) : 1994 CrLJ 2320 : (1994) 2 (Supp) SCC 73.

5. CORROBORATION CONNECTING ACCUSED WITH OFFENCE

[10731] ● ***Corroboration connecting accused with offence.***—Corroboration required for conviction on the basis of approver's evidence, need not be of a kind which proves the offence against the accused—It is sufficient to connect the accused with crime. *S. Swamirathnam* v. *State of Madras*, AIR 1957 SC 340 : 1957 CrLJ 422.

[10732] ● ***Corroborative evidence must relate to identity of accused.***—Corroborative evidence must be evidence which implicates the accused, *i.e.*, which confirms in some material particulars not only the evidence that the crime had been committed but also that the appellant had committed it. The moment there is corroboration evidence which connects or tends to connect an accused with the crime such corroborative evidence relates to the identity of the accused in connection with that crime. It is the approver's evidence which is the direct evidence of the crime. There should be corroboration in material particulars not only concerning the crime but corroboration of the approver's story by evidence which connects or tends to connect an accused with the crime. It is this corroborative evidence which determines the mind of the Court or a jury that the approver's evidence that the accused committed the crime is true. *Jnanendra Nath Ghose* v. *State of West Bengal*, AIR 1959 SC 1199 : 1959 CrLJ 1492.

[10733] ● ***Accomplice evidence—Corroboration from independent source.***—The combined effect of Sections 133, and 114, Illustration (b) is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another. *Mohd. Hussain Umar Kochra* v. *K.S. Dalip Singh Ji*, AIR 1970 SC 45 : (1969) 3 SCC 429 : 1970 CrLJ 68 : (1970) 1 SCR 130 : (1970) 1 SCJ 149. **TO THE SAME EFFECT** : (1) *Rabindra Singh* v. *State of Haryana*, AIR 1975 SC 856 : (1975) 3 SCC 742 : 1975 SCC (Cri) 202 : 1975 CrLJ 765.

[10734] ● ***Evidence of approver corroboration—Necessity.***—The corroborating evidence, broadly stated, must connect or tend to connect the accused with the crime charged. This is so because of the danger of the approver introducing some innocent person or persons into an otherwise true prosecution story. Such evidence, however, need not by itself be sufficient for sustaining the conviction of the accused for in that case the evidence of the approver would be wholly unnecessary and mere surplusage. *Ram Narain* v. *State of Rajasthan*, AIR 1973 SC 1188 : (1973) 3 SCC 805 : 1973 SCC (Cri) 545 (551) : 1973 CrLJ 914 : 1973 CrLR (SC) 228 : (1973) 3 SCR 463.

[10735] ● ***Testimony of approver corroboration.***—The corroboration must be on a point material to the issue; the testimony of the approver ought to be corroborated in some material circumstances, such circumstances connecting and identifying the prisoners with the offence. *Ranjeet Singh* v. *State of Rajasthan*, AIR 1988 SC 672 : (1988) 1 SCC 633 : 1988 CrLJ 845. **To the same effect :** (1) *Chandan* v. *State of Rajasthan*, AIR 1988 SC 599 : (1988) 1 SCC 696 : 1988 CrLJ 842; (2) *Balwant Kaur* v. *Union Territory of Chandigarh*, AIR 1988 SC 139 : 1988 CrLJ 398 : (1988) 1 SCC 1; (3) *G.S. Bakshi* v. *State (Delhi Admn.)*, AIR 1979 SC 569 : (1978) 4 SCC 482 : 1979 CrLJ 476; (4) *Mukhtiar Kaur* v. *State of Punjab*, AIR 1980 SC 1871 (2) : 1980 CrLJ 1420; (5) *Ranbir Singh* v. *Emperor*, AIR 1932 Lah 204 : 136 IC 19 : 33 PLR 241.

6. CORROBORATION IN MATERIAL PARTICULARS : MODE OF CORROBORATION :

[10736] ● ***Corroboration in material particulars : mode of corroboration.***—The independent corroboration need not cover the whole prosecution story; on the other hand, corroboration must not be on minor particulars and incidental details—the corroboration must be on material particulars. *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 CrLJ 1014.

[10737] ● ***Approver evidence—Corroboration on material particulars.***—The approver's evidence must show that he is a reliable witness, and secondly, there should be corroboration on material particulars. Corroborative evidence must relate to the identity of the accused in connection with the crime. *Jnanendranath Ghose* v. *State of West Bengal*, AIR 1959 SC 1199 : 1959 CrLJ 1492.

[10738] ● ***Accomplice competent witness.***—An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious taint in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not, however, be right to expect that such independent corroboration should cover the whole of the prosecution case or even all the material particulars of the prosecution case. If such a view is adopted it will render the evidence of the accomplice wholly superfluous. On the other hand, it will not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. It is well-settled that the appreciation of approver's evidence has to satisfy a doubt test. His evidence must show that he is a reliable witness and that is a test which is common to all the witnesses. If this test is satisfied, the second test which will remain to be applied is that approver's evidence must receive sufficient corroboration. *Piara Singh* v. *State of Punjab*, AIR 1969 SC 961 : (1969) 1 SCC 379 : 1969 CrLJ 1435 : (1969) 3 SCR 236.

[10739] ● ***Accomplice evidence—Corroboration necessity.***—So far as the evidence of an accomplice is concerned it is most fundamental that the Court will not accept an evidence of an accomplice unless it is corroborated in material particulars. *Hussein Umar* v. *Dalip Singh*, AIR 1970 SC 45 : 1970 CrLJ 9 : (1970) 1 SCJ 149 : 1970 SCD 58 : 1970 Mad LJ (Cri) 68 : 1970 SC Cr R 76 : (1970) 1 SCR 130. **To the same effect :** (1) *Mukkar Kaur* v. *State of Punjab*, AIR 1980 SC 1871 : (1980) 2 SCC 369 : 1980 SCC (Cri) 456 : 1980 CrLJ 1420.

[10740] ● ***Testimony of approver corroboration.***—When there is a chain of circumstantial evidences not explainable by any other hypothesis except that the accused is guilty, it may furnish adequate corroboration of the testimony of approver whereon conviction may be based. *Maghar Singh* v. *State of Punjab*, AIR 1975 SC 1320 : (1975) 4 SCC 234 : 1975 SCC (Cri) 479 : 1975 CrLJ 1102 : 1975 Cur LJ 484 : (1975) 1 SCWR 624.

[10741] ● ***Accomplice evidence corroboration.***—Though an approver, an accomplice is a competent witness, yet to base conviction of other accused persons Court should require corroboration in material particulars which mean there should be some independent evidence tending to criminate the particular accused in the commission of the crime. *Dogdu* v. *State of Maha-*

rashtra, AIR 1977 SC 1579 : (1977) 3 SCC 68 : 1977 CrLJ 1206.

[10742] ● ***Accomplice evidence corroboration—Necessity.***—Accomplice needs corroboration on material particulars-but not on all insignificant details. One tainted evidence cannot corroborate another tainted evidence. *C. Chellapan* v. *State of Kerala*, AIR 1979 SC 1761 : (1979) 4 SCC 312 : 1979 SCC (Cri) 1029 : 1979 CrLJ 1335 : 1979 CrLR (SC) 744.

[10743] ● ***Approver's evidence—Corroboration.***—If there are several accused persons the corroboration in material particulars must connect each of the accused person. *G.S. Bakshi* v. *State*, AIR 1979 SC 569 : (1978) 4 SCC 482 : 1979 SCC (Cri) 148 : 1979 CrLJ 476 : 1978 CrLR (SC) 438 : (1979) 1 SCJ 530 : 1979 Mad LJ (Cri) 433.

[10744] ● ***One accomplice cannot corroborate another.***—One accomplice cannot corroborate another when it has been laid down that statement of accused person under Section 108, Customs Act cannot be corroborative evidence of the testimony of another accused who later turned to be a prosecution witness. *Supdt. of Customs* v. *Bhanabhai Bhalpabhai Patel*, AIR 1992 SC 1583 : 1992 CrLJ 2516 : JT 1992 (2) SC 305.

[10745] ● ***Approver evidence—Finds corroboration in all material particulars.***—We have carefully gone through the evidence of Ashok Kumar Singh (PW-1), the approver and we find that his evidence is trustworthy. Moreover this evidence finds corroboration in all material particulars from the evidence of Meena Kumari (PW-22) and Phulia Devi (PW-28). The evidence of Ashok Kumar Singh (PW-1), the approver apart from being reliable does not suffer from any omission or contradiction *vis-a-vis* his statement recorded under Section 164, CrPC Ashok Kumar Singh (PW-1) has given all minor details about the conspiracy hatched. *Yamuna Singh* v. *State of Bihar*, AIR 1996 SC 2826 : 1996 SCC (Cri) 1177 : 1996 CrLJ 4144 : 1996 (3) Crimes 220 (SC).

7. NATURE AND EXTENT OF CORROBORATION

[10746] ● ***Nature and extent of corroboration.***— It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear : "*First,* it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord READING says : 'Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of another and independent testimony.' All that is required is that there must be 'some additional evidence rendering it probable that the story of the accomplice (for complainant) is true and that it is reasonably safe to act upon it.' *Secondly*, the independent evidence must not only make it safe to believe that the crime is committed but must, in some way, reasonably connect or tend to connect the accused with it by confirming, in some material particular, the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identify must extend to all the circumstances necessary to identity the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all......... It would not at all tend to show that the party accused participated in it. *Thirdly,* the corroboration must come from independent sources, and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal. *Fourthly,* the corroboration need not be direct evidence that the accused committed the crime. It is sufficient, if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, 'many crimes which are usually committed between accomplices in secret, (such as incest offences with females for unnatural offences) could never be, brought to justice. *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54 at 57 : 1952 CrLJ 547. **TO THE SAME EFFECT :** (1) *Shamsher Bahadur Saxena* v. *State of Bihar*, AIR 1956 Pat 404; (2) *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500 : 1958 CrLJ 976; (3) *Sideshwar Ganguly* v. *State of West Bengal*, AIR 1958 SC 143 : 1958 CrLJ 273 : 1959 SCR 749 :

1958 AWR (HC) 391 : 1958 Pat LR (SC) 1 : 1958 MLJ (Cri) 311 : 1958 SCA 147 : 1958 SCJ 349; (4) *Balwant Kaur* v. *Union Territory of Chandigarh*, AIR 1988 SC 139 : (1988) 1 SCC 1 : 1988 CrLJ 398.

[10747] ● ***Evidence of accomplice—Corroboration.***—Although, under this section, a conviction is justified in law even on the uncorroborated testimony of an accomplice, yet Courts should be slow to depart from the rule of prudence based on long experience which requires some independent evidence implicating the particular accused. The Court should give some indication in its judgment that it has had the above rule of caution and prudence in mind and should proceed to give reasons for considering corroboration unnecessary. Ordinarily, the Court should require corroboration, and if there is no corroboration, it must show why it considers it safe to convict the accused without corroboration in that particular case. *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 CrLJ 547 : 1952 SCA 40.

[10748] ● ***Evidence of accomplice—Corroboration—Nature and extent of—Rules to.***—The extent of the corroboration must necessarily vary (a) with the circumstances of each case, and also (b) according to the circumstances of the offence charged. *Rameshwar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54.

[10749] ● ***Accomplice—Appreciation of evidence.***—If the position of a witness is somewhat analogous to that of an accomplice, though not exactly the same, there should be such corroboration of the material part of the story connecting the accused with the crime as well as satisfy reasonable minds that the witness can be regarded as truthful. *V. Satyanarayan Reddy* v. *State of Hyderabad*, AIR 1956 SC 379 : 1956 CrLJ 777.

[10750] ● ***Approver's evidence corroboration.***—Though the corroboration of an approver's evidence need not be of a kind which proves the offence against the accused, it is sufficient if it connects the accused with the crime. The corroboration is required only of material circumstances but not confirmation of every detail deposed to by the accomplice. There must be corroboration both of the crime and of the identity of the person charged. The corroboration must be by independent testimony but not necessarily by direct evidence. Corroborative evidence means evidence which shows or tends to show that the story of the accomplice regarding the fact that the accused committed the crime is true. *Swamirathnam* v. *State of Hyderabad*, AIR 1957 SC 340 : 1957 CrLJ 422.

[10751] ● ***Accomplice evidence—Corroboration by independent evidence.***—It would not be right to expect that the independent corroboration required to support the evidence of the accomplice should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted, it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details, because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 CrLJ 1014 : 1957 SCJ 699.

[10752] ● ***Approver's evidence—Corroboration in material particulars.***—Although the approver's evidence is the direct evidence of the crime yet it should be corroborated in material particulars by evidence—

(a) concerning the crime, and

(b) connecting or tending to connect the accused with the crime. *Jnanendra Nath Ghose* v. *State of West Bengal*, AIR 1959 SC 1199 : (1960) 2 SCA 180.

[10753] ● ***Accomplice competent to give evidence.***—According to Section 133, Evidence Act, which is a rule of law, an accomplice is competent to give evidence and according to illustration (b) to Section 114, Evidence Act which is a rule of practice, it is almost always unsafe to convict an accused person upon his testimony alone. *Bhiva Doulu Patil* v. *State of Maharashtra*, AIR 1963 SC 599 : (1963) 3 SCR 830 : (1963) 2 SCJ 327 : 1963 SCD 276 : 1963 AWR (HC) 163 : 1963 ALJ 253 : 65 Bom LR 347 : 1963 MPLJ 225 : 1963 MLJ (Cri) 450 : (1963) 1 Ker LR 109. **TO THE SAME EFFECT :** (1) *Mohd. Hussain Umar* v. *K.S. Dalipsinghji*, AIR 1970 SC 45 (50); (2) *Shankar* v. *State of T.N.*, (1994) 4 SCC 478 : 1994 SCC (Cri) 1252.

[10754] ● ***Accomplice evidence corroboration need not be by direct evidence.***—That what the law requires in the case of an accomplice's evidence is that there should be such corroboration for the material parts of the story connecting the accused with the crime as will satisfy reasonable minds that the approver can be regarded as a truthful witness. The corroboration need not be by direct evidence of the commission of the offence by the accused. It may merely be by circumstantial evidence of his connection with the crime. But the nature of the corroboration will depend on, and vary with, the circumstances of each case.

Kanbi Karsan Jadav v. *State of Gujarat*, AIR 1966 SC 821 (823) : 1966 CrLJ 605.

[10755] ● ***Tainted evidence of approver—Corroboration by independent evidence.***—Naturally reluctant to act on the tainted evidence of an approver unless it is corroborated in material particulars by other independent evidence, it does not follow that independent corroboration should cover the whole of the prosecution story or even all the material particulars, as, in that case, the evidence of the accomplice will be rendered wholly superfluous. It would not be safe to act, upon the approver's evidence, merely because it is corroborated in minor particulars, or incidental details, as, in such cases, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. *Sarwan Singh* v. *State of Punjab*, AIR 1967 SC 637 : (1967) SCR 255.

[10756] ● ***Testimony of accomplice—Corroboration.***—Corroboration should be such which lends assurance to the reliability of the story testified by the accomplice. *Tribhuvan Nath* v. *State of Maharashtra*, AIR 1973 SC 450 : (1972) 3 SCC 511 : 1972 SCC (Cri) 604 : 1972 CrLJ 1277 : 1972 SCD 571 : 1972 SC CrR 458.

[10757] ● ***Evidence of accomplice—Rule of appreciation—Duty of Court.***—The relative scope of illustration (b) to Section 114, and Section 133 and observed that the need of corroboration which was a rule of prudence has been by judicial experience elevated into a rule of law, however, the rule is not that conviction without corroboration is illegal but that the necessity of corroboration should be present in the mind of the Judge and must be dispensed with only when circumstances are such that it can be safely dispensed with. *Dagdu* v. *State of Maharashtra*, AIR 1977 SC 1579 : (1977) 3 SCC 68 : 1977 SCC (Cri) 421 : (1977) CrLJ 1206 : (1977) 2 SCJ 241 : (1977) 1 MLJ (Cri) 462. **TO THE SAME EFFECT :** (1) *Ranjeet Singh* v. *State of Rajasthan*, AIR 1988 SC 672 : (1988) 1 SCC 633 : 1988 CrLJ 845 : (1988) 1 SCJ 321; (2) *Balwant Kaur* v. *Union Territory of Chandigarh*, AIR 1988 SC 139 : (1988) 1 SCC 1 : 1988 SCC (Cri) 1 : 1988 CrLJ 398 : (1988) 1 Cr LC 197; (3) *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, 1900 CrLJ 889 (SC); (4) *Sheikh Zakir* v. *State of Bihar*, AIR 1983 SC 911 : (1983) 4 SCC 10 : 1983 CrLJ 1285.

[10758] ● ***Recovery of weapons at instance of accused lending reassurance by way of corroboration.***—The prosecution has been able to recover weapons of the crime from the accused. The recovery of the weapons has been made at the instance of the accused. It also lends reassurance by way of corroboration to the evidence of the approver. *Ranjeet Singh* v. *State of Rajasthan*, AIR 1988 SC 672 : (1988) 1 SCC 633 : 1988 SCC (Cri) 229 : 1988 CrLJ 845 : 1988 CrLR (SC) 173.

[10759] ● ***Testimony of accomplice—Basing of conviction.***—"So far as the question about the conviction based on the testimony of an accomplice is concerned the law is settled and it is established as a rule of prudence that the testimony of accomplice if it is thought reliable as a whole conviction could only be based if it is corroborated by independent evidence either direct or circumstantial connecting the accused with the crime." *Chandan* v. *State of Rajasthan*, AIR 1988 SC 599 : (1988) 1 SCC 696 : 1988 CrLJ 842 : (1988) 1 SCJ 321.

[10760] ● ***Evidence of approver—Plenty of corroborating evidence on record.***—While looking for corroboration, we must first look at the broad spectrum of the approver's version and then find out whether there is other evidence to lend assurance to that version. The nature and extent of the corroboration may depend upon the facts of each case. The corroboration need not be of any direct evidence that the accused committed the crime. The corroboration even by circumstantial evidence may be sufficient. But such evidence as to corroboration must be independent and must not be vague or unreliable. In the instant case, we have plenty of such corroborating evidence.

The evidence of Hanuman (PW-15) is trustworthy. He is a khati (carpenter). He was very much known to the accused. He saw the accused alongwith the approver at the sunset time near the waterkund from where they proceeded towards the house of the deceased. He saw them taking their meals at that kund. Khyali Ram (PW-3) and Ram Kishan (PW-4) saw a part of the incident. They saw the accused in the house of the deceased. The evidence of Jaisingh (PW-9) further established the presence of the accused alongwith the approver in the house of the deceased. There is no reason to discard the testimony of these three witnesses. *Ranjeet Singh* v. *State of Rajasthan*, AIR 1988 SC 672 : (1988) 1 SCC 633 : 1988 SCC (Cri) 229 : 1988 CrLJ 845 : 1988 CrLR (SC) 173.

[10761] ● ***Eye-witnesses injured witnesses—Corroboration.***—What type of corroboration is necessary in a given case depends upon various factors and circumstances. In the instant case, all the eye-witnesses are injured witnesses. It cannot be said that every one of them is active partisan in the sense that they would have the tendency of implicating the innocent persons leaving out the real culprits. *Amarjit Singh* v. *State of Punjab*, AIR 1993 SC 229 : 1993 SCC (Cri) 509 (515) : 1992 CrLJ 3858 : JT 1992 (5) SC 676 : (1992) 3 Crimes 549.

[10762] ● ***Murder—Eye-witnesses Testimony corroboration.***—The testimony of PW-3, who had sent rukka, ExPD, to the Police after deceased had been taken to the Primary Health Centre in a seriously injured condition by PW-8 and PW-10, clearly establishes the presence of both these witnesses in the Primary Health Centre at about 4.30 p.m. The name of PW-8, as the person who had brought deceased to the Primary Health Centre is clearly written in rukka ExPD. Corroboration in this behalf is also available from rukka, ExPA sent by PW-1 which conveyed the necessary information to the police at Gurgaon to the effect that the deceased had been brought to the casualty ward of the Civil Hospital Gurgaon as dead. *Balwant Singh* v. *State of Haryana*, AIR 1995 SC 84 (87) : 1994 Supp (2) SCC 471.

[10763] ● ***Accomplice evidence—Corroboration.***—Thus, the law is not that the evidence of an accomplice deserves outright rejection if there is no corroboration. What is required is to adopt great circumspection and care when dealing with the evidence of an accomplice. Though there is no legal necessity to seek corroboration of accomplice's evidence it is desirable that Court seeks reassuring circumstances to satisfy the judicial conscience that the evidence is true. *State of Tamil Nadu* v. *Suresh*, AIR 1998 SC 1044 : (1998) 2 SCC 372 : 1998 CrLJ 1416 (1420) (SC).

[10764] ● ***Corroboration—No distinction made between accomplice who is approved and who is not so.***—No distinction is made between an accomplice who is or is not an approver. As both have been treated alike, the rule of corroboration applies to both. Accomplice's evidence is taken on record as a matter of necessity in cases where it is impossible to get sufficient evidence of a heinous crime unless one of the participators in the crime is disposed to disclose the circumstances within his knowledge on account of tender of pardon.

For corroborative evidence, the Court must look at the broad spectrum of the approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon the facts of different cases. Corroboration need not be in the form of ocular testimony of witnesses and may be even in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable. From the judgment of the trial Court as well as the High Court it is crystal clear that the Courts were conscious of the credibility of an approver's witness and insisted upon the corroborative evidence in material particulars of the depositions made by PW-2. *Narayan Chetanram Chaudhary* v. *State of Maharashtra*, AIR 2000 SC 3352 : (2000) 8 SCC 457 : 2000 SCC (Cri) 1546 (1566, 1567) : 2000 CrLJ 4640 : 2000 CrLR (SC) 700.

8. BLOOD

[10765] ● ***Blood.***—Legally there is no bar to accepting the uncorroborated testimony of a child witness yet prudence requires that Courts should not act on the uncorroborated evidence of a child whether sworn or unsworn. The true rule is not that corroboration is essential before there can be a conviction, but the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, (and be indicated in the judgment) before a conviction without corroboration can be sustained. *Rameswar Kalyan Singh* v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 CrLJ 547 : 1952 SCA 40 : 7 DLR (SC) 87 : (1952) 1 Mad LJ 440 : 1952 SCJ 46 : 1952 SCR 377.

[10766] ● ***Child witness conviction without corroboration not proper.***—Conviction on evidence of child witness without corroboration generally is not proper. *Bikha Valu* v. *State of Gujarat*, AIR 1971 SC 1064 : 1971 CrLJ 927.

[10767] ● ***Evidence of eye-witnesses corroboration.***—In the instant case of murder, the evidence of eye-witnesses was corroborated by recovery of weapon of attack stained with human blood. The evidence of eye-witnesses is also corroborated by the fact that spear P-1 stained with human blood was secured from Asa Singh, likewise, spear P-2 and Kirpan P-3 both of which were stained with human blood, were recovered in pursuance of the disclosure statement of Darshin Singh and Sewa Singh accused. *Asa Singh* v. *State of Punjab*, AIR 1973 SC 512 : (1972) 3 SCC 746 : 1972 SCC (Cri) 814 (817, 818) : 1973 CrLJ 623.

[10768] ● ***Teenage witness—Evidence of.***—Evidence of teenage eye-witnesses should be scrutinized with care and caution. *Shivji Genu Mohite* v. *State of Maharashtra*, AIR 1973 SC 55 : (1973) 3 SCC 219 : 1973 SCC (Cri) 214 : 1973 CrLJ 159 : (1973) 2 SCJ 303. TO THE SAME

EFFECT : (1) *C.P. Fernandez* v. *Union Territory*, AIR 1977 SC 135 : (1977) 1 SCC 707 : 1977 CrLJ 167.

[10769] ● *Dying declaration—Corroborated by recovery of blood-stained clothes.*—Evidence furnished by the dying declaration corroborated by the recovery of blood-stained clothes from the person of accused 1 further corroborated by the recovery of blood-stained knife on the information given by him would affirmatively establish that accused I attacked deceased and caused him four injuries. *State of H.P.* v. *Wazir Chand*, AIR 1978 SC 315 : (1978) 1 SCC 130 : 1978 SCC (Cri) 58 (66) : 1978 CrLJ 347 : 1977 CrLR (SC) 511.

[10770] ● *Rickshaw puller most important witness—Evidence corroborated by discovery of blood-stained baniyan and knife.*—The most important witness in this case is Bodu Lal (PW-2). He is an independent witness, in whose cycle rickshaw the appellant and the co-accused Kanahiya Lal travelled from the Hotel of Shankar Maharaj to the scene of offence. Bodu Lal identified the appellant in the identification parade. According to his evidence, the appellant was wearing a yellow baniyan at the time of the incident. When the appellant was arrested, a yellow baniyan was found on his person and it was stained with human blood. A knife stained with human blood was also recovered from his person.

The High Court convicted the appellant relying on the evidence of Bodu Lal, as corroborated by the discovery of blood-stained baniyan and knife. This evidence seems to us unassailable. *Bhanwar Lal* v. *State of Rajasthan*, AIR 1985 SC 336 (337) : 1984 Supp SCC 538 : 1985 SCC (Cri) 91 : 1985 CrLJ 657 : 1985 CrLR (SC) 23 : (1985) 1 SCR 859.

[10771] ● *Extra-judicial confession—Evidentiary value.*—It is clear from the evidence that the accused had made a confession before the police and on the basis of their statements, a blood-stained farsi and a sword were recovered which were found to contain human blood as mentioned earlier. This circumstance, therefore, reinforces both the extra-judicial confession and the evidence of PW-11. *Narayan Singh* v. *State of M.P.*, AIR 1985 SC 1678 : (1985) 4 SCC 26 : 1985 SCC (Cri) 460 : 1985 CrLJ 1862 : 1985 CrLR (SC) 404 : 1985 (2) Crimes 604.

[10772] ● *Presence of human blood on weapon and pant corroborative testimony of witness.*—The finding of human blood on the weapon and the pant of the appellant lends corroboration to the testimony of PW-1, Komal Chand, when he states that he had seen the appellant inflicting a knife blow on the deceased. The appellant has not explained the presence of human blood on these two articles. *Khujji alias Surendra Tiwari* v. *State of Madhya Pradesh*, AIR 1991 SC 1853 : (1991) 3 SCC 627 : 1991 SCC (Cri) 916 (928) : 1991 CrLJ 2653 : 1991 CrLR (SC) 605 : JT 1991 (3) SC 151 : (1991) 3 Crimes 82.

[10773] ● *Child witness—Evidence of—Corroboration.*—Evidence of a child witness should be examined cautiously and the Court should find some corroboration. In this case the child witness was silent as to the names of the assailants who at night caused death of five persons inside a family house in her statement to police under Section 161, CrPC nor she said about the lantern by which she during the trial asserted, she could identify the culprits. Recovery of murder weapon at the instance of an accused, cannot be held to be a corroborative evidence of the testimony of the child witness. *Nirmal Kumar* v. *State of U.P.*, AIR 1992 SC 1131 : 1993 Supp (1) SCC 510 : 1992 CrLJ 1426.

[10774] ● *Existence of blood-stains on turban and gandasi—Corroborates testimony of eye-witnesses.*—The blood-stain on the turban of the appellant and also on the *gandasi* of the appellant could not be explained by the appellant. Such existence of the blood-stain on the said articles corroborates the testimony of the eye-witnesses. *Lakhwinder Singh* v. *State of Punjab*, AIR 1993 SC 87 : (1993) 2 SCC (Supp) 551 : 1993 SCC (Cri) 719 (724) : 1992 CrLJ 3958 : JT 1992 (5) SC 461 : (1992) 3 Crimes 531.

[10775] ● *Children witnesses—Corroboration.*—In a Supreme Court case the deceased was the husband of the woman with whom the main accused was intimate. The accused once came to the house when the deceased was absent. The main accused wanted another accused to distil illicit liquor as liquor was not available. The liquor was being distilled. At this stage the deceased came and abused the main accused. The wife of the victim brought a gun and the accused shot him to death. The children of the couple gave detailed description of the episode. Their presence at the place of occurrence was natural. They had been subjected to a preliminary questioning and then were examined. The Supreme Court affirmed conviction. It may be noted that in that case the children witnesses received corroboration from circumstantial evidence as also an oral dying declaration. *Baby Kandayanathil* v. *State of Kerala*, AIR 1993 SC 2275.

[10776] ● ***Conviction on basis of evidence of child aged five years.***—Immediately after the incident, the witness, a minor girl was taken away by her maternal uncle. In her evidence she stated that there used to be quarrels between her father and mother and the former used to ill-treat the latter without any rhyme or reason. Then she adds that her father wanted to remarry and therefore, he was ill-treating her mother. Now the case put up was that the husband was ill-treating the wife as he wanted to sell her jewellery to purchase a scooter. Therefore, the statement made by PW-2 that her father was ill-treating her mother because he wanted to remarry could only be result of tutoring. She also tried to involve all the other family members including her uncle Shambhoo whom she could not even recognize in the dock. This she could have done only at the behest of someone else. She also stated that neither her father nor her grandfather met her mother's expense at Deoghar, a fact of which ordinarily a child under five years of age would not be aware. She even tried to involve her father's sister whose name she had not mentioned earlier. There are also certain other statements made in the course of her deposition which would suggest that possibility of tutoring could not be ruled out. Having taken a careful look at the evidence of this child witness we are of the opinion that implicit faith and reliance cannot be placed on her testimony since it is not corroborated by any independent and reliable evidence. It is well-settled that a child-witness is prone to tutoring and hence the Court should look for corroboration particularly when the evidence betrays traces of tutoring. *Arbind Singh* v. *State of Bihar*, AIR 1994 SC 1068 : 1995 Supp (4) SCC 416 : 1994 SCC (Cri) 1418 (1420) : 1994 CrLJ 1227.

[10777] ● ***Case based on circumstantial evidence.***—"If the evidence of PW-2 is trust-worthy, which we hold it is, we see no reason why reliance should not be placed thereon, particularly when it is corroborated by the finding of the blood-stained sickle, a blood-stained banian on the person of the accused and injuries on the person of the accused which could have been caused to him in the course of the struggle which his wife who was a well-built person must have put up." *State of M.P.* v. *Ratan Lal*, AIR 1994 SC 458 (460) : 1994 CrLJ 131.

[10778] ● ***Evidence on record corroborating evidence of approver.***—The tractor and trolley owned by Amrik Singh, the accused developed a fault and was stranded near the railway track and thereafter Amrik Singh contacted Gandoor Singh (PW-4) and Ranjit Singh (PW-5) residents of village Chotian to tow-chain the said tractor and trolley and bring it to the village Chotian. This all happened on 8th December, 1980, at about 5.00 a.m. Both these witnesses then brought the tractor and trolley to village Chotian. On the following day Amrik Singh and Niranjan Singh, the appellant went to the said village and after knowing the suspicion entertained by Gandoor Singh (PW-4) and Ranjit Singh (PW-5) as regards the foul play since the blood was found on the trolley, Amrik Singh and Niranjan Singh (accused) brought the said tractor to their village. The evidence of Gandoor Singh (PW-4) and Ranjit Singh (PW-5) corroborates the evidence of Gurjant Singh, the approver on this issue. In these circumstances we are of the opinion that the High Court was right in upholding the conviction of the appellant under Sections 120-B, 201 of the Indian Penal Code. We accordingly uphold the conviction of the appellant for the offences punishable under Sections 120-B and 201, IPC. *Niranjan Singh* v. *State of Punjab*, AIR 1996 SC 3254 : 1996 SCC (Cri) 939 : 1996 CrLJ 2506 : 1996 (2) Crimes 251 (SC) : 1996 (2) CCR 137.

[10779] ● ***Witness—Testimony.***—It is settled law some improvements here and some exaggerations there or some minor discrepancies in the evidence do not hurt the prosecution case. PW-4, Dr. Das, who had done post-mortem, does not in any way show if Ranjit Singh was not in a position to speak. Dying declaration has received corroboration because of finding of one blood-stained keduwa from appellant Rooqa and blood-stained lathi recovered at the instance of appellant Baje. No doubt, it is correct that the serologist had not given the blood groupings; but, the finding of extensive stains of human blood does incriminate the appellants, because when they were questioned about these findings in their examination under Section 313, CrPC they had not given any explanation, which it was their duty, if the blood-stains had been contacted, not in the course of the occurrence but due to injury received somewhere else, as contended by Shri Bachawat. Failure to bring on record any evidence regarding motive does not, however, weaken a prosecution case, though existence of the same may strengthen the same. Secondly, there is also nothing on record to show as to why the dying man would have falsely implicated the appellants. Natural presumption is that a dying man does not lie, if there be no motive for the same. We confirm the conviction as awarded by the High Court; so too the sentence which is imprisonment for life. *Meharban* v. *State of Madhya Pradesh*, AIR 1997 SC 1528 : 1997 SCC (Cri) 118 : 1997 CrLJ 766 : 1996 CrLR (SC) 614 : 1996 (4) Crimes 23.

[10780] ● *Appreciation of evidence—Knife blows corroborated by recovery of knife.*—In the present case, apart from the evidence of PW-7, the prosecution version that he saw that appellant was having knife in his hand and was quarrelling with the deceased gets corroboration from the evidence of PWs-11 and 12 to whom he disclosed the incident immediately. On the basis of the said information, within one hour, FIR was lodged disclosing the name of the appellant as the person who inflicted the knife blow. The prosecution version gets further corroboration from discovery of Mndammal Knife containing the human blood Group "A". Further the bush shirt and banyan which were put on by the accused at the time of incident were having extensive blood stains which were also found containing human blood Group "A". *Koli Lakhmanbhai Chanabhai* v. *State of Gujarat*, AIR 2000 SC 210 (211, 212) : (1996) 10 SCC 615 : 1997 CrLJ 766 : 2000 CrLR (SC) 111.

[10781] ● *Testimony of child—No legal bar against relying on.*—There is no legal bar against relying on the testimony of a child to whom oath could not be administered due to her incapacity to understand the meaning of oath, if the Court is satisfied that her evidence is reliable. Evidence of victim was corroborated by her friend and medical evidence. High Court was correct in believing the story of the victim, particularly in the light of the medical evidence and also the testimony of her friend. *Paras Ram* v. *State of Himachal Pradesh*, (2001) 4 Supreme 484 : (2001) 3 Crimes 184 (SC).

[10782] ● *Child witness.*—It cannot be laid down as a rule that in all circumstances, the evidence of a minor must be corroborated by other independent evidence, but the evidence of a minor requires close scrutiny. *Pratap Singh* v. *State of Madhya Pradesh*, AIR 2006 SC 514 : (2005) 13 SCC 624 : 2006 CrLJ 310 (312, 313) : 2006 (1) Crimes 61.

[10783] ● *Finding of blood stains on salwar of accused.*—Finding of blood stains on Salwar of Accused and its matching with the blood group of deceased Sunil and Lokesh strengthened the case of prosecution. *Ram Singh* v. *Sonia*, AIR 2007 SC 1218 : (2007) 3 SCC 1 : 2007 CrLJ 1642 (1663) : 2007 (2) Crimes 1 (SC).

9. CIRCUMSTANCES

[10784] ● *Circumstances.*—The learned Judges who dealt with the case, did not condemn the oral evidence outright, but, as a matter of prudence and caution, they decided not to convict an accused person unless there were some circumstances to lend support to the evidence of the eye-witnesses with regard to him. It is quite clear on reading the judgment that the corroboration which the learned Judges required to satisfy themselves, was not that kind of corroboration which one requires in the case of the evidence of an approver or an accomplice, but corroboration by some circumstances which would lend assurance to the evidence before them and satisfy them that the particular accused persons were really concerned in the murder of the deceased. Judged by this standard, which it was open to them to prescribe, it seems to us that the case of each of the appellants clearly fell within the rule which they had laid down for their own guidance. *Lachman Singh* v. *State*, AIR 1952 SC 167 : 1952 CrLJ 863.

[10785] ● *Dying declaration—Conviction of accused on basis of.*—The firing of shot was heard by the deceased and after he was injured, he turned to that side and saw the accused running away and he identified him and has given the particulars of the accused namely about his residence and his brother's name also. Therefore, there is no question of any mistake in identification. The High Court has considered this aspect in great detail and has rightly held that all the particulars mentioned in the dying declaration would leave no doubt regarding the identity of the accused. Apart from this even though PW-1 is treated hostile, in his chief examination and also during cross-examination on the first day, he supported the prosecution case and his evidence also would show that it was the accused who shot at the deceased. The Doctors, PWs. 3 and 4 who recorded the dying declaration deposed that the injured was conscious and his mental condition was such that he could give a statement and whatever he stated was correctly recorded and read out to him. The High Court also pointed out certain circumstances which corroborate the dying declaration. Therefore we see absolutely no grounds to come to a different conclusion. *Gopal (Ram Gopal)* v. *State of U.P.*, 1994 SCC (Cri) 169 : 1994 CrLJ 240 : 1993 CrLR (SC) 683 : 1993 (3) Crimes 1106.

[10786] ● *Evidence of approver—Corroboration.*—In the instant case the only evidence other than the deposition of the said approver, is the deposition of PW-16, the brother of the deceased who only stated that the deceased was seen by the said brother near the canal bridge of village Midha at about 9.00 p.m. on 28.7.1982 and he had gone to the western side alongwith the appellant Shera Singh. As the names of other two accused were not mentioned by PW-16, the High Court gave them the benefit of doubt and acquitted them but since the name of the appellant was mentioned by PW-16 as the person with whom the deceased was last seen together, the conviction against the appellant has been upheld by the High Court. Such finding of the High Court is not justified. Simply on the evidence of PW-16 that the deceased was last seen in the company of the appellant, the appellant is not liable to be convicted for the offence of murder. The deposition of an approver is required to be corroborated in material particulars. The circumstances about which PW-16 deposed cannot be regarded such a corroboration. So, the conviction of the appellant by relying upon the evidence of PW-13 was not justified. *Shera Singh* v. *State of Punjab,* (1996) 10 SCC 330 : 1996 SCC (Cri) 1271 (1271-1272).

[10787] ● ***Minor inter se contradiction in evidence of eyes-witnesses.***—There are some minor *inter-se* contradictions in the evidence of these three eye-witnesses but in our opinion the same are of too trivial in nature and, therefore, the Courts below rightly ignored such minor contradictions. All the three accused came together on a motorcycle and after getting down near the log cabin of Cheturam, A-1 and A-2 threw the acid and then assaulted him and thereafter fled away on the same motorcycle. This unimpeachable evidence cannot be overlooked and in our opinion the Courts below have committed no error in convicting all the three accused persons. The most crucial circumstance against A-1 and A-2 is that they had sustained acid burn injuries on their persons. After going through the evidence and other materials on record we are satisfied that the impugned judgment and order of conviction and sentence passed by the High Court does not suffer from any infirmity. *Asha alias Ashanand* v. *State of Rajasthan*, AIR 1997 SC 2828 : (1997) 11 SCC 525 : 1997 SCC (Cri) 712 : 1997 CrLJ 3508 : 1997 CrLR (SC) 406 : 1997 (2) Crimes 36.

[10788] ● ***Evidence of witness—Corroborated by the facts that explosion took place in house of appellant.***—The most important circumstance which corroborates the evidence of PW-2 is the very fact that an explosion took place in the house of the appellant, which was proved to be the consequence of storing explosive bombs. *Shamsher Khan* v. *State (NCT of Delhi)*, AIR 2000 SC 3662 (3664) : (2000) 8 SCC 568 : 2001 CrLJ 119 : 2001 CrLR (SC) 49.

10. CONFESSION

[10789] ● ***Confession.***—The extent and nature of corroboration depends upon the circumstances of each case. Corroboration, however, must be on material particulars connecting the accused with the crime. The production of property, the subject of offence, or some other article connected with the offence will be sufficient corroboration. *Hemraj* v. *State of Ajmer*, AIR 1954 SC 462 : 1954 SCR 1133. **TO THE SAME EFFECT :** (1) *Shri Sail Nageshia Pare* v. *State of Maharashtra*, AIR 1985 SC 866 : (1985) 2 SCC 341 : 1985 SCC (Cri) 235 : 1985 CrLJ 1173 : (1985) 1 Crimes 876 : 1985 Pat LJR (SC) 40.

[10790] ● ***Evidentiary value of confession.***—Each and every circumstance mentioned in the confession with regard to the participation of the accused person in the crime is not required to be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession is made. *Balbir Singh* v. *State of Punjab*, AIR 1957 SC 216 : 1957 CrLJ 216.

[10791] ● ***No bar to base conviction on retracted confession.***—Although rule or prudence insists on corroboration there is no legal bar to base conviction on retracted confession. The test for the evidence of accomplice is not appropriate for dealing with retracted confessions. The standard of corroboration in the two are quite different. In case of a person who has retracted from his statement general corroboration is sufficient, while the evidence of an accomplice is required to be corroborated in material particulars. *Subramania Goundan* v. *State of Madras*, AIR 1958 SC 66 : 1958 CrLJ 238.

[10792] ● ***Retracted confession and evidence of accomplice—Difference.***—The standard of corroboration in respect of retracted confession and evidence of an accomplice is different. In the case of a person confessing who has resided from his statement, general corroboration is sufficient, while accomplice's evidence should be corroborated in material particulars. In addition the Court must find that the reasons given for the retraction in the case of a confession are untrue. *Subramaniyam Goundan* v. *State of Madras*, AIR 1958 SC 66 : 1958 CrLJ 238. **TO THE SAME EFFECT :** (1) *Modi Ganga* v. *State of Orissa*, AIR 1981 SC 1165 : (1981) 2 SCC 224 : 1981 SCC (Cri) 411 : 1981 CrLJ 628.

[10793] ● ***Confession of co-accused—Relevancy.***—The confession of co-accused is not irrelevant against co-accused but it is a matter of practice that it is not ordinarily acted upon without corroboration. *Ram Parkash* v. *State of Punjab*, AIR 1959 SC 1 : 1959 CrLJ 90 : 1959 SCR 1219.

[10794] ● ***Extra-judicial confessional statement corroboration.***—The Court requires some material corroboration before an extra-judicial confessional statement is acted upon. *Ratan Gaud* v. *State of Bihar*, AIR 1959 SC 18 : 1959 CrLJ 108.

[10795] ● ***Retracted confession unsafe to convict on basis of.***—Courts ordinarily consider it unsafe to convict any accused person on the basis of his retracted confession except where the truth of such confession is established by corroboration in material particulars by independent evidence. What is sufficient corroboration for this purpose has to be decided in each case on its own facts and circumstances. It may, however, be generally stated that where the prosecution by the production of reliable evidence which is independent of the confession and which is also not tainted evidence like the evidence of an accomplice or the evidence of a co-accused, establishes the truth of certain parts of the account given in the confession and these parts are so integrally connected with other parts of the accused's confession, that a prudent judge of facts would think it reasonable to believe, in view of the established truth of these parts, that what the accused has stated in the confession as regards his own participation in the crime is also true, that a sufficient corroboration. More than this is not needed; less than this is ordinarily insufficient. *Nand Kumar* v. *State of Rajasthan*, 1963 (2) CrLJ 702 : 1963 (2) SCR 890.

[10796] ● ***Admissibility of evidence and weight to be attached—Distinction between.***—There is a clear distinction between the admissibility of an evidence and the weight to be attached to it. A confessional soliloquy is a direct piece of evidence. It may be an expression of conflict of emotion; a conscious effort to stifle the pricked conscience; an argument to find excuse or justification for his act; or a penitent or remorseful act of exaggeration of his part in the crime. The tone may be soft and low; the words may be confused; they may be capable of conflicting interpretations depending on witnesses, whether they are biased or honest, intelligent or ignorant, imaginative or prosaic, as the case may be. Generally they are mutterings of a confused mind. Before such evidence can be accepted, it must be established by cogent evidence what were the exact words used by the accused. Even if so much was established, prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may be used only as a corroborative piece of evidence. *Sahoo* v. *State of Uttar Pradesh*, AIR 1966 SC 40 : 1966 CrLJ 68 : 1965 (3) SCR 86.

[10797] ● ***Extra-judicial confession—Whether reliable and whether finds corroboration.***—Before the Court will act on extra-judicial confession the circumstances under which the confession is made, the manner in which it is made, the persons to whom it is made will be considered along with two rules of caution. First, whether the evidence of confession is reliable and secondly whether it finds corroboration. *Wakil Nayak* v. *State of Bihar*, (1971) 3 SCC 778 : 1972 CrLJ 566.

[10798] ● ***Extra-judicial confession corroboration.***—It is a matter of prudence for the Courts to find corroboration from some independent source before relying upon confession even though retracted extra judicial confession can also legally form basis of concession. *Abdul Ghani* v. *State of U.P.*, AIR 1973 SC 264 : (1973) 4 SCC 17 : 1973 CrLJ 280 : 1973 CrLR (SC) 64.

[10799] ● ***Extra-judicial confession—Evidence furnished by.***—The evidence furnished by the extra-judicial confession made by the accused to witnesses cannot be termed to be a tainted evidence and if corroboration is required it is only by way of abundant caution. If the Court believes the witnesses before whom the confession is made and it is satisfied that the confession was voluntary, then in such a case conviction can be founded on such evidence alone. *Maghar Singh* v. *State of Punjab*, AIR 1975 SC 1320 : (1975) 4 SCC 234 : 1975 CrLJ 1102.

[10800] ● ***Retracted confession when to be acted upon.***—Retracted confession can be acted upon only if substantially corroborated by independent evidence. *State of U.P.* v. *Bolta Singh*, AIR 1978 SC 1770 : (1979) 1 SCC 31 : 1978 All LJ 1156. **TO THE SAME EFFECT :** (1) *Puran* v. *State of Punjab*, AIR 1953 SC 459 : 1953 CrLJ 1925; (2) *Pyare Lal Bhargav* v. *State of Rajasthan*, AIR 1963 SC 1094 : 1963 (2) CrLJ 178.

[10801] ● ***Retracted confession—Conviction on basis of.***—Conviction on the basis of retracted confession is not permissible. *Kora Ghasi* v. *State of Orissa*, AIR 1983 SC 360 : (1983) 2 SCC 251 : 1983 SCC (Cri) 387 : 1983 CrLJ 692 : 1983 CrLR (SC) 188.

[10802] ● ***Confessions retracted.***—The confessions have no doubt been retracted, but in view of the fact that they are generally corroborated the circumstantial evidence in ample measure there is no satisfactory reason for the confessions not being accepted and acted upon. *Henry West Muller Roberts* v. *State of Assam*, AIR 1985 SC 823 : (1985) 3 SCC 291 : 1985 CrLJ 1079.

[10803] ● *Retracted confession by accused form basis for convicting co-accused.*—A retracted confession by an accused may form the basis for convicting co-accused though it may be taken into consideration against co-accused also. It is wrong to think that a confession can lead nowhere. *Shri Shail Nageshi Pare* v. *State of Maharashtra*, AIR 1985 SC 866 : (1985) 2 SCC 341 : 1985 SCC (Cri) 235 : 1985 CrLJ 1173.

[10804] ● *Retracted confession—Without independent corroboration.*—Retracted confession without independent corroboration cannot sustain conviction. *Palanisamy* v. *State of T.N.*, AIR 1986 SC 593 : (1986) 1 SCC 693 : 1986 CrLJ 551 : (1986) 1 Crimes 599 (SC).

[10805] ● *Hand-writing expert—Evidence of.*—Confessional statement corroborated without first marshalling and considering evidence against accused excluding confession altogether from consideration. If on such consideration or evidence available other than confession conviction can safely be based, then only confession could be used to support that belief or conclusion. Confession could be used to support that belief or conclusion. Confession of accused retracted at the time when accused was questioned under Section 313, CrPC—It would be erroneous when prosecution making confessional statement as basis and then looking for corroboration and concluding that confession corroborated in material particulars by prosecution witness. Evidence of handwriting expert be decisive if prosecution witness believable. *Chandrakant Chimanlal Desai* v. *State of Gujarat*, (1992) 1 SCC 473 : 1992 CrLJ 2757.

[10806] ● *Circumstantial evidence—Corroborated by extra-judicial confession.*—PW-1 has given a cogent and convincing evidence and has given all the details as to how the accused came to him and confessed before him and that accused said that he would go to Police Station. Then we have the evidence of the Head Constable who was in the Police Station before whom the accused surrendered himself. As a matter of fact the accused himself has gone to the Police Station and lodged a complaint by giving there a first information report. The evidence of the two children show that the accused was in the company of the deceased in the field and thereafter he was seen missing. The accused has no explanation as to where he went and why he went to the Police Station and he also had not come forward with any acceptable explanation for the presence of the blood on the clothes as well as on the pick-axe. The serological report shows that the group of the blood found on the clothes of the accused was the same as that of the deceased. These are the circumstances which corroborate extra-judicial confession. *Lavji Mona* v. *State of Gujarat*, AIR 1993 SC 2480 (2481) : 1993 CrLJ 3148.

[10807] ● *Firing by guns corroborated by against of ballistic expert.*—Prosecution case that the appellants had fired their guns stood amply corroborated by the report of the ballistic expert that all the cartridges of .12 bore recovered from the house of the deceased had been fired from the guns of the appellants. *Bhola Singh* v. *State of Punjab*, AIR 1994 SC 137 : 1994 Supp (1) SCC 546 : 1993 CrLJ 3904 : 1993 CrLR (SC) 558 : 1993 Crimes 303.

[10808] ● *Retracted extra-judicial confession—Reliability.*—It is well-settled now that a retracted extra-judicial confession, though a piece of evidence on which reliance can be placed, but the same has to be corroborated by independent evidence. That apart, the Court must be satisfied that the confession alleged to have been made to PW-11 was true and voluntary one and in judging the same, the conduct of PW-11 and the circumstances which impelled the accused to make such a statement to PW-11 should be above suspicion. PW-11 deposed that he and the accused studied together some years ago and thereafter they left the school and PW-11 was working as a labourer. PW-11 further admitted that 7 or 8 years back, the accused and the father left the village and two years prior to this occurrence he met him and during the period, the accused did not even visit his house. PW-11 further admitted that he did not inform anybody and he did not even think of informing the Police even after coming to know that the accused committed the murder. Though he has stated that he informed his mother but no statement of the mother has been recorded as such. PW-11 further deposed that on 8-5-1977 the accused was living in the village on which date he was arrested. But he has not stated so before the Police. This conduct of PW-11 throws any amount of suspicion on his veracity. Unless we are satisfied that the extra-judicial confession itself is true, voluntary and reliable, we cannot proceed further to examine whether there is any other independent corroboration evidence. There are many suspicious features in the evidence of PW-11. It becomes highly doubtful as to why the accused should cover such a long distance and go all the way to PW-11 to confess his crime and then immediately leave his house. This is a retracted extra-judicial confession which is the sole basis on which both the Courts have relied and based the conviction. If PW-11's evidence becomes unreliable, then there is no other circumstance to connect the accused with the crime. *Sakharam Shankar Bansode* v. *State of Maharashtra*, AIR 1994 SC 1594 (1595) : 1994 SCC (Cri) 505 : 1994 CrLJ 2189.

[10809] ● ***Extra-judicial confession—Corroboration not necessary.***—Law does not require that the evidence of an extra-judicial confession should in all cases be corroborated and where such confession was proved by an independent witness who was a responsible officer and who bore no animus against the accused, there was hardly any justification to disbelieve the same. *Vinayak Shivajirao Pal* v. *State of Maharashtra*, AIR 1998 SC 1096 (1100) : (1998) 2 SCC 233 : 1998 SCC (Cri) 610 : 1998 CrLJ 1558 : 1998 CrLR (SC) 83. **TO THE SAME EFFECT :** (1) *Piara Singh* v. *State of Punjab*, AIR 1977 SC 2274 : (1977) 4 SCC 452 : 1977 CrLJ 1941.

[10810] ● ***Extra-judicial confession corroboration.***—It is no doubt true that extra-judicial confession by its very nature is rather a weak type of evidence and it is for this reason that a duty is cast upon the Court to look for corroboration from other reliable evidence on record. Such evidence requires appreciation with a great deal of care and caution. If such an extra-judicial confession is surrounded by suspicious circumstances, needless to state that its credibility becomes doubtful and, consequently, it loses its importance. *Pakkirisamy* v. *State of Tamil Nadu*, AIR 1998 SC 107 (109) : (1997) 8 SCC 158 : 1998 CrLJ 89 : JT 1997 (8) SC 310.

[10811] ● ***Confessional statement of approver to Magistrate before tender of pardon can be aged as corroborative material.***—The confessional statement given by PW-2 to the Magistrate before pardon was tendered to him, is projected as a material for corroboration. Though legally it can be used as a corroborative material, we are not disposed to attach great weight to it since it is only the former statement of an accomplice. *Ramprasad* v. *State of Maharashtra*, AIR 1999 SC 1969 : (1999) 5 SCC 30 : 1999 SCC (Cri) 651 (657) : 1999 CrLJ 2889 : 1999 CrLR (SC) 378 : JT 1999 (4) SC 74.

[10812] ● ***Confession by one accused can be used against Co-accused for Corroboration.***—The Confession made one co-accused can be used against the co-accused even when the other conditions under Section 30, Evidence Act are satisfied only for the purpose of corroboration. *State of Maharashtra* v. *Damu Gopinath Shinde*, AIR 2000 SC 1691 : (2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 CrLJ 2301.

[10813] ● ***Corroboration of confessional statement of rule of law.***—Corroboration of the confessional statement is not a rule of law but a rule of prudence. Whether in a given case corroboration is sufficient, would depend upon the facts and circumstances of that case. In order to sustain a conviction on the basis of a confessional statement, it is sufficient that there is its general corroboration. *State of Maharashtra* v. *Bharat Chaganlal Raghani*, AIR 2002 SC 409 : (2001) 9 SCC 1 : 2002 CrLJ 1944.

[10814] ● ***Confessional statement sufficient general corroboration from testimony of witnesses and documents.***—Looking at the record of the instant case including the testimony of witnesses and the documents produced, we find sufficient general corroboration of the confession statements made by A 5 and A 6. It is proved that they were associates of Dawood Ibrahim and Abu Salem (A 9) and were continuously in touch with them on telephone for the purpose of getting directions and receiving remuneration. They were seem at and near the place of occurrence on 7-3-1995. They had brought weapons of offence and distributed to other accused. Recoveries of the weapons were made from them which were seized in the presence of witnesses. They were identified by the witnesses at the Test identification parade. Their other associates in crime have been killed or absconding. The cause which provoked Abu Salim (A 9) to kill Pradeep Jain stands corroborated by the testimony of PW-23, widow of the deceased what more corroboration was required in such a case has not been pointed out for the learned counsel appearing for A 5 and A 6. *State of Maharashtra* v. *Bharat Chaganlal Raghani*, AIR 2002 SC 409 (429, 430, 431) : (2001) 9 SCC 1 : 2002 CrLJ 944.

[10815] ● ***Extra-judicial confession by co-accused may be admitted as corroboration piece of evidence.***—Another incriminating circumstance sought to be proved against the accused is the extra-judicial confession alleged to have been made by the ninth accused PM wherein he named A-1, A-2, A-5 and A-6. It is alleged that he made the confession of PW-105 SN and A-9 is alleged to have disclosed to PW-105 that these accused persons had given him money and he murdered SGN for the sake of money. Under Section 30 of the Evidence Act, the extra-judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. In the absence of any substantive evidence against these accused persons, the extra-judicial confession allegedly made by the ninth accused loses its significance and there cannot be any conviction based on such extra-judicial confession. The High Court, in our view, has given cogent and satisfying reasons for the acquittal of the accused A-1 to A-8. *State of Madhya Pradesh* v. *Paltan Mallah*, AIR 2005 SC 733 : 2005 CrLJ 918 (921, 922) : 2005 (3) Crimes 220 (SC).

[10816] ● ***Extra-judicial confession—Corroboration.***—Extra-judicial confession being generally of weak nature, no conviction can be based solely thereupon unless the same is corroborated on material particulars. *Baldev Singh* v. *State of Punjab*, (2009) 6 SCC 564 : 2009 (3) Crimes 8 (SC).

11. DYING DECLARATION

[10817] ● ***Dying declaration—Not safe to conviction evidence furnished by.***—It is not safe to convict an accused person merely on the evidence furnished by dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the marker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. *Ram Nath Madhoprasad* v. *State of Madhya Pradesh*, AIR 1953 SC 420 : 1953 CrLJ 1772.

[10818] ● ***Dying declaration to be subjected to close scrutiny.***—In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case. *Khushal Rao* v. *State of Bombay*, AIR 1958 SC 22 : 1958 CrLJ 106 : 1958 Mad LR (Cri) 100.

[10819] ● ***Truthful and reliable dying declaration from sole basis of conviction.***—A truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration. *Thurukanni Pompiah* v. *State of Mysore*, AIR 1965 SC 939 : 1965 (2) CrLJ 31.

[10820] ● ***Dying declaration—When can be acted upon without—Corroboration.***—If the statement of a dying person passes the test of careful scrutiny applied by the Courts, it becomes a most reliable piece of evidence which does not require any corroboration. Suffice it to say that it is now well established by a long course decisions of this Court that although a dying declaration should be carefully scrutinized but if after perusal of the same, the Court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and is consistent, there is no legal impediment in founding the conviction on such a dying declaration even if there is no corroboration. *Kusa* v. *State of Orissa*, AIR 1980 SC 559 : (1980) 2 SCC 207 : 1980 SCC (Cri) 389 (393, 394) : 1980 CrLJ 408 : 1980 CrLR (SC) 200 : (1980) 2 SCR 801.

[10821] ● ***Dying declaration—Conviction on basis of.***—There can be conviction on the basis of dying declaration and it is not at all necessary to have a corroboration provided the Court is satisfied that the dying declaration is a truthful dying declaration and not vitiated in any manner. *State of Assam* v. *Mufizuddin Ahmad*, AIR 1983 SC 274 : (1983) 2 SCC 14 : 1983 SCC (Cri) 325 : 1983 CrLJ 426 : 1983 CrLR (SC) 1673. **TO THE SAME EFFECT :** (1) *State of U.P.* v. *Chet Ram*, AIR 1989 SC 1543 : (1989) 2 SCC 425 : 1989 CrLJ 1785 : 1989 (2) Crimes 13.

[10822] ● ***Dying declaration—Evidentiary value.***—Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32 when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the cause of circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes a very important and a reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are more than one dying declarations, then the Court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. *Kundula Bala Subrahmanyam* v. *State of Andhra Pradesh*, (1993) 2 SCC 684 : 1993 CrLJ 1635 : 1993 (1) Crimes 1169.

[10823] ● ***Dying declaration—Corroborated by evidence of witnesses.***—Even assuming there was some infirmity, there is ample corroboration to the dying declaration from the evidence of PWs-1, 3 and 4, out of whom PWs-1 and 3 are the injured witnesses. The injuries on them establish that they were present at the scene of occurrence and during the course of the same transaction they received the injuries. The learned Counsel further submits that the assailants alleged to have inflicted these injuries have been acquitted. That by itself cannot be a ground to reject the evidence once we accept their presence and also other persons received injuries during the course of the same transaction. However, their evidence have been used only for corroboration in the dying declaration. The names of three appellants have been mentioned in the dying declaration and to that extent the dying declaration is also corroborated by the evidence of PWs-1, 3 and 4. Therefore, there is ample evidence in this case establishing the guilt of the three appellants. *Nawab Ali Jhinnu* v. *State of Uttar Pradesh*, AIR 1994 SC 1607 (1609) : 1994 CrLJ 2191.

[10824] ● ***Dying declaration—Basis of conviction.***—The dying declaration, if after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there is no legal impediment to form such dying declaration the basis of conviction, even if there is no corroboration. *State of Rajasthan* v. *Kishore*, AIR 1996 SC 2035 : (1996) 9 SCC 225 : 1996 SCC (Cri) 646 : 1996 CrLJ 2003 : 1996 (1) Crimes 156 (SC).

[10825] ● ***Dying declaration recorded by Magistrate—Corroborated by other dying declaration.***—The statement given to the Executive Magistrate is quite clear and is a categorical statement. It gets corroboration, if at all it is needed, from the subsequent dying declaration recorded by the Investigation Officer. It is settled law that a dying declaration, if found truthful, is sufficient to base a conviction without any further corroboration. In this case, the medical evidence corroborates her dying declarations. It is not necessary that it should be recorded in the form of questions and answers as contended for the accused. The Doctor has certified that she was in a mentally fit condition to give the statement. That the prosecution has proved its case beyond any shadow of doubt. The judgment and order of acquittal passed by the High Court is set aside and that of the Sessions Court stands confirmed consequently. *State of Uttar Pradesh* v. *Ameer Ali*, (1996) 8 SCC 523 : 1996 SCC (Cri) 686 (688) : JT 1996 (4) SC 123.

[10826] ● ***Statement given under expectation of death.***—Though the statement given to a Magistrate by someone under expectation of death ceases to have evidentiary value under Section 32 of the Evidence Act if the maker thereof did not die, such a statement has, nevertheless, some utility in trials. It can be used to corroborate this testimony in Court under Section 157 of the Evidence Act which permits such use, being a statement made by the witness "before any authority legally competent to investigate". The word "investigate" has been used in the section in a broader sense. Similarly, the words "legally competent" denote a person vested with the authority by law to collect facts. A Magistrate is legally competent to record dying declaration "in the course of an investigation" as provided in Chap. XII of the CrPCode, 1973. The contours provided in Section 164(1) would cover such a statement also *vide Maqsoodan* v. *State of U.P.*, AIR 1983 SC 126. However, such a statement, so long as its maker remains alive, cannot be used as substantive evidence. Its user is limited to corroboration of contradiction of the testimony of its maker. *Gentela Vijayavardhan Rao* v. *State of Andhra Pradesh*, AIR 1996 SC 2791 (2793, 2794) : (1996) 6 SCC 241 : 1996 SCC (Cri) 1290 : 1996 CrLJ 4151.

[10827] ● ***Dying declaration—Corroboration if necessary.***—Though no corroboration of dying declaration as such is necessary to convict the accused a principle which has been laid down in *Khushal Rao's* case AIR 1958 SC 22, however, in this case, there is circumstantial evidence which corroborates the dying declaration, *viz.*, the statements of PWs-3 and 4 that they found the victim in her room where the smell of kerosene was present, the statement of PW-5, the Doctor, who conducted the post-mortem examination after four days of the accident noticed smell of kerosene, from the scalp of the deceased, statements of PWs-4 and 6 who rushed to the house of the appellant immediately after hearing of the incident and found that the house was locked from inside and the appellant was delaying in opening the lock on one pretext or the other; the plea of the appellant that she died of accident while igniting the oven and that the appellant and DW 2 put water on her was belied from the evidence on record as no sign of water was found in the kitchen and that the ash in the oven was found intact. These facts corroborate and lend assurance to the truth of the declaration of the deceased *"mere pati ne mujhe jala diya hai"*. *Ram Bihari Yadav* v. *State of Bihar*, AIR 1998 SC 1850 (1854) : (1998) 4 SCC 517 : 1998 SCC (Cri) 1085 : 1998 CrLJ 2515 : 1998 CrLR (SC) 562 : JT 1998 (3) SC 290.

[10828] ● ***Dying declaration—Evidentiary value.***—A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premises that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premises which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross-examined. In order that a dying declaration may form the sole basis of conviction without corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the Court on strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence. *Jai Karan* v. *State of NCT Delhi*, AIR 1999 SC 3512 : (1999) 8 SCC 161 : 1999 SCC (Cri) 1385 (1388) : 1999 CrLJ 4529 : 1999 CrLR (SC) 767 : JT 1999 (7) SC 514.

[10829] ● ***Dying declaration—Court to deal with caution.***—It is well settled that a dying declaration must be dealt with caution for the reason that the maker of the statement had not been subjected to cross-examination. There is no rule of law or rule of prudence that a dying declaration cannot be accepted unless it is corroborated. (*Khushal Rao's* case, AIR 1958 SC 22). In the instant case PW-9, though declared hostile has admitted that at about 2.30 a.m. when he was going to fetch water for his child, he had seen the deceased running with his clothes on flames. PW-13, who was also declared hostile has admitted that he had heard noise and saw Islamuddin in flames. Later, he informed the accused persons that the man in flames was running from their side of *Jhuggi.* PW-16 (Dr. George Paul) has stated that in his opinion the deceased had died due to septicaemia and toxaemia and that his body had burn injuries. PW-19, the then SDM has referred to the recording of statement Ex PW-19/A, the narration of which is almost identical as detailed in Ex PW-22/B. It is worthwhile to mention that all the four accused were arrested immediately after recording of the statement of the deceased and registration of the case against them. It is, therefore, evident that the material facts stated in Ex PW-22/B have been corroborated by various witnesses and the attending circumstances of the case. *Gulam Hussain* v. *State of Delhi*, AIR 2000 SC 2480 : (2000) 7 SCC 254 : 2000 SCC (Cri) 1343 (1348, 1349) : 2000 CrLJ 3949 : 2000 CrLR (SC) 634.

[10830] ● ***Oral dying declaration.***—An oral dying declaration no doubt can form the basis of conviction, though the Courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the Court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability. So far as the statement in the ambulance is concerned, it was made to PW-2 who is the brother of the deceased. PW-2 in his cross-examination, candidly admitted that there were three or four persons inside the ambulance when his brother told him the names of his assailants but none of those disinterested persons have been examined by the prosecution to corroborate said PW-2. He also admitted in his cross-examination that those persons who were in the ambulance were present near him when his brother stated the words and yet the prosecution has not offered any explanation as to why none of those persons were examined who could have been disinterested persons deposing about the dying declaration said to have been made by the deceased inside the ambulance while he was being carried to the hospital. While according to the evidence of PW-2, the deceased told him that the appellant gave him a dao blow but according to PW-5 to whom the deceased made a declaration in the hospital, the deceased told him that the appellant held a thang and Paka Singh had a hockey stick. Intrinsically, therefore, the so-called dying declaration made by the deceased to PW-2 is different from the declaration made by the deceased to PW-5. PW-2 happens to be the elder brother of the deceased. In the aforesaid premise, we do not think it safe to hold the evidence of PW-2 to be reliable and, therefore, the oral dying declaration as deposed to him by him cannot be pressed into service for bringing home the charges levelled against the accused/appellant. *Heikrujam Chaoba Singh* v. *State of Manipur*, AIR 2000 SC 59 : (1999) 8 SCC 458 : 2000 CrLJ 184.

[10831] ● ***Rule requiring corroboration of dying declaration—Mere rule of prudence.***—Rule requiring corroboration of the dying declaration is a mere rule of prudence. *Sham Shankar Kankaria* v. *State of Maharashtra*, (2006) 3 SCC 165 : (2007) 2 SCC (Cri) 663 : (2006) 4 Crimes 59.

[10832] ● ***Court satisfied that declaration is true—No corroboration required.***—Once Court is satisfied that the dying declaration is true, conviction can be based on it without any further corroboration. *State of Punjab* v. *Raj Kumar*, 2008 AIR SCW 5698 (5701).

[10833] ● ***Principles governing dying declaration.***—The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration. *S.P. Devaraju* v. *State of Karnataka*, AIR 2009 SC 1725 : 2009 (12) SCC 676 : 2009 (2) SCR 308.

[10834] ● ***Dying declaration—Necessity of corroboration.***—No absolute rule of law can be laid down that unless dying declaration is corroborated, no conviction can be based on it. Once the Court is satisfied that declaration is true and voluntary, it can base conviction on dying declaration without any further corroboration. *Jaishree Anant Khandekar* v. *State of Maharashtra*, (2009) 11 SCC 647 : 2009 (2) Crimes 23 (SC) : 2009 (4) SCR 982; **TO THE SAME EFFECT** : (1) *Sharda* v. *State of Rajasthan*, AIR 2010 SC 408 : 2010 (1) Crimes 24 : JT 2009 (15) SC 164. (2) *Subash Soni* v. *State of Madhya Pradesh*, (2009) 6 SCC 647 : 2009 (8) SCR 136.

[10835] ● ***Rule of prudence.***—Rule requiring corroboration is merely a rule of prudence. *Satish Ambanne Bansode* v. *State of Maharashtra*, AIR 2009 SC 1626 : (2009) 1 SCC 217 : 2009 (2) Crimes 19 (SC) : 2009 (3) SCR 1166.

[10836] ● ***Corroboration, when not required.***—Corroboration is not required when a dying declaration is found to be voluntary, reliable and made in fit mental condition. *Gopal* v. *State of Madhya Pradesh*, AIR 2009 SC 2111 : (2009) 12 SCC 600 : 2009 CrLJ 2434; **TO THE SAME EFFECT** : *Varrikuppal Srinivas* v. *State of Andhra Pradesh*, AIR 2009 SC 1487 : (2009) 3 SCC 415 : 2009 (1) SCR 680.

[10837] ● ***Suspicious dying declaration.***—Suspicious dying declaration must be corroborated before conviction is based on it. *Varrikuppal Srinwas* v. *State of Andhra Pradesh*, AIR 2009 SC 1487 : (2009) 3 SCC 415 : JT 2009 (2) SC 8.

[10838] ● ***Dying declaration found voluntary—No corroboration required.***—Once Court is satisfied that the statement of deceased was not as a result of either tutoring or prompting or product of imagination and further that deceased was in a fit condition of mind, it can base conviction without further corroboration. *Kalawati* v. *State of Maharashtra*, AIR 2009 SC 1932 : (2009) 4 SCC 37 : 2009 (3) SCR 187. **TO THE SAME EFFECT** : *Ongali Ravikant* v. *State of Andhra Pradesh*, AIR 2009 SC 2129 : (2009) 13 SCC 647 : 2009 CrLJ 3944.

[10839] ● ***Different dying declarations—Contradictory to each other—Corroboration is***

required.—Different dying declaration with contradictions and inconsistency cannot be accepted on their face value and corroboration must be sought from other evidence on record. *Samadhan Dhudaka Kali* v. *State of Maharashtra*, AIR 2009 SC 1059 : (2008) 16 SCC 705 : 2009 (1) Crimes 190 (SC) : JT 2009 (1) SC 122.

[10840] ● ***Dying declaration—Voluntary—Needs no corroboration.***—The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. *Jayabalan* v. *U.T. of Pondicherry*, 2010 (1) SCC 199 : 2009 (14) JT 401 : 2009 (7) Supreme 270 : 2009 (4) Crimes 172 (SC).

[10841] ● ***Conviction based on dying declaration—Principles.***—The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. *Jayabalan* v. *U.T. of Pondicherry*, 2010 (1) SCC 199 : 2009 (13) Scale 614 : 2009 (7) Supreme 270 : 2009 (4) Crimes 172 (SC).

[10842] ● ***Court satisfied that dying declaration is true and voluntary—No inducement—No corroboration is necessary.***—The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration. *S.P. Devaraju* v. *State of Karnataka*, AIR 2009 SC 1725 : (2009) 12 SCC 676 : 2009 (2) SCR 308 : JT 2009 (2) SC 408 : 2009 (2) Scale 572.

12. EXPERT

[10843] ● ***Expert.***—There is no rule of law nor any rule of prudence which has crystallized into a rule of law that opinion evidence of a handwriting expert must never be acted upon unless substantially corroborated. But having regard to the imperfect nature of the science of identification of handwriting, the approach should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence, must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of an handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight. *Murari Lal* v. *State of M.P.*, AIR 1980 SC 531 : (1980) 1 SCC 704 : 1980 SCC (Cri) 330 (338) : 1980 CrLJ 396 : 1980 CrLR (SC) 168.

13. FIRST INFORMATION REPORT

[10844] ● ***First Information Report.***—The fact that the first information report was lodged within 35 minutes of the occurrence at the police station at a distance of two miles from the place of occurrence and the fact that in the aforesaid report the names of the accused as the culprits as well as the names of the eye witnesses were mentioned lends considerable corroboration to the testimony of Harihar Nath PW-regarding the participation of the accused-appellants in the present occurrence. *Dargahi* v. *State of U.P.*, AIR 1973 SC 2695 : 1973 CrLJ 1828.

[10845] ● ***First Information Report—Evidentiary value.***—Unless a first information report can be tendered in evidence under any provision contained in Chapter II of the Evidence Act such as a dying declaration falling under Section 32(1) as to the cause of the informants' death, or as a part of informants' conduct under Section 8, it can ordinarily be used only for the purpose of corroborating, contradicting or discrediting its author, if examined and not any other witness. *Shanker* v. *State of U.P.*, AIR 1975 SC 757 : (1975) 3 SCC 851 : 1975 SCC (Cri) 270 (273) : 1975 CrLJ 634 : 1975 CrLR (SC) 199.

[10846] ● ***FIR corroborates statement of maker.***—The first information report was lodged within about 10 minutes of the incident and contains the necessary details, including the name of the respondent as the person who inflicted the dagger blow, and the names of the eye-witnesses. It, therefore, goes to corroborate the statement of its maker, Harnam Singh. *State of Punjab* v. *Ramji Das*, AIR 1977 SC 1085 : (1977) 4 SCC 597 : 1977 SCC (Cri) 368 (373) : 1977 CrLJ 705 : 1977 CrLR (SC) 198.

[10847] ● ***Statement in FIR establishing one of miscreants assaulted by vegetable knife.***—The best corroborative piece of evidence is furnished by the FIR which was lodged by Karamat Ali (PW-1) on the basis of what he heard from PW-5 in the FIR, which was lodged within two hours of the incidence, the substratum of the entire prosecution case finds place including a statement that during the incident Smt. Naeema Parveen had, in defending herself, given a blow to one of the accused with a vegetable cutting knife. *Chand Khan* v. *State of Uttar Pradesh*, AIR 1995 SC 2140 (2145) : (1995) 5 SCC 448 : 1995 SCC (Cri) 915 : 1995 CrLJ 3675.

14. HEARSAY

[10848] ● ***Hearsay.***—The witness stated that the deceased shouted the name of assailant while he was beaten. This part of testimony is admissible as part of *res qestae*. It can be used for corroboration of other evidence. *Badruddin Rukonddin*, AIR 1981 SC 1227 : 1981 Supp SCC 1 : 1981 SCC (Cri) 610 : 1981 CrLJ 729 : 1981 CrLR (SC) 198.

[10849] ● ***Hearsay evidence—Admissibility.***—When a witness testifies about what he heard from somebody else, it is ordinarily not admissible in evidence being hearsay, but if the person for whom he heard is examined to give direct evidence within the meaning of Section 60 of the Evidence Act, the former's evidence would be admissible to corroborate the latter in accordance with Section 157, CrPC. However, such a statement made to a Police Officer, when he is investigating into an offence in accordance with Chap. XII of the CrPCode cannot be used to even corroborate the maker thereof in view of the embargo in Section 162(1), CrPCode appearing in that Chapter and can be used only to contradict him (the maker) in accordance with the provision thereof, except in those cases where sub-section (2) of the section applies. *Jagdish Narain* v. *State of Uttar Pradesh*, AIR 1996 SC 3136 : (1996) 8 SCC 199 : 1996 SCC (Cri) 565 (569).

15. HOSTILE WITNESS

[10850] ● ***Hostile witness.***—It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence. *In Re : Bhagwan Singh* v. *State of Haryana*, AIR 1976 SC 202 : (1976) 1 SCC 389 : 1976 CrLJ 203. **TO THE SAME EFFECT :** (1) *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294 : (1976) 1 SCC 727 : 1976 CrLJ 295; (2) *Koli Lakhmanbhai Chanabhai* v. *State of Gujarat*, AIR 2000 SC 210 (211) : (1999) 8 SCC 624 : 2000 CrLJ 408 : 2000 CrLR (SC) 111.

16. INFIRM WITNESS

[10851] ● ***Infirm witness.***—It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand. *Muluwa* v. *State of M.P.*, AIR 1976 SC 989 : (1976) 1 SCC 37 : 1975 SCC (Cri) 759 (764) : 1976 CrLJ 717 : 1975 CrLR (SC) 521.

17. INFORMERS, SPIES AND DECOY

[10852] ● ***Informers, Spies and Decoy.***—If any of the witnesses are accomplices who are *particepes criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the Court may even look for independent corroboration before convicting the accused person. If a Magistrate puts himself in the position of a partisan or interested witness, he cannot claim any higher status and must be treated as any other interested witness. *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500 : 1958 CrLJ 976 : 1958 SCJ 856 : 1958 MCJ (Cri) 641 : (1958) 2 MLJ (SC) 136 : (1958) 2 Andh WR (SC) 136. **TO THE SAME EFFECT :** (1) *Khilli Ram* v. *State of Rajasthan*, AIR 1985 SC 79 : (1985) 1 SCC 28 : 1985 SCC (Cri) 24 : 1985 CrLJ 504 : (1984) 2 Crimes 909; (2) *Prakash Chand* v. *State (Delhi Admn.)*, AIR 1979 SC 400 : (1979) 3 SCC 90 : 1979 SCC (Cri) 656 : 1979 CrLJ 329; (3) *Khemu Ram* v. *State*, 1972 CrLJ 381 (HP).

[10853] ● ***Interested and partisan witnesses—Corroboration.***—Both P.Ws. were interested and partisan witnesses. They were concerned in the success of the trap and their evidence must be tested in the same way as that of any other interested witness and in a proper case the Court may look for independent corroboration before convicting the accused person. There is no search witness who is independent in the present case and there is no other evidence from which any corroboration could be found of the evidence given by the members of the raiding party. *Ram Prakash Arora* v. *State of Punjab*, AIR 1973 SC 498 : (1972) 3 SCC 652 : 1972 CrLJ 1293.

[10854] ● ***No flexible rule of law that evidence of relations required corroboration.***—There is no general rule that the evidence of the relations of the deceased must be corroborated for securing the conviction of the offender. Each case depends on its own facts and circumstances. In the present case the straightforward nature of the deposition of these two witnesses and the fact that they were undoubtedly in a position to identify the assailants of their father coupled with the recovery of blood-stained earth from the place of occurrence leave no reasonable doubt about the guilt of the accused persons. *State of U.P.* v. *Paras Nath Singh*, AIR 1973 SC 1073 : (1973) 3 SCC 647 : 1973 CrLJ 850 : 1973 CrLR (SC) 186 : 1973 (3) SCR 313.

18. INTERESTED WITNESS

[10855] ● ***Interested witness.***—Interested or partisan witness is distinct from an approver or accomplice. While the evidence of former can be accepted even without corroboration, the evidence of the latter class cannot be. *Karim* v. *State*, 1971 Ker LT 672 : (1962) 2 SCR 195 **relying on** : AIR 1961 SC 1762 : (1962) 2 SCR 195. **TO THE SAME EFFECT :** (1) *B.H. Dabe* v. *State of Gujarat*, AIR 1968 SC 1323 : 1968 CrLJ 1505 : 9 Guj LR 853.

[10856] ● ***Witnesses and deceased involved in same litigation.***—Where witnesses and deceased are involved in the same litigation against each other, witnesses are not reliable without corroboration. *Satyanarain* v. *State of M.P.*, AIR 1972 SC 1309 : (1972) 3 SCC 484 : 1972 CrLJ 881.

[10857] ● ***Not safe to act upon testimony of close relation of deceased without corroboration.***—"We cannot lose sight of the fact that Ramji Das and Rup Lal being close relations were highly interested in the prosecution. There was no love lost between Ramji Das and the deceased on one hand, and both the accused on the other. In a case of this kind, therefore, particularly where sitting in appeal over a judgment of acquittal recorded by the High Court, it will not be safe to act upon his testimony without corroboration from independent source against each of the two accused. *State of Punjab* v. *Mukhtiar Singh*, AIR 1975 SC 2001 : (1975) 4 SCC 590 : 1975 SCC (Cri) 625 (632) : 1975 CrLJ 1745 : 1975 CrLR (SC) 477.

[10858] ● ***Interested and partisan witness—Evidentiary value of.***—It is not the law that the evidence of an interested witness should be equated with that of a tainted witness or that of an approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such but the Courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinized with a little care. Once that approach is made and the Court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon without corroboration. *Sarwan Singh* v. *State of Punjab*, AIR 1976 SC 2304 : (1976) 4 SCC 369 : 1976 SCC (Cri) 646 (653) : 1976 CrLJ 1757 : 1976 CrLR (SC) 362.

[10859] ● ***Credibility of witness—Tests.***—The real test of the credibility of Tatoba's version was the medical evidence. If his version was corroborated by the medical evidence there could be no ground to discard his sole evidence just because he happened to be a brother of the deceased. On the other hand, if medical evidence contradicted the version of Tatoba, it was evident that the prosecution case could not succeed. *Shamu Balu Chaugule* v. *State of Maharashtra*, AIR 1976 SC 557 : 1976 SCC (Cri) 56 : 1976 CrLJ 492 : 1976 CrLR (SC) 26.

[10860] ● ***Evidence of partisan witness—Corroboration.***—There is no hard and fast rule that the evidence of a partisan witness cannot be acted upon without corroboration. If his presence at the scene of occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and probabilities of the case and strikes the Court as true, it can be a good foundation for a conviction more so if some assurance for it is available from the medical evidence. *Tameshwar Sahi* v. *State of U.P.*, AIR 1976 SC 59 : (1974) 3 SCC 595 : 1976 SCC (Cri) 19 (24) : 1976 CrLJ 6.

[10861] ● ***Partisan testimony corroboration by medical evidence.***—In the instant case, on facts, the corroboration furnished by the medical evidence, in the circumstances of the case was sufficient to make partisans testimony safe for basing a conviction thereon. *Tameshwar Sahi* v. *State of U.P.*, AIR 1976 SC 59 : (1974) 3 SCC 595 : 1976 SCC (Cri) 19 (23) : 1976 CrLJ 6.

[10862] ● ***Eye-witnesses highly interested and partisan.***—In the present case each of the two witnesses has deposed that appellant held the left hand of the deceased, appellants 3 & 5 held his right hand and held the deceased from behind and then appellant No.1, delivered a knife blow which according to them resulted in the death of the deceased. Both the witnesses did not attribute any other overt act to appellants 2 to 5. Since both the witnesses are highly interested and partisan, their evidence has to be subjected to a greater scrutiny. In a case of this nature, there is a likelihood of false implication and having regard to the version, we find it difficult to accept the evidence of these two witnesses as against appellants 2 to 5, who are not attributed any overt acts without any further corroboration. It is not necessary in every case that there should be such corroboration, but having regard to the part attributed to the appellants 2 to 5, the possibility of false implication of one or more cannot be ruled out. Therefore, we think it is not safe to convict the appellants 2 to 5. *Shaikh Nabab Shaikh Babu Musalman* v. *State of Maharashtra*, AIR 1993 SC 169 : 1993 Supp (2) SCC 217 : 1993 SCC (Cri) 517 (520) : 1993 CrLJ 43.

[10863] ● ***Interested witnesses.***—Since they are interested witnesses, their evidence was subjected to greater scrutiny and one of the tests applied is whether the specific overt acts are attributed to them so that the *omnibus* allegations may not be accepted so as to rule out the possibility of implicating some innocent persons. In appreciating evidence of this kind of witnesses, the Courts have always considered that such of those accused to whom specific overt acts have been attributed consistently and the same is corroborated by the medical evidence and the circumstances of the case, can safely be convicted. *Bolineedi Venkataramaiah* v. *State of A.P.*, AIR 1994 SC 76 (78) : 1994 Supp (3) SCC 732 : 1994 CrLJ 61.

[10864] ● ***Evidence of decoy-witness in bribery case—Corroboration.***—To sustain conviction on the evidence of a decoy-witness in bribery case, corroboration is needed. But the corroborating evidence can be even by way of circumstantial evidence. *M.O. Shamsuddin* v. *State of Kerala*, (1995) 3 SCC 351 : 1995 SCC (Cri) 509 : JT 1995 (3) SC 367 : 1995 (2) Scale 298. **TO THE SAME EFFECT :** (1) *Ramesh Kumar Gupta* v. *State of M.P.*, AIR 1995 SC 2121 : (1995) 5 SCC 320 : 1995 SCC (Cri) 909 : 1995 CrLJ 3656 : JT 1995 (6) SC 88 : 1995 CCR (3) 74 (SC) : (1995) 3 Crimes 263 (SC).

[10865] ● ***Acceptance of bribe by accused Police Inspector.***—The complainant went to police station to lodge a diary about disappearance of his wife along with one person, a Kotwar. They met the accused, a police officer, at the police station, narrated to him about the missing wife of PW-1 whereon the accused rebuked him for beating his wife and put PW-1 to custody. PW-1 requested the accused to release him and the accused released him on condition that he would pay to the accused a sum of Rs. 500/-. The aggrieved PW-1 contacted higher officers, a trap was laid. A few notes were treated by phenolphthalein powder. PW-1 knocked the door of the house of the accused and he was called in. The accused asked him if he had brought the amount and PW-1 took out the packet containing five currer.cy notes and tried to hand over the same to the accused. The accused, however, asked him to keep the money between the tape (niwar) and mattress of the cot on which he was sitting. Accordingly PW-kept the notes and gave a signal. Immediately the members of the trap party entered and disclosed their identity to the accused. They searched his person but not finding anything on his person they searched the room and recovered the five notes which were kept between the tape and the mattress of the cot. A seizure memo was prepared and the hands of the accused were washed with solution of Sodium Carbonate and the same was collected in a bottle and sealed. The hands of PW-1 also were washed in that solution which was kept in a separate bottle and sealed. The same test was conducted in respect of the five currency notes. The necessary panchanama of search and seizure was made and after completion of the investigation and after obtaining the necessary sanction, the charge-sheet was laid. It was urged that no currency notes having been found on the person of the accused, the possibility could not be ruled out that the notes were kept there or smuggled inside the cot without the knowledge of the accused. Repelling this contention the apex Court held that PW-1 categorically stated that the accused asked him to keep the notes between the tape and the mattress of the cot and after that he left the room and gave the signal. It must also be remembered that the notes were wrapped in a paper. Unless the accused has touched them after PW-1 left the room his hands would not have been tainted and the phenolphthalein powder test regarding the washing of the hands of the accused gave positive result itself shows that the accused must have handled them at some stage and therefore his bare denial that he had no knowledge whatsoever is without any substance. *Ramesh Kumar Gupta* v. *State of M.P.*, AIR 1995 SC 2121 : (1995) 5 SCC 320 : 1995 SCC (Cri) 909 : 1995 CrLJ 3656 : JT 1995 (6) SC 88 : 1995 (3) Crimes 263 (SC).

[10866] ● ***Interested witness not incompetent.***—An interested witness is not incompetent to depose but rules of prudence dictate that deposition of such witness should be weighed with care and caution before accepting it. *Wariyam Singh* v. *State of U.P.*, AIR 1996 SC 305 : (1995) 6 SCC 458 : 1995 CrLR (SC) 581 : JT 1995 (7) SC 117 : 1995 (5) Scale 604 (2).

[10867] ● ***Witnesses—Police officials—Conviction can be recorded on testimony of.***—No infirmity attaches to the testimony of Police Officials, merely because they belong to the Police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the Police Officials, if found reliable, unless corroborated by some independent evidence. The rule of prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the Police Officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case. *Tahir* v. *State (Delhi)*, AIR 1996 SC 3079 : (1996) 3 SCC 338 : 1996 SCC (Cri) 515 (517, 518).

19. INVESTIGATING OFFICER

[10868] ● ***Investigating officer.***—Whether the evidence of an investigating officer who conducted the search needs to be corroborated depends on the facts of each case. *Girdhari Lal Gupta* v. *D. N. Mehta, Assistant Collector of Customs*, AIR 1971 SC 28 : (1970) 2 SCC 530 : 1970 SCC (Cri) 496 : 1971 CrLJ 1.

[10869] ● ***Testimony of investigating officer—Consideration of.***—There is no general rule that the testimony of investigating officer cannot be considered without corroboration. *Girdhari Lal Gupta* v. *D. N. Mehta, Assistant Collector of Customs*, AIR 1971 SC 28 : (1970) 2 SCC 530 : 1971 CrLJ 1 : 1971 (3) SCR 748.

[10870] ● ***Trap witness—Credibility corroboration.***—The demanding degree of proof, traditionally required in a criminal case and the devaluation suffered by a witness who is naturally involved in the fruits of his investigative efforts, suggest the legitimate search for corroboration from an independent or unfaltering source—human or circumstantial—to make judicial certitude doubly sure. Not that this approach casts any pejorative reflection on the Police Officer's integrity, but that the hazard of holding a man guilty on interested, even if honest, evidence may impair confidence in the system of justice. We are aware of the exaggerated criticism of the Police Force as a whole and of the reluctance of the framers of the CrPC to trust statements recorded by Police investigators but these are partly at least, the hangover of the British past. Today trust begets trust and the higher officers of the Indian Police, especially in the Special Police Establishment deserve better credence. *Som Prakash* v. *State of Delhi*, AIR 1974 SC 989 : (1974) 4 SCC 84 : 1974 SCC (Cri) 215 (219) : 1973 CrLJ 784 : 1974 CrLR (SC) 216 : (1974) 3 SCR 200.

[10871] ● ***Investigating officer not appearing as witness without justifiable reason.***—It is unfortunate that Investigating Officer has not stepped into the witness-box without any justifiable ground. But this conduct of the Investigating Officer or other hostile witnesses cannot be a ground for discarding the evidence of the eyewitness PW-5 and PW-7, who are injured eyewitnesses and whose presence on the spot is established beyond reasonable doubt. *Ambika Prasad* v. *State (Delhi Admn.)*, AIR 2000 SC 718 (722) : (2000) 2 SCC 646 : 2000 SCC (Cri) 522 : 2000 CrLJ 810.

20. PREVIOUS STATEMENT OF ACCUSED

[10872] ● ***Previous statement of accused.***—"The section makes no exception." Therefore, provided the conditions prescribed, that is to say, "at or about the time, *etc.*" are fulfilled, there can be no doubt that previous statement of accomplice is legally admissible in India as corroboration. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value of two statements emanating from the same tainted source may not be high, but in view of Section 118 its legal admissibility as corroboration cannot be questioned. To state this is, however, no more than to emphasise that there is no rule of thumb in these cases. When corroborative evidence is produced, it also has to be weighed and in a given case, as with other evidence, even though it is legally admissible for the purpose on hand its weight may be nil. On the other hand, seeing that corroboration is not essential to a conviction, conduct of this kind may be more than enough in itself to justify acceptance of the complainant's story. It all depends on the facts of the case. *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54 (58) : 1952 CrLJ 547.

21. REASONS FOR HOLDING TO BE UNTRUSTWORTHY

[10873] ● ***Reasons for holding to be untrustworthy.***—But, whenever corroboration is looked for, the other evidence must be : (a) from an independent source, and (b) such as to support the direct testimony in material particulars, and (c) must connect the accused with the crime. However, the rule as to the need for corroboration of tainted evidence of an accomplice, or an interested or hostile witness, is not absolute; and, if the Court is satisfied that the witness is truthful and reliable and his evidence does not suffer from any infirmity, it is open to the Court to base a conviction on this sole uncorroborated testimony. *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 CrLJ 547. **To the same effect :** (1) *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159 : 1953 CrLJ 839; (2) *Rao Shiv Bahadur Singh* v. *State of U.P.*, AIR 1954 SC 322 : 1955 CrLJ 310; (3) *Swamirathnam* v. *State of Madras*, AIR 1957 SC 340 : 1957 CrLJ 1014; (4) *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637 : 1957 CrLJ 1014; (5) *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500 : 1958 CrLJ 976; (6) *Vaiknntam Chandrappa* v. *State of A.P.*, AIR 1960 SC 1340 : 1960 CrLJ 1681; (7) *Ram Narayain* v. *State of Rajasthan*, AIR 1973 SC 1188 : (1973) 1 SCC 805 : 1973 SCC (Cri) 545 : 1973 CrLJ 914 : 1973 CrLR (SC) 228; (8) *Chandan* v. *State of Rajasthan*, AIR 1988 SC 672 : (1988) 1 SCC 633 : 1988 CrLJ 845 : (1988) 1 SCJ 472.

22. RELATIVE WITNESSES

[10874] ● ***Relative witnesses.***—The proposition that when the eye-witnesses to the occurrence were interested persons there should be corroboration of their evidence by independent witnesses cannot be of universal application. *Mangal Singh* v. *State of M.B.*, AIR 1957 SC 199 : 1957 CrLJ 325.

[10875] ● ***Eye-witness closely related to victim.***—In a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal Courts must examine the evidence of the interested witnesses, like the relatives of the victim very carefully. But a person may be interested in the victim, being his relation or otherwise and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. In dealing with such evidence, Courts naturally being the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence. If the offence has taken place in front of the house of the victim, the fact that on hearing his shouts, his relatives rushed out of the house, cannot be ruled out as being improbable. If the criminal Court is satisfied that the witness who is related to the victim was not a chance witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised. In dong so it may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. It is not possible to hold that such witnesses are no better than accomplices and their evidence as a matter of law must receive corroboration before it is accepted. That is not to say that the evidence of such witnesses should be accepted light-heartedly without very close and careful examination. *Dariya Singh* v. *State of Punjab*, AIR 1965 SC 328 : 1965 (1) CrLJ 350 : (1964) 2 SCJ 319.

[10876] ● ***Evidence of related witness.***— Evidence of related witness hostile to accused by itself cannot be relied on for conviction without corroboration from independent sources against each of accused. *State of Punjab* v. *Mukhtiar Singh*, AIR 1975 SC 2001 : (1975) 4 SCC 590 : 1975 SCC (Cri) 625 : 1975 CrLJ 1745.

[10877] ● ***Evidence of eye-witness if corroborated by medical evidence.***—If the evidence of an eye-witness is corroborated by medical evidence he should not be disbelieved because he happens to be the brother of deceased. *Shamnbalu* v. *State of Maharashtra*, AIR 1976 SC 557 : (1976) 1 SCC 438 : 1976 CrLJ 492.

[10878] ● ***Evidence relatives of deceased.***— This is not a case where there was any previous enmity between the deceased or his relative on the one side and the appellant and the accused No. 2 on the other, so that evidence given by the relatives of the deceased could be regarded as suspect needing corroboration from independent witnesses. *Varghese Thomas* v. *State of Kerala*, AIR 1977 SC 701 (703) : (1976) 4 SCC 348 : 1977 SCC (Cri) 643 : 1977 CrLJ 1343 : 1977 CrLR (SC) 86.

[10879] ● ***Evidence of mother of deceased.***— The evidence of PW 5 who is no other than the mother of the deceased, is ample corroboration of PW 1 the brother of deceased whose presence is not at all doubted at the scene of occurrence. *Jairam* v. *State of Madhya Pradesh*, AIR 1993 SC

92 : 1993 SCC (Cri) 731 : 1993 CrLJ 3994 : 1992 (3) Crimes 274.

[10880] ● ***Evidence of eye-witness—One of whom wife of deceased.***—These two witnesses who were related to deceased having not only seen the occurrence but also they have seen the accused persons with their respective weapons in their hands mercilessly assaulting the deceased, which is fully corroborated by the medical evidence and presence of large number of injuries on the dead body of the deceased on different parts. There is no infirmity in High Court relying upon the testimony of the two trustworthy witnesses PWs-6 and 7, one of whom happens to be the wife of the deceased and as such is the most natural witness to be present and having witnessed the occurrence. *Hari Ram* v. *State of Rajasthan*, AIR 2000 SC 1647 : (2000) 9 SCC 136 : 2000 SCC (Cri) 1178 (1182) : 2000 CrLJ 2312.

[10881] ● ***Relative witness—Value of.***—The Place of the occurrence is the Court-yard of deceased-Kitab Singh. It was the beginning of the month of July. In that part of the country where the village of occurrence is situated, in early July, the summer is at its height and arrival of monsoon is awaited. The weather is sultry. Usually, people in the villages sleep in verandahs or court-yards to avail open air and if at all there are any casual showers they can easily move to a covered place so as to save themselves from rain water. Gangashri being the wife of the deceased was sleeping on a cot in the same part of the house where her husband was sleeping, and there is nothing unnatural about it. After the mid-night, her getting awake for easing herself and then returning to her cot also appears to be natural and in any case there is nothing unusual or unbelievable about it. She heard some voice and became alert and soon she saw her husband being fatally shot at. A murder having taken place in the house nobody would risk moving 10kms. away in the dead of night to lodge FIR of the incident. Early morning Karan Singh left for the Police Station and lodged the FIR at about 9.45 a.m. The testimony of Gangashri finds support from the testimony of Ram Sanehi, PW-3, Karan Singh, PW-2 and corroboration from the promptly lodged FIR. Baij Nath, PW-4, an uncle of the deceased-Kitab Singh, who also reached soon after the occurrence corroborates the statements of Gangashri and Ram Sanehi. The narration of the incident by Gangashri is most natural. Her testimony has remained unshaken though subjected to lengthy cross-examination. We find no reason to disbelieve her. There is nothing unnatural about Gangashri also sleeping on a cot in the Court-yard. Rising from the sleep at about or after midnight for easing oneself during summer when people consume enough water is also very natural. The voice she heard was "here is enemy shoot him". Rakesh had not named the deceased in his exhortation. But the time Gangashri could understand what the exhortation meant and what was going to happen, the appellant had fired from the katta. The witness sprang up from her cot and grappled with the assailants. The conduct of the witness is most natural and the criticism levelled on the conduct of the witness is unwarranted. Thus, the High Court was fully justified in holding Gangashri a natural witness and a witness of truth and we too on our own independent evaluation of her testimony, find ourselves in agreement will the opinion of the High Court. *Sewaka* v. *State of Madhya Pradesh*, AIR 2002 SC 50 : (2001) 10 SCC 1 : 2002 CrLJ 205 : 2002 (1) Crimes 131.

23. RETRACTED CONFESSION

[10882] ● ***Retracted confession.***—A retracted confession does not come within the definition of evidence contained in Section 3. But, where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence. *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159 : 53 CrLJ 839 : 1952 SCA 474 : 1952 SCJ 201 : 1952 SCR 526.

[10883] ● ***Confession Evidentiary value use of in corroboration of accomplice and approver.***—"Then, as regards its use in the corroboration of accomplices and approvers, a co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the evidence is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who, though not an accomplice, is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice, provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it." *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159 : 53 CrLJ 839 : 1952 SCA 474 : 1952 SCJ 201 : 1952 SCR 526.

[10884] ● *Standards of corroboration in retracted confession and accomplice evidence different.*—The standards of corroboration in Retracted Confession and accomplice evidence are quite different. In the case of the person confessing who has resided from his statement, general corroboration is sufficient while the evidence of an accomplice should be corroborated in material particulars. In addition the Court must feel that the reasons given for the retraction in the case of a confession are untrue. *Subramania Goundan* v. *State of Madras*, AIR 1958 SC 66 : 1958 CrLJ 238 : (1958) 1 Mad LJ (SC) 130 : 1958 SCR 428 : (1958) 1 SCJ 321 : 1958 AWR (Supp) 78 : 1958 Mad LJ (Cri) 292 : (1958) 1 Andh WR (SC) 130 : 1958 All Cr R 261.

[10885] ● *Retracted confession to form basis of conviction when.*—"We wish to make it clear and this is only to repeat what is so well established that a retracted confession by an accused may form the basis of a conviction of that accused, if it receives some general corroboration from other independent sources. It cannot, however, be the basis for convicting co-accused though it may be taken into consideration against co-accused also. It is entirely wrong to think that a confession can lead nowhere." *Shrishail Nageshi* v. *State of Maharashtra*, AIR 1985 SC 866 : 1985 CrLJ 1173 (1174).

[10886] ● *Corroboration necessary for basing conviction on retracted confession.*—A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a confession without corroboration. The expression "corroboration of material particulars" does not imply that there should be meticulous examination of the entire material particulars. It is enough that there is broad corroboration in conformity with the general trend of the confession, as pointed out in *Subramania Goundan's* case. *Parmananda Pegu.* v. *State of Assam*, AIR 2004 SC 4197 : (2004) 7 SCC 779 : 2004 CrLJ 4197 : 2004 (3) Crimes 337.

[10887] ● *Retracted confession.*—Evidence brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidence, which would lead adequate assurance to the Court that it may seek to rely thereupon. *Vinod Solanki* v. *Union of India*, (2008) 16 SCC 537 : 2008 (17) SCR 1070 : JT 2009 (1) SC 1.

24. RULE IN SECTION 133 & SECTION 114, ILL (B)

[10888] ● *Rule in Section 133 & Section 114, ILL (b).*—The Evidence Act nowhere requires that in class of cases commonly referred to as sexual cases, there should be corroboration of the testimony of an accomplice. Although it says in Section 114(b) that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, it makes it clear in Section 133 that an accomplice shall be a competent witness against the accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. There is no doubt, therefore, that the uncorroborated evidence of an accomplice is admissible in evidence. But it has long been a rule of practice at common law, which has become virtually equivalent to a rule of law, and which is exactly that law in India, so far as accomplices are concerned, and it is certainly not any higher in the case of sexual offences, that the Judge should warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and it lies in the discretion of the Judge to advise them not to convict upon such evidence : but the Judge should point out to the jury that it is within their legal province to convict upon unconfirmed evidence. If after this proper caution by the Judge, the jury nevertheless convict the prisoner, his conviction will not be quashed, merely upon the ground that the accomplice's testimony was uncorroborated. The only clarification necessary in India is where this class of offence is sometimes tried by a Judge without the aid of a jury. The rule in every case of this type is that the rule absent the advisability of corroboration should be present to the mind of the Judge. In such cases, it is necessary that the Judge should give some indication in his judgment that he had this rule of caution in mind, and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. It is wrong for a Judge to think that he could not, as a matter of law, convict without corroboration. "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and injury cases, must find place in the charge, before a conviction without corroboration can be sustained." See *Rameshwar* v. *State of Rajasthan*, AIR 1952 SC 54 : 1952 CrLJ 547. **TO THE SAME**

EFFECT : (1) *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500 : 1958 CrLJ 976.

[10889] ● ***Accomplice unworthy of credit unless corroborated in material particulars.***—Though, under Section 133 of the Evidence Act, a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witness. Illustration (b) to Section 114 lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person, on his own showing, he is a depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances, it is absolutely necessary that what he has deposed must be corroborated in material particulars. *Subramania Goundan* v. *State of Madras*, AIR 1958 SC 66 : 1958 SCR 428 : 1958 SCJ 321.

[10890] ● ***Inquiring officer in departmental inquiry against public servant not Bound by strict rules of law of evidence.***—An inquiring officer, in a departmental inquiry against a public servant, is not bound by the strict rules of the law of evidence. Hence Illustration (b) to Section 114 of the Evidence Act cannot be literally applied and it is open to such inquiring officer to hold a public servant guilty even on the basis of evidence of an accomplice. *M.R. Bhatia* v. *Union of India*, AIR 1962 SC 1344.

[10891] ● ***Evidence of approver—Corroboration of.***—The combined effect of Sections 133 and 114, illustration (b) may be stated as follows : "According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will as a matter of practice, not accept the evidence of a witness without corroboration in material particulars. There should be corroboration of the approver in material particulars and *qua* each accused. *Bhiba* v. *State of Maharashtra*, AIR 1963 SC 599 : 1963 Supp (1) SCR 275.

[10892] ● ***Accomplice evidence to be received after usual corroboration.***—It is sad that the approver is a most unworthy friend and he having bargained for his immunity must prove his worthiness for credibility in Court. Ordinarily, combined effect of Sections 133 and 114 of the Evidence Act is that conviction can be based on uncorroborated testimony of an approver but as a rule of prudence it is unsafe to place reliance on the uncorroborated testimony of an approver. Section 114 illustration (b) incorporated a rule of caution to which the Courts should have regard. The word "accomplice" is ordinarily used in connection with law of evidence and rarely under substantive law of crimes. Accomplice evidence denotes evidence of a participant in crime with others. *L. Chorasia* v. *State of Maharashtra*, 1968 CrLJ 1124 (1127-1128) (SC).

[10893] ● ***Approver's evidence—Corroboration necessity.***—Section 133, Evidence Act provides that an accomplice is a competent witness and the conviction is not illegal merely because it proceeds on uncorroborated testimony of an accomplice. In other words this section renders admissible such uncorroborated testimony. But this section has to be read along with illustration (b) to Section 114. The latter section empowers the Court to presume the existence of certain facts and the illustrations elucidate what the Court may presume and make clear by means of examples as to what facts the Court shall have regard in considering whether or not the maxims illustrated apply to given case before it. Illustration (b) in express terms says that an accomplice is unworthy of credit unless he is corroborated in material particulars. The statute permits the conviction of an accused person on the basis of uncorroborated testimony of an accomplice but the rule of prudence embodied in illustration (b) of Section 114 strikes a note of warning cautioning the Court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. In other words, the rule is that the necessity of corroboration as a matter of prudence except when it is safe to dispense with such corroboration must be clearly present to the mind of the judge. *Ram Narain* v. *State of Bihar*, AIR 1973 SC 1188 : (1973) 3 SCC 805 : 1973 SCC (Cri) 545 : 1973 CrLJ 914.

[10894] ● ***Approver—Testimony—Credibility.***—An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in Court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given of minute details according with reality is likely to save it from being rejected *brevi manu*. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case, taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the Court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars ridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based. *Ravinder Singh* v. *State of Haryana*, AIR 1975 SC 856 : (1975) 3 SCC 742 : 1975 CrLJ 765.

[10895] ● ***Evidence of accomplice—Corroboration.***—There is no antithesis between Section 133 and illustration (b) to Section 114 of the Evidence Act, because the illustration only says that the Court may presume a certain state of affairs. It does not seek to raise conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of case that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime. It is hazardous, as a matter of prudence, to proceed upon the evidence of a self-confessed criminal, who in so far as an approver is concerned, has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars is real and potent. *Dagdu* v. *State of Maharashtra*, AIR 1977 SC 1579 : (1977) 3 SCC 68 : 1977 CrLJ 1206 : (1977) 2 SCJ 241 : (1977) Mad LJ (Cri) 462.

[10896] ● ***Conviction—Uncorroborated evidence of accomplice.***—"Although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the Judge, who, in dong so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motives which he may have for stating what is false. If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict." *Joseph* v. *State of Kerala*, 1993 Supp (4) SCC 7 : 1994 SCC (Cri) 23 : 1993 CrLJ 3538.

[10897] ● ***Uncorroborated testimony of approver—Credibility.***—Section 133, Evidence Act deals with the testimony of an accomplice. It contemplates that an accomplice shall be a competent witness against an accused person : and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The first part envisages that an accomplice in other words a guilty companion in crime shall be a competent witness while the second part states that conviction is not illegal merely because it is based on the uncorroborated testimony of an accomplice. But if one read Section 133 with illustration (b) of Section 114 it may lead to certain amount of confusion and misunderstanding as to the real and true intention of the Legislature because quite contrary to what is contained in Section 133 illustration (b) : Section 114 lays down "that an accomplice is unworthy of creed, unless he is corroborated in material particulars". A combined reading of the two provisions that is Section 133 and illustration (b) of Section 114 goes to show that it was considered necessary to place the law of accomplice evidence on a better footing by stating in unambiguous terms that according to Section 133 a conviction is "not illegal or in other words not unlawful" merely because it is founded on the uncorroborated testimony of an accomplice while accepting that an accomplice is a competent witness. But at the same time the Legislature intended to invite attention to the illustration (b) of Section 114 with a view to emphasise that the rule contained therein as well as in Section 133 are parts of one and the same subject and neither can be ignored in the exercise of judicial discretion except in cases of very exceptional nature. However, the difficulty in understanding the combined effect of the aforementioned two provisions arises largely due to their placement at two different places of the same Act. It may be noticed that illustration (b) attached to Section 114 is placed in Chapter VII of Evidence Act while Section 133 is inserted in Chapter IX of the Act. The better course was to insert the illustration (b) to Section 114 as an explanation or in any case as proviso to Section 133 of the Act instead of their insertion at two different places and that too in different chapters of Evidence Act. In any case since an approver is guilty companion in crime and, therefore, illustration (b) to Section 114 provides a rule of caution to which the Courts should have regard. Though a conviction can be based on uncorroborated evidence of an accomplice but as a rule of prudence it is unsafe to place reliance on the uncorroborated testimony of an approver as required by illustration (b) of Section 114. *S.C. Bahri* v. *State of Bihar*, AIR 1994 SC 2420 : 1995 Supp (1) SCC 80 : 1994 CrLJ 3271 (SC) : (1994) 2 Crimes 1027.

[10898] ● ***Testimony of approver basing of conviction on uncorroborated.***—Ordinarily the combined effect of Sections 133 & 114 is that conviction can be based on uncorroborated testimony of an approver but as a rule of prudence it is unsafe to place reliance on the uncorroborated testimony of an approver. Section 114 illustration (b) incorporates a rule to which the Courts should have regard. *Niranjan Singh* v. *State of Punjab*, AIR 1996 SC 3254 : (1996) 9 SCC 98 : 1996 SCC (Cri) 939 : 1996 CrLJ 2506 : 1996 (2) Crimes 251 (SC) : 1996 (3) Scale 774.

25. SEXUAL OFFENCES

[10899] ● ***Sexual offences.***—A woman who has been raped is not an accomplice, if she was ravished, she is the victim of an outrage, if she consented, there is no offence unless she is a married woman, in which case question of adultery may arise. But adultery presupposes consent and so is not on the same footing as rape. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented, her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences. But, in all these cases, a large volume of case-law has grown up which treats the evidence of the complainant some what along the same lines as accomplice evidence, though often for widely differing reasons, and the position now reached is that the rule about corroboration has hardened into one of law. *Rameshwar Kalyan Singh* v. *State of Rajasthan,* AIR 1952 SC 54 (57) : 1952 CrLJ 547.

[10900] ● ***Corroboration by independent evidence.***—The only rule of law is that this rule of caution and prudence must be present to the mind of the Judge or the jury and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration, before a conviction can be allowed to stand. The independent evidence must not only make it safe to believe that the crime was committed, but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the victim. There cannot be any hard and fast rule as to the nature and extent of the evidence required to corroborate the case. The corroboration should be such as to render the prosecution story reliable and safe to act upon. *Rameshwar Kalyan Singh* v. *State of Rajasthan,* AIR 1952 SC 54 : 1952 SCR 377 : 1952 CrLJ 547.

[10901] ● ***Mother of raped child—If independent witness for corroboration purpose.***—Corroboration may be had from the testimony of the mother of the prosecutrix. It may be that all mothers may not be sufficiently independent to fulfil the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. Independent merely means independent of sources which are likely to be tainted. In the absence of enmity against the accused there is no reason why she should implicate him falsely. *Rameshwar Kalyan Singh* v. *State of Rajasthan,* AIR 1952 SC 54 : 1952 CrLJ 547.

[10902] ● ***Evidence of accomplice corroboration—Nature and extent of.***—The nature and extent of the corroboration must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. It is not necessary that there should be independent confirmation of every material circumstance, that is, the independent testimony should not, itself, be sufficient to sustain conviction. All that is required is, that there must be some additional evidence, direct or indirect rendering it probable that the story is true and that it is reasonably safe to act upon it. *Rameshwar Kalyan Singh* v. *State of Rajasthan,* AIR 1952 SC 54 : 1952 CrLJ 547.

[10903] ● ***Evidence of spouse accusing other of matrimonial offence—Corroboration.***—A spouse, accusing the other of any matrimonial offence, must prove the offence beyond reasonable doubt, and that where the evidence is that of the spouse, it is a rule of caution and prudence that the evidence should receive corroboration. *Bipinchandra* v. *Prabhavati,* AIR 1957 SC 176 : 1956 SCR 838.

[10904] ● ***Testimony of prosecutrix uncorroborated.***—The Judge may, as a rule of prudence, warn the jury that such a rule of prudence required corroboration of the testimony of the prosecutrix, but that it was open to the jury to convict even on the uncorroborated testimony of the prosecutrix if the jury, in the particular circumstances of the case before it, came to the conclusion that corroboration was not essential for conviction. It is for the jury to decide whether or not it will convict on the uncorroborated testimony of a prosecutrix in the particular circumstances of the case before it. In other words insistence on corroboration is advisable but is not compulsory in the eye of law. *Sidheswar Ganguly* v. *State of West Bengal,* AIR 1958 SC 143 : 1958 CrLJ 273.

[10905] ● *Corroboration of evidence—Victim of outrageous attack.*—It is well established that the nature and extent of corroboration, necessary, vary with the circumstances of each case. The nature of the corroborative evidence should be such as to lend assurance that the evidence of the prosecutrix can be safely acted upon. *Sidheswar Ganguly* v. *State of West Bengal,* AIR 1958 SC 143 : 1958 CrLJ 273. **TO THE SAME EFFECT :** (1) *Rameshwar* v. *State of Rajasthan,* AIR 1952 SC 54 : 1952 CrLJ 547; (2) *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat,* AIR 1983 SC 753 : (1983) 3 SCC 217 : 1983 CrLJ 1096 : 1983 Guj Crimes 232; (3) *Sheikh Zakir* v. *State of Bihar,* AIR 1983 SC 911 : (1983) 4 SCC 10 : 1983 CrLJ 1285; (4) *State of Maharashtra* v. *Chandra P.K. Jain,* AIR 1990 SC 658 : (1990) 1 SCC 550 : 1990 SCC (Cri) 210 : 1990 CrLJ 889 : 1990 East CrC 341 (SC).

[10906] ● *Statement of prosecutrix that she was threatened and induced to go with accused must be corroborated in material particulars.*— Keeping in view the medical evidence which shows that the prosecutrix had been used to sexual intercourse, in order to accept her statement that she was compelled, threatened or otherwise induced to go with the appellant, there should, in our opinion, be corroboration of some material particular from some independent source and her bare statement cannot be considered sufficient to sustain the appellant's conviction. *Ram Murti* v. *State of Haryana,* AIR 1970 SC 1029 : (1970) 3 SCC 21 : 1970 CrLJ 991.

[10907] ● *Offence under Section 366, IPC—Corroboration necessity.*—In the case of an offence under Section 366, Indian Penal Code, there should be corroboration of some material particular from some independent source and the bare statement of the prosecutrix is not sufficient to sustain the conviction of the accused. *Ram Murti* v. *State of Haryana,* AIR 1970 SC 1029 (1032) : (1970) 3 SCC 21 : 1970 CrLJ 991 : 1970 SCD 663 : 1970 SCCrR 510. **TO THE SAME EFFECT :** (1) *Gurcharan Singh* v. *State of Haryana,* AIR 1972 SC 2661 : (1972) 2 SCC 749 : 1973 CrLJ 179.

[10908] ● *Evidence of prosecutrix—Corroboration of.*—It is well-settled that the prosecutrix cannot be considered as an accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence. As a rule of prudence, however, Court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated.

The recovery of the prosecutrix and Sanjha Ram, *i.e.,* the co-accused from the appellant's sugarcane field, her complaint to Harnam Singh and others about the abduction and rape and the later recovery of some broken pieces of bangles from the said field and the medical evidence in our opinion fully corroborate the testimony of the prosecutrix which even without corroboration seems to us to be impressive enough to render it safe for sustaining the appellant's conviction. *Gurcharan Singh* v. *State of Haryana,* AIR 1972 SC 2661 : (1972) 2 SCC 749 : 1973 CrLJ 179 : 1973 CrLR (SC) 280 : 1972 Cr App R (SC) 407 : (1973) 2 SCR 197.

[10909] ● *Testimony of prosecutrix not equated with that of accomplice—Corroboration.*—The testimony of the prosecutrix cannot be equated with that of an accomplice. As a rule of prudence, Court, however, normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape has not been falsely implicated. *Gurcharan Singh* v. *State of Haryana,* AIR 1972 SC 2661 : (1972) 2 SCC 749 : 1973 CrLJ 179 : 1973 CrLR (SC) 280.

[10910] ● *Evidence of prosecutrix value of—Corroboration.*—In a trial under Section 376 or 366, IPC prosecutrix could not be considered as an accomplice. But the Court normally looked for corroboration but there was no rule of practice that there should be corroboration in every case to base conviction. *Madhoran* v. *State of U.P.,* AIR 1973 SC 469 : (1973) 1 SCC 530 : 1973 CrLJ 673 : 1973 SCD 173 : 1973 Mad LJ (Cri) 366 : (1973) 2 SCJ 140. **TO THE SAME EFFECT :** (1) *Gurcharan Singh* v. *State of Haryana,* AIR 1972 SC 2661 : (1972) 2 SCC 749 **following** (2) *Rameshwar Kalyan Singh* v. *State of Rajasthan,* AIR 1952 SC 54 : 1952 CrLJ 547 : 1952 SCR 377; (3) *Siddeswar Ganguli* v. *State of West Bengal,* AIR 1958 SC 749 : 1958 CrLJ 273 : (1961) 1 CrLJ 689.

[10911] ● *Evidence—Rape absence of injury on male organ of accused.*—According to Dr. Katiyar, Medical Officer of District Jail Rae Bareli, if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No injury was, however, detected by the doctor on the male organ of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their innocence. *Rahim Beg* v. *State of U.P.,* AIR 1973 SC 343 : (1972) 3 SCC 759 : 1972 SCC (Cri) 827 : 1972 CrLJ 1260.

[10912] ● *Evidence—Semen stain on Langot of young man exists because of variety of reasons.*—Rahim Beg is a young man of 22. The Langot in question was dirty at the time it was taken into possession. It cannot be said as to how old was the semen stain on the Langot. The semen stain on the Langot of a young man can exist because of a variety of reasons and would not necessarily connect him with the offence of rape. *Rahim Beg* v. *State of U.P.,* AIR 1973 SC 343 : (1972) 3 SCC 759 : 1972 SCC (Cri) 827 : 1972 CrLJ 1260.

[10913] ● *Evidence of prosecutrix corroboration—Necessity.*—The prosecutrix cannot be considered to be an accomplice. As a rule of prudence Courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and that a person accused of abduction or rape has not been falsely implicated. The view that, as a matter of law, no conviction without corroboration was possible is erroneous. The only rule of law is the rule of prudence, namely the advisability of corroboration should be present in the mind of the Judge or the Jury, as the case may be. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand. As to what type of corroboration may be required when the Court is of the opinion that it is not safe to dispense with that requirement, it has been laid down that the type of corroboration required must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence with which a person is charged. The High Court, in the instant case, found corroboration regarding abduction in the evidence of PWs-1, 11 and 13. In respect of offence of rape, the High Court found corroboration in the reports of the chemical examiner and the sexologist regarding her clothes containing spermatozoa and human blood. *Madho Ram* v. *State of U.P,* AIR 1973 SC 469 : (1973) 1 SCC 533 : 1973 SCC (Cri) 417 (420) : 1973 CrLJ 673 : 1973 CrLR (SC) 132.

[10914] ● *Victim child of six years—Corroborating evidence.*—Even assuming that the evidence of little children requires general corroboration, we are satisfied that the proved circumstances that the girl was playing in broad day light, that she was carved away by the accused and brought back trying after a time, that the medical examination of the accused's genitals indicated the presence of spermatozoa, are sufficiently corroborative of the guilt of the appellant. *R.K. Agarwal* v. *State of Orissa,* AIR 1976 SC 1774 : (1976) 2 SCC 177 : 1976 SCC (Cri) 244 (245) : 1976 CrLJ 1376 : 1976 CrLR (SC) 144.

[10915] ● *Rape—Evidence and proof.*—Although according to the prosecutrix, three persons raped her with great force and violence resulting in great pain to her and her breasts becoming swollen and red and other injuries yet when she was examined by the Doctor only after 16 or 17 hours of the occurrence, the Doctor found no marks of injuries on her body at all.

Thus, if such a serious violence was caused to the prosecutrix by the appellants, the injuries are not likely to have disappeared before 2 or 3 days and the signs were bound to persist at least when she was examined by the Doctor. The absence of injuries on the person of the appellants as also on the person of the prosecutrix is yet another factor to negative the allegation of rape and to show that the appellants had sexual intercourse with the prosecutrix with her tacit consent. *Pratap Misra* v. *State of Orissa,* AIR 1977 SC 1307 : (1977) 3 SCC 41 : 1977 SCC (Cri) 447 (455, 456) : 1977 CrLJ 817 : 1977 CrLR (SC) 233 : 1977 Cr App R (SC) 164.

[10916] ● *Evidence of prosecutrix—Corroboration necessity.*—Previously, on the question whether the version of the prosecutrix about the factum of rape was required to be corroborated or not the rule of law was that corroboration was not essential before there could be a conviction but the necessity of corroboration, as a matter of prudence except where the circumstances made it safe to dispense with it, must have to be present in the mind of the Judge before a conviction without corroboration could be sustained. It would be dangerous to formulate the kind of evidence which should or would be regarded as corroboration. Its nature and extent would necessarily vary with the circumstances of each case and also according to particular circumstances of the offence charged. *M. Mahammad* v. *State of Karnataka,* 1978 CrLJ (NOC) 17 (Kant-Myilsam) : (1977) 2 Kant LJ 308. **TO THE SAME EFFECT :** (1) *In Re,* (1970) 2 Mad LJ 422; (2) *Madhoram* v. *State of U.P.,* AIR 1973 SC 469 : (1973) 1 SCC 533 : 1973 SCC (Cri) 417 : 1973 CrLJ 673 : 1973 Mad LJ (Cri) 366 : 1973 SCD 179 : 1973 All WR 391.

[10917] ● *Prosecutrix—Testimonial Potency.*—"We must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimony which warrants credence. More than all, it baffles belief in human nature that a girl sleeping with her mother and other children in the open will come by blood on her garments and injury in her private parts unless she has been subjected to the torture of rape. And if rape has been committed, as counsel more or less conceded, why, of all persons in the world, should the victim hunt up the petitioner and point at him the accusing finger? To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice commonsense in favour of an artificial concoction called 'Judicial' probability. Indeed, the Court loses its credibility if it rebels against realism. The law Court is not an unnatural world." *Kishan Lal* v. *State of Haryana,* AIR 1980 SC 1252 : 1980 CrLJ 926.

[10918] ● ***Testimony of prosecutrix—Corroboration.***—"In the Indian setting refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles filled with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat,* AIR 1983 SC 753 (756) : (1983) 2 SCC 217 : 1983 CrLJ 1096 : (1983) 2 Crimes 232.

[10919] ● ***Rape—Corroboration necessity.***—While corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would, therefore, be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Courts in the western world. If the evidence of the victim does not suffer from any basic infirmity, and the "probabilities factor" does not render it unworthy of evidence as a general rule, there is no reason to insist on corroboration except from the medical evidence.

Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the "probabilities factor" is found to be out of tune. Even at the age of 10 or 12, a girl in India can be trusted to be aware of the fact that the reputation of the entire family would be jeopardised upon such a story being spread. She can be trusted to know that in the Indian society her own future chances of getting married and settling down in a respectable or acceptable family would be greatly marred if any such story calling into question her chastity were to gain circulation in the society. It is also unthinkable that the parents would tutor their minor daughter to invent such a story in order to wreak vengeance on some one. *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat,* AIR 1983 SC 753 (757) : (1983) 2 SCC 217 : 1983 CrLJ 1096 : (1983) 2 Crimes 232.

[10920] ● ***Evidence of victim of rape—To be treated like evidence of accomplice.***—Even though a victim of rape cannot be treated as an accomplice on account of a long line of judicial decisions rendered in our country the evidence of the victim in a rape case is to be treated almost like the evidence of an accomplice requiring corroboration……. . There must be an indication in the course of the judgment that the Judge had this rule in his mind when he prepared the judgment and if in a given case the Judge finds that there is no need for such corroboration he should give reasons for dispensing with the necessity for such corroboration. But if a conviction is based on the evidence of a prosecutrix without any corroboration it will not be illegal on that sole ground. In the case of a grown-up and married woman it is always safe to insist on such corroboration. Wherever corroboration is necessary it should be from an independent source but it is not necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both. *Sheikh Zakir* v. *State of Bihar,* AIR 1983 SC 911 : (1983) 4 SCC 10 : 1983 SCC (Cri) 761 : 1983 CrLJ 1285.

[10921] ● ***Gang rape—Medical report supporting case of prosecutrix.***—In the instant case it is not correct to say that that the evidence of prosecutrix does not find any corroboration. The medical report supports the case of the prosecutrix that she was raped. According to the medical report, the hymen was torn and edges of the tear were red and painful and bled on tonch. There were abrasions on the right breast. She complained of pain in both legs and back of neck. There is no reason why her evidence should not be believed. *Balwant Singh* v. *State of Punjab,* AIR 1987 SC 1080 : (1987) 2 SCC 27 : 1987 SCC (Cri) 249 (252, 253) : 1987 CrLJ 971 : 1987 CrLR (SC) 187 : 1987 (1) Crimes 910.

[10922] ● ***Prosecutrix of sex offence not on par with accomplice.***—A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act no where says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration……. . "We think it proper, having regard to the increase in the number of sex-violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to the crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the Western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the Court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity." *State of Maharashtra* v. *Chandraprakash Kewalchand Jain,* AIR 1990 SC 658 : (1990) 1 SCC 550 : 1990 CrLJ 889.

[10923] ● ***Victim of outrageous act not accomplice—Corroboration necessity.***—"In sexual crimes, the other person usually the woman—may or may not be an accomplice, according as she is, by the nature of the crime, a victim of it or a voluntary partner in it. Thus, in adultery, the other party may well be deemed an accomplice : and so also, perhaps, in incest, and in pandering or pimping. But the woman is not an accomplice in rape, rape under age, seduction, or abortion, nor the participant in sodomy." A girl who is a victim of an outrageous act is, generally speaking, not an accomplice, though the rule of prudence requires that the evidence of a prosecutrix should be corroborated before a conviction can be based upon it. *State of Maharashtra* v. *Chandraprakash Kewalchand Jain,* AIR 1990 SC 658 : (1990) 1 SCC 550 : 1990 CrLJ 889 : 1990 East Cr C 341 (SC). **TO THE SAME EFFECT :** (1) *Sheikh Zakir* v. *State of Bihar,* AIR 1983 SC 911 : (1983) 4 SCC 10 : 1983 SCC (Cri) 761 : 1983 CrLJ 1285; (2) *Sidheswar Ganguly* v. *State of West Bengal,* AIR 1958 SC 143 : 1958 CrLJ 273.

[10924] ● ***Rape—Evidence of prosecutrix corroboration not necessary.***—Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony, if there is independent evidence lending assurance to her accusation. *State of Maharashtra* v. *Chandraprakash Kewalchand Jain,* AIR 1990 SC 658 : (1990) 1 SCC 550 : 1990 CrLJ 889 : 1990 East CrC 341 (80).

[10925] ● ***Rape—Evidence of prosecutrix standard of proof.***—"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied then it can act on the evidence of the prosecutrix; there is no rule or law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding, the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality and the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence." (per AHMADI C.J.) *State of Maharashtra* v. *Chandraprakash Kewalchand,* AIR 1991 SC 658 : (1990) 1 SCC 550 : 1990 CrLJ 889 : 1990 East CrC 341 (SC) **followed in TO THE SAME EFFECT :** (1) *State of Punjab* v. *Gurmit Singh,* AIR 1996 SC 1393 : (1996) 2 SCC 384 : 1996 SCC (Cri) 316 : JT 1996 (1) SC 298.

[10926] ● ***Victim of rape—Corroboration not necessary.***—It is not necessary that there would be corroboration to the evidence of the victim of rape. If her evidence inspires confidence to be truthful that itself would be sufficient to connect the accused. We need not seek corroboration. *State of Orissa* v. *Damburu Naiko,* AIR 1992 SC 1161 : (1992) 2 SCC 522 : 1992 SCC (Cri) 400 (402) : 1992 CrLJ 1537.

[10927] ● ***Rape—Medical evidence inconsistent with version of prosecutrix.***—The only ground urged in support of this appeal is that the medical evidence is, inconsistent with the version of the prosecutrix who claims to have been raped by the appellant. That there is such a discrepancy is beyond doubt. However, the High Court has in explicit terms observed that the medical evidence had been influenced and deserved to be rejected. It appears that the Doctor examining the prosecutrix was changing her stand, an initially she had stated that there were signs of sexual intercourse, but later changed her opinion to say that there was no such signs. The prosecutrix was an unmarried girl coming from the weaker section of the society who pinned the appellant to be the one who had committed rape on her. Her words have believed by both the Court below. We see no reason to differ from the analysis of her statement and as to her credibility, as recorded by the High Court. There is, therefore, no ground to interfere in this appeal. *Dagdulal* v. *State of Madhya Pradesh,* 1995 CrLJ 3639.

[10928] ● ***Custodial Rape—Evidence of prosecutrix reliable.***—The prosecutrix is not only a reliable witness but her word directed against the appellants bears a ring of truth for no explanation whatsoever as to why the appellants have been accused of the offence has been rendered. Her word is corroborated by the evidence of not only her husband, PW 4, but her brother-in-law, PW 1. Besides this evidence, we have the evidence of local people who had seen the prosecutrix being led to the Police Station and PW 6, who was approached by PW to seek help because of the illegal confinement of the prosecutrix and her husband. *Ram Kumar* v. *State of Himachal Pradesh,* AIR 1995 SC 1965 (1966) : 1995 Supp (4) SCC 67 : 1996 SCC (Cri) 100 : 1995 CrLJ 3621.

[10929] ● ***Woman victim of sexual assault not accomplice.***—A woman who is a victim of sexual assault is not an accomplice to the crime but is a victim of another person's lust and therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice and, therefore, the rule of prudence that her evidence must be corroborated in material particulars has no application, at the most the Court may look for some evidence which lends assurance. In the present case the prosecutrix was a poor labourer hired by a contractor just a few days back and had no enmity with the appellant and his companion. Nor is there any such history so far as her husband is concerned. There is, therefore, no reason to doubt her word. As for corroboration the find of semen stains on her "saya" and in her vagina lends sufficient assurance to her accusation. *Karnel Singh* v. *State of Madhya Pradesh,* AIR 1995 SC 2472 (2474) : (1995) 5 SCC 518 : 1995 CrLJ 4173.

[10930] ● ***Testimony of prosecutrix—Evidentiary value.***—The testimony of the victim in vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to connect an accused. Where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. The Court while appreciating the evidence of the prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to lease conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. *State of Punjab* v. *Gurmit Singh,* AIR 1996 SC 1393 : (1996) 2 SCC 384 : 1996 SCC (Cri) 316 (327).

[10931] ● ***Rape—Sufficient corroboration from medical evidence.***—In the instant case the trial Court totally ignored the report of the Chemical Examiner, Ex PM, according to which semen had been found on the slides which had been prepared by the Lady Doctor for the vaginal secretions from the posterior of the vaginal fornix of the prosecutrix. The presence of semen on the slides lent authentic corroboration to the testimony of the prosecutrix. Thus even though no corroboration is necessary, yet sufficient corroboration from the medical evidence and the report of the chemical examiner is available on the record. *State of Punjab* v. *Gurmit Singh,* AIR 1996 SC 1393 : (1996) 2 SCC 384 : 1996 SCC (Cri) 316 (329).

[10932] ● ***Rape—Corroborative evidence.***—Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. *State of Punjab* v. *Gurmit Singh,* AIR 1996 SC 1393 : (1996) 2 SCC 384 : 1996 SCC (Cri) 316 (327).

[10933] ● ***Non-detection of semen.***—The High Court went wrong in negativing the version of PW-1 regarding sexual ravage merely on the basis of non-detection of semen or spermatozoa in the vaginal swab. There could be more than one explanation for absence of semen in the vaginal swab. *State of Tamil Nadu* v. *Suresh*, AIR 1998 SC 1044 : (1998) 2 SCC 372

[10934] ● ***Spermatozoa.***—The presence of spermatozoa, dead or alive, would differ from person to person and its positive presence depend upon various circumstances. Otherwise also the presence or absence of spermatozoa is ascertained for the purposes of corroboration of the statement of the prosecutrix. If the prosecutrix is believed to be truthful witness, in her deposition, no further corroboration may be insisted. *State of Himachal Pradesh* v. *Lekhraj*, AIR 1999 SC 3916 : (2000) 1 SCC 247 : 2000 SCC (Cri) 147 : 2000 CrLJ 44 : JT 1999 (9) SC 43.

[10935] ● ***Rape—Testimony of prosecutrix corroboration.***—It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the Court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do. *State of Rajasthan* v. *N.K.,* AIR 2000 SC 1812 : (2000) 5 SCC 30 : 2000 SCC (Cri) 898 : 2000 CrLJ 2205 : 2000 CrLR (SC) 388.

[10936] ● ***Absence of spermatozoa.***—The absence of spermatozoa on the clothes worn by the prosecutrix or accused does not show that the rape has not been committed. *State of Himachal Pradesh* v. *Mange Ram*, AIR 2000 SC 2798 : (2007) 7 SCC 224 : 2000 SCC (Cri) 1331 : 2000 CrLJ 4027 : (2000) 3 Crimes 179.

[10937] ● ***Rape—Corroboration of prosecutrix testimony.***—The narration of the incident to so many independent witnesses without any discrepancy soon after the incident was also in our view, correctly, admitted by the Trial Court under Section 157 of the Evidence Act as corroborative of prosecutrix's testimony. *State of Karnataka* v. *Manjanna,* AIR 2000 SC 2231 (2234) : (2000) 6 SCC 188 : 2000 SCC (Cri) 1031 : 2000 CrLJ 3471 : 2000 CrLR (SC) 482 : JT 2000 (6) SC 529.

[10938] ● ***Rape—Appreciation of evidence.***—Prosecutrix herself has stated that she had sustained scratches on the right side of her cheeks, on her chin and on the left side of the hip which was swollen. Her mother (PW 10) also said that prosecutrix had scratches on her cheeks and on her buttocks. These statements are corroborated not only by Ex P 7 and PW-8 but also by the oral testimony of Paw-13, Dr. K.M. Shantabai. According to PW-13, the injuries found on prosecutrix's face could be caused while she was struggling to extricate herself from the clutches of the person committing rape and the injury to her hip when she was forcibly thrown on the ground. *State of Karnataka* v. *Manjanna,* AIR 2000 SC 2231 (2234) : (2000) 6 SCC 188 : 2000 SCC (Cri) 1031 : 2000 CrLJ 3471 : 2000 CrLR (SC) 482 : JT 2000 (6) SC 529.

[10939] ● ***To insist on corroboration except in rarest of rare cases is insult to womanhood.***—To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Why should be the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance. *Bhupender Sharma* v. *State of Himachal Pradesh*, AIR 2003 SC 2684 : (2003) 8 SCC 551 : 2004 SCC (Cri) 31 : 2004 CrLJ 1.

[10940] ● ***Victim of rape not accomplice.***—A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would value, it may search for evidence, direct of circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice. *Aman Kumar* v. *State of Haryana,* AIR 2004 SC 1497 : (2004) 4 SCC 379 : 2004 SCC (Cri) 1266 (1272) : 2004 CrLJ 1399 : JT 2004 (2) SC 274. TO THE SAME EFFECT : *State of Chhattisgarh* v. *Derha*, AIR 1976 SC 1774 : 2004 CrLJ 1376.

[10941] ● ***Prosecutrix not accomplice.***—It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the Court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice. *State of Himachal Pradesh* v. *Shree Kant Shekari*, AIR 2004 SC 4404 : (2004) 8 SCC 153 : 2004 CrLJ 4232 (4235, 4236) : 2004 (4) Crimes 32.

[10942] ● ***Corroboration of prosecutrix in material particulars—Not required.***—It is not the law that in every case version of the prosecutrix must be corroborated in material particulars by independent evidence on record. It all depends on the quality of the evidence of the prosecutrix. If the Court is satisfied that the evidence of prosecutrix is free from blemish and is implicitly reliable, then on the sole testimony of the prosecutrix, the conviction can be recorded. In appropriate cases, the Court may look for corroboration from independent sources or from the circumstances of the case before recording an order of conviction. In the instant case the allegations were that the accused during night entered the prosecutrix room and committed rape on her, the evidence of the prosecution was found worthy of credit and implicitly reliable. The evidence of four witnesses PW-2 (mother of the prosecutrix), PW3, PW7 (younger brother) and PW9 (younger brother), corroborated the prosecutrix version. The acquittal of the accused on charge under Sections 376 and 450 IPC recorded by trial Court was set aside and conviction recorded by the trial Court was restored. *State of Rajasthan* v. *Biram Lal*, AIR 2005 SC 2327 : (2005) 10 SCC 714 : 2005 CrLJ 2561 (2564) : 2005 (2) Crimes 133.

[10943] ● ***Conviction can be founded on testimony of prosecutrix alone, unless compelling reasons.***—It is now well-accepted principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. It is also well accepted principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence. The woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice. *State of Tamil Nadu* v. *Ravi*, AIR 2005 SC 2568 : (2006) 10 SCC 534 : 2006 CrLJ 3305 (3308, 3309) : 2006 (3) Crimes 17.

[10944] ● ***Conviction can be based on testimony of prosecutrix alone unless compelling reasons exist.***—It is now well settled principle of law that conviction can be founded on the testimony of prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The witness of sexual assault is vital unless there are compelling reasons, which necessitate looking for corroboration of her statement, The Courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. *State of Himachal Pradesh* v. *Asha Rai*, AIR 2006 SC 381 : (2005) 13 SCC 766 : 2006 CrLJ 139 (141) : 2005 (4) Crimes 269. **To the same effect** : *Vishnu* v. *State of Maharashtra*, AIR 2006 SC 508 : (2006) 1 SCC 283 : 2006 CrLJ 303 (309) : 2005 (4) Crimes 323.

[10945] ● ***Rape by father on her own daughter.***—In case of rape by father on her own daughter the evidence of prosecution corroborated by the testimony of her mother and sisters and medical evidence was believed. The acquittal recorded by the High Court was set aside and the conviction recorded by the trial Court was restored. *State of Himachal Pradesh* v. *Asha Ram*, AIR 2006 SC 381 : (2005) 13 SCC 766 : 2006 CrLJ 139 (145) : 2005 (4) Crimes 269.

[10946] ● ***Evidence of prosecutrix corroborated by medical evidence.***—Victim (PW-1) had gone in the field to bring green grass and after collecting the green grass she was on her way back to her home. The appellant came to her and proposed for sexual intercourse. The victim protested and told that she will inform her mother in respect thereof. The appellant induced her not to say so to her mother as he will provide Rs. 10/- to her. The appellant felled her on the ground and removed her undergarment and ravished her. She was crying in pain and at this the appellant had stuffed her mouth by clothes. The genital of the appellant had penetrated in her genital which gave immense pain to her and, thereafter, the appellant left her. She saw blood oozing from her private part which had besmeared her undergarment. After the return from the said field she narrated the incident to the brothers and their wives. The evidence of medical officer noted by the High Court was: PW-7, Dr. Asha Saxena had deposed to have examined PW-1, Jalebia on 29.2.1998 and she had found superficial laceration present over perineum just at the bottom of Labia Majora and Labia Minora, the size which is 1/4 cms. X 1/4 cms. She has further deposed that the hymen membrane of the victim was found torn and there was fresh bleeding from slight touch and she had also found that her vaginal orifice admits one finger with difficulty." The evidence of the prosecutrix was corroborated by medical evidence. The conviction of the accused for offence under Section 376 IPC was found proper. *Ram Kripal* v. *State of Madhya Pradesh*, (2007) 11 SCC 265 : 2007 CrLJ 2302 (2305) (SC) : 2007 (3) Crimes 115 (SC).

[10947] ● ***Conviction in case of rape needs no corroboration.***—It is not well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. *Radhu* v. *State of Madhya Pradesh*, (2007) 12 SCC 57 : 2007 CrLJ 4704 (4705) : 2007 (4) Crimes 1 (SC).

[10948] ● ***Insistence on corroboration in rape case—Not required.***—In a charge of rape, an accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. *Moti Lal* v. *State of Madhya Pradesh*, (2008) 11 SCC 20 : 2008 CrLJ 3543 (3546).

26. SINGLE WITNESS

[10949] ● ***Single witness.***—A witness may be neither an accomplice nor anything analogous to an accomplice; he may be an ordinary witness, who was undoubtedly present at the time the incident took place. As a general rule, a Court may act on the testimony of a single witness, though uncorroborated. Unless corroboration is insisted upon by statute Court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires, as a rule of prudence that corroboration should be insisted upon, and that the question, whether corroboration of the testimony of a single witness was or was not necessary must depend upon the facts and circumstances of each case. *Vadravelu Thevar* v. *State of Madras,* AIR 1957 SC 614 : 1957 CrLJ 1000 : (1957) 3 SCR 981. TO THE SAME EFFECT : (1) *Ramratan* v. *State of Rajasthan,* AIR 1962 SC 424 : (1962) 1 CrLJ 473 : (1962) 1 SCJ 371 : (1962) 3 SCR 590.

[10950] ● ***Corroboration with former statement by solitary witness.***—Corroboration with former statement made earlier by the solitary witness held to be sufficient corroboration. *Ramratan* v. *State of Rajasthan,* AIR 1962 SC 424 : 1962 (1) CrLJ 473 : 1962 (3) SCR 590.

[10951] ● ***Witness resiling from statement in committing Court.***—The witness resiled from his statement before Sessions Court. Earlier statement was relied on account of its vividness and description of details of incident. In the absence of corroboration, conviction on the basis of such sole testimony is not safe. *Sharnappa Mutyappa Halke* v. *State of Maharashtra,* AIR 1964 SC 1357 : 1964 (2) CrLJ 359 : 1964 (4) SCR 589 : 66 Bom LR.

[10952] ● ***Evidence of single witness—Enough to sustain conviction.***—Even if the case against the accused hangs on the evidence of a single eye-witness it may be enough to sustain the conviction given on sterling testimony of a competent, honest man, although as a rule of prudence Courts call for corroboration. It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs. We are persuaded that the PW-5 is a witness for truth but in view of the circumstances that he is interested, we would still want corroboration in this case to reassure ourselves. *Shivaji Sahebrao Bobade* v. *State of Maharashtra,* AIR 1973 SC 2622 : (1973) 2 SCC 793 : 1973 CrLJ 1783 : 1974 (1) SCR 489.

[10953] ● ***Conviction—Basing of on sole testimony of Food Inspector.***—There is no rule of law that convictions cannot be based on the sole testimony of a Food Inspector. It is only out of a sense of caution that the Courts insist that the testimony of a Food Inspector should be corroborated by some independent witness. This is a necessary caution which has to be borne in mind because the Food Inspector may in a sense be regarded as an interested witness, but this caution is a rule of prudence and not a rule of law. *Prem Ballab* v. *State (Delhi Admn.),* AIR 1977 SC 56 : (1977) 1 SCC 173 : 1977 SCC (Cri) 78 (81) : 1977 CrLJ 12 : 1976 CrLR (SC) 495 : (1977) 1 SCR 592.

[10954] ● ***Single eye-witness—Basing of conviction on testimony of.***—This case primarily lunges on the testimony of a single eye-witness. Indeed. Conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sale witness passes the test of reliability.

So long as the single eye-witness is a wholly reliable witness the Courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the Courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the Court finds that the single eye-witness is wholly unreliable witness that his testimony is discarded in to and no amount of corroboration can cure that defect. *Anil Phukan* v. *State of Assam,* AIR 1993 SC 1462 (1464) : (1993) 3 SCC 282 : 1993 CrLJ 1796 : JT 1993 (2) SC 290 : (1993) 1 Crimes 1180.

[10955] ● ***Conviction of accused on basis of testimony of sole eye-witness.***—"That the entire case revolves around and rests on the testimony of PW 3 only is not in doubt. It is now well established that conviction can be based on the testimony of a single eye-witness provided the Court finds from the scrutiny of his evidence that he is a wholly reliable witness. Where, however, the Court is of the opinion that the single eye-witness is only partly reliable, prudence requires that corroboration of his testimony in material particulars should be sought before recording conviction. . . . . . On his own showing PW 3 was an employee of the deceased. He was present according to his testimony, when the deceased was assaulted by the appellants. He admits that after committing the crime the appellants and their associates fled away. The witness, however, not only did not raise any alarm when his master was being assaulted, he did not go near his employer even after the assailants had fled away to see the condition in which the employer was after having suffered the assault. According to him he got frightened and fled away to his home. He also admitted in his cross-examination that neither at his home nor in the village did he disclose what he had seen in the evening of 4th February, 1982.

The witness however tried to take shelter on the pleas that he was "frightened" and therefore till he appeared before the Police, he did not pick up courage to inform anyone either in the village or on the brick-fields regarding the occurrence. This plea does not impress us.

It is not understandable why the witness who was in the village did not appear before the Investigating Officer, when he was camping in the village throughout the night or even the next morning. No explanation whatsoever has been offered by him. PW-3 in view of his unexplained silence, delayed statement to the Police and relationship with the deceased, therefore, does not appear to be a wholly reliable witness. There is no corroboration of his evidence from any other independent source either. In the absence of any corroboration of his testimony. We find it rather unsafe to rely upon the evidence of PW 3 only to uphold the conviction and sentence of the appellants." *Alil Mollah* v. *State of West Bengal,* AIR 1996 SC 3471 : (1996) 5 SCC 369 : 1996 SCC (Cri) 1028 (1030) : 1996 CrLJ 3842.

[10956] ● ***Conviction of accused on uncorroborated evidence of single eye-witness.***—If the High Court thought it unsafe to convict any of the accused on the uncorroborated evidence of a single eye-witness it does not mean that the evidence of the witness stands castigated. It is no stigma against the evidence of any eye-witness if the Court only wanted re-assurance from yet other sources. The corroboration is what the Court required as a matter of prudence and as a step of caution. If the accused had used a torchlight or if the victim had a torchlight with him during the occurrence there would be much force in insisting that the investigating officer should have seized it as the same could be used as a material object during trial but a torchlight used by the witness to see the occurrence cannot be equated with the torchlight used by the victim or the assailants in the encounter for evidentiary purposes. Non-seizure of such a torchlight cannot therefore, be considered as a lapse on the part of any investigating officer much less a ground for impairment of the testimony of the eye-witness concerned.

Apparently, those were sharp cutting weapons. One of them could have been a pointed and sharp weapon. All the injuries of the deceased were incised wounds and two of them had penetrated into the body and perforated some of the vital organs. The doctor who conducted the autopsy has said in evidence that the injuries which he noticed could have been caused with those weapons.

None of the points raised before us by the learned counsel for the appellants is capable of changing the conclusion reached by the High Court against the appellants. *Balo Yadav* v. *State of Bihar,* AIR 1997 SC 2678 : 1997 SCC (Cri) 701 : 1997 CrLJ 3395 : 1997 CrLR (SC) 414 : 1997 (2) Crimes 38.

27. STATEMENT OF ANOTHER WITNESS

[10957] ● ***Statement of another witness.***—Ordinarily, the testimony of one accomplice would not be sufficient to corroborate that of another. But an exception arises. If several accomplices simultaneously and without previous covert, gives a consistent account of the crime implicating the accused, the Court may accept the several statements of the accomplices were given independently and without any previous concert. *Mohd. Husain Umar* v. *K.S. Dalip Singhji,* AIR 1970 SC 45 : (1969) 3 SCC 429 : 1970 CrLJ 9 : (1970) 1 SCR 130.

28. STATEMENT OF PW DURING INQUIRY UNDER SECTION 202, CrPC

[10958] ● ***Statement of PW during inquiry under Section 202, CrPC.***—A plain reading of Section 157 of the Evidence Act would show that previous statement of a particular witness can be used to corroborate only his own evidence during trial and not evidence of other witnesses. *Sashi Jena* v. *Khadal Swain*, AIR 2004 SC 1492 : (2004) 4 SCC 236 : 2004 SCC (Cri) 1077 (1082) : 2004 CrLJ 1394 : JT 2004 (2) SC 339 : (2004) 2 Crimes 153 : (2004) 1 JCC 420.

29. STATEMENT UNDER SECTION 161, CrPC

[10959] ● ***Statement under Section 161, CrPC.***—Statements recorded under Section 161 cannot be used for corroborating statements made in Court. *Rameshwar Singh* v. *State of J&K,* AIR 1972 SC 102 : (1971) 2 SCC 715 : 1972 CrLJ 15 : 1970 Cr App R 416 (SC) : (1972) 1 SCR 627 : (1972) 1 SCJ 594 : 1972 Mad LJ (Cri) 364.

30. STATEMENT RECORDED UNDER SECTION 164, CrPC

[10960] ● ***Statement recorded under section 164, CrPC.***—The statement recorded is not substantive evidence but is only corroborative evidence. *State of Rajasthan* v. *Kartar Singh,* AIR 1970 SC 1305 : (1970) 2 SCC 61 : 1970 CrLJ 1144 : (1970) 1 SCR 56 : (1971) 1 SCJ 165 : 1971 Mad LJ (Cri) 113 : 1970 SCD 724. **To the same effect :** (1) *Ram Kishan Singh* v. *Harmit Kaur,* 1972 CrLJ 267 : (1972) 1 SCWR 130.

31. STATEMENT TO POLICE

[10961] ● ***Statement to police.***—Statement to Police cannot be used to corroborate statement made before the Court. *Rameshwar Singh* v. *State of J&K,* AIR 1972 SC 102 : (1971) 2 SCC 715 :

1972 CrLJ 15 : 1971 CAR 416 : (1972) 1 SCR 627 : 1972 All WR 247 : 1972 Mad LJ (Cri) 364.

32. STATEMENT RECORDED DURING COMMITTAL PROCEEDINGS

[10962] ● ***Statement recorded during committal proceedings.***—Statement of one witness recorded during committal proceedings can corroborate another. *Dhanabal* v. *State of Tamil Nadu,* AIR 1980 SC 628 : (1980) 2 SCC 84 : 1980 SCC (Cri) 340 : 1980 CrLJ 439 : 1980 CrLR (SC) 90.

33. TEST IDENTIFICATION PARADE

[10963] ● ***Test identification parade.***—Purpose of test identification is to have corroboration to the evidence of the eye-witnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the Court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. *Daya Singh* v. *State of Haryana,* AIR 2001 SC 1188 : (2001) 3 SCC 468 : 2001 SCC (Cri) 553 (562) : 2001 CrLJ 1268 : 2001 CrLR (SC) 284 : (2001) 2 Crimes 93.

[10964] ● ***Evidence of identification—Value.***—In appropriate cases the Court may accept the evidence of identification even without insisting on corroboration. *Md. Kalam* v. *State of Rajasthan,* AIR 2008 SC 1813 : (2008) 11 SCC 352 : 2008 CrLJ 2602 (2605) (SC).

34. TRAP WITNESS

[10965] ● ***Trap witness.***—A bribe-giver is an accomplice only when he gives it with intention of gaining some undue official favour, but one who gives it to aid detection of a crime is not an accomplice, necessary *mens rea* being absent. *Rao Shib Bahadur* v. *State of U.P.,* AIR 1954 SC 322 : 1954 SCR 1098 : 1954 CrLJ 910.

[10966] ● ***Appreciation of evidence—Distinction between tainted evidence of accomplice and interested testimony of partisan witness.***—"The principles, on which the employment of magistrates as witnesses of police traps has been condemned, have hardly any application where the magistrates concerned are executive magistrates who perform no judicial functions, or where the officers concerned are the officers of the Anti-Corruption Department, whose duty it is to detect offences of corruption. In the case before us, Mukherji and Misra belonged to such a department. Moreover, however inexpedient it may be to employ magistrates as trap witnesses, their evidence has to be judged by the same standard as the evidence of other partisan or interested witnesses, and the inexpediency of employing magistrates as trap witnesses cannot be exalted into an inflexible rule of total rejection of their evidence, in the absence of independent corroboration. The learned Solicitor-General referred, in the course of arguments, to the difficulty of detecting corruption cases and of securing conviction in such cases. We do not think that such a consideration should influence the mind of a judge. Whatever be the difficulties, *admissible evidence given in a case must be judged on its own merits, with due regard to all the circumstances of the case.* In some of the cases which have been cited at the bar a distinction has been drawn between two kinds of 'traps'— legitimate and illegitimate—and in some cases, a distinction has been made between tainted evidence of an accomplice and interested testimony of a partisan witness, and, it has been said, that the degree of corroboration necessary is higher in respect of tainted evidence that for partisan evidence. We think that, for deciding the questions before us, such distinctions are somewhat artificial, and in the matter of assessment of the value of evidence and the degree of corroboration necessary to inspire confidence, no rigid formula can or should be laid down." *State of Bihar* v. *Basawan Singh,* AIR 1958 SC 500 : 1958 CrLJ 976 : 1958 SCJ 856.

[10967] ● ***Evidence of raiding party—Corroboration.***—There is no inflexible rule that the evidence of the witnesses of the raiding party must be discarded in the absence of any independent corroboration. The correct rule is this : if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisans or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the Court may even look for independent corroboration before convicting the accused person. If a Magistrate puts himself in the position of a partisan or interested witness, he cannot claim any higher status and must be treated as any other interested witness. *State of Bihar* v. *Basawan Singh,* AIR 1958 SC 500 : 1958 CrLJ 976.

[10968] ● ***Evidence of interested and partisan witnesses—Corroboration.***—Evidence of interested and partisan witnesses who are concerned in the success of a trap must be tested in the same way as that of any other interested witness. In a proper case Court can look for independent corroboration before convicting the accused. *State of Bihar* v. *Basawan Singh,* AIR 1958 SC 500 : 1959 SCR 195. **To the same effect :** (1) *Ram Arora* v. *State of Punjab,* AIR 1973 SC 498 : (1972) 3 SCC 652 : 1972 CrLJ 1293.

[10969] ● ***Evidence of accomplice corroboration necessity.***—When the witnesses fall under the category of accomplices by reason of their being bribe-givers independent corroboration is necessary. *R.R. Chari* v. *State of U.P.,* AIR 1959 All 149 : 1959 CrLJ 268. This decision has been reversed on another point in *R.R. Chari* v. *State of U.P.,* AIR 1962 SC 1573 : (1962) 2 CrLJ 510.

[10970] ● ***Conviction not to be based on accomplice evidence without corroboration.***—No conviction can be based on accomplice evidence unless it is corroborated in material particulars. But as to evidence of a partisan or interested witness, *i.e.* who had laid a trap or offered bribe it is open to the Court to convict solely on the basis of such evidence, if reliable. In appropriate case the Court may look for corroboration in a general way and not material corroboration as in the case of evidence of accomplice. *E.G. Barsay* v. *State of Bombay,* AIR 1961 SC 1762. **To the same effect :** (1) *Bhamprosad Dabe* v. *State of Gujarat,* AIR 1968 SC 1323 : 1968 CrLJ 1505 : 1968 SCD 1026 : 9 Guj LR 853 **overruling** (2) *Rao Shiv Bahadur Singh* v. *State of U.P.,* AIR 1954 SC 322 : 1954 CrLJ 910.

[10971] ● ***Trap witness—Not approver.***—A trap witness is not an approver but he is certainly an interested witness in the sense that he is interested in seeing that the trap laid by him has succeeded. He could hence be at least equated with a partisan witness, and it would therefore be not advisable to rely upon his evidence without corroboration. Though the Court might reject the evidence of the witness in regard to some events, either because that part of the evidence is inconsistent with the other parts of his evidence, or with the evidence of some disinterested witnesses, still it can accept the evidence given by the witness in regard to the events when the version is corroborated in all material particulars by the evidence of the other disinterested witnesses. Corroboration must be by independent testimony, confirming, in some material particulars, not only that the crime was committed but also that the accused had committed it, it is, however, not necessary that all the circumstances of the case or every detail of the crime must be corroborated. It is enough, if it relates to the material circumstances of the case and of the identity of the accused. *E.G. Barsay* v. *State of Bombay,* AIR 1961 SC 1762.

[10972] ● ***Though witness—Evidence not to be rejected for want of corroboration.***—Though trap witness is an interested witness, as a matter of law his evidence cannot be rejected for want of corroboration. *Dalpat Singh* v. *State of Rajasthan,* AIR 1969 SC 17 : 1969 CrLJ 262 : (1968) 3 SCR 189 : 1969 SCD 43 : (1968) 2 SCJ 676 : 1968 Mad LJ (Cri) 668 : (1968) 1 Um NP 737.

[10973] ● ***Person giving illegal gratification not accomplice.***—The person giving illegal gratification to the person accused of accepting bribe cannot be treated as accomplice. Corroboration of testimony in material particulars, is not necessary. *Dalpat Singh* v. *State of Rajasthan,* AIR 1969 SC 17 : 1969 CrLJ 262 : 1968 (3) SCR 189 : 1968 Mad LJ (Cri) 668.

[10974] ● ***Illegal gratification—Trap witness to be corroborated.***—In the case of acceptance of illegal gratification, trap-witness should be corroborated by independent evidence. *Darshan Lal* v. *Delhi Administration,* AIR 1974 SC 222 : (1974) 3 SCC 587 : 1974 CrLJ 307.

[10975] ● ***Evidence of trap witnesses—Corroboration required.***—Corroboration is required from independent source of the evidence of trap-witnesses for two reasons. Firstly, a criminal case is to be proved beyond reasonable doubt. Secondly, evidence of witnesses interested in the fruits of investigative efforts becomes devalued. *Som Prakash* v. *State of Delhi,* AIR 1974 SC 989 : (1974) 4 SCC 278 : 1974 SCC (Cri) 215 : 1974 CrLJ 784 : 1974 CrLR (SC) 216 : (1974) 1 SCWR 386.

[10976] ● ***Officer in anti-corruption department to secure independent and respectable witnesses.***—The officers functioning in the anti-corruption department must seriously endeavour to secure really independent and respectable witnesses so that evidence in regard to trap inspires confidence in the mind of the Court and the Court is not left to doubt as to whether or not any money was paid to public servant by way of bribe. Trap witnesses when are interested witnesses the prosecution should fail. *Raghuvir Singh* v. *State of Punjab,* AIR 1976 SC 91 : (1976) 1 SCC 145 : 1975 SCC (Cri) 776 : 1976 CrLJ 172 : 1975 CrLR (SC) 646 : 1975 BBCJ 821 : 1976 Cr App R (SC) 1.

[10977] ● ***Appreciation of evidence.***—In absence of evidence that accused ever demanded bribe or even made suggestion about it, conviction cannot be upheld. *Shantilal Rameshwar* v

State of Rajasthan, AIR 1976 SC 739 : (1976) 1 SCC 577 : 1976 SCC (Cri) 95 : 1976 CrLJ 625 : 1975 BBCJ 846.

[10978] ● ***Court justified in acting upon uncorroborated testimony of trap witness.***—A trap-witness may perhaps be considered as a person interested in the success of the trap may entitle a Court to view his evidence as that of an interested witness. Where the circumstances justify it, a Court may refuse to act upon the uncorroborated testimony of a trap-witness. A Court may well be justified in acting upon the uncorroborated testimony of a trap-witness, if the Court is satisfied from the facts and circumstances of the case that the witness is a witness of truth. *Prakash Chand* v. *State (Delhi Administration),* AIR 1979 SC 400 (402, 403) : 1979 SCC 90 : 1979 SCC (Cri) 656 : 1979 CrLJ 329 : (1979) 1 SCJ 512 : 1979 BLJR (Summary of Cases) 3 : (1979) 2 SCR 330 : 1979 LW 17 : 1979 Mad LJ (Cri) 419. **To the same effect :** (1) *Ram Prakash Arora* v. *State of Punjab,* AIR 1973 SC 498 : (1972) 3 SCC 652 : 1972 CrLJ 1293; (2) *Darshan Lal* v. *Delhi Administration,* AIR 1974 SC 218 : (1974) 3 SCC 595 : 1974 CrLJ 307; (3) *Bihar* v. *Basawan Singh,* AIR 1958 SC 500 : 1958 CrLJ 976; (4) *Raghubir Singh* v. *State of Haryana,* AIR 1974 SC 1516 : (1974) 4 SCC 560 : 1974 SCC (Cri) 596 : 1974 CrLJ 1062 : (1974) 3 SCR 799; (5) *Raghubir Singh* v. *State of Punjab,* AIR 1976 SC 91 : (1976) 1 SCC 145 : 1975 SCC (Cri) 776 : 1976 CrLJ 172; (6) *Bhanu Prasad* v. *State of Gujarat,* AIR 1968 SC 1323 : 1968 CrLJ 1505.

[10979] ● ***Evidence of trap officer—Corroboration.***—The evidence of trap officer can be acted upon even without the help of any corroboration. *Vide Prakash Chand* v. *State Delhi Administration,* AIR 1979 SC 400 : (1979) 3 SCC 90 : 1979 CrLJ 329 : (1979) 2 SCR 330. **To the same effect :** (1) *Hazari Lal* v. *Delhi Administration,* AIR 1980 SC 873 : (1980) 2 SCC 390 : 1980 CrLJ 564 : (1980) 2 SCR 1053; (2) *State of U.P.* v. *Zakaullah,* AIR 1998 SC 1474 : (1998) 1 SCC 557 : 1998 SCC (Cri) 456 : 1998 CrLJ 863 : 1998 CrLR (SC) 137.

[10980] ● ***Evidence of Police Officer laid trap—Corroboration not necessary.***—There is no rule of prudence which has crystallised into a rule of law, nor indeed any rule of prudence, which requires that the evidence of a police officer who laid a trap in a bribery case should be treated on the same footing as evidence of accomplices and there should be insistence on corroboration. In the facts and circumstances of a particular case, a Court may be disinclined to act upon the evidence of such an officer without corroboration, but, equally, in the facts and circumstances of another case of Court may unhesitatingly accept the evidence of such an officer. It is all a matter of appreciation of evidence and on such matters there can be no hard and fast rule, nor can there be any precedential guidance. *Hazarilal* v. *State (Delhi Administration),* AIR 1980 SC 873 (1980) 2 SCC 390 : 1980 SCC (Cri) 458 : 1980 CrLJ 564 : (1980) 2 SCR 1053 : 1980 Mad LJ (Cri) 756 at p. 759 : 1980 LW (Cri) 130 (SC).

[10981] ● ***Complainant in bribery case accomplice.***—The complainant in a bribery case is in the nature of accomplice. His story is *prima facie* suspect and, therefore, corroboration of his testimony in material particulars is accessory for the Court to act upon the same. *Gulam Mahmood A Malik* v. *State of Gujarat,* AIR 1980 SC 1558 : 1980 Supp SCC 684 : 1981 SCC (Cri) 586 : 1980 CrLJ 1096 : 1980 CrLR (SC) 504.

[10982] ● ***Trap witness—Appreciation of evidence.***—It is not proper on the part of the Judge to magnify every minor detail or omission of a trap witness to falsify him and to cast a shadow of doubt in the prosecution case. *State of Maharashtra* v. *K.G. Pimple,* AIR 1984 SC 63 : (1984) 1 SCC 446 : 1984 CrLJ 4 : (1983) 2 Crimes 838.

[10983] ● ***Testimony of trap witness—Reliability.***—The testimony of a trap-witness who has no *animus* or grudge against the accused is ordinarily reliable. *State of Maharashtra* v. *Narsingrao Gangarao,* AIR 1984 SC 63 : (1984) 1 SCC 446 : 1984 CrLJ 4.

[10984] ● ***Trap witness turning hostile.***—Where the trap-witnesses turn hostile, conviction can be recorded on the testimony of the complainant and Police officials conducting raid, where the testimony is corroborated by circumstantial evidence. *State of U.P.* v. *G.R. Ghosh,* AIR 1984 SC 1453 : (1984) 1 SCC 254 : 1984 SCC (Cri) 46 : 1985 CrLJ 904.

[10985] ● ***Evidence of trap witness not to be viewed with suspicion.***—The evidence of trap-witnesses should not be viewed with suspicion because they are Government servants or because they are associated with the investigating agencies. *State* v. *Raghunath Baxi,* (1985) 2 GLR 988 at 991 (SC).

[10986] ● ***Uncorroborated testimony of trap witness.***—The Court can act on the uncorroborated testimony of the trap-witnesses if the Court is satisfied from the facts and circumstances of the case that they are witnesses of trust. *Narayan*

Chandra Sahu v. *State of Orissa,* 1986 (1) Crimes 593 at 597 (Ori). **TO THE SAME EFFECT :** (1) *C. Ganesan, In re,* 1983 LW (Cri) 15 (SN) (Mad); (2) *State of Maharashtra* v. *Nar Singhrao,* AIR 1984 SC 63 at 67 : (1984) 1 SCC 446 : (1984) SCC (Cri) 10 : 1984 CrLJ 4 : 1984 CrLR (SC) 10 : (1983) 2 Crimes 838 : (1984) 1 Bom CR 77 : 1984 Mad LJ (Cri) 207 : 1984 Cr App R (SC) 97.

[10987] ● ***Evidence of complainant trap witness.***—When *X* demands bribe from the complainant, a trap is laid, but on being approached *X* leaves the place allegedly requesting that the sum may be given to *Y* and when it is really paid to *Y* and recovered from his possession, no adverse inference against *X* is permissible. *Sadasiv Mahadeo* v. *State of Maharashtra,* AIR 1990 SC 287 : (1990) 1 SCC 299 : 1990 CrLJ 600 : (1990) 1 Crimes 46 (SC).

[10988] ● ***Acceptance of illegal gratification proof.***—In all this type of cases of bribery, two aspects are important. Firstly, there must be a demand and secondly there must be acceptance in the sense that the accused has obtained the illegal gratification. Mere demand by itself is not sufficient to establish the offence. Therefore, the other aspect, namely, acceptance is very important and when the accused has come forward with a plea that the currency notes were put in the drawer without his knowledge, then there must be clinching evidence to show that it was with the tacit approval of the accused that the money had been put in the drawer as an illegal gratification. Unfortunately, on this aspect in the present case there is no other evidence except that of PW 1. Since PW 1's evidence suffers from infirmities, we sought to find some corroboration but in vain. There is no other witness or any other circumstance which supports the evidence of PW 1 that this tainted money as a bribe was put in the drawer, as directed by the accused. Unless we are satisfied on this aspect. It is difficult to hold that the accused tacitly accepted the illegal gratification or obtained the same within the meaning of Section 5 (1)(d) of the Prevention of Corruption Act, 1947, particularly when the version of the accused appears to be probable. *M.K. Harshan* v. *State of Kerala,* AIR 1995 SC 2178 (2181) : (1996) 11 SCC 720 : 1995 CrLJ 3978.

[10989] ● ***Evidence of bribe giver—Nature and extent of corroboration needed.***—It is generally accepted that the person offering a bribe to a public officer is in the nature of an accomplice in the offence of accepting illegal gratification but the nature of corroboration required in such a case should not be subjected to the same rigorous tests which are generally applied to a case of an approver. Though bribe-givers are generally treated to be in the nature of accomplices but among them there are various types and gradations. In cases under the Prevention of Corruption Act the complainant is the person who gives the bribe in a technical and legal sense because in every trap case wherever the complaint is filed there must be a person who has to give money to the accused which in fact is the bribe money which is demanded and without such a giving the trap cannot succeed. When there is such a demand by the public servant from a person who is unwilling, and if to do public good approaches the authorities and lodges a complaint, then in order that the trap succeeds he has to give the money. There could be another type of bribe-giver who is always willing to give money in order to get his work done and having got the work done he may send a complaint. Here he is a *particeps criminis* in respect of the crime committed and thus is an accomplice. Thus there are grades and grades of accomplices and therefore a distinction could as well be drawn between cases where a person offers a bribe to achieve his own purpose and where one is forced to offer bribe under a threat of loss or harm that is to say under coercion. A person who falls in this category and who becomes a party for laying a trap stands on a different footing because he is only a victim of threat or coercion to which he was subjected to. Where such witnesses fall under the category of 'accomplices' by reason of their being bribe-givers, in the first instance, the Court has to consider the degree of complicity and then look for corroboration if necessary as a rule of prudence. The extent and nature of corroboration that may be needed in a case may vary having regard to the facts and circumstances. *M.O. Shamsuddin* v. *State of Kerala,* (1995) 3 SCC 351 : 1995 SCC (Cri) 509 (516).

[10990] ● ***Evidence of interested witness—Scrutinizing of by Court.***—If any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charge, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices in that sense but are only partisan or interested witnesses who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested which may vary from case to case and the corroboration in the case of such interested witnesses can be in a general way and not as one required in material particulars as in the case of an approver. Therefore in seeking corroboration for the evidence of trap witnesses a distinction has to be drawn where participation of an individual in a crime is not voluntary but is the result of pressure. In such a case the element of *mens rea* to commit the crime is not apparent and (*sic*) cannot strictly be classified as an accomplice and at any rate he cannot be treated as being on the same footing. Where a bribe has already been demanded from a man and if without giving the bribe he goes to the police or magistrate and brings them to witness the payment it will be a legitimate trap and in such cases at the most he can be treated as an interested witness and whether corroboration is necessary or not will be within the discretion of the Court depending upon the facts and circumstances of each case. However as a rule of prudence, the Court has to scrutinise the evidence of such interested witnesses carefully. *M.O. Shamsuddin* v. *State of Kerala,* (1995) 3 SCC 351 : 1995 SCC (Cri) 509 (522, 523).

[10991] ● ***Corroboration can be by way of circumstantial evidence.***—Now coming to the nature of corroborating evidence that is required, it is well-settled that the corroborating evidence can be even by way of circumstantial evidence. No general rule can be laid down with respect to quantum of evidence corroborating the testimony of a trap witness which again would depend upon its own facts and circumstances like the nature of the crime, the character of trap witness *etc.* and other general requirements necessary to sustain the conviction in that case. The Court should weigh the evidence and then see whether corroboration is necessary. Therefore as a rule of law it cannot be laid down that the evidence of every complainant in a bribery case should be corroborated in all material particulars and otherwise it cannot be acted upon. Whether corroboration is necessary and if so to what extent and what should be its nature depends upon the facts and circumstances of each case. In a case of bribe, the person who pays the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to give evidence about the bribe and it is not possible to get absolutely independent evidence about the payment of bribe. However, it is cautioned that the evidence of a bribe-giver has to be scrutinised very carefully and it is for the Court to consider and appreciate the evidence in a proper manner and decide the question whether a conviction can be based upon it or not in those given circumstances. *M.O. Shamsudhin* v. *State of Kerala,* (1995) 3 SCC 351 : 1995 SCC (Cri) 509 (523).

CORRUPT
§ (See Also " BRIBERY" and "PREVENTION OF CORRUPTION ACT")

[10992] ● ***Corrupt.***—Corruption in a civilised society is a disease like cancer, which if not detected in time is sure to malign the polity of country leading to disastrous consequences. It is termed as plague which is not only contagious but if not controlled spreads like a fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as Royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti people, but aimed and targeted against them. It affects the economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence shaking of the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society. *State of Madhya Pradesh* v. *Ram Singh*, AIR 2000 SC 870 (873) : (2000) 5 SCC 88 : 2000 CrLJ 1401 : 2000 CrLR (SC) 188.

[10993] ● ***FIR—Registration of—Not actuated by malafides or extraneous consideration.***—After going through the pleadings of the parties and keeping in view the rival submissions made, the registration of the FIR against the appellant and others cannot be held to be the result of *malafides* or actuated by extraneous consideration. The menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities. In such matters, probes conducted are required to be determined on facts and in accordance with law. *K. Karunakaran* v. *State of Kerala*, AIR 2000 SC 3381 : (2000) 3 SCC 761 : 2000 CrLJ 2278.

CORRUPT PRACTICE : STANDARD OF PROOF

[10994] ● ***Corrupt practice : standard of proof.***—As to the standard of proof of corrupt practice in election it is well settled that a charge of corrupt practice in election it is well settled that a charge of corrupt practice is substantially akin to a criminal charge. The commission of a corrupt practice entails serious penal consequences. It not only vitiates the election of the candidate concerned but also disqualifies him from taking part in elections for a considerably long time. Thus, the trial of an election petition being in the nature of an accusation, bearing the indelible stamp of quasi-criminal action, the standard of proof is the same as in a criminal trial. *Ch. Razik Ram* v. *Ch. Jaswant Singh Chouhan*, AIR 1975 SC 667 : (1975) 4 SCC 769 **TO THE SAME EFFECT :** (1) *Sultan Salauddin Owasi* v. *Md. Osman Saheed*, AIR 1980 SC 1347 : (1980) 3 SCC 281; (2) *A. Younus Kunju* v. *R.S. Unni*, AIR 1984 SC 960 : (1984) 3 SCC 346; (3) *Ram Singh* v. *Col. Ram Singh*, AIR 1986 SC 3 : 1985 Supp SCC 611.

[10995] ● ***Corrupt practice—Charge of—To be proved by convincing evidence.***—A charge of corrupt practice has to be proved by convincing evidence and not merely by preponderance of probabilities. As the charge of a corrupt practice is in the nature of a criminal charge it is for the party who sets up the plea of undue influence to prove it to the hilt beyond reasonable doubt and the manner of proof should be the same as for an offence in a criminal case. This is more so because once it is proved to the satisfaction of a Court that a candidate has been guilty of undue influence he is likely to be disqualified for a period of six years or such other period by the authority concerned. By and large, the Court in such cases while appreciating or analysing the evidence must be guided by the following considerations :

(1) the nature, character, respectability and credibility of the evidence;

(2) the surrounding circumstances and the improbabilities appearing in the case;

(3) the slowness of the appellate Court to disturb a finding of fact arrived at by the trial Court who had the initial advantage of observing the behaviour, character and demeanour of the witnesses appearing before it, and

(4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged. *Ram Sharan Yadav* v. *Thakur Muneshwar Nath Singh*, AIR 1985 SC 24 : (1984) 4 SCC 649 : (1985) 1 SCR 1089 : 1985 BLJ 247 : 1985 BLJR 19 : 1985 UJ (SC) 229.

[10996] ● ***Corrupt practice—Standard of proof.***—Inasmuch as the standard of proof is very high and corrupt practice is to be proved beyond all reasonable doubt, if on evidence two views are possible one in favour of the elected candidate and the other against him, election cannot be declared void. *Ram Singh* v. *Col. Ram Singh*, AIR 1986 SC 3 : 1985 Supp SCC 611.

CORRUPT PRACTICE UNDER REPRESENTATION OF THE PEOPLE ACT (43 OF 1951)

1. CASSETTE

[10997] ● ***Cassette.***—From the evidence of PW-1 and the election petitioner it is found that the story regarding the recording of the cassette Ex P-7 by Shri Ingini is shrouded in mystery and the cassette, Ex P-7 appears to be a piece of evidence on which reliance cannot be placed since the very basis as to how it came to be recorded and why it was preserved or how the election petitioner came to know about it, has not been explained by the election petitioner and has been further confused by Basavaraj Ingini, appearing as Court Witness. The appellant has denied his voice in the recorded cassette. ... The manner in which cassette Ex P. 7 came into existence and was produced at the trial and relied upon by the election petitioner has created an impression on our minds that the election petitioner has not come out with the true story. The learned Trial Judge fell in error, even without going into the question of the admissibility of cassette Ex P-7, which, has been seriously disputed by Mr. Subal in view of the denial by the returned candidate that the voice in the cassette was his, to rely upon this piece of evidence and to hold on the basis thereof, that the appellant was guilty of committing the corrupt practices covered by Section 123(2), (3), (3-A) of the Representation of People Act, 1951. We find ourselves unable to rely on cassette Ex P-7 or to hold that it was recorded in the manner and at the time and place as deposed to by the election petitioner and Shri Ingini. The cassette Ex P-7 is not a reliable price of evidence. *Quamarul Islam* v. *S.K. Kanta*, AIR 1994 SC 1733 : 1994 Supp (3) SCC 5 : JT (1994) 1 SC 452.

CORRUPTION

[10998] ● ***Corruption—Meaning of.***—Corruption as such has reached dangerous heights and dangerous potentialities. The word "corruption" has a wide connotation and embraces almost all the spheres of our day-to-day life the world over. In a limited sense it connotes allowing decisions and actions of a person to be influenced not by rights or wrongs of a cause, but by the prospects of monetary gains or other selfish considerations. Avarice is a common frailty of mankind, and while Robert Walpole's observation that every man has a price, may be a little generalized, yet it cannot be gainsaid that it is not far from the truth. Burke cautioned "Among a people generally corrupt, liberty cannot last long." *State of A.P.* v. *V. Vasudeva Rao*, AIR 2004 SC 960 : (2004) 9 SCC 319 : 2004 SCC (Cri) 968 (980) : 2004 CrLJ 620 : 2003 (4) Crimes 519.

[10999] ● ***Acceptance of illegal gratification sentence.***—When corruption was sought to be eliminated from the polity, all possible stringent measures are to be adopted within the bounds of law on such measure is to provide a condign punishment. Parliament measured the parameters for such condign punishment and in that process wanted to fix a minimum sentence of imprisonment for giving deterrent impact on other public servants. Who are prove to corrupt deal. That was precisely the reason why the sentence was fixed a 7 years and directed that even of the said period of imprisonment need not be given the sentence shall not be less than imprisonment for one year. Such a legislative insistence is a reflection of Parliaments resolve to meet corruption cases with a very strong hand and to give signals of deterrence as the most pivotal feature of sentencing of corrupt public servants. All public servants were warned through such a legislative measure that corrupt public servants have to face very serious consequences. If on the other hand, any public servant is given the impression that if he succeeds in protracting the proceedings that would help him to have the advantage of getting a very light sentence even if the case ends in conviction. Its fall out would afford an incentive to public servants who are susceptible to corruption to indulge in such nefarious practices with immunity.

Increasing the fine after reducing the imprisonment to a normal period can also defeat the purpose as the corrupt public servant could easily raise the fine amount through the same means. *State of A.P.* v. *V. Vasudeva Rao*, AIR 2004 SC 960 : (2004) 9 SCC 319 : 2004 SCC (Cri) 968 (980) : 2004 CrLJ 620 : 2003 (4) Crimes 519.

COUNSEL
§ (See "ADVOCATE")

COUNTER AFFIDAVIT
§ (See "AFFIDAVIT")

COUNTER CASE

[11000] ● ***Counter Case.***—No reason has also been indicated by the High Court as to why the evidence of PWs 3, 8, 11, 12 and 15 was to be obliterated merely because they were accused in the counter-case. In a case of this nature, when a counter-case has been registered, the Court hearing the same has to scrutinize the evidence in greater detail and even in such a situation the evidence which is cogent, credible and trustworthy cannot be totally wiped out because of the only circumstance that they were accused in the counter-case. Additionally, we find that PWs-3, 6 and 9 have not been merely described in the first information report to have taken the deceased to the hospital, as observed by the High Court. A bare reading of the firsts information report clearly shows that they were described as eyewitnesses also. Here again, the High Court has committed an error. *Raj Kishore Jha* v. *State of Bihar*, AIR 2003 SC 4664 : (2003) 11 SCC 519 : 2004 SCC (Cri) 212 (218) : 2003 CrLJ 5050.

[11001] ● ***Refusal to register complaint—Counter complaint by police.***—In the case of *T.T. Antony* v. *State of Kerala*, AIR 2001 SC 2637 : (2001) 6 SCC 181 : 2001 SCC (Cri) 1048 : 2001 CrLJ 3329 has not excluded the registration of a complaint in the nature of a counter-case from the purview of the Code. This Court in that case only held that any further complaint by the same complainant or others against the same accused, subsequent to the registration of a case, is prohibited under the Code because an investigation in this regard would have already started and further complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence will be prohibited under Section 162 of the Code. This prohibition noticed by this Court, in, does not apply to counter-complaint by the accused in the first complaint or on his behalf alleging a different version of the said incident. In the instant case, it is seen in regard to the incident which took place on 20.5.1995, the appellant and the first respondent herein have lodged separate complaints giving different versions but while the complaint of the respondent was registered by the police concerned, the complaint of the appellant was not so registered, hence on his prayer the learned Magistrate was justified in directing the police concerned to register a case and investigate the same and report back. In our opinion, both the learned Additional Sessions Judge and the High Court erred in coming to the conclusion that the same is hit by Section 161 or 162 of the Code which, in our considered opinion, has absolutely no bearing on the question involved. Section 161 or 162 of the Code does not refer to registration of a case, it only speaks of a statement to be recorded by the police in the course of the investigation and its evidentiary value. *Upkar Singh* v. *Ved Prakash*, AIR 2004 SC 4320 : (2004) 13 SCC 292 : 2005 SCC (Cri) 211 (215-6, 217-18) : 2004 CrLJ 4219.

COUNTERFEITING

SYNOPSIS

1. **Delivery of coin (Section 238, IPC) 2253**
2. **Import or export of counterfeit coin (Section 237, IPC) 2253**
3. **Possession of instrument or material (Section 235, IPC) 2253**
4. **Counterfeiting Court fee stamps (Sections 258, 259, IPC)..................................2253**
5. **Counterfeiting currency notes or bank notes (Sections 489A to 489E, IPC) 2254**
6. **Counterfeiting property mark (Section 486, IPC) 2255**

1. DELIVERY OF COIN (SETION 238, IPC)

[11002] ● *Delivery of coin.*—Section 238, IPC is directed against a person other than the coiner, who procures or obtains or receives counterfeit coin and not to the offence committed by the coiner. When a counterfeit Indian coin is involved, Section 240, IPC, is applied. In respect of other counterfeit coins, Section 239 is appropriate. Delivery to another of coin with the knowledge of its counterfeitness is an offence. To constitute the offence under this section it is not necessary to prove that the coin used is a counterfeit of current coin. (1905) 1 Weir 221.

2. IMPORT OR EXPORT OF COUNTERFEIT COIN (SECTION 237, IPC)

[11003] ● *Import or export of counterfeit coin.*—The word "import" has not been defined in Penal Code nor in the General Clauses Act. The definition of the term in one statute does not afford a guide to the construction of the same term in another statute. *Income-Tax Commissioner* v. *Binay Kumar*, AIR 1957 SC 768 : 1958 SCR 101.

[11004] ● *Import—Meaning of.*—To import is to bring something within the municipal limits from a place beyond its boundaries, irrespective of the consideration as to whether the goods were manufactured within the municipal limits, how long they were outside those limits and for what purpose—Import is not merely the bringing into but comprises something more *i.e.* incorporating and making up of goods imported with the mass of the property in the local area. *Central India Spinning* v. *Municipal Committee*, AIR 1958 SC 341 : 1958 SCR 1102 : 1958 SCJ 604.

[11005] ● *"Counterfeit"—Definition.*—The expression "counterfeit" has been defined in Section 28, IPC. Ordinarily counterfeiting implies the idea of an exact imitation. But for the purpose of the Indian penal Code there can be counterfeiting even though the imitation is not exact and there are differences in detail between the original and the imitation so long as the resemblance in so close that deception may thereby be practiced. *State of U.P.* v. *H.M. Ismail*, AIR 1960 SC 669 : 1960 CrLJ 1017 : (1960) 2 SCR 911 : 1960 All LJ 438.

[11006] ● *Expression "import"—Subsequent transaction of said goods outside scope of.*— The process of import does not end immediately and prohibited goods are brought into India but continues till the goods are delivered to the importer physically or constructively. But the subsequent transactions in regard to the said goods are outside the scope of the expression "import". *Assistant Collector of Customs* v. *Sitaram Agarwala*, AIR 1966 SC 955 : (1965) 2 SCJ 111 : (1966) 1 SCA 640 : (1966) 2 SCR 1.

3. POSSESSION OF INSTRUMENT OR MATERIAL (SECTION 235, IPC)

[11007] ● *Possession of instrument or material.*—Possession of instrument or material for the purpose of counterfeiting coins is the visible possibility of excusing physical control over a thing, coupled with the intention of doing so, either against all the world or against all the world except certain persons. There are, three requests of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession unless accompanied by intention; hence if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed—Jowilt's Dictionary of English Law, 2nd Edn. *Possession must be conscious possession—S.D.O. Shiv Sagar* v. *Gopal Chandra*, AIR 1971 SC 1190 : (1972) 4 SCC 263.

[11008] ● *"Possession"—Meaning.*—"Possession" is a polymorphous or term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations on the context of all statutes. *Superintendent Legal Remembrancer* v. *Anil Kumar*, AIR 1980 SC 52 : (1979) 4 SCC 274 : 1979 CrLJ 1390 : (1979) 2 SCWR 334.

[11009] ● *Possession or "occupation" takes various forms.*—Possession or occupation may take various forms and even keeping the household effects by the owner in the premises is act of occupation. *Bimla Devi* v. *Kailash Nandan*, AIR 1984 SC 1376 : (1984) 2 SCC 582.

4. COUNTERFEITING COURT FEE STAMPS (SECTIONS 258, 259, IPC)

[11010] ● *Counterfeiting Court fee stamps.*—The gravamen of the charge was that all the accused conspired and agreed to do the illegal act of counterfeiting of Government stamps and in pursuance of that conspiracy, counterfeited Government stamps and sold the same and they were also found in possession of the counterfeit stamps and some of them were found in possession of instruments and other materials intended to be used for the purpose of counterfeiting stamps. The High Court while confirming the acquitted of other accused, however convicted the appellant under Sections 258, 259, IPC and sentenced him to undergo three years R.I. and a fine of Rs 500/= on each count. The offence is a serious one and the sentence awarded is not excessive. *Joti Parshad* v. *State of Haryana*, AIR 1993 SC 1167 (1167, 1169) : 1993 SCC (Cri) 691 : 1993 CrLJ 413 : (1992) 3 Crimes 256.

[11011] ● ***Counterfeit Court fee stamps—Recovery of from possession of licensed stamp vendor.***—In context of the circumstances in the instant case namely that the appellant admittedly was a licensed stamp vendor and he was found in possession of counterfeit stamps, the explanation of the accused also becomes relevant and important in assessing and appreciating whether he had such knowledge or reason to believe that the stamp was counterfeited. Admittedly, he used to purchase stamps from the treasury and all such transactions are duly recorded in the official registers. There is absolutely no material whatsoever to show that counterfeit stamps were in fact purchased by him from the treasury. A bare allegation by way of an explanation by the appellant that he purchased all the stamps including the counterfeit ones from the treasury appears on the face of it to be false, as he has neither produced registers maintained by him nor did he make even an effort to summon the treasury records. There is no material whatsoever even to probabilise such a plea. In these circumstances the only inference that can be drawn is that he had "knowledge" and "reason to believe" that the stamps which he had in his possession and which he was selling or offering to sell, were counterfeit ones. *Joti Prashad* v. *State of Haryana*, AIR 1993 SC 1167 (1169) : 1993 SCC (Cri) 691 : 1993 CrLJ 413 : (1992) 3 Crimes 256.

5. COUNTERFEITING CURRENCY NOTES OR BANK NOTES (SECTIONS 489A TO 489E, IPC)

[11012] ● ***Counterfeiting currency notes or bank notes.***—In a case of possession of counterfeit currency notes, there was no evidence of any witness to show that the counterfeit notes were of such a nature or description that a mere look at them would convince any person of average intelligence that it was a counterfeit note. No question was put to the accused in his examination under Section 342 (Section 313 of the new Code) of the CrPC, 1898. No presumption could reasonably be drawn, if the notes were not of such a nature that a mere look at them would convince anybody that it was counterfeit. The appellant was not examined in order to find out whether he knew that the notes were of such a nature. It is impossible to sustain the conviction of the appellant in those circumstances. Decision of the Karnataka High Court was reversed. *M. Mammutti* v. *State of Karnataka*, AIR 1979 SC 1705 : (1979) 4 SCC 723 : 1979 CrLJ 1383 : 1979 UJ (SC) 271 : 1979 BBCJ (SC) 54 : 1979 Chand LR (Cri) 186 (SC).

[11013] ● ***Currency notes—Counterfeiting of.***— The analysis of Section 489A revealed that the legislative embargo against counterfeiting enveloped and took within its sweep currency notes of all countries. It was not restricted to 'Indian' currency notes. If the legislative intent was to restrict the parameters of prohibition to 'Indian currency' only, the legislature could have said so unhesitatingly. The expression 'currency note' was large enough in its amplitude to cover the currency notes of 'any' country. When the legislature did not speak of currency notes of India, the Court interpreting the relevant provision of law could not substitute the expression 'Indian currency note' in the place of the expression 'currency note' as had been done by the High Court. The Code not only defined the word 'counterfeit' in very wide terms but a rule of evidence was also prescribed in Expln. 2 to Section 28 of the Code so as to draw an adverse presumption against the maker of the counterfeit article. The expression 'bank note' employed in Section 489 A to 489E of the I.P.C. also took within its sweep an engagement for the payment of money issued by or under the authority of any State or Sovereign power as was evident from the analysis of Section 489A. It would, therefore, cover a Dollar Bill or Dollar Note as well. *State of Kerala* v. *Mathal Verghese*, AIR 1987 SC 33 : (1986) 4 SCC 746 : 1987 CrLJ 308.

[11014] ● ***Sections 489A to 489E, IPC—Object of.***—Sections 489A to 489E, IPC deal with various economic offences in respect of forged or counterfeit currency notes or bank-notes. The object of legislature in enacting these provisions is not only to protected the economy of the country but also to provide adequate protection to currency notes and bank-notes. The currency notes are, in spite of growing accustomedness to the Credit Cards System, still the backbone of the commercial transactions by multitudes in our country. But these provisions are not meant to punish unwary possessors or users. *Umashanker* v. *State of Chhattisgarh*, AIR 2001 SC 3074 (3075) : (2001) 9 SCC 642 : 2001 CrLJ 4696.

[11015] ● ***Mens rea essential to constitute offence under Sections 489B and 489C, IPC.***—A perusal of the provisions contained in Section

489-A to 489-E shows. *Mens rea* of offences under S. 489-B and 489-C, I.P.Code is, "knowing or having reason to believe the currency notes or banknotes are forged or counterfeit". Without the aforementioned *mens rea,* selling, buying or receiving from another person or otherwise trafficking in or using as genuine, forged or counterfeit currency notes or banknotes is not enough to constitute offence under S. 489-B of I.P.C. So also possessing or even intending to use any forged or counterfeit currency notes or banknotes is not sufficient to make out a case under S. 489-C in the absence of the *mens rea.* No material in brought on record by the prosecution to show that the appellant had the requisite *mens rea. Umashanker* v. *State of Chhattisgarh*, AIR 2001 SC 3074 (3075) : (2001) 9 SCC 642 : 2001 CrLJ 4696.

[11016] ● *Counterfeiting currency notes or bank-notes (S. 489-A, IPC).*—The Supreme Court maintaining the conviction of accused, who was already undergoing sentence for a period of 7 years, altered the sentence to imprisonment for a period 10 years. *Uma Shankar Singh* v. *State of Jharkhand*, (2004) 13 SCC 373 : (2006) 1 SCC (Cri) 761.

[11017] ● *"Counterfeiting"—Ingredients of.*— Section 28 defines the word "counterfeiting in very wide terms. The main ingredients of counterfeiting as laid down in Section 28 are :

(1) causing one thing to resemble another thing;

(2) intending by means of that resemblance to practise deception; or

(3) knowing it to be likely that deception will thereby be practised.

Thus, if one thing is made to resemble another thing and the intention is that by such resemblance deception would be practised or even if there is no intention but it is known to be likely that the resemblance is such that deception will thereby be practised, there is counterfeiting. There is no necessity of importing words like "colourable imitation" therein. In order to apply Section 28, what the Court has to see is whether one thing is made to resemble another thing and if that is so and if the resemblance is such that a person might be deceived by it, there will be a presumption of the necessary intention or knowledge to make the thing counterfeit, unless the contrary is proved. "Counterfeit" in Section 28 does not connote an exact reproduction of the original counterfeited. Explanation 2 of Section 28 is of great significance. It lays down a reputable presumption where resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved. *K. Hashim* v. *State of T.N.*, AIR 2005 SC 128 : (2005) 1 SCC 237 : 2005 SCC (Cri) 292 (306) : 2005 CrLJ 143.

[11018] ● *Counterfeiting currency—Notes or bank-notes.*—Sections 489-A to 489-E deal with various economic offences in respect of forged or counterfeit currency notes or banknotes. The object of the legislature in enacting these provisions is not only to protect the economy of the country but also to provide adequate protection to currency notes and banknotes. Section 489-A not only deals with complete act of counterfeiting but also covers the case where the accused performs any part of the process of counterfeiting. Therefore, if the material shows that the accused knowingly performed any part of the process of counterfeiting, Section 489-A becomes applicable. Similarly Section 489-B relates to using as genuine forged or counterfeited currency notes or banknotes. The object of the legislature in enacting this section is to stop the circulation of forged notes by punishing all persons who knowing or having reason to believe the same to be forged do any act which could lead to their circulation. Section 489-C deals with possession of forged or counterfeit currency notes or banknotes. It makes possession of forged and counterfeited currency notes or banknotes punishable. Possession and knowledge that the currency notes were counterfeited notes are necessary ingredients to constitute offence under Sections 489-C and 489-D. The expression "currency notes" is large and wide enough in its amplitude to cover the currency notes of any country. Section 489-C is not restricted to Indian currency note alone but it includes the dollar also and it applies to American dollar bills. The wording of Section 489-D is very wide and would clearly cover a case where a person is found in possession of machinery, instrument or materials for the purpose of being used for counterfeiting currency notes, even though the machinery, instruments or materials so found were not all the materials particular (*sic*) required for the purpose of counterfeiting. *K. Hashim* v. *State of T.N.*, AIR 2005 SC 128 : (2005) 1 SCC 237 : 2005 SCC (Cri) 292 (305-306) : 2005 CrLJ 143.

6. COUNTERFEITING PROPERTY MARK (SECTION 486, IPC)

[11019] ● *Counterfeiting property mark.*— Under Section 28 which defines the word "counterfeit", the offence of counterfeiting has two ingredients, namely, (*a*) that one thing must be caused to resemble another thing, and (*b*) that the act must be done with the intention of practising deception, or with the knowledge that deception is likely to be practiced thereby. Explanation I to Section 28 says that it is not essential to counterfeiting that the imitation should be exact. Explanation 2 lays down the rule of evidence, that when the accused causes his article or goods to resemble that of another, and the resemblance with the original is of such a nature that a person may be deceived thereby, then, unless the accused proves the contrary, it shall be presumed that he did so either with the intention of practicing deception or with the knowledge that deception was likely to be practiced thereby. *State of U.P.* v. *Hafiz Mohammad Ismail*, AIR 1960 SC 669 : 1960 CRLJ 1017 : (1960) 2 SCR 911.

[11020] ● ***Existence of resemblance enough.***—The combined effect of Section 28 and its Explanations is that, when a person is charged with an offence which includes the element of counterfeiting, what is required to be proved is only that the accused caused his goods to resemble the goods of another, and that the resemblance is close enough to deceive any ordinary person. It that is proved, it shall be presumed that the accused caused such resemblance with the guilty intention or knowledge. For the purpose of the Penal Code, there can be counterfeiting even though the imitation is not exact, and there are differences in detail between the original and the imitation, so long as the resemblance is close enough to enable a deception to be practiced thereby. *State of U.P.* v. *Hafiz Mohammad Ismail*, AIR 1960 SC 669 : 1960 CrLJ 1017 : (1960) 2 SCR 901

[11021] ● ***No necessity of importing words—Colourable imitation into definition of counterfeiting.***—When considering the application of Section 28, there is no necessity of importing words like 'colourable imitation' into the definition of 'counterfeiting' in Section 28. When determining the question whether the accused is guilty under Section 486, the Court should not be led away, by the difference in detail between the label or wrapper used on the original product and the label or wrapper used by the accused on his product, and if merely by stressing those differences the Court comes to the conclusion that 'though the wrapper or label used by the accused is a colourable imitation of the wrapper or label on the genuine product, it cannot be regarded as a counterfeit', it is a clear error in law. Such an approach is wrong, because it overlooks the plain language of Section 28. *State of U.P.* v. *Hafiz Mohammad Ismail*, AIR 1960 SC 669 : 1960 CrLJ 1017 : (1960) 2 SCR 901.

[11022] ● ***Causing wrapper or label to reasonable wrapper or Label of genuine product.***—In order to determine the question whether the accused is guilty under Section 486 read with Section 28, what the Court has to see is, whether the accused has caused his wrapper or label to resemble the wrapper or label of the genuine product, and if that is so, whether, even with the differences in detail between the two, the resemblance is close enough to deceive an ordinary person. If the Court is satisfied on both these question of fact, it is bound in law to raise the presumption under Explanation 2 regarding the intention or knowledge of the accused to practice deception or that deception was likely to be praised, unless the contrary is proved by the accused. Thereafter, the Court has to consider whether the accused has proved that his case fell under clauses (*a*) and (*b*) or under clause (*c*) of Section 486, and if it finds that he has not, the Court must hold that the charge under Section 486 has been established. *State of U.P.* v. *Hafiz Mohammad Ismail*, AIR 1960 SC 609 : 1960 CrLJ 197 : (1960) 2 SCR 911.

[11023] ● ***Suggestion of defence at investigation stage.***—Each and every suggestion of the defence at the investigation need not lead the investigator to follow it. Had there been a counter version and the suggestion was that the Investigating Officer had wrongly not recorded a cross FIR it might have been different matter. Various avenues were then open to Kirtan Bhuyan and his co-accused to approach the higher officers in the Police hierarchy or to approach the District Magistrate for the purpose. Furthermore, a criminal complaint could have been filed if the counter version had to be deployed. The suspicion entertained by the defence could, thus, be of no consequences for that alone could not lead to discredit the eye-witnesses to the crime. It was at best a rumour. *Kirtan Bhuyan* v. *State of Orrisa*, AIR 1992 SC 1579 : 1992 CrLJ 2325.

COURSE OF CONDUCT

[11024] ● ***Course of conduct.***—The course of conduct of the parties is of no relevance for the construction of a document which is itself un ambiguous. *Ram Kishorelal* v. *Kamalnarayan*, AIR 1963 SC 890 (897) : 1963 Supp (2) SCR 417.

COURT IDENTIFICATION

[11025] ● ***Court Identification.***—As a general rule the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to list and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to identify the accused who are strangers to them, in the form of earlier identification proceedings. *Heera* v. *State of Rajasthan*, AIR 2007 SC 2425 : (2007) 10 SCC 175 : 2007 CrLJ 3514 (3516) (SC).

COURT MARTIAL
§ (See "ARMY ACT" and "ARMY RULES")

[11026] ● *Court.*—The word "Court in Section 197(2) is not the same as "person" in Section 14(1). The power vested in the sanctioning Government by Section 197(2) is only permissive, and it is not exclusive of the powers vested under Section 14(1) in any other Government. If the sanctioning Government does not choose to exercise its power under Section 197(2) by specifying the Court of trial for an offence as to which it has given sanction, trial of the accused for that offence remains subject to the operation of the other provisions of the Code.

Even when the sanctioning Government has exercised its power of specifying the "Court" before which the trial is to be held, such specification does not touch the question as to who is to be the person to function as such Court, and it is open to the Government of the area in which the offence was committed to decide *where* the trial is to take place, and *who* will be the person to preside over such a trial. *Gopalan, M.K.* v. *State of M.P.*, AIR 1954 SC 362 : 1954 CrLJ 1012 : 1954 SCR 108.

[11027] ● *High Court at request of Govt. confer upon any person power alike to those of Judicial Magistrate.*—Section 13 of the new Code authorises the High Court at the request of the Government to confer upon any person powers alike to those of judicial Magistrates. The old provision in Section 14 of the old Code authorised the State Government to confer upon any qualified person all or any of the powers vested under the Code in a Magistrate of any class, in respect to a particular case or class or classes of cases in specified local areas.

If two contended in the present case that Section 14 violates the guarantee under Article 14 of the Constitution, and in support reliance was placed on the decision of the Court in *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75 : 1952 CrLJ 510. That decision applies only to statutes under which an individual case or group of cases is allotted to a Special Court for trial under a special procedure which is substantially different from the normal procedure under the Code, so that a discrimination arises as between offenders who have committed the same or similar offences. No such discrimination can possibly arise as a result of a trial held by a Special Magistrate appointed under Section 14 because the procedure to be applied at such a trial is entirely the same normal procedure which is prescribed under the Code. A provision of this type which only authorises the Government to invest qualified persons with magisterial powers cannot be said to be discriminatory and is not hit by Article 14. *Gopalan, M.K.* v. *State of M.P.*, AIR 1954 SC 362 : 1954 CrLJ 1012 : 1954 SCA 557 : 1954 SCJ 534 : 1955 SCR 168 : (1954) 2 MLJ 76 : 1954 MWN 564 : 1954 AWR (HC) 392.

[11028] ● *Pronouncement of definitive judgment essential sine qua non of Court.*—The pronouncement of a definitive judgment is considered the essential *sine qua non* of a Court and unless and until a binding or authoritative judgment can be pronounced by a person or a body of persons it cannot be a Court. *Brajnandan Singh* v. *Jyoti Narayan*, AIR 1956 SC 66 : 1956 CrLJ 156 : (1955) 2 SCR 255.

[11029] ● *Court and quasi-judicial tribunal—Distinction.*—What distinguishes a Court from a *quasi*-judicial tribunal is that it is charged with the duties (i) to decide disputes in a judicial manner which involves that the parties are entitled as a right to be heard in support or their claim and to adduce evidence in proof of it (ii) to declare the rights of the parties in a definitive judgment. *Virendra Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : (1955) 2 SCR 1013 : 1956 SCJ 138.

[11030] ● *Returning officer under representation of People Act not Court.*—The Returning Officer appointed under the Act of 1951 is not a "Court" within the meaning of Section 195, CrPC, though he discharged *quasi-judicial* functions, and hence the offence under Section 193 of the Penal Code which was committed before him was not an offence "in or in relation to a proceeding in a Court" within the meaning of Section 195(1)(b), CrPC. That being so, the complaint made by the Returning Officer was only a private complaint under Section 200, CrPC, and not one made under Section 476, CrPC and hence no appeal to the High Court under Section 476-B could lie against such a complaint. Under the circumstances, the order of the High Court rejecting *V*'s appeal under Section 200, and not under Section 476, was perfectly justified and proper. *Virendra Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : 1956 SCJ 138 : 1956 SCA 410.

[11031] ● *Commissioner appointed under Public Servants (Inquiries) Act not Court.*—A Commissioner appointed under the Public Servants (Inquiries) Act, 1850 is not a Court within the meaning of the Contempt of Courts Act, 1952. *Brajnandan Sinha* v. *Jyoti Narain*, AIR 1956 SC 66 : 1956 CrLJ 156 : (1955) 2 SCR 955.

[11032] ● *Fabricating false evidence—Offence of.*—The offence of fabricating false evidence punishable under Section 193 of the Penal Code falls under two parts, the first being one which relates to that offence when committed in or in relation to a judicial proceeding, an the other to the same offence when committed ”in any other case”. Section 195(1)(*b*), CrPC, applies only when the offence committed falls under the first part of Section 193, and not when it falls under its second part. Therefore even when the offence of fabricating false evidence is committed before a tribunal which is *quasi-judicial* in character, and not merely administrative or ministerial, the offence is not one to which Section 195(1)(*b*), CrPC, can apply, because such a tribunal is not a "Court" within the meaning of that expression as used in Section 195. A tribunal is a "Court" only when it has the statutory power to decide as between rival claims and give a definitive and enforceable judgment. *Virendara Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : 1956 SCA 410 : 1956 SCJ 138.

[11033] ● *Senior Subordinate Judge not appellate authority.*—The Senior Subordinate Judge is not the appellate authority contemplate by Section 476-A, read with Section 195(3) of the Code, because his appellate jurisdiction is exercisable only under a special notification; and is not a Court to which appeals would 'ordinarily' lie, within the meaning of Section 195(3), from the orders of the Subordinate Judge. The District Court is the Court of inferior jurisdiction to which such appeals would ordinarily lie, and that Court alone is the proper authority for the exercise of powers under Section 476-A or 476-B. The High Court itself has no power to make the complaint applied for, and it had no jurisdiction, in the exercise of its powers in revision, either to make an order making a complaint or to restore the original order making such a complaint, because the High Court was not the Court contemplated for that purpose by Section 476-A or 476-B or 195(3). All that the High Court was authorised to do in the exercise of its powers of revision was to send the case back to the District Court for disposal according to law. *Kuldip Singh* v. *State of Punjab*, AIR 1956 SC 391 : 1956 SCC 455 : 1956 CrLJ 781 : 1956 SCJ 387 : 1956 SCR 125.

[11034] ● *Magistrate acting under Section 234 of Ajmer—Merwara Municipalities Regulation not act as inferior criminal Court.*—A Magistrate who is designated in a Municipal Act or Regulation as the authority to which the Municipality can apply for recovery of any Municipal tax or of any amount recoverable as if it were a tax is a *persona designata,* and the recovery proceeding before him is a ministerial proceeding, or at best a *quasi-judicial* proceeding of a civil nature. The Magistrate who holds such a proceeding in his capacity as a *persona designata* under the Municipal Act or Regulation does not function as a Magistrate under the Code of Criminal Procedure. That being so, the order made by the Magistrate in such a proceeding is not an order of an "inferior criminal Court" within the meaning of Sections 435 and 439 of the Code, and revision application under Section 439 to the High Court from an order made by the Magistrate in a recovery proceeding under the Municipal Act or Regulation is not competent. *Dargah Committee, Ajmer* v. *State of Rajasthan*, AIR 1962 SC 574 : 1962 (1) CrLJ 507 : (1962) 1 SCJ 583 : (1962) 2 SCR 265 : 1962 MLJ (Cri) 321.

[11035] ● *Sales Tax Officers instrumentalities of State for collection of taxes.*—Sales Tax Officers are the instrumentalities of the State for the collection of certain taxes. Under the Sales Tax Act and the Rules made thereunder they have duties assigned to them for the imposition and collection of taxes and in the process they have to perform many duties which are administrative duties. Merely because these instrumentalities of the State employed for the purpose of taxation have, in the discharge of their duties, to perform certain *quasi-judicial* functions, they are not converted thereby into Courts. They remain the instrumentalities of the State and are within the definition of "State" in Article 12. No doubt, they have certain powers which are similar to the powers exercised by Courts, but that would not make them "Courts" as understood in Section 195 of the Code. Under the Sales Tax Act, as Sales Tax Officer is only an assessing authority and the scheme of the Act shows that the Sales Tax Officer cannot be equated with a Court. *Jagannath Prasad* v. *State of U.P.*, AIR 1963 SC 416 : 1963(1) CrLJ 330 : (1963) 2 SCJ 120 : (1963) 1 SCA 248 : 1963 SCD 167 : (1963) 2 SCR 850 : 1963 ALJ 1 : ILR (1963) 1 All 147 : 1963 MLJ (Cri) 338 : 1963 AnWR (HC) 152 : 1963 ACrR 99 : (1963) 1 ALT 194 : (1963) 14 STC 536.

[11036] ● ***Proceeding before income-tax officer under Section 37(4) of Income Tax 1922 proceeding in Court.***—Proceeding's before an Income-Tax officer under Section 37(4) of the Indian Income-Tax Act, 1922 is a proceeding in any Court within the meaning of Section 195(3), CrPC. *Lalji Haridas* v. *State of Maharashtra*, AIR 1964 SC 1154 : (1964) 2 CrLJ 249.

[11037] ● ***Word "Court" connotation.***—The word "Court" in sub-section (3) of Section 195, CrPC includes not only a civil, revenue or criminal Court but also Courts which are not civil, revenue or criminal Courts. But still to be a Court, the authority in question must satisfy the essential requirements of a Court as settled by established principles. *Lalji Haridas* v. *State of Maharashtra*, AIR 1964 SC 1154 : (1964) 2 CRLJ 249.

[11038] ● ***Magistrate acting as Court subject to revisional jurisdiction.***—The fact that the enquiry does not relate to an offence is not decisive of the question whether the Magistrate is functioning as a Court. There are many proceedings under the Code of Criminal Procedure, such as those under Ss. 133, 144,145 and 488, which do not deal with offences but still it is never suggested that a Magistrate in making an enquiry in respect of matters thereunder is not functioning as a Court. We, therefore, hold that in the circumstances the Magistrate must be held to be acting as a Court. If the Magistrate is acting as a Court, as we have held he is, it is obvious that he is subject to the revisional jurisdiction conferred under Ss. 435 and 439 of the CrPC. *State of Uttar Pradesh* v. *Kaushailiya*, AIR 1964 SC 416 : 1964 CrLJ 304(308) : (1964) 4 SCR 1002.

[11039] ● ***Term 'Court'—Meaning.***—Originally, the term Court meant among other things, the sovereign's place that it had acquired the meaning of the place where justice was administered and had further come to mean the person who exercised judicial functions under the authority derived either immediately or moderately from the sovereign. *Thakur Jugal Kishore* v. *Sitamurhi Central Cooperative Bank Ltd.*, AIR 1967 SC 1494 : 1967 CrLJ 1380.

[11040] ● ***Assistant Registrar discharging function of Registrar.***—The Assistant Registrar discharging functions of the Registrar under Section 48 read with Section 6(2) of the Bihar and Orissa Cooperative Societies Act was a Court. *Thakur Jugal Kishore* v. *State Mushi Central Cooperative Bank Ltd.*, AIR 1967 SC 1494 : 1967 CrLJ 1380.

[11041] ● ***Registrar or Sub-Registrar under Registration Act not Courts.***—The Registrar or Sub-Registrar under Registration Act are not Courts. *Rama Rao* v. *Narayan,* AIR 1969 SC 724 : (1969) 1 SCC 167 : 1969 CrLJ 1064.

[11042] ● ***Obligation to act judicially.***—The obligation to act judicially may not necessarily make an officer a "Court" for example the Registrars nominee under the Maharashtra Cooperative Societies Act, 1960. *Rama Rao* v. *Narayan*, AIR 1969 SC 724 : (1969) 1 SCC 167 : 1969 CrLJ 1064 : (1969) 3 SCR 185.

[11043] ● ***Person filing sworn affidavit not witness.***—The crucial point to be noticed in Section 479-A, CrPC is that it is only a witness who has appeared before the Court who can be proceeded against. Now the appellant did not appear as a witness before the High Court. He undoubtedly filed sworn affidavits but is not possible to hold that by doing so he could be said to have appeared as a witness. Section 479-A, CrPC is, therefore inapplicable and it cannot operate as a bar to the proceedings under Section 476, CrPC. *Chajoo Ram* v. *Radhey Shyam*, AIR 1971 SC 1367 : (1971) 1 SCC 774 : 1971 SCC (Cri) 331 : 1971 CrLJ 1096 (1098).

[11044] ● ***Discretion of officer mentioned in Section 125 Army Act to decide before which Court proceedings to be instituted.***—But in the first instance, discretion is left to the officer mentioned in Section 125, Court Martial (adjustment of Jurisdiction) Rules, 1952 to decide before which Court the proceedings should be instituted. It is only when he so exercises his discretion and decides that the proceedings should be instituted before a Court-Martial, that the provisions of Section 126(1) of the said Act come into operation. If the designated officer odes not exercise his discretion and decides that the proceedings should be instituted before a Court-Martial, the Army Act would not obviously be in the way of a criminal Court exercising its ordinary jurisdiction in the manner provided by law. Then Section 126 of the said Act would not come into operation. From a perusal of Rules 3 and 4 framed by the Central Government under Section 549(1) of the old Code (Section 475(1) of the new Code), the scheme of these two Rules appears to be that the Magistrate shall not proceed to try a military personnel unless he forms an opinion for reasons to be recorded to proceed with the trial without being moved by the competent authority or the Magistrate has been so moved by the competent military authority; but before a Magistrate decides to proceed with the trial without being moved by the competent authority or the Magistrate has been so moved by the competent military authority; but before a Magistrate decides to proceed with the trial without being moved by the competent authority, he is obliged to give a return notice to the Commanding Officer of the accused and is further enjoined not to pass any of the orders enumerated as (a) to (d) in Rule 4, till the expiry of the said period of the notice mentioned in Cls. (1) and (2). Where the designated officer under Section 125 of the said Act, who had the discretion in the first instance to decide that the appellant should be tried before a Court-Martial had decided to the contrary, surrender of the accused to the civil authorities to be dealt with by the latter, after being made aware of the nature of the offence against the appellant, is a clear indication that the decision of the military authorities was that the appellant need not be tried by a Court-Martial and that his trial can take place before the criminal Court. *Joginder Singh* v. *State of H.P.*, AIR 1971 SC 500 : (1971) 3 SCC 86 : 1971 CrLJ 511 : (1971) 2 SCJ 277 : (1971) 2 SCA 517 : 1971 CrAppR (SC) 32 : 1971 MLJ (Cri) 684.

[11045] ● ***Document to be produced or given in evidence in proceeding.***—The document must be produced or given in evidence in a proceeding in any Court. Where, therefore, the Magistrate orders an investigation under Section 156(3) of the Code and the alleged forced receipt is produced by the accused in the inquiry by the police and is then seized by them, then the forged document cannot be held to have been produced in a proceeding before any Court. *Nirmaljit Singh Han* v. *State of W.B.*, AIR 1972 SC 2639 : (1973) 3 SCC 573 : 1973 CrLR (SC) 237.

[11046] ● ***Use of false property mark.***—Though the complainant used the words "Trade mark" at several places in his complaint, it was loosely used by him as it was not registered. His accusation was the use by the accused of a property mark of the complainant with the object of "palming off" to likely purchasers, his scent of inferior quality as if it was the scent made by and belonging to the complainant. As such, the accused committed the offences of using a false property mark and of selling goods marked with a counterfeit property mark. *Sumat Prasad* v. *Sheojanan Prasad*, AIR 1972 SC 2488 : (1973) 1 SCC 56 : 1972 CrLJ 1707.

[11047] ● ***Administration of justice.***—Judicial administration is an integrated function of the judge and cannot suffer any dissection so far maintenance of high standards of rectitude or judicial administration is concerned. The whole set up of a Court is for the purpose of administration of justice, and the control which the Judge exercise over his assistants has also the object of maintaining the purity of administration of justice. These observations apply to all Courts of justice in the land whether they are regarded as superior or inferior Courts of justice. Courts of justice have, in accordance with their constitutions, to perform multifarious function for due administration of justice. Any lapse from the strict standards of rectitude in performing these functions is bound to affect administration of justice which is a term of wider import than mere adjudication of causes from the seat of justice.

In a country which has a hierarchy of Courts one above the other it is usual to find that the one which is above is entrusted with disciplinary control over one below it. Such control is devised with a view to ensure that the lower Court functions properly on its judicial administration. It is therefore as important for the superior Court to be vigilant about the conduct and behaviour of the subordinate Judge as a Judge, as it is to administer the law because both functions are essential for administration of justice. The Judge of the superior Court in whom this disciplinary control is vested functions as much as a Judge in such matters as when he hears and disposes of cases before him. If the Superior Courts neglect to discipline subordinate Courts. They will fail in an essential function of judicial administration. The mere function of adjudication between parties is not the whole of administration of justice for any Court. It is important to remember that disciplinary control is vested in the Court and not in a Judge as a private individual. Control, therefore, is an function as conducive to proper administration of justice as laying down the law or doing justice between the parties. *Baradakanta Misra* v. *Registrar of Orissa High Court*, AIR 1974 SC 710 : (1974) 1 SCC 374 : 1974 SCC (Cri) 128 : 1974 CrLJ 631 (642) : 1974 CrLR (SC) 124.

[11048] ● ***Decision of co-ordinate judge.***—When there was a decision of a co-ordinate Court, it was open to the learned Judge to differ from it but in that case the only judicial alternative was to refer it to a larger Bench and not to dispose of the appeal by taking a contrary view. Judicial discipline as well as decorum should suggest that as the only course. It is true that the decision is pending before this Court in appeal by special leave. That however cannot be sufficient reason for the learned Judge to ignore it and observe that it is "unnecessary to keep back this matter" till the Supreme Court decides the matter. *Eknath Shankarrao Mukkawar* v. *State of Maharashtra*, AIR 1977 SC 1177 : (1977) 3 SCC 25 : 1977 SCC (Cri) 410 : 1977 CrLJ 964 (968) : 1977 CrLR (SC) 352 : (1977) 3 SCR 513.

[11049] ● *Appellate authority under Section 6-C of Essential Commodities Act.*—Even though the State Government is authorised to appoint an appellate authority under Section 6-C of the Essential Commodities Act, 1955, the Legislature clearly indicated that such appellate authority must of necessity be a judicial authority. Since under the constitution the Courts being the repository of the judicial power and the officer presiding over the Court derives his designation from the nomenclature of the Court, even if the appointment is made by the designation of the judicial officer the appellate authority indicated is the Court over which he presides discharging functions under the relevant Code and placed in the hierarchy of the Courts for the purposes of appeal and revision. Viewed from this angle, the Sessions Judge, though appointed an appellate authority by the notification what the state Government did was to constitute an appellate authority in the Sessions Court over which the Sessions Judge presides. The Sessions Judge is constituted under the Code of criminal procedure and indisputably it is an inferior criminal Court in relation to High Court. Therefore against the order made in exercise of powers conferred by Section 6-C of the Essential Commodities Act, a revision application would be to the High Court. *Thakur Das (dead) by LRs.* v. *State of M.P.*, AIR 1978 SC 1 (6) : (1978) 1 SCC 27 : 1978 SCC (Cri) 21 : 1978 CrLJ 1 : 1977 CrLR (SC) 484 : (1978) 1 SCR 732.

[11050] ● *Magistrate master of orderly conduct of Court proceedings.*—The Magistrate is the master of the orderly conduct of Court proceedings and his authority shall not hang limp if his business is stalled by browbeating. It is his duty to clear the Court of confusion, yelling and nerve racking gesture which mar the serious tone of judicial hearing. The officials whose duty is to keep the public place shall on requisition be at the command of the Court to help it run its process smoothly. *Maneka Sanjay Gandhi* v. *Ram Jethmalani*, AIR 1979 SC 468 : (1979) 4 SCC 167 : 1979 SCC (Cri) 934 : 1979 CrLJ 458 (462) : (1979) 2 SCR 378 : 1979 UJ (SC) 120.

[11051] ● *Magistrate releasing person on bail.*—A Magistrate while passing an order releasing an accused person on bail or discharging him in pursuance of a report submitted by the police to the effect that the evidence was insufficient to sustain the charge, acts judicially and therefore is a Court within the meaning of that term as used in clause (b) of Sub-Section (1) of Section 195 of the Code. *Kamalapati* v. *State of W.B.*, AIR 1979 SC 777 : (1980) 2 SCC 91 : 1979 CrLJ 679 : 1979 CrLR SC 128 : (1979) 2 SCR 717.

[11052] ● *Dynamics of judicial process has new "enforcement" dimension.*—The dynamics of the judicial process has a new "enforcement" dimension not merely through some of the provisions of the Criminal Procedure Code, but also through activated tort consciousness. The officers-in-charge and even the elected representatives will have to face the penalty of the law if what the Constitution and follow-up legislation direct them to do are defied or denied wrongfully. The wages of violation is punishment, corporate and personal. *Municipal Council, Ratlam* v. *Vardhichand*, AIR 1980 SC 1622 : (1980) 4 SCC 162 : 1980 SCC (Cri) 933 (945) : 1980 CrLJ 1075 : 1980 CrLR (SC) 543 : (1980) 1 SCR 97 : 1980 CrAppR (SC) 267.

[11053] ● *Counter-petitioner—Prisoner—Court to give him facility of being defended at state expense.*—When counter-petitioner is in prison, the Magistrate trying the case should give him the facility of being defended by counsel now that Article 21 of the Constitution has been reinforced by Article 39(a). Otherwise the order to bind over would be bad and void. The Court must insist on specificity of facts and be satisfied that one swallow did not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference that by confirmed habit, which is second nature, the counter-petitioner was sure to commit the offences mentioned if he was not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, might do deeper injury. *Goplanachari* v. *State of Kerala*, AIR 1981 SC 674 : 1980 Supp SCC 649 : 1981 SCC (Cri) 546 : 1981 CrLJ 337 : 1981 CrLR (SC) 94 : 1981 KLT 108 : 1981 CrAppR (SC) 15 : 1981 ACrC 49 : 1981 Supp SCC 649 : 1981 SCCrR 338.

[11054] ● *In or in relation to proceeding in Court—Meaning of.*—Bail proceedings took place before Magistrate *D* and subsequent proceedings before Magistrate *K* commencing with presentation of challan by Police for prosecution of one *DK*. Both proceedings are parts of or stages of the same integral whole. DK was released on a bail application accompanied by an affidavit purported to have been sworn by one *GRT* as a surety. As the accused failed to appear, *NBW* was issued against him and notice to the surety. Surety appeared and filed a reply in writing contending that he never stood as surety, did not make any affidavit or sign on any application, affidavit or bail bond, that he was a literate while those documents bore thumb-impressions of the surety. After enquiry, the respondent and others were committed for trial and two of the accused convicted under Sections 419, 465 and 471, IPC. *etc.* Bail proceedings and subsequent trial proceedings before the Magistrate are parts, of entire judicial process and as such the offences relating to the surety bond are committed "in or in relation to" the proceedings before Magistrate *K* for the purpose of taking action under Section 476 of the Code. The High Court erred that the Magistrate was not competent to hold a preliminary enquiry under Section 476, CrPC and /or to make a complaint for prosecution of the respondents in respect of the offences for which they were convicted. *State of Maharashtra* v. *S.K. Bannu*, AIR 1981 SC 22 : (1980) 4 SCC 286 : 1980 SCC (Cri) 951 : 1980 CrLJ 1280 : 1980 CrLR (SC) 638 : 1980 CrAppR (SC) 385 : 1981 MLJ (Cri) 166 : (1981) 1 SCJ 244 : 1981 SCCrR 173 : (1981) 1 SCR 694.

[11055] ● ***Filing false affidavit before Rent Central Officer.***—Offence under Section 193, IPC, was alleged for filing a false affidavit before the Rent Control Officer. Rent Control Officer shall be deemed to be a Civil Court within the meaning of Sections 345 & 346, CrPC, 1973 and in view of Section 34(2) of the U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972, shall be a Civil Court for purposes of Section 193, IPC. Compliant by the Court in writing is a pre-condition under Section 195(1)(b)(i) for taking cognizance of such offence by any Criminal Court. If the same is not satisfied, the Court has no jurisdiction to take cognizance. *Chandrapal Singh* v. *Maharaj Singh*, AIR 1982 SC 1238 : (1982) 1 SCC 466 : 1982 SCC (Cri) 249 : 1982 CrLJ 1731 : 1982 CrLR (SC) 126 : 1982 ALJ 507 : 1982 CrAppR (SC) 65 : 1982 ACrR 170 : 1982 UJ (SC) 517 : (1982) 2 SCWR 61.

[11056] ● ***Judgments not to be treated as mere counters in game of litigation.***—"We are afraid that we cannot launch into any inquiry as to what transpired in High Court. It is simply not done Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. 'Judgments cannot be treated as mere counters in the game of litigation." *State of Maharashtra* v. *Ramdas Shriniwas Nayak*, AIR 1982 SC 1249 : (1982) 2 SCC 463 : 1982 SCC (Cri) 478 (481) : 1982 CrLJ 1581.

[11057] ● ***Court bound to accept statement of Judges recorded in judgment.***—We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in the Court. We cannot allow the statement of Judges to be contradicted by statements at the Bar or by affidavit or other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happening s in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (*Per* Lord BUCKMASTER *in Madha Sudan Chowdhri* v. *Chandrabati Chaudhrain*, AIR 1917 SC 30 : 42 2C 527). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice, but, he may not call in question the very fact of making the concession as recorded in the judgment. So the judges record is conclusive. Neither lawyer nor litigant may claim to contradict it except before the judge himself, but no where else. *State of Maharashtra* v. *Ramdas Shrinivas Nayak*, AIR 1982 SC 1249 : (1982) 2 SCC 463 : 1982 SCC (Cri) 478 (481) : 1982 CrLJ 1581 : 1982 CrLR (SC) 328 : (1983) 1 SCR 8.

[11058] ● ***Court cannot insist that accused shall keep on standing during trial.***—Court cannot insist that accused shall keep on standing during trial, particularly when it is long and arduous. All High Courts will take appropriate steps, if not already done, to provide in their respective Criminal Manuals prepared under Section 477(1) of the Code that accused shall be permitted to sit down during trial unless it became necessary to stand up for any specific purpose. *Avtar Singh* v. *State of M.P.*, AIR 1982 SC 1260 : (1982) 1 SCC 438 : 1982 CrLJ 1740.

[11059] ● ***Court of special Judge—Court of original jurisdiction.***—"Shorn of all embellishment the Court of a special Judge is a Court of original criminal jurisdiction. As a Court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the Court. Except those specifically conferred and specifically denied, it has to function as a Court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrate or a Court of Session under the Code it will enjoy all powers which a Court of original criminal jurisdiction enjoys same and except the ones specifically derived. *A.R. Antulay* v. *Ramdas Sriniwas Nayak*, AIR 1984 SC 718 : (1984) 2 SCC 500 : 1984 SCC (Cri) 277 : 1984 CrLJ 647 : 1984 CrLR (SC) 206 : 1984 (1) Crimes 547.

[11060] ● ***Juvenile Courts—Necessity to set up.***—The State Governments must set up Juvenile Courts in each district and they must appoint suitably trained special cadre of Magistrates for dealing with cases against children. Where a complaint is filed or FIR is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more that 7 years, the investigation shall be completed within a period of two months from the date of filing of the compliant or lodging of the FIR and if the investigation is not completed within that time, the case against the child must be treated as closed. If a charge-sheet is filed within 3 months in the case of such an offence, the case must be filed and disposed of within a further period of 6 months at the most inclusive of the time taken up in committal proceedings, if any. If is desirable to have a uniform Children Act throughout India instead of State Acts. *Sheela Barse* v. *Union of India*, AIR 1986 SC 1773 : (1986) 3 SCC 596 : 1986 SCC (Cri) 337 : 1986 CrLJ 1736.

[11061] ● ***Offence under Section 52 of Army Act—Trial by ordinary criminal Court or Court martial.***—In regard to the offence which fall within the purview of S. 70 of the Army Act of 1950, an offender can be tried only by Court-Martial whereas in regard to offences falling within the purview of S. 52 of the said Act, the offences can be tried both by the ordinary Criminal Court as also by the Court-Martial both of which have concurrent jurisdiction. The offences with which the concerned accused were charged before the learned Trial Judge were offences which fell within the scope of S. 52 of the Army Act of 1950 and accordingly the ordinary Criminal Court as also the Court-Martial had concurrent jurisdiction. In order to avoid any conflict of jurisdiction between the criminal Court and the Court-Martial in regard to offenders who are charged with having committed offences which fall under purview of Section 52 of Army Act, 1950, Section 549(1) of the CrPC provides that Central Government may make Rules consistent with CrPC and the Army Act. In pursuance of this provision contained in S. 549(1), CrPC the Central Government has framed Rules known as Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952. R. 3 of the said Rules requires that when a person subject to Military, Naval or Air Force law is brought before a Magistrate on accusation of an offence for which he is liable to be tried by Court-Martial also, the Magistrate shall not proceed with the case unless he is requested to do so by the appropriate Military Authority. On a combined reading of Rr. 3 and 4, it is evident that in case the Magistrate is of the opinion that he should proceed with the case without there being any such request from the appropriate Military Authority, the concerned Magistrate is enjoined to give notice to the Commanding Officer in this behalf. Till the expiry of seven days from the service of such notice on the Commanding Officer, the Magistrate is prohibited from making any order of conviction or acquittal or framing any charges or committing the accused. It is in the background of those provision that the High Court has taken the view that compliance with the procedure prescribed by the Rules is a mandatory requirement and that any proceedings undertaken by the learned Trial Judge without compliance with the aforesaid mandatory procedure would vitiated the trial before the ordinary Criminal Court and the entire proceedings would be rendered null and void. It cannot be said that the Rules framed thereunder are applicable only to the Court presided by the Magistrate and not to a Judge presiding over a special Court. *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Usha Ranjan Roy Choudhury*, AIR 1986 SC 1655 : 1986 Supp SCC 190 : 1986 SCC (Cri) 311 (314, 315) : 1986 CrLJ 1248 : 1986 CrLR (SC) 309 : JT (1986) SC 363 : (1986) 3 Crimes 11.

[11062] ● ***Section 549, CrPC designed to avoid conflict of jurisdiction.***—Section 549(1), CrPC is designed to avoid the conflict of jurisdiction in respect of the last category of offences. The phrase in the said section "is liable to be tried either by a Court to which this Code applies or a Court-Marital" imports that the offence for which the accused is to be tried should be an offence of which cognizance can be taken by an ordinary Criminal Court as well as a Court-Martial. In our opinion the phrase is intended to refer to the initial jurisdiction of the two Courts to take cognizance of the case and not to their jurisdiction to decide it on merits. It is admitted that both the ordinary Criminal Court and the Court-Martial have concurrent jurisdiction with respect to the offences for which the respondent has been charged by the Special Judge. So, S. 549 and the Rules made thereunder are attracted to the case at hand. Having regard to the enunciation of law to this effect it is evident that the ordinary Criminal Court would have no jurisdiction to take cognizance of the case and to try the accused in a matter where the procedure prescribed by the Rules has not been complied with. The initial lack of jurisdiction to take cognizance and try the case would of logical necessity vitiate the trial and the order of conviction and sentence would be liable to be quashed as a result thereof we are therefore unable to accept to the submission urged that even if Rules are applicable having regard to the fact that more than three years have expired from the date of the commission of the alleged offence, the trial is not vitiated. *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Usha Ranjan Roy Choudhury*, AIR 1986 SC 1655 : 1986 Supp SCC 190 : 1986 SCC (Cri) 311 : 1986 CrLJ 1248 : 1986 CrLR (SC) 309 : (1986) 3 SCR 113 : (1986) 3 Crimes 11.

[11063] ● ***Juvenile Court—Meaning of.***—The Juvenile Court has to be manned by a Judicial Officer with some special training. Creation of a Court with usual Judicial Officer and labeling it as Juvenile Court does not serve the requirement of the statute. If that were so, the statutes have no necessity of providing a Juvenile Court. The statutory scheme contemplates a Judicial Officer of a different type with a more sensitive approach-oriented outlook. Without these any Judicial Officer would, indeed, not be competent to handle the special problem of children. *Sheela Barse* v. *Secretary Children Aid Society*, AIR 1987 SC 656 : (1987) 3 SCC 50 : 1987 SCC (Cri) 458 (463) : 1987 CrLR (SC) 29 : JT (1987) SC 58 : (1987) 1 SCR 870 : (1987) 1 UJ (SC) 516.

[11064] ● ***Commission of inquiry not Court for purposes of Section 195, CrPC.***—A Commission of Inquiry appointed by the appropriate Government under S. 3(1) of the Commission of Inquiry Act is not a Court for the purposes of S. 195 of the CrPC. *Baliram Hiray (Dr.)* v. *Justice B.lentin*, AIR 1988 SC 2267 : (1988) 4 SCC 419 : 1988 SCC (Cri) 941 : 1989 CrLJ 306 : 1988 CrLR (SC) 799.

[11065] ● ***Commission of Inquiry fictionally civil Court for limited purpose of proceeding under Section 346, CrPC.***—We are quite clear that the first part of Sub-Section (4) of Section 5 of the commission of Inquiry Act, 1952 cannot be read in isolation but must take its colour from the context in which it appears. It would not be correct to contend that the fiction created by the first part by the words "shall be deemed" to be a "Civil Court" is full and complete in itself. The purpose and object of the legal fiction created by the first part of sub-S (4) of Section 3 of the said Act is reflected in the second. A Commission of Inquiry is, therefore, fictionally a Civil Court for the limited purpose of proceeding under S. 482 of the old Code or under S. 346 of the present Code. A *fortiori* the legal fiction contained in sub-s. (5) of S. 5 of the said Act which relates to the proceedings before the Commission is necessarily confined to offences that are punishable under Ss. 193 and 228 of the IPC and does not extend beyond that. *Baliram Hiray (Dr.)* v. *Justice B. Lentin*, AIR 1988 SC 2267 : (1988) 4 SCC 419 : 1988 SCC (Cri) 941, 967 : 1989 CrLJ 306 : 1988 CrLR (SC) 799.

[11066] ● ***Case diary—Use by accused.***—The provision embodied in S. 172(3) of the code cannot be characterised as unreasonable or arbitrary. Under S. 172 (2) the Court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The Legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. It has empowered the Court to call for any such relevant case diary, if there is any inconsistency or contradiction arising in the context of the case diary the Court can use the entries for the purpose of contradicting the Police Officer as provided in S. 172(3) of the CrPC. Ultimately there can be no better custodian or guardian of the interest of justice than the Court trying the case. No Court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. The petitioner claims an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the Court has used these entries for the purpose of contradicting such police officer. It cannot be said that unless such unfettered right is conferred an recognised, the embargo engrafted in S. 172 (3) of the Code would fail to meet the test of reasonableness. *Mukund Lal* v. *Union of India*, AIR 1989 SC 144 : 1989 SCC (Cri) 606 : 1989 CrLJ 872 : 1989 CrLR (SC) 29 : JT 1988 (4) SC 143.

[11067] ● ***Offence to be investigated or inquired into or tried according to provisions of CrPC.***—Under S. 26(b) of the CrPC, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is mentioned in this behalf, may be tried by the High Court or other Court by which such offence is shown in the First Schedule to be triable.

The combined operation of Ss. 4(2) and 26(*b*) of the CrPC is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Criminal Procedure Code where the enactment which creates the offence, indicates no special procedure. The provisions of the Criminal Procedure Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code. *Directorate of Enforcement* v. *Deepak Mahajan*, AIR 1994 SC 1775 : (1994) 3 SCC 440 : 1994 SCC (Cri) 785 (819, 821) : 1994 CrLJ 2269.

[11068] ● ***Custodial death or police torture—Evidence and proof.***—The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case often results in miscarriage of justice and makes the first delivery system a suspect. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it re-inforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The Court must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society. The Court must, therefore deal with such cases in a realistic manner and with the seniority which they deserve. The Courts should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape. So that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed. *State of M.P.* v. *Shyam Sunder Trivedi*, (1995) 4 SCC 262 : 1995 SCC (Cri) 715 (725, 726).

[11069] ● ***Railway claims tribunal not Court.***—Railway claims Tribunal is not a Civil Court and therefore Limitation Act would not apply. *Birla Cement Works* v. *G.M. Western Railway*, AIR 1995 SC 111 : 1994 Supp (3) SCC 424.

[11070] ● ***Word "Court" connotation.***—The word "Court" is a word of very wide connotation. In legal parlance it indicates a place where justice is judicially administered. But for the purposes of Section 195(1)(b) of the Code we have to go by the definition of the word "Court" contained in sub-section (3) of Section 195 (1)(b) of the Code. The term "Court" had a wider meaning under the old Code but under the new Code it is given a restricted meaning. Now the word "Court" does not include all the judicial bodies and authorities constituted for administering justice. The Courts, contemplated now by Section 195 are only Civil Courts, revenue Courts and Criminal Courts and those tribunals which are required by the Acts constituting them to be Courts for the purposes of Section 195, CrPC. *Keshab Narayan Banerjee* v. *State of Bihar*, AIR 2000 SC 485 : (2000) 1 SCC 607 : 2000 SCC (Cri) 272 (278) : 2000 CrLJ 595.

[11071] ● ***Compensation officer appointed under Bihar Land Reforms Act not Court.***—A Compensation Officer appointed under the Bihar Land Reforms Act, 1950 is not a Court for the purposes of Section 195(1)(b), CrPC. Though a proceeding before him is to be considered as a judicial proceeding and is of a civil nature, it is of a limited nature. His appointment is under a special law and for a specific and limited purpose. His main function is to determine the amount of compensation. The amount of compensation is to be determined by finding out the rent and then making certain additions, subtractions and multiplication as provided in the Act itself. He cannot determine the questions of title or rights of the rival claimants except for the purpose of determining who should be paid compensation. The party claiming compensation cannot lead evidence as regards the value of his interest in the estate or tenure. Nor does a Compensation Officer has the discretion to decide independently the amount of compensation on the basis of such evidence. He lacks the essential attribute of evidence which a Civil Court possesses. Thus, considering the nature of his jurisdiction and the extent of powers conferred on him, it has to be said that he is not a Civil Court. Determination of compensation for divesting a tenure holder or an intermediary of his right in the estate or tenure is not a matter pertaining to revenue. For that reason he is not a Revenue Court also. *Keshab Narayan Banerjee* v. *State of Bihar*, AIR 2000 SC 485 : (2000) 1 SCC 607 : 2000 SCC (Cri) 272 (278) : 2000 CrLJ 595.

[11072] ● ***Registrar or Sub-Registrar under Indian Registration Act not Court.***—A Registrar or Sub-Registrar under the Indian Registration Act, 1877 is not Court within the meaning of that word in clause (b) of Section 195(1), CrPC 1973

In the former Court the Registrar as well as Sub-Registrar had been expressly excluded by the words " but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1977". Sub-section (3) of Section 195 of the Code of CrPC makes such words superfluous, because under that clause a Court means only a civil criminal or Revenue Court and includes only a new category known as Tribunal. *Keshab Narayan Banerjee* v. *State of Bihar*, AIR 2000 SC 485 : 2000 SCC (Cri) 272 : 2000 CrLJ 495.

[11073] ● ***Rules 39, 40 and 102, Army Rules, 1954—Interpretation.***—A combined reading of Rules 39, 40 and 102 of the Army Rules, 1954 suggest that an officer who is disqualified to be a part of Court-Martial is also disqualified from acting and sitting as a Judge-Advocate at the Court-Martial. It follows, therefore, that if an officer lower in rank than the officer facing the trial cannot become a part of the Court-Martial, the officer of such rank would be disqualified for acting as a Judge-Advocate at the trial before a General Court-Martial. Accepting a plea to the contrary, would be invalidating the legal bar imposed upon the composition of the Court in sub-rule (2) of Rule 40. In other words, a Judge-Advocate appointed with the Court-Martial should not be an officer of a rank lower than that of the officer facing the trial unless the officer of such rank is not (having due regard to the exigencies of public services) available and the opinion regarding non-availability is specifically recorded in the convening order. *Union of India* v. *Charanjit S. Gill*, AIR 2000 SC 3445 : (2000) 5 SCC 742.

[11074] ● ***Court-Martial proceedings—Nature.***—The Court-Martial proceedings deal with the penal aspect of the misconduct while the proceedings under the Central Rules deal with the disciplinary aspect of the misconduct. The two proceedings do not overlap. *Union of India* v. *Sunil Kumar Sarkar*, AIR 2001 SC 1092 : (2001) 3 SCC 414.

[11075] ● ***Arbitrator not Court within the meaning of Section 195, CrPC.***—An Arbitrator cannot be termed to be a Court within the meaning of Section 195, CrPC and as such question of applicability of Section 340, CrPC does not and cannot arise. *Manohar Lal* v. *Vinesh Anand*, AIR 2001 SC 1820 : (2001) 5 SCC 407 : 2001 SCC (Cri) 1322 (1333) : 2001 CrLJ 2044.

[11076] ● ***Objection to membership of Court-Martial—Disposal of.***—*Navy Act, 1957, Sections 101, 102, 103, 105, 77, 97.*—The steps taken before the stage is reached under Section 104 of the Act for administering oath or affirmation to the President and the Members of the Court-Martial, are taken at the pre-trial stage. Though the proceedings commence before the Court-Martial for compliance with the requirements of Sections 101, 102 and 103 of the Act, the trial commences only after the President and the Members of the Court-Martial are administered oath as required by Section 104 of the act and the accused is produced before the Court-Martial. Sub-section (3) of Section 101 directs the Trial Judge Advocate to read out the warrant for assembling the Court and the names of officers who are exempted from attending together with the reasons for such exemption. After the warrant is read out, the Trial Judge is required to read out the names of the officers composing the Court. It shall then ask the prosecutor whether he objects to any of them. If any objection is made by the prosecutor the same has to be disposed of. However, if the prosecutor has no objection, the Trial Judge Advocate shall ask the accused if he objects to any Member of the Court. It would, thus, appear that before the trial commences, objections to membership of the Court have to be considered with a view to ensure fairness of trial and to avoid charge of bias against any of the Members of the Court-Martial. Section 102 lays down the provisions, which shall apply to the disposal of objections raised by the prosecutor as well as the accused. cl. (*a*) provides that any Member may be objected to on a ground, which affects his competency to act as an impartial judge, and the Trial Judge Advocate may reject summarily without reference to the Members of the Court any objection not made on such ground. Section 103 refers to any further objection respecting the constitution of the Court-Martial. It is, therefore, open to the accused to raise further objections on other grounds respecting the constitution of the Court-Martial, and for this purpose he may urge the ground of breach of any of the provisions of the sub-sections of Section 97 of the act, or any other objection which he has respecting the constitution of the Court-Martial. These objections have to be decided under Section 103 by the Court-Martial, which must mean all the Members of the Court-Martial, who are entitled to sit as a Court after the disposal of objections, if any, under Section 102 of the Act. *Union of India* v. *Shivendra Bikaram*, AIR 2003 SC 2481 : (2003) 6 SCC 359 : 2003 SCC (Cri) 1343 : 2003 CrLJ 3028.

[11077] ● ***Objections to constitution of Court-Martial—Consideration of.***—Reading the provisions contained in Section 102 & 130 together the scheme of the Act appears to be that in the first instance the Court has to consider whether any of its member is disentitled to sit as a member of the Court martial on the ground that he is not competent to act as an impartial judge. No other objection is to be entertain at this stage. Therefore, when an objection to any member is raised on a ground other than the ground, which affects his competency to act as an impartial judge, the trial Judge Advocate is authorized to reject the same summarily without reference to the members of the Court martial. But if any member is objected to on the ground, which affects his competency to act as an impartial judge, the trial Judge Advocate has no discretion in the matter and he must place the matter before the Court, which must consider the objection in accordance with the procedure laid down in clauses (b) to (e) of Section 102. Whether there is any merit in the objection, is not a matter to be considered by the trial Judge Advocate, since he is not vested with the jurisdiction to decide such objections. That power has to be exercised by the Court itself. The only authority that is given to the trial Judge Advocate under clause (a) of Section 102 is to reject at that stage all other objections without reference to the members of the Court martial which are not on a ground which affects the competency of a member to act as an impartial judge. This is because such other objections may be considered later after the constitution of the Court is first finalized after disposal of objections to membership of the Court martial on the ground, which affects the competency of any member to act as an impartial judge. The scheme of the Act, therefore, is to provide for two stages at which the objections to the constitution of the Court martial have to be considered. Section 102 clarifies that at that stage only those objections have to be considered which proceed on a ground, which affects the competency of any member to act as an impartial judge. All other objections to the constitution of the Court have to be considered after the objections on the grounds specified in clause (a) of Section 102 of the act are disposed of. Those other objections have to be disposed of in the manner laid down under Section 103 of the Act. *Union of India* v. *Shivendra Bikaram Singh*, AIR 2003 SC 2481 : (2003) 6 SCC 359 : 2003 CrLJ 3028 : (2003) 3 Crimes 17 (SC).

[11078] ● ***Non-production of records.***—The respondent challenged the order convening General Court of Martial in writ petition. Despite several opportunities to appellant, records were not produced on the ground of being destroyed. *Held*, According to Rules records relating to Court-Martial proceedings should be retained only for 7 years. The respondent filed the writ petition within seven years. Despite the matter was sub-judice before the Court, the records were alleged to have been destroyed. In absence of records, it cannot be determined effectively as to whether the appellant had applied the mind or not. The High Court was justified in quashing the order convening the General Court-Martial. *Union of India* v. *Ex-Major Sudershan Gupta*, 2009 (9) SCR 584 : (2009) 6 SCC 298 : JT 2009 (14) SC 99.

COURT MARTIAL (APPEAL) ACT, 1968

[11079] ● ***Court Martial (Appeal) Act, 1968.***—The Court Martial appellate Court has power to determine any question necessary to be determined to do justice and also has power to order production of documents and witnesses. *Prithipal Singh Bedi* v. *Union of India*, AIR 1982 SC 1413 : 1982 (3) SCC 140 : 1982 SCC (Cri) 642 : 1982 CrLJ 647 : 1982 CrLR (SC) 524.

[11080] ● ***Expression of opinion.***—Any expression of opinion by trial Court regarding petitioner will not be taken into consideration by the Courts in trial by way of appeal or revision arising out of that trial. *Jiwan Mal Kochar* v. *Union of India*, AIR 1983 SC 1102 : 1983 CrLR (SC) 453 : 1983 UJ(SC) 852 : 1983 (2) Crimes 587.

[11081] ● ***Interrogation not to mean inflicting injuries.***—Interrogation does not mean inflicting injuries, while it should make the investigation effective and as such torturing a person and using third degree methods are contrary to law. *Bhagwan Singh* v. *State of Punjab*, AIR 1992 SC 1689 : (1992) 3 SCC 249 : 1992 CrLJ 3144 : 1992 CrLR (SC) 454.

COURT'S POWERS AND DUTIES

[11082] ● ***Court's powers and duties.***—If at the trial of a murder case it is shown that persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as consisting a serious infirmity in the proof of the prosecution case. In such a case if the ends of justice require, the Court may even examine such witnesses by exercising its power under Section 540, CrPC but to say that in every murder case, the Court must scrutinize the police diary and make a list of witnesses whom the prosecutor must examine is virtually to suggest that the Court should itself take the role of a prosecutor. *Darya Singh* v. *State of Punjab*, AIR

1965 (SC) 328 : (1965) CrLJ 350 : (1964) 2 SCJ 319 : 1964 SCD 87.

[11083] ● ***Duty of Court in the matter of appreciating evidence.***—The Criminal Courts holding trial under the Code of Criminal Procedure have to bear in mind the provisions of Section 342-A of the Code of Criminal Procedure and to take anxious care that in appreciating the evidence on the record and the circumstances of the case, their mind is not influenced by failure on the part of the accused to give evidence. *Hargun Sunder Das Godeja* v. *State of Maharashtra*, AIR 1970 SC 1514 : (1970) 1 SCC 724 : 1970 SCC (Cri) 284 : 1970 CrLJ 1391 : 1970 SCD 790 : 1970 SC CrR 422.

[11084] ● ***Recalling witness.***—The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. In this case, there was no material upon which the Court could be so satisfied. The Magistrate rightly disallowed the prayer for recalling the witness in question. *Mohd. Hussain Umar Kachra* v. *K.S. Dalip Singhji*, AIR 1970 SC 45 : (1969) 3 SCC 429 : 1970 CrLJ 9 : (1970) 1 SCJ 149.

[11085] ● ***Appreciation of evidence.***—No doubt, in cases of party faction, there is generally speaking, a tendency on the part of the prosecution witnesses to implicate some innocent persons also along with the guilty ones, but normally where the general substratum of the occurrence cannot be held to arouse, any reasonable doubt of suspicion about its having taken place, then the prosecution witnesses, provided they are held to have witnessed the occurrence and to be in a position to identify the assailants, are ordinarily not to be assumed to have left out the actual offender or the guilty persons. Although the witnesses for the prosecution are in such circumstances prove to exaggerate the culpability of the actual assailants as also to extend the participation in the occurrence to some possible innocent members of the opposite party as well, the Court has to sift the evidence and after a close scrutiny with anxious care and caution to try to come to a judicial conclusion as to who out of the accused persons can be safely considered to have taken part in the assault. As pointed out in *Deep Chand* v. *State of Haryana* the maxim *falsus in ure falsus omnibus* is not a sound rule to apply in the conditions in this country and, therefore, it is the duty of the Court in cases where a witness has been found to have given unreliable evidence in regard to certain particulars to scrutinize the rest of his evidence with care and caution. If the remaining evidence is trustworthy and the substratum of the prosecution case remains intact, then the Court should uphold the prosecution case to the extent it is considered safe and trustworthy. *Ranbir* v. *State of Punjab*, AIR 1973 SC 1409 : (1973) 2 SCC 444 : 1973 SCC (Cri) 858 : 1973 CrLJ 1120 : 1973 CrLR (SC) 488 : (1973) 2 SCWR 25 : 1973 Cur LJ 721 : 1973 SCD 723.

[11086] ● ***Where prosecution leads two sets of evidence.***—The function of the Court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the Court must see the material on record to find whether there is any, reliable and trustworthy evidence upon the basis of which it is possible to have found the conviction of the accused and to hold that he is guilty of the offence with which is charged. If in a case the prosecution leads two sets of evidence, each one of which contradict and strikes at the other and shows it to be unreliable, the result would unnecessarily be that the Court would be left with no reliable an trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation. *Harchand Singh* v. *State of Haryana*, AIR 1974 SC 344 : (1974) 3 SCC 397 : 1974 CrLJ 366 : 1973 CrLR (SC) 628.

[11087] ● ***Rules 44(g) and 45 of PFA Rules not violative of Article 14 of constitution.***—In no view can the discretion of the Government, exercised after listening to the technical counseling of the Central Committee, be castigated as arbitrary and capricious are as unreasonable. So long as the exercise of power is not smeared by bad faith, influenced by extraneous considerations, uniformed by relevant factors, and is within the limits of reasonableness it becomes out of bounds for judicial re-evaluation. Where expertise of a complex nature is expected of the State in framing rules, the exercise of that power, not demonstrated as arbitrary must be presumed to be valid as reasonable restriction on the fundamental rights of the citizen and judicial review must halt at the frontiers. The Court cannot re-weigh and substitute its notion of expedient solution. Constitutionality not chemistry, abuse not error, is our concern and the executive has not transgressed limits at all here. Within the wide judge-proof areas of policy and judgment open to Government, if they makes mistakes, correction is not in Court but elsewhere. That is the comity of constitutional jurisdictions in our jurisprudence. We cannot evolve a judicial policy on medical issues or food additives and should refuse to invalidate Rules 44 (g) and 47 on the mystic may be and happy hopefuls held up before us by the appellant. *Pyarali K. Tejani* v. *Mahadao Ramchandra Donge*, AIR 1974 SC 228 : (1974) 1 SCC 167 : 1974 CrLJ 313 : 1973 CrLR (SC) 758.

[11088] ● ***Evidence—Appreciation of.***—Unless the exaggeration and falsehood in the evidence are on points destructive of the substance of the prosecution story, it is the Court's duty to sift the evidence, separating truth form falsehood, and come to its conclusion about the guilt or innocence of the persons accused of the offence. Exaggeration or falsehood on points which do not touch the core of the prosecution story are not to be given undue importance, provided, of course, there is trustworthy evidence supporting the real substance and core of the prosecution case. After going through the judgment of the trial Court we cannot help observing that the real test. *Dharamdas* v. *State of U.P.*, AIR 1974 SC 2195 : (1973) 2 SCC 216 : 1973 SCC (Cri) 765 : 1973 CrLJ 1181 : 1973 CrLR (SC) 421 : (1973) 1 SCWR 808 : 1973 SCD 568.

[11089] ● ***Appreciation of evidence—Duty of Court.***—In case where the large number of persons are involved and in the commotion some persons cause injuries to others and the evidence is of a partisan character, it is often safer for the Judge of fact to be guided by the compass or probabilities along the rock ribbed contours of the case converging on the heart of the matter. Once the Court goes astray from the basic features of the case, it is apt to lose itself in the labyrinths of immaterial details, sultory discussion and vacillation arising from unfounded suspicious. This is exactly what has happened in the instant case. Despite the pains taken and the conscientious effort put into write an elaborate judgment, the trial Judge had, as it were, missed the wood for the trees. The Learned Judges of the High Court were, therefore, right in discarding altogether the basically wrong "scheme of approach" adopted by the trial Court, and in analysing the evidence in their own way. *Bava Hajee Homsa* v. *State of Kerala*, AIR 1974 SC 902 : (1974) 4 SCC 479 : 1974 CrLJ 755 : 1974 CrLR (SC) 31.

[11090] ● ***Communal riot—Murder—Partisan witness.***—The High Court had found that the appellant had serious injuries on his body. We think that the High Court had not given due importance to this fact and had dismissed the statement of the appellant that he had only a stick with him, without examining the credibility of this version supported by the fact that only a stick not get up. The injury on the body belies the whole prosecution case that a body of persons had fallen upon and done him to death and that a Dhariya blow was inflicted by the appellant in the course of that attack. It is not uncommon in case of a communal nature to find witnesses coming forward to depose falsely about an attack by a person who is believed to be guilty. Apparently, this is why the witnesses had tried to involve the appellant whose participation in the occurrence seemed to them to be established by his having been found lying on the road in an injured condition. This may be enough to convince unsophisticated persons of his complicity in the murder of. But, a Court of justice has to sift and analyse evidence very carefully so as to determine whether the case against an accused person is established beyond reasonable doubt. This is particularly in a case with a communal background in which partisan witnesses may depose falsely out of a mistaken or misplaced sense of a group loyalty. *Aher Bhagu Jetha* v. *State of Gujarat*, AIR 1974 SC 292 : (1974) 2 SCC 653 : 1973 CrLJ 343 : 1974 CrLR (SC) 30.

[11091] ● ***Appeal from conviction—Appreciation of evidence.***—It was repeatedly emphasised by the learned counsel for the appellant that the post-mortem examination report disclosed that the small intestine as well as the large intestine of the deceased contained faecal matter and were distended with gas whereas the stomach was found empty. It was submitted before as that it was quite unnatural, that a healthy villager, even though his age was estimated by the Doctor as 60 years found enormously mentioned as so in the judgment of the High Court or in any case that he would not defalcate until that time during the day when there was nothing in evidence that he was suffering from constipation we found that would not eat until 1 p.m. during the day, although Doctor PW-8 who performed the post-mortem examination and Manchanda were examined at the trial no question was put by either side to elucidate whether the contents of the small intestine and the large intestine could remain in that condition until 1 p.m. during the day assuming that the deceased was quite healthy. It is precisely questions of this kind which, even if the prosecution or the defence Counsel omit to put them, the trial Court could and should have put to the Doctors to clear up the position. If the trial Court had failed to consider their importance, the High Court could have and should have taken further evidence on this matter under S. 540, CrPC. In a criminal case, the fate of the proceeding cannot always be left entirely in the hands of the parties. The Court has also a duty to see that essential questions are not so far as reasonably possible, left unanswered. We find it very difficult to believe that a case with death sentence, a matter of such significance, which was noticed by the trial Court, was not raised at all by Counsel for the appellants. In any event, it ought to have been dealt with by the High Court after taking appropriate additional expert medical evidence under S. 540 read with S. 428, CrPC if that was considered necessary before deciding it. The case is remanded. *Raghunandan* v. *State of U.P.*, AIR 1974 SC 463 : (1974) 4 SCC 186 : 1974 SCC (Cri) (358, 359) : 1974 CrLJ 453 : 1974 CrLR (SC) 195 : (1974) 3 SCR 92 : (1974) CrAppR (SC) 79.

[11092] ● ***Cross-case—Evidence in one not to be considered in another.***—It is difficult to comprehend as to how the High Court could decide the appeal before it by taking into account evidence recorded in another case, even though it might be what is loosely called a cross-case. It is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. Even in other cases this cannot be done unless the parties are agreed that evidence in one case may be treated as evidence in the other. Much more so in criminal cases would this be impermissible is doubtful whether the evidence in one criminal case can be treated as evidence in the other, even with the consent of the accused. The judgment of the High Court must, therefore, be set aside and we must proceed to consider whether, on the evidence recorded in the present case without looking into the evidence record in the other cross-case the conviction and sentence recorded against the appellants can be sustained. *Mithulal* v. *State of Madhya Pradesh*, AIR 1975 SC 149 : (1975) 3 SCC 529 : 1975 CrLJ 236 : 1974 CrLR (SC) 702 : (1974) 2 SCWR 592 : 1974 UJ (SC) 777 : 1974 CrAR 370.

[11093] ● ***Appreciation of evidence—Court to make attempt to separate grain from chaff.***—It is true that there are as many as eight witnesses who are alleged to have seen the occurrence and they have given a parrot-like version of the entire case regarding the assault on the deceased by the various accused persons. All these witnesses have with one voice and with complete unanimity implicated even the four accused persons acquitted by the High Court, equally with the appellants making absolutely no distinction between one and the other. A perusal of the evidence of the prosecution witnesses would show that the prosecution case against the appellants and the four accused is inextricably mixed up that it is not possible to sever one from the other. It is true that, as laid down by this Court in *Twinglee Ariel* v. *State of Madhya Pradesh* and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff the truth from the falsehood. yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff, because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply. We are satisfied that in the facts of the present case, having regard to the partisan and interested evidence of the prosecution witnesses who can implicate the appellants and the four accused equally with regard to the assault on the deceased it is not possible to reject the prosecution case with respect to the four accused and accept it with respect to the other five appellants. If all the witnesses could in one breathe implicate the four accused who appear to be innocent, then one cannot vouchsafe for the fact that even the acts attributed to Balaka Singh, Joginder Singh, Pritam Singh, Darbara Singh and Jarnail Singh may have been conveniently made to suit the needs of the prosecution case having regard to the animus which the witnesses as also Banata Singh bore against the appellants. In these circumstances, therefore, we are satisfied that in view of finding of the High Court that the FIR was a belated document having come into existence much latter that the time it is said to have been recorded and which adds the names of the fours accused against whom the prosecution case is absolutely identical with the appellants, the case of the appellants cannot at all be distinguished from that of the four accused in any respect. If the case against the four accused fails, then the entire prosecution will have to be discarded and it will not be possible for this Court to make out a new case to convict the appellants as has been done by the High Court. *Balaka Singh* v. *State of Punjab*, AIR 1975 SC 1962 : (1975) 4 SCC 511 : 1975 CrLJ 1734 : 1975 UJ (SC) 529.

[11094] ● ***Duty of prosecution and Court.***—The approach of the Courts below in reconstructing a story different from the one propounded by the prosecution and then convicting the appellant on that basis, is clearly erroneous. It was never the prosecution case that there was a fight or pitched battle between two parties. According to the prosecution, the occurrence was only a one-sided affair, that P.W. Kashiram was forcibly pulled out and taken from his house by the three accused to a distance of 80 feet, and there assaulted. In the FIR, Devisingh made no mention whatever of the injuries received by the accused side. At the trial also, the prosecution witnesses brazenly refused to concede that the appellant or his companion Manohar had received any injury at the time of occurrence. Contrary to what these prosecution witnesses had stated, the Courts have come to the conclusion that these injuries, three of which were incised wounds were received by the accused side, in the course of a free fight, at the hands of the complainant party. The prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the Court, on its own make out a new case for the prosecution and convict the accused on that basis.. *Bhagirath* v. *State of Madhya Pradesh*, AIR 1976 SC 975 : (1976) 1 SCC 20 : 1976 CrLJ 706 : 1975 CrLR (SC) 560.

[11095] ● ***Appeal against acquittal.***—"The approach of the trial Judge could not be said to be a judicial approach. Prepossessed by suspicion, he smelled something sinister in the evidence of each and every witness examined by the prosecution. Instead of logical ratiocination, he depended for his conclusions on speculation and conjectures. This is apparent from his repeated observations that he was not impressed by the demeanour of the witnesses, although he did not make any note whatever of such demeanour. Even in his judgment he did not reveal with particularity the nature of the "demeanour" that led him to doubt the veracity of the witnesses. We want to say no more. Suffice it to say that the view of the evidence taken by the learned trial Judge was not reasonably possible, and the High Court was fully justified in reversing the acquittal of the appellant". *Abdul Majid, Abdul Rehman, Abdul Samad, Aminmiya* v. *State of Gujarat*, AIR 1976 SC 1782 : (1976) 4 SCC 351 : 1976 SCC (Cri) 625 : 1976 CrLJ 1382 : 1976 CrLR (SC) 260 : 1976 UJ (SC) 652 : 1976 SC Cri 299 : 1976 CrAppR (SC) 247 : 1976 Guj Cr 211.

[11096] ● ***Conspiracy of all witnesses to implicate innocent person from.***—It is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version. Where it is not possible to disengage the truth from falsehood, to sift the grain from the chaff and the truth and falsehood are so inextricably mixed together that it is difficult to separate them, if one tries to do so, it will amount to reconstructing a new case for the prosecution which cannot be done in a criminal case. *Lakshmi Singh* v. *State of Bihar*, AIR 1976 SC 2263 : (1976) 4 SCC 394 : 1976 CrLJ 1736 : 1977 CrLR (SC) 76.

[11097] ● ***Not expedient to permit continuance of proceedings for lying complaint in regard to state matter.***—In the present case after about 10 years of the alleged incident, the State succeeded in restoring its application which had been dismissed for default. We do think that is not expedient in the interest of justice that a compliant should be laid against the appellant after so many years. We think that the laying of a complaint at this belated stage would make the prosecution a veritable prosecution. Shri Kohli lead counsel for the University very vehemently contended that the appellant had obtained a decree against the University for a large amount by making a false statement on oath and, therefore the interest of justice required that a compliant should be laid against him. He submitted that unless a compliant was laid the University would not be able to get back its money from the appellant. We are not prepared to agree with Sri Kohli. It is not the function of the Court, hearing an application under Section 476, CrPC to cater to the acrimonious and vengeful attitudes taken up by the parties and to advance their interest elsewhere. It will of course be open to the University to take suitable steps by filing a suit of so advised to recover the money paid under the decree. *K.N. Mishra* v. *Jiwagi University*, AIR 1981 SC 174 : 1981 SCC (Cri) 356 : 1980 Supp SCC 415.

[11098] ● ***Death sentence—Reduction of.***—Friedman in his *Law in Changing Society* stated that, "State of criminal law continues to be—As it should be—A decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. *Friedman in his law changing society.*

It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in Courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon. *Mahesh* v. *State of M.P.*, AIR 1987 SC 1346 : (1987) 3 SCC 80 : 1987 SCC (Cri) 379 : 1987 CrLJ 1073 : (1987) 2 SCR 710.

[11099] ● ***Court to award proper sentence.***—Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. *Sevak Perumal* v. *State of T.N.*, AIR 1991 SC 1463 : (1991) 3 SCC 471 : 1991 SCC (Cri) 724 : 1991 CrLJ 1845 : 1991 (2) Crimes 515.

[11100] ● ***Circumstantial evidence.***—In the instant case, the circumstances lend ample support to the case set up in defence which is not an after thought it being that the appellant fined shots only in exercise of his right of his private defence of his person and his brother. Presumably, the appellant might have thought that Virendra Pal Singh who was lying with severe injuries outside the house and who could not get up and enter into the house was dead and might have entertained, in such circumstances, a reasonable apprehension of imminent danger to his and to his brothers life. Both the Courts below have not adverted to these important and telling circumstances surrounding the case but had proceeded on the ground that one of the persons of the prosecution party was dead. *Nagendra Pal Singh* v. *State of U.P.*, AIR 1993 SC 950 : 1993 SCC (Cri) 896 (900) : 1993 CrLJ 190.

[11101] ● ***Death sentence—Object.***—In the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue. *Jashubha Bharatsinh Gohil* v. *State of Gujarat*, (1994) 4 SCC 353 : (1994) SCC (Cri) 1193 : 1994 (2) Crimes 92.

[11102] ● ***Imposition of appropriate punishment.***—In *Dhananjoy Chatterjee* v. *State of W.B.*, (1994) 2 SCC 220 : 1994 SCC (Cri) 358 this Court has observed that a shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. *Dhananjoy Chatterji* v. *State of W.B.*, (1994) 2 SCC 220 : 1994 SCC (Cri) 358.

[11103] ● ***Death sentence—Nature and gravity of crime.***—It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for the extremely heinous crime of murder perpetrated in a very brutal manner without any provocation; most deterrent punishment is not given, the case of deterrent punishment will lose its relevance. *Rajiv* v. *State of Rajasthan*, (1996) 2 SCC 175 : 1996 SCC (Cri) 225.

[11104] ● ***Role of Public Prosecutor.***—The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The Courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hyper-technical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The Courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind. *State of Himachal Pradesh* v. *Lekh Raj*, AIR 1999 SC 3916 : 2000 SCC (Cri) 147 : 2000 CrLJ 44.

[11105] ● ***Appreciation of evidence.***—Investigation and prosecution are two different facts in the administration of criminal justice. The role of Public Prosecutor is inside the Court, whereas investigation is outside the Court. Normally, the role of Public Prosecutor commences after investigating agency presents the case in the Court on culmination of investigation. Its exception is that Public Prosecutor may have to deal with bail applications moved by the parties concerned at any stage. Involving the Public Prosecutor in investigation is injudicious as well as pernicious in law. At any rate, no investigating agency can be compelled to seek opinion of a Public Prosecutor under the orders of Court.

Here is a case wherein the Investigating Officer concerned is directed by the High Court to take back the case from the Court whereat it was laid by him after completing the investigation and he is further directed to consult the Public Prosecutor and submit a fresh charge-sheet in tune with the opinion of the Public Prosecutor.

The High Court has committed an illegality in directing the final report to be taken back and to file a fresh report incorporating the opinion of the Public Prosecutor. Such an order cannot stand legal scrutiny. Same is set aside. *R. Sarala* v. *T.S. Velu*, AIR 2000 SC 1731 : 2000 SCC (Cri) 823 : 2000 CrLJ 2453.

[11106] ● ***Community acting through State and Public Prosecutor entitled to justice.***—Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of a guilty man's escape though some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate Court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action under Section 391. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of he section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence, it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of discretion of the appellate Court. As reiterated supra, the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions. *Zahira Habibullah Sheikh* v. *State of Gujarat*, (2003) 11 SCC 486 : 2004 SCC (Cri) 999 (1028-29).

[11107] ● ***Fill lacuna in prosecution case.***—It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not 'fill the lacuna in the prosecution case'. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up. *P. Chhaganlal Daga* v. *M. Sanjay Shaw*, (2003) 11 SCC 486 : 2004 SCC (Cri) 183 (185)

[11108] ● *Power to receive evidence—Exercise of.*—The power to receive evidence in exercise of Section 311 of the Code could be exercised "even if evidence on both sides is closed" and such jurisdiction of the Court is dictated by the exigency of the situation and fair play. The only factor which should govern the Court in exercise of powers under Section 311 should be whether such material is essential for the just decision of the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word "any" at different places. This would also indicate the widest range of power conferred on the Court in that matter. *P. Chhaganlal Daga* v. *M. Sanjay Shaw*, 2004 SCC (Cri) 183 (185).

[11109] ● *Power of Court under Section 165—Evidence Act complementary to its power under Section 311, CrPC.*—If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine, by becoming a participant in the trial evincing intelligence, active interest and eliciting all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to the proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of Court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective *i.e.* truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on th part of the prosecuting agency. The prosecuto who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicia system, and Courts could not also play into th hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness

The power of the Court under Section 165 o the Evidence Act is in a way complementary to it power under Section 311 of the Code. The sectio consists of two parts *i.e.* : (i) giving a discretion t the Court to examine the witness at any stage, an (ii) the mandatory portion which compels th Court to examine a witness if his evidenc appears to be essential to the just decision of th Court. Though the discretion given to the Court i very wide, the very width requires a corresponding caution.

The objection of Section 311, CrPC is t enable the Court to arrive at the truth irrespectiv of the fact that the prosecution or the defence ha failed to produce some evidence which i necessary for a just and proper disposal of th case. The power is exercised and the evidence i examined neither to help the prosecution nor th defence, if the Court feels that there is necessity t act in terms of Section 311 but only to subserv the cause of justice and public interest. It is don with an object of getting the evidence in aid of a just decision and to uphold the truth. It is not tha in every case where the witness who had give evidence before Court wants to change his min and is prepared to speak differently, that the Cour concerned should readily accede to such reques by lending its assistance. If the witness wh deposed one way earlier comes before the appellate Court with a prayer that he is prepared t give evidence which is materially different fro what he has given earlier at the trial with th reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context a to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it. It is not that the power is t be exercised in a routine manner, but being a exception to the ordinary rule of disposal o appeal on the basis of records received in exceptional cases or extraordinary situation the Cour can neither feel powerless nor abdicate its duty t arrive at the truth and satisfy the ends of justice The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonablenes and genuineness in the prayer, the same has to b accepted, at least to consider the worth, credibility and the acceptability of the same on merit of th material sought to be brought in.

Ultimately, *ad nauseam* the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case. *Zahira Habibullah Sheik* v. *State of Gujarat*, 2004 SCC (Cri) 999 (1027, 1028).

[11110] ● ***Sentence to be proportionate to gravity of offence.***—Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle McGautha* v. *State of California*, 402 US 183 : 281 Ed 2nd 711 (1971) that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of the gravity of the crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished. *State of M.P.* v. *Babbu Barkare*, AIR 2005 SC 2846 : (2005) 5 SCC 413 : 2005 SCC (Cri) 1335 (1339-40) : 2005 CrLJ 3117 : 2005 (2) Crimes 245.

[11111] ● ***Imposition of appropriate sentence.***—Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, *e.g.* where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system. *State of M.P.* v. *Babbu Barkare*, AIR 2005 SC 2846 : (2005) 5 SCC 413 : 2005 SCC (Cri) 1335 (1340) : 2005 CrLJ 3117 : 2005 (2) Crimes 245.

[11112] ● ***Rape—Sentence—Discretion of Court to award.***—In order to exercise the discretion of reducing the sentence the statutory requirement is that the Court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the Court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated. What is applicable to trial Courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court is that the accused belonged to rural areas. The same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative. *State of M.P.* v. *Babbu Barkare*, AIR 2005 SC 2846 : (2005) 5 SCC 413 : 2005 SCC (Cri) 1335 (1341) : 2005 CrLJ 3117 : 2005 (2) Crimes 245.

COURT WITNESS

[11113] ● ***Court witness.***—The witness was declared hostile by the prosecution and thus the prosecution did not choose to rely upon him in support of the prosecution case. In the Sessions Court, he was not examined as a witness, but was later called as a Court witness. In these circumstances, therefore, his testimony does not inspire much confidence. *Mahadeo* v. *State of Maharashtra*, AIR 1980 SC 102 : (1980) 1 SCC 490 : 1980 CrLJ 189.

CRIME

[11114] ● ***Crime.***—Crime is a revolt against the whole society and an attack on the civilization of the day. Order is the basic need of any organised civilized society and any attempt to disturb that order affects the society and the community. The distinction between breach of "law and order" and disturbance of "public order " is one of degree and the extent of reach of the activity in question upon the society. In their essential quality, the activities which affect "law and order" and those which disturb "public order" may not be different but in their potentiality and effect upon even tempo of the society and public tranquillity there is a vast difference. In each case, therefore, the Courts have to see the length, magnitude and intensity of the questionable activities of a person to find out whether his activities are prejudicial to maintenance of "public order " or only "law and order". *Harpreet Kaur* v. *State of Maharashtra*, AIR 1992 SC 979 : (1992) 2 SCC 177 : 1992 SCC (Cri) 370 (379) : 1992 CrLJ 769 : JT (1992) SC 502.

[11115] ● ***Word "crime" dated back to 14th century.***—Earliest reference to the word "crime" dates back to 14th century when it conveyed to the mind something reprehensible, wicked or base. Any conduct which a sufficiently powerful section of any given community feels to be destructive of its own interest, as endangering its safety, stability or comfort is usual regarded as heinous and it is sought to be repressed with severity and the sovereign power is utilised to prevent the mischief or to punish anyone who is guilty of it. Very often crimes are creations of government policies and the Government in power forbids a man to bring about results which are against its policies. *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844 : (1994) 3 SCC 394 : 1994 SCC (Cri) 740 (758) : 1994 CrLJ 1605.

[11116] ● ***No distinction between Crime and Tort.***—In a way there is no distinction between crime and tort, inasmuch as a tort harms an individual whereas a crime is supposed to harm a society. But then, a society is made of individuals, harm to an individual is ultimately harm to society. *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844 : (1994) 3 SCC 394 : 1994 SCC (Cri) 740 (759) : 1994 CrLJ 1605.

[11117] ● ***Crime—Characteristics.***—A crime presents these characteristics: (1) it is a harm, brought about by human conduct which the sovereign power in the State desires to prevent; (2) among the measures of prevention selected is the threat of punishment; and (3) legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so. (*See pp.* 1 to 5 of *Kenny's Outlines of Criminal Law*, 19th Edn., for the above propositions.) *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844 : (1994) 3 SCC 394 : 1994 SCC (Cri) 740 (759) : 1994 CrLJ 1605.

[11118] ● ***Protection of society—Basic reason of treating some acts as crime.***—Protection of society is the basic reason of treating some acts as crime. Indeed it is one of the aims of punishment. Where there is no feeling of security, there is no true freedom. What is the effect of the same cannot be described better that what was stated by Hobbes in *Leviathan*, which is : "There is no place for industry, because the fruit thereof is uncertain; and consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instrument of moving and removing such things as require much forces; no knowledge of the face of the earth; no account of time; no arts, no letters; no society; and which is worst of all continual fear and danger of violent death; and the life of a solitary, poor, nasty, brutish and short." *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844 : (1994) 3 SCC 394 : 1994 SCC (Cri) 740 (759) : 1994 CrLJ 1605.

[11119] ● ***Crime—Definition of.***—The very definition of 'crime" depends on the values of a given society. To establish this what has been stated by Justice Krishna Iyer in his book *Perspectives in Criminology, Law and Social Change* (1980) at pp. 7 and 8 may be noted : "What is a sex crime in India may be sweetheart virtue in Scandinavia. What is an offence against property in a capitalist society may be a lawful way of life in a socialist society. What is permissible in an affluent economy may be a pernicious vice in a indigent community. Thus, criminologists must have their feet all the time on terra firm a." *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844 : (1994) 3 SCC 394 : 1994 SCC (Cri) 740 (759, 760) : 1994 CrLJ 1605.

[11120] ● ***Crimes—Created or abolished with passage of time.***—Crimes can also be created or abolished with the passage of time, as stated at p. 7 of R.S. Cavan's *Criminology* (2nd Edn.). This has been elucidated by the author by stating that in democracy where individual opinion can express itself freely through speaking, writing and elections, public opinion becomes the final arbiter in placing the opprobrium of crime upon a specific type of behaviour and when a law is not accepted the police may attempt to enforce it against public opinion, but gradually the police yield to the pressure of public opinion, which they perhaps share. The law may remain on the statute books but be ignored by all. Whereas when the public opinion supports the law, many pressures of an informal nature are brought against the violators to aid and lessen the police action. *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844 : (1994) 3 SCC 394 : 1994 SCC (Cri) 740 (760) : 1994 CrLJ 1605.

[11121] ● ***Criminology—Crime prevention measures—Moulding of.***—The subject as to "how crime can be prevented" is too wide and cannot be discussed meaningfully within the parameters available to us in this judgment. The treatise on *Crime and its Prevention* edited by Stephen Lewin, Editor, World Week Magazine, would show how complicated the subject is. At p. 217 of the 3rd printing (1973) mention has been made about seven steps for combating a crime. We may not go into the details. Sufficient to say that the steps relate to different disciplines. Professor Dr. N.V. Paranjape. Professor and Head of the Department of Postgraduate and Research in Law and Dean faculty of Law. Jabalpur University, in his book *Criminology and Penology* has something to say in Chapter VI about causes of crime, knowledge of which is necessary to combat and prevent the same. Dr. Paranjape states that in the absence of a single theory of crime-causation, criminologists have offered different explanations to justify their own theory as an explanation of delinquent behaviour. There are, however, some writers who seem to be convinced that no single theory of crime can fully explain the causes of crime. They therefore prefer a multiple approach to criminal behaviour which suggests that crime is generated not as a result of one solitary factor but as a consequence of a combination of such factors. Justice Krishna Iyer also in his aforesaid book has dealt with this aspect in Chapter 2 captioned "*The Pathology of Indian Criminology*". In his usual inimitable style, he has painted the crime scenario on a broad canvas and has mentioned about various factors which lead to commission of crimes. Reference may also be made to the White Paper presented to the Parliament by Her Majesty's Government in 1990 on the subject of "*Crime, Justice and Protecting the Public*", published as Cm. No. 965. The White Paper had summarised main proposals as below : "A coherent legislative framework for sentencing with the severity of the punishment matching the seriousness of the crime and a sharper distinction in the way the Courts deal with violent and non-violent crimes;

New powers for the Crown Court to impose longer sentences for violent and sexual offences, if this is necessary to protect the public from serious harm;

New powers for all Courts to combine community service and probation and to impose curfews on offenders so that more offenders convicted of property crimes can be punished in the community;

Reducing the maximum penalties for theft and burglary, except burglaries of people's homes, which can be a very serious matter;

Requiring the Courts to consider a report by the probation service before giving a custodial sentence and to give reasons for imposing a custodial sentence, except for the most serious offences;

Encouraging more use of financial penalties, especially compensation to victims and fines which take account of offender's means;

Making the time actually served in prison closer to the sentence ordered by the Court, replacing the present system of remission and parole by new arrangements which ensure that all prisoners serve at least half their sentences in custody; prisoners serving sentences of 4 years or more would not get parole if this would put the public at risk;

New powers for the Courts to return released prisoners to custody up to the end of their sentence, if they are convicted of a further imprisonable offence;

All prisoners serving sentences of a year or more to be supervised by the probation service on release, with new national standards for supervision;

Wider powers for the Courts to make parents take more responsibility for crimes committed by their children;

More flexible powers for the Courts to deal with 16 and 17 year old offenders;

Changing the juvenile Courts, to youth Courts, to deal with defendants under the age of 18."

It would be of some interest in this connection to point out that as late as 1991 a need was felt by the British Government to issue a Royal Warrant for issuing a commission to examine the effectiveness of the criminal justice in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who were innocent. For this purpose, the Royal Warrant wanted the commission to make its recommendation on various aspects of the criminal justice. The commission submitted its report in July 1993 and it contains recommendations which number 352 and have been mentioned at pp. 188 and 219 of the Report issued by Her Majesty's Stationery Office. The difficult task of crime prevention would not therefore permit the solution to be put into a strait-jacket; it has to be modulated an moulded as per time and clime. *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844 : (1994) 3 SCC 394 : 1994 SCC (Cri) 740 (760,761) : 1994 CrLJ 1605.

[11122] ● ***Punishment whether reduces crime— Doubtful.***—We have also to know as to whether infliction of punishment can be said to have a direct relation with the reduction of criminal propensity. It would be enough in the context to state that it has been seriously doubted whether imposition of even death sentence has been able to reduce the number of murders. BHAGWATI, J. as he then was, in his dissenting judgment in the case of *Bachan Singh* v. *State of Punjab* has brought home well this aspect of the matter. While on the question of sentencing it would be rewarding to note that sentencing has been regarded as a subtle art of healing, and the legal and political people uninstructed in the humanist strategy of reformation, fail even on first principles. Justice Iyer in his aforesaid book has further stated at p. 47 that it puzzles a Judge or a Home Secretary to be told in Shavian paradox:

> "If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries."

What was said by Victor Hugo in his *Les Miserables* is instructive:

> "We shall look upon crime as a disease. Evil will be treated in charity instead of anger. The change will be simple an sublime. The cross shall replace the scaffold reason is on our side, feeling is on our sid and experiment is on our side." *P. Rathinam* v. *Union of India*, AIR 1994 SC 1844 (1994) 3 SCC 394 : 1994 SCC (Cri) 74 (761,762) : 1994 CrLJ 1605.

[11123] ● ***Crime—Connotation.***—What i crime in a given society at a particular time has wide connotation as the concept of crime keeps on changing with change in political, economic and social set-up of the country. Various legislations dealing with economic offences or offences dealing with violation of industrial activity o breach of taxing provision are ample proof of it The constitution makers foresaw the eventuality Therefore they conferred such powers both o central and State legislatures to make laws in this regard. Such right includes power to define crime and provide for its punishment. Use o expression "including all matters included in the Indian Penal Code at the commencement of the constitution" is unequivocal indication of comprehensive nature of this entry. It further empowers the legislature to make laws, not only in respect o matters covered by the India Penal Code but any other matter which could reasonably and justifiably be considered to be criminal in nature. Terrorist and disruptive activity is criminal i content, reach and effect. The Central and State Legislature both, therefore, are empowered to legislatee in respect of such an activity in exercise of the power covered under Entry I of the concurrent list. But this power is otherwise controlled and restricted by the latter part of the entry. *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899 (1076) : 1994 CrLJ 3139.

[11124] ● ***Crime—Meaning of.***—Crime can be defined as an act that subjects the doer to legal punishment. It may also be defined as the commission of an act specifically forbidden by law, it may be an offence against morality or social order. *T.K. Gopal* v. *State of Karnataka*, AIR 2000 SC 1669 : (2000) 6 SCC 168 : 2000 SCC (Cri) 1037 (1045) : 2000 CrLJ 2286 : 2000 CrLR (SC) 456 : 2000 CrAppR (SC) 366.

[11125] ● ***Sentence of death or life imprisonment.***—In dealing with criminal matters where death sentence is prescribed in law as the punishment for the crimes, the Courts are required to answer new challenges as the object lies to be not only to protect the society at large but impose appropriate sentence lest there should be tendency to undermine the public confidence in criminal justice delivery system. Crimes, like the one before us cannot be looked upon with equanimity because they tend to destroy one's faith in all that is good in life. A young man was given opportunity to learn gold-smithery. He was once sent away for alleged act of theft. Yet again, on the day of incident, he was permitted to accompany the deceased old man and as per the evidence, he accompanied the deceased in his house. The reward of that kindness is murder of old man and his wife along with three daughters including one whose marriage was fixed after two months. Hence, even though we reduce the death penalty, we think that punishment should be sufficient so as to have deterrent effect as well as one that gives no further chance to the accused for relapsing into the crime and becoming danger to the Society. *Bhagwan* v. *State of Rajasthan*, AIR 2001 SC 2342 : (2001) 6 SCC 296 : 2001 SCC (Cri) 1095 (1102, 1103) : 2001 CrLR (SC) 425.

[11126] ● ***Crime—Mode of proof.***—For a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances, be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. *Liyakat* v. *State of Uttaranchal*, AIR 2008 SC 1537 : (2008) 16 SCC 148 : 2008 CrLJ 1931 (1933) (SC).

[11127] ● ***Crime is an offence against society.***—Every crime is considered to be an offence against the society as a whole and not only against an individual even though an individual might have suffered thereby. It is, therefore, the duty of the State to take appropriate action against the offender. *Vinay Devanna Nayak* v. *Ryot Seva Sahakari*, AIR 2008 SC 716.

[11128] ● ***Thoughts even criminal in character, often involuntary.***—Thoughts even criminal in character, often involuntary, are not crimes but when they take a concrete shape of an agreement to do or caused to be done an illegal act or an act which is not illegal, by illegal means then even if nothing further is done, agreement would rise to a criminal conspiracy. *Mir Naqvi Askari* v. *C.B.I.*, 2009 (13) SCR 124 : JT 2009 (11) SC 191.

CRIMINAL AND CIVIL REMEDY

[11129] ● ***Criminal and civil remedy.***—"There are a large number of cases where criminal law and civil law can run side by side. The two remedies are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of the Criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrong doer in cases like arson, accidents, *etc.* It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import." *Pratibha Rani* v. *Suraj Kuamr*, AIR 1985 SC 628 : (1985) 2 SCC 370 : 1985 SCC (Cri) 180 : 1985 CrLJ 817 : 1985 CrLR (SC) 149 : 1985 CrAppR (SC) 96 : (1985) 3 SCR 191 : (1985) 1 Crimes 614. **TO THE SAME EFFECT :** (1) *Medchalo Pharma (P) Ltd.* v. *Biological E Ltd.*, AIR 2000 SC 1869 : (2000) 3 SCC 269 : 2000 SCC (Cri) 615 : 2000 CrLJ 1487.

[11130] ● ***Breach of Trust both civil wrong and criminal offence.***—Though a case of breach of trust may be both a civil wrong and a criminal offence but there would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. The present case in one of that type where where, if at all, the facts may constitute a civil wrong and the ingredients of the criminal offences are wanting. Having regard to the relevant documents, including the trust deed as also the correspondence following the creation of the tenancy, the submissions advanced on behalf of the parks the natural relationship between the settler and the trustee as mother and son and fall out in their relationship and the fact that the wife of co-trustee was no more interested in the tenancy, it must be held that the criminal case should not be continued. *Madhavrao Jiwajirao Seindia* v. *Sambhajirao Chandrojirao Angre*, AIR 1988 SC 709 : (1988) 1 SCC 692 : 1988 CrLJ 853.

[11131] ● ***Many cheating committed in course of commercial or money transaction.***—Merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. In the instant case it may be that the facts narrated in the complaint would as well reveal a commercial or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact many a cheating were committed in the course of commercial and also money transactions. *Rajesh Bajaj* v. *State NCT of Delhi*, AIR 1999 SC 1216 : (1999) 3 SCC 259 (263) : 1999 SCC (Cri) 426 : 1999 CrLJ 1833.

[11132] ● ***Civil profile not sufficient to denude of its criminal outfit.***—".... merely because an act has a civil profile is not sufficient to denude it of its criminal outfit .... we are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement, but the arbitrator cannot conduct a trial of any act, which amounted to an offence, albeit the same act may be connected with the discharge of any function under the agreement. Hence those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases". *Trisuns Chemical Industry* v. *Rajesh Agarwal*, AIR 1999 SC 3499 : (1999) 8 SCC 686 : 1999 CrLJ 4325.

CRIMINAL COURT

[11133] ● ***Criminal Court.***—Once a judgment has been pronounced by a High Court either in excuse of its appellate or revision jurisdictions no review or revision can be entertained against that judgment as there is no provision in the criminal Procedure Code which would enable the High Court to review the same or to exercise the revisional jurisdiction. The Court entertained the application for quashing the proceedings on the ground that a subsequent application to quash would not amount to review or revise on order made by the Court. The provision of Section 561-A of the old Code cannot be invoked for excuse of a power which is specifically prohibited by the Court. *U.J.S. Chopra* v. *State of Bombay*, AIR 1955 SC 633 : 1955 CrLJ 1410.

[11134] ● ***Magistrate acting under Section 234 of Ajmer Merware Municipalities—Regulation not act inferior criminal Court to High Court.***—The Magistrate who holds proceedings in his capacity as a *persona designata* under Section 34 of the Ajmer Merware Municipalities Regulations, 1925 does not function as a Magistrate under the Code of Criminal Procedure. That being so, the order made by the Magistrate in such a proceeding is not an order of an inferior "Criminal Court" within the meaning of Sections 435 and 439 of the Code and revision application under Section 439 to the High Court from an order made by the Magistrate in a recovering proceedings under the Municipal Act or Regulation is not competent. *Dargah Committee, Ajmer* v. *State of Rajasthan*, AIR 1962 SC 574 : 1962 CrLJ 507 : (1962) 1 SCJ 583 : (1962) 2 SCR 265.

[11135] ● ***Order passed under Section 488 CrPC—Summary order.***—The order passed in a application filed under S. 488 of the CrPC i summary order which does not finally determine the rights and obligations of the parties thereto. I is an order made in a proceeding under a provision enacted with a view provide a summary remedy for providing maintenance, and for preventing vagrancy. The decision of the Crimina Court that there was a marriage between Barbara and Sethurathinam and that it was valid marriage will not operate as decisive in any civil proceeding between the parties for determining those question. It is made clear that civil Court in hearing the proceeding initiated by Sethurathinam will decide it as evidence which may be produced before the Court uninfluenced by the decision of High Civil Court as to the factum of the ceremony of marriage or as to the validity of a marriage Between a Hindu male and a Christian female. *S* *Sethurathinam* v. *Barbara*, (1971) 3 SCC 923 1972 SC (Cri) 171 (172).

[11136] ● ***Examination of witnesses—Court's power to ask questions.***—If a criminal Court is to be an effective instrument in dispensing justice the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. And the Judge may ask any question, in any form, at any time, of any witness or of the parties, about any fact, relevant or irrelevant. But no question would frighten or bully the witness. Nor the Judge must expose any hint of his partisanship. Nor any question should coerce, confuse or intimidate the witness. *Ram Chander* v. *State of Haryana*, AIR 1981 SC 1036 (1981) 3 SCC 191 : 1981 SCC (Cri) 683 : 1981 CrLJ 609.

[11137] ● ***Offence under Section 193, IPC of filing false affidavits before Rent Control Officer.***—Offence under Section 193, IPC was alleged for filing a false affidavit before the Rent Control Officer. Rent Control Officer shall be deemed to be a civil Court within the meaning of Sections 345 and 346, CrPC, 1973 and in view of Section 34(2) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 shall be a Civil Court for purposes of Section 193, IPC. Complaint by the Court in writing is a pre-condition under Section 195 (i)(b) for taking cognizance of such offence by any criminal Court. If the same is not satisfied, the Court has no jurisdiction to take cognizance. *Chandrapal Singh* v. *Maharaj Singh*, AIR 1982 SC 1238 : (1982) 1 SCC 466 : 1982 SCC (Cri) 249 : 1982 CrLJ 1731 : 1982 CrLR (SC) 126.

[11138] ● ***Murder Trial—Evidence.***—Every person who witnesses a murder reacts in his own way. Some are stunned become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as for removed from the spot as possible. Yet others rush to the rescue of the victim even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic unimaginative way. *Rana Pratap* v. *State of Haryana*, AIR 1983 SC 680 : (1980) 3 SCC 8 : 1983 CrLJ 1272 (1274).

[11139] ● ***Witnesses to serious crime do not react in normal manner.***—The witnesses to a serious crime may not react in a normal manner nor do they act uniformly. The horror sticken witnesses at a distardly crime or an act of egregious nature may react differently. Then course of conduct may not be of ordinary type in the normal circumstances. The Court, cannot therefore reject their evidence merely because they have behaved or reacted or an unusual manner. *Appabhai* v. *State of Gujarat*, AIR 1988 SC 696 : 1988 Supp SCC 241 : 1988 CrLJ 848 (851).

[11140] ● ***Wrongful possession of property.***—The appellant had joined the services of M/s. Rallis India Ltd. on 10.3.1965. He had occupied a residential flat. He resigned on 15.7.1986. The Rallis India Ltd., initiated proceedings in January, 1987 against the appellant under S. 408, IPC and S. 630 of the Companies Act for the continued occupation of the appellant in the said flat. The Magistrate, by his order dated 12.10.1994, found the appellant guilty of offence under S. 630 of the Companies Act and directed restitution of the flat.

The Trial Court after considering the entire evidence recorded the findings by his judgment and decree dated June 9, 1995 holding that the Company failed to prove that they are the tenant in respect of the suit premises. They had not given the premises to the appellant under leave and licence agreement, as pleaded by them in the plaint. The Company failed to prove that the appellant is a liecensee of the suit premises. It also failed to prove that the premises were given to the appellant *in lieu* of his service. On the other hand, the appellant proved that he is a monthly tenant of the premises with the landlords.

The civil Court after full dressed trial recorded the finding that the appellant had not come into possession through the company but had independent tenancy rights from the principal landlord and therefore, the decree for eviction was negatived. The findings, recorded by the Criminal Court, stand superseded by the findings recorded by the Civil Court. Thereby, the findings of the Civil Court get precedence over the findings recorded by the Trial Court, or particular in summary trial for offences like Section 630 of the Companies Act.

The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the Trial Court and neither the finding of the Civil Court get nor the decree becomes inoperative.

In these circumstances it cannot be held that the appellant has been in wrongful possession of the property entailing his conviction and punishment under S. 630 of the Companies Act and requiring handing over of the possession of the flat. *V.M. Shah* v. *State of Maharashtra*, AIR 1996 SC 339 : (1995) 5 SCC 767 : 1995 SCC (Cri) 1077 : JT 1995 (6) SC 433.

[11141] ● ***Conflicting finding of Civil and Criminal Courts.***—As between the Civil Court and the criminal proceedings, the criminal matters should be given precedence. No hard and fast rule can be laid down but the possibility of conflicting decisions in the Civil and Criminal Courts is not a relevant consideration. Law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other or even relevant except for certain limited purposes, such as sentence or damages. The only relevant consideration is the likelihood of embarrassment. Another relevant factor to be noted is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should await till everybody concerned has forgotten all about the crime. Public interest demands that criminal justice should be swift and it should ensure that the guilty is punished while the events are still fresh in public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case may make some other course more expedient and just. Therefore, each case has to be considered on its own facts. *V.M. Shah* v. *State of Maharashtra*, AIR 1996 SC 339 (1995) 5 SCC 767.

[11142] ● ***Appearance by non-advocate.***—The work in a Court of law is a serious and responsible function. The primary duty of Criminal Court is to administer criminal justice. Any lax or wayward approach, if adopted towards the issues involved in the case, can cause serious consequences for the parties concerned. It is not just somebody representing the party in the Criminal Court who becomes the pleader of the party. In the adversary system which is now being followed in India, both in civil and criminal litigation. It is very necessary that the Court gets proper assistance from both sides. *T.C. Mathai* v. *District and Sessions Judge Thiruvanthapuram*, AIR 1999 SC 1385 : (1999) 3 SCC 614 : 1999 SCC (Cri) 455 (458, 459) : 1999 CrLJ 2092 : 1999 CrLR (SC) 499 : JT 1999 (2) SC 494.

[11143] ● ***Evidence of eye-witness.***—Criminal Courts should not expect a set reaction from any eye-witness on seeing an incident like murder. If five persons witness one incident there could be five different types of reactions from each of them. It is neither a tutored impact nor a structured reaction which the eye-witness can make. It is fallacious to suggest that PW 11 would have done this or that on seeing the incident. Unless the reaction demonstrated by an eye-witness is so improbable or so inconceivable from any human being petted in such a situation. It is unsafe to dub his reactions as unnatural. *State of Karnataka* v. *K. Yaiappa Reddy*, AIR 2000 SC 185 (189) : (1999) 8 SCC 715 : 2000 CrLJ 400 : 1999 CrLR SC 723.

[11144] ● ***High Court cannot review its own judgment except to correct clerical or arithmetical error.***—The Code of Criminal Procedure does not authorise the High Court to review its judgment or order passed either in excuse of its appellate, revisional or original jurisdiction. Section 362 of the Code prohibits the Court after it has signed its judgment or final order disposing of case from altering or reviewing the said judgment or order except to convict a clinical or arithmetical error. This prohibition is complete and no criminal Court can review its own judgment or order after it is signed. *State of Kerala* v. *M.M. Manikantan Nair*, AIR 2001 SC 2145 : (2001) 4 SCC 752 : 2001 SCC (Cri) 808 (810) : 2001 CrLJ 2346.

[11145] ● ***No jurisdiction of High Court to alter or review its own judgment or order.***—Section 362, CrPC mandates that no Court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clinical or an arithmetical error and this section is based on an acknowledged principle of law that once a matter is finally dispersed of by a Court, the said Court in the absence of a statutory provision becomes *functus officio* and disentitled to entertain a fresh prayer for the same relief unless the formal order of final disposal is set aside by the Court of competent jurisdiction. *Har Singh Mann* v. *Harbhajan Singh*, AIR 2001 SC 43 : (2001) 1 SCC 169 : 2001 SCC (Cri) 113 : 2001 CrLJ 128.

CRIMINAL LIABILITY OF COMPANY

[11146] ● ***Criminal Liability of Company.***—A company cannot be prosecuted for offences under Sections 276-C, 277 and 278 read with Section 278-B of the Income-Tax Act, 1961 since each one of these sections requires the imposition of a mandatory term of imprisonment coupled with a fine and leaves no choice to the Court to impose only a fine. *Assistant Commissioner* v. *Velliappa Textiles Ltd.*, AIR 2004 SC 86 : (2003) 11 SCC 405 : 2004 SCC (Cri) 1214 (1241) : 2004 CrLJ 1221.

[11147] ● ***Section 276-B, Income-tax Act.***—Company and its Directors failing to credit the amount of TDS, in the account of the Central Government, are liable to prosecution. *Machumilan Syntex Ltd.* v. *Union of India*, AIR 2007 SC 1481 (1489) : (2007) 11 SCC 297.

[11148] ● ***Section 141, Negotiable Instruments Act.***—Section 141 of the Negotiable Instruments Act raises a legal fiction in terms whereof the Directors of a company which would include the partners of a firm would be deemed to have committed an offence along with the company if they are in charge of the affairs of the company and responsible to it. *Green Earth Asphalt and Power Private Ltd.* v. *State of Maharashtra*, (2008) 8 SCC 278 (279). See *Maksud Saiyed* v. *State to Gujarat*, (2008) 5 SCC 668.

CRIMINAL MISAPPROPRIATION
(Section 403, 404, IPC)

[11149] ● ***Criminal misappropriation.***—The offence under Section 403 was not established since the collections made by the accused had not been "misappropriated by him or converted to his own use", within the meaning of that expression as used in that section.

There was no statutory obligation on the accused to reserve the collection made in any one competition for payment to the prize-winners of that very competition, nor was he a trustee for that amount. No doubt the accused had acted with utter recklessness and irresponsibility in setting out to give huge amounts as prizes, but as a consequence of that he had incurred heavy losses in running business and had applied everything, which he collected in making good the losses in the previous competitions. Since it was established, that he had not appropriated any part of the collection from competition No. 92 to his own personal use, the charge of criminal misappropriation must fail. Conviction under Section 403 was set aside and the accused was acquitted. *Ramaswami Nader* v. *State of Madras*, AIR 1958 SC 56 : 1958 CrLJ 228 : 1958 SCJ 743 : 1958 SCR 739.

[11150] ● ***Dishonest misappropriation of property.***—It is obvious that an owner of the property, in whichever way he uses his property and with whatever intention, will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. A partner has, undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit any criminal misappropriation within the meaning of Section 403, IPC. *Velgi Raghavji Patel* v. *State of Maharashtra*, AIR 1965 SC 1433 : (1965) 2 CrLJ 431 : 1965 SCD 824 : (1965) 2 SCJ 186.

[11151] ● ***Moneys payable towards Govt. dues paid by debtors to collection Amin.***—Where the Collection Amin was charge under Section 409. IPC, the Supreme Court confirmed his conviction holding that he collected larger amount, but credited negligible amount in the Treasury and misappropriated the balance, that he had passed receipts for the amount collected and no adverse inference should be drawn against the prosecution, because of its failure to produce the demand notice served on the witnesses and the recovery list maintained in the Tehsil in view of the direct evidence of the concerned witnesses, and also when there was nothing to show that any demand notice was issued at all to the witnesses. *Shariful Islam* v. *State of U.P.*, AIR 1973 SC 82 : (1973) 4 SCC 74 : 1973 CrLJ 199.

[11152] ● ***Dishonest misappropriation—Evidence and proof.***—Where a head Constable had taken away by force, for example, by giving a slap, the watch, gold ornaments and cash from a boatman who had recovered these articles from a dead body of a drowned person but instead of entering them in official records dishonestly kept them with himself and produced them only when confronted with a boatman, apart from an offence under Section 394 he had also committed an offence under Section 404, IPC. *Sathi Prasad* v. *State of U.P.*, AIR 1973 SC 448 : (1972) 3 SCC 613 : 1973 CrLJ 344.

[11153] ● ***Criminal misappropriation.***—The offence like the offence of criminal misappropriation is characterised by an actual fraudulent appropriation of property. There is not originally wrongful taking or moving as the in the case of theft but the offence consists in wrongful appropriation of property, consequent upon a possession which is lawful. The offence is distinguishable from criminal misappropriation because the subject of it is not the property which by some casual act or otherwise, but without criminal means, comes into the offender's possession : but the property which is entrusted to the offender by the owner or by others lawful authority and which the offender holds subject to some duty or obligation to apply it according to the trust. *Ram Narain Poply* v. *Central Bureau of Investigation*, AIR 2003 SC 2748 : (2003) 3 SCC 641 : 2003 SCC (Cri) 869 (996-97) : 2003 CrLJ 4801 : JT 2003 (1) SC 184 : (2003) 2 Crimes 312.

[11154] ● ***Essential ingredients of Section 403, IPC.***—The contract between complaint and TCPL is altogether a different contract. The contractual obligations under both the contracts are separate and independent of each other. The rights and obligations of the parties *i.e.* the complainant and TCPL are to be governed by the contract between them for which the contract between TCPL and Bokaro Steel (SAIL) has no relevance. Therefore, even if Bokaro Steel has made the payment to TCPL under its contract with the latter, it will not give rise to plea of misappropriation of money because that money is not money or movable property of the complainant. Further, Section 403 uses the words "dishonestly" and "misappropriate". These are necessary ingredients of an offence under Section 403, IPC. Neither of these ingredients is satisfied in the facts and circumstances of the case. Thus admittedly, the two contracts are independent of each other and payment under one has no relevance *qua* the other. It cannot be said that there is any dishonest intention on the part of appellants nor it can be said that TCPL or the appellants have misappropriated or converted the movable property of the complainant to their own use. Since the basic ingredients of the relevant Section in the Indian Penal Code are not satisfied, the order taking cognizance of the offence as well as the issue of summons to the appellants is wholly uncalled for. Such an order brings about serious repercussions. So far as the appellants are concerned when no case is made out for the alleged offences even as per the complaint filed by the complainant, there is no reason to permit the appellants to be subjected to trial for the alleged offences. *U. Dhar* v. *State of Jharkhand*, AIR 2003 SC 974 : (2003)

2 SCC 219 : 2003 SCC (Cri) 490 : 2003 CrLJ 1224 : (2003) 1 Crimes 449 (SC).

CRIMINAL NEGLIGENCE

[11155] ● ***Criminal negligence on the part of doctor.***—For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence or recklessness". It is not merely lack of necessary care, attention and skill. Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as "criminal". It can be termed "criminal" only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

From the post-mortem report and the opinion of the three medical experts of the medical team specially constituted, the case of the prosecution laid against the surgeon is that there was negligence in not putting a cuffed endotracheal tube of proper size and in a manner so as to prevent aspiration of blood blocking respiratory passage. No doubt in the present case, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. Even his own wife did not accompany him during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be "not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage". This act attributed to the doctor, even if accepted to be true can be described as negligent act as there was lack of due care and precaution. For this act of negligence, he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him "criminally liable".

To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The Courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state, which can be described as totally apathetic towards the patient. Such a gross negligence alone is punishable.

Thus, no case of recklessness or gross negligence has been made out against the doctor to compel him to face the trial for offence under Section 304-A of the IPC. *Suresh Gupta* v. *Govt. of NCT of Delhi*, AIR 2004 SC 4091 : (2004) 6 SCC 422 : 2004 CrLJ 3870 : (2004) 3 Crimes 149 : JT 2009 (SC) 6238.

[11156] ● ***Criminal negligence—Ingredients of.***—Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a Criminal Court consists of criminal negligence. In *R.* v. *Lawrence*, (1981) 1 All ER (974) : 1982 AC 510. LORD DIPLOCK spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in *R.* v. *Caldwell*, (1981) All ER 961 : 1982 AC 341 and dealt with the concept of recklessness as constituting *mens rea* in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said : (All ER p. 982 *e-f*)

"Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, the either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it." *Jacob Mathew* v. *State of Punjab*, AIR 2005 SC 3180 : (2005) 6 SCC 1 : 2005 SCC (Cri) 1369 (1383) : 2005 CrLJ 3710 : 2005 (3) Crimes 63.

[11157] ● ***Criminal negligence—When actionable.***—In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. LORD ATKIN in his speech in *Andrews* v. *Director of Public Prosecutions*, 1937 AC 576 : (1937) 2 All ER 552 (HC) stated : (All ER p. 556 C)

> "Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."

Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. In *Riddell* v. *Reid*, (1942) All ER 161 (AC at p. 31) LORD PORTER said in his speech—

> "A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability." *Jacob Mathew* v. *State of Punjab*, AIR 2005 SC 3180 : (2005) 6 SCC 1 : 2005 SCC (Cri) 1369 (1383-84) : 2005 CrLJ 3710 : 2005 (3) Crimes 63.

[11158] ● ***Degree of negligence—Jurisprudentially different.***—The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher *i.e.* gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimising violations, may be motivated by thrill-seeking. These are clearly reckless. *Jacob Mathew* v. *State of Punjab*, AIR 2005 SC 3180 : (2005) 6 SCC 1 : 2005 SCC (Cri) 1369 (1383) : 2005 CrLJ 3710 : 2005 (3) Crimes 63.

[11159] ● ***Medical negligence.***—To constitute criminal negligence by a medical practitioner, the negligence must be of a gross or a very high degree. *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, AIR 2010 SC 1162 : (2009) 9 SCC 221 : JT 2009 (10) SC 256.

[11160] ● ***Criminal negligence—Meaning.***—Criminal negligence means failure to exercise duty with reasonable care and proper care and employing precautions guarding against injury to public generally or to any individual in particular. *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, AIR 2010 SC 1162 : (2009) 9 SCC 221 : 2009 (13) SCR 1 : JT 2009 (10) SC 256.

[11161] ● ***Criminal negligence—What is.***—Criminal negligence is gross and culpable neglects or failure to exercise reasonable and proper care and precaution to guard against injury either to public generally or to an individual in particular, which having regard to all even instances out of which charge has arisen it was imperative duty of accused person to have adopted. *State of Kerala* v. *Muralidhar*, AIR 2009 SC 1621 : (2009) 4 SCC 463 : 2009 (4) SCR 400.

[11162] ● ***Culpable rashness or negligence.***—Culpable negligence lies in a failure to exercise a reasonable and proper care and extent of its reasonableness will always depend upon circumstances of each case. Rushness means doing any act with consciousness of a risk that evil consequences will fallow but hope that it will not. Negligence is breach of duty imposed by law. *State of Karnataka* v. *Muralidhar*, AIR 2009 SC 1621 : (2009) 4 SCC 463 : JT 2009 (4) SC 108.

[11163] ● ***Object of Section 304-A, IPC.***—The provisions of Section 304-A are directed at offences outside the purview of Section 299 and 300 IPC. *State of Karnataka* v. *Muralidhar*, AIR 2009 SC 1621 : (2009) 4 SCC 463 : 2009 (4) SCR 400.

[11164] ● ***Negligent Act—Meaning.***—A negligent Act as an act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate conduct of human affairs would or act which a prudent or reasonable man would not do in circumstances attending it. *State of Karnataka* v. *Muralidhar*, AIR 2009 SC 1621 : (2009) 4 SCC 463 : 2009 (4) SCR 400.

[11165] ● ***Ingredients.***—To prove criminal negligence under Section 304-A it must be proved that (i) there was a death of person; (ii) these was a breach of duty causing death, and (iii) the breach of duty must be characterised as gross-negligence. *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, AIR 2010 SC 1162 : (2009) 9 SCC 221 : JT 2009 (10) SC 256.

[11166] ● ***Medical negligence—Standard of proof.***—It is noteworthy that standard of proof as also culpability requirements under Section 304-A of Indian Penal Code stands on an altogether different footing. On comparison of the provisions of Penal Code with the thresholds under the Tort Law or the Consumer Protection Act, a foundational principle that the attributes of care and negligence are not similar under Civil and Criminal Branches of Medical Negligence law is borne out. An act which may constitute negligence or even rashness under torts may not amount to same under Section 304-A. *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, AIR 2010 SC 1162 : (2009) 9 SCC 221 : JT 2009 (10) SC 256.

[11167] ● ***Civil and criminal negligence—Distinction.***—*Held*: For negligence to amount to an offence the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, AIR 2010 SC 1162 : (2009) 9 SCC 221 : 2009 (13) SCR 1 : 2009 (10) Scale 675 : JT 2009 (10) SC 256.

[11168] ● ***Civil and criminal Negligence—Distinction.***—In criminal law, the degree of negligence has to be higher than that under civil law. *Post-Graduate Institute of Medical Education and Research* v. *Jaspal Singh*, (2009) 7 SCC 330 : JT 2009 (7) SC 527.

[11169] ● ***Road accidents—Economic impact.***—In addition to the devastating human toll, the economic impact of road crashes is also enormous. Many of those injured or killed are wage earners, leaving families destitute and without means of support. Loss of wages, property damage, and other factors affected by road traffic crashes represented 4.6% of the gross national product of the United States in 1994. In developing countries, road traffic crashes represent 3-5% of the GNP. The estimated annual cost of road traffic crashes in developing countries exceeds $100 billion (US). This amounts to nearly double the total combined development assistance these countries receive every year from bilateral and multi-lateral government organizations. Globally, the estimated annual costs of road crashes are 500 billion (US). *State of Karnataka* v. *Muralidhar*, AIR 2009 SC 1621 : (2009) 4 SCC 463 : 2009 (4) SCR 400 : JT 2009 (4) 108.

[11170] ● ***Medical negligence.***—Admittedly, Anuradha was administered steroids. The learned counsel for the parties have brought before us a vast volume of material to contend that the experts in the field as also the doctors or medical practitioners who have specialized in TEN and other dermatological diseases are sharply divided on the administration of steroid. We for the sake of brevity refer to them as the pro-steroid group and anti-steroid group. Medical science, therefore, has a grey area in this respect.

We would, in view of the difference of opinion amongst experts as noticed by us heretoabove in some detail, proceed on the assumption that steroid can be administered in the TEN patients.

As noticed hereinbefore, precautions as also the course of actions suggested by the authors have not been undertaken by the respondents. It is to be noted that the learned authors' expertise in the field is neither in doubt nor in dispute, particularly when both parties have extensively relied thereupon. Even the suspected offending drug was not withdrawn at later stages. This drug is considered to be a real risk for the patient suffering from TEN. The medicine has also been administered having regard to the physical condition of the patient. They were required to be given only as a part of the total program. We may also place on record that there has been a cleavage of opinion in regard to mortality rate. Whereas according to the one group of experts in TEN patients when properly treated and in particular given supportive treatment, the mortality rate is 0-10% the respondents contend that in fact the mortality rate is quite high being 30-70%.

We would assume that the mortality rate is very high. If that be so, we feel that the doctors should have been more careful. They should have treated the patient upon exercise of more care and caution. For the said purpose, if they had not been able to diagnose the disease properly or identify the proper drug they would have undertaken some research. It is clear that they did not have any expertise in the field and therefore they ought not to have behaved as experts.

We are, therefore, of the opinion that the universally accepted medicated treatment protocol had also not been followed. It is also to be noted at this juncture, that there may well be a difference of opinion on the course of action to be adopted while treating a patient of TEN, but the treatment line followed by Dr. Mukherjee which entailed administration of 80 mg of Depomedrol injection twice is not supported by any school of thought. The treatment line, in this case, does not flow from any considered affinity to a particular school of thought, but out of sheer ignorance of basic hazards relating to use of steroids as also lack of judgment.

It is also of some great significance that both in the criminal as also the civil cases, the concerned doctors took recourse to the blame game. Some of them tried to shirk their individual responsibilities.

In the instant case, negligent action has been noticed with respect to more than one respondent. A cumulative incidence, therefore, has led to the death of the patient. It is to be noted that doctrine of cumulative effect is not available in criminal law. The complexities involved in the instant case as also differing nature of negligence exercised by various actors, make it very difficult to distil individual extent of negligence with respect to each of the respondent. In such a scenario finding of medical negligence under Section 304-A cannot be objectively determined.

In view of our discussions made hereinbefore, we are of the opinion that for the death of Anuradha although Dr. Mukherjee, Dr. Halder, Dr. Abani Roy Chowdhury, AMRI, Dr. B. Prasad were negligent, the extent thereof and keeping in view our observations made hereinbefore, it cannot be said that they should be held guilty for commission of an offence under Section 304-A of the Indian Penal Code. We furthermore in a case of this nature do not intend to exercise our discretionary jurisdiction under Article 136 of the Constitution of India having regard to the fact that a judgment of acquittal has been recorded by the Calcutta High Court. *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, AIR 2010 SC 1162 : (2009) 9 SCC 221 : 2009 (13) SCR 1 : 2009 (10) JT 256 : 2009 (10) Scale 675 : JT 2009 (10) SC 256.

[11171] ● ***Determination of Medical negligence—Principles.***—On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom some basic principles emerged in dealing with the cases of medical negligence in *Kusum Sharma* v. *Batra Hospital and Medical Research Centre*, AIR 2010 SC 105 : (2010) 3 SCC 480. The Hon'ble Supreme Court laid down the said principles as under :

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humi liated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind. *Kusum Sharma* v. *Batra Hospital & Medical Research Centre*, AIR 2010 SC 1050 : (2010) 3 SCC 480 : JT 2010 (2) 7 : 2010 (2) Scale 267.

[11172] ● ***Medical negligence—Requirements for prosecution.***—To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. Hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. *Kusum Sharma* v. *Batra Hospital & Medical Research Centre*, AIR 2010 SC 1050 : (2010) 3 SCC 480 : JT 2010 (2) 7 : 2010 (2) Scale 267.

CRIMINAL PROCEEDINGS
§ (See also Art. 21, Constitution of India)

[11173] ● ***Criminal proceedings.***—The state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure, but, the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty or administrative inability. *Hussainara Khatoon (IV)*, AIR 1979 SC 1369 : (1980) 1 SCC 98 : 1979 CrLJ 1045.

[11174] ● ***Provision prescribed by S. 549 read with rules framed thereunder would be applicable to proceeding before Special Judge in West Bengal.***—The branch of jurisprudence that deals with offences committed against the safety and order of the State. No doubt it is true that criminal law is subject which falls within the scope of Entry 1 of List III (Concurrent List) embodied in 7th Schedule to the Constitution of India. The Union Government as well as the State Government can, therefore, legislate in regard to criminal law. The contention that the Criminal Law (Amendment) Act, 1952 enacted by the Parliament of India is not applicable to the State of West Bengal is altogether misconceived. The West Bengal Criminal Law Amendment (Special Courts) Act, 1949, does not contain any provision pertaining to personnel governed by the Army Act. It is altogether silent in regard to the matter pertaining to the procedure to be followed in regard to Army personnel from the perspective of Section 549, CrPC and the Rules framed under the authority thereof. There is, thus, no conflict between the Criminal Law (Amendment) Act of 1952 and the West Bengal Act in so far as this matter is concerned. Such being the position, the provision contained in Criminal Law (Amendment) Act of 1952 with a special eye on the procedure to be followed in Sections 8(3-A) and 11 of the Criminal Law (Amendment) Act of 1952 will operate in this sphere without any let or hindrance.

In view of this provision, the procedure prescribed by Section 549, CrPC read with the Rules framed thereunder will be applicable to a proceeding before a Special Judge in West Bengal as well. *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Usha Ranjan Roy Choudhary*, AIR 1986 SC 1655 : 1986 SCC (Cri) 311 : 1986 CrLJ 1248 : 1986 (3) Crimes 11.

[11175] ● ***Right to Speedy Trial.***—"(1) Fair, just and reasonable procedure implicit in Article 21 of the constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trail flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction.

(b) The worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) Undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses of otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is — who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior Court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on *ex parte* representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the Court concerned, prevailing local conditions and so on—what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by POWELL, J. in Barker 33 Led 2d 101, "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by WHITE, J. in *U.S.* v. *Ewell* 15 L Ed 2d 627 in the following words:

> '.....the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the Court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in *Barker* and other succeeding cases.

(8) Ultimately, the Court has to balance and weigh the several relevant factors— 'balancing test' or 'balancing process' — and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the Court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the Court to make such other appropriate order—including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence

where the trial has concluded —as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trail, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the Court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit in effectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis" *Abdul Rehman Antulay* v. *R.S. Nayak*, AIR 1992 SC 1701 : (1992) 1 SCC 225 : 1992 SCC (Cri) 93 (138,141).

[11176] ● ***Criminal proceedings pending for more than ten years.***—During the course of arguments', the learned counsel for the appellant submitted that though a criminal prosecution is pending against the appellant-Ram Niwas but no effective progress has been made in the case except filing of challan. It appears to us that the State is not serious in pursuing the criminal proceedings and even otherwise more than 10 years have already elapsed to the alleged commission of the offence. It would be against the interest of justice to further continue any criminal proceedings in the case. *Munshi Ram Ram Niwas* v. *Collector, Food & Supplies Department*, AIR 1993 SC 1203 (1206) : 1991 Supp (2) SCC 310 : 1991 SCC (Cri) 1037 : JT 1991 (4) SC 151 : (1991) 2 UJ (SC) 736.

[11177] ● ***Any person can initiate criminal proceedings.***—The proposition that any one can initiate a criminal proceeding is not in dispute. *Union of India* v. *W.N. Chadha*, AIR 1993 SC 1082 : 1993 CrLJ 859 : 1993 (1) Crimes 308.

[11178] ● ***Simultaneous Disciplinary proceedings and criminal proceedings.***—There is no legal bar for both proceedings disciplinary and criminal to go on simultaneously, however, in certain situations, it may not be "desirable" or "appropriate" to proceed with the disciplinary enquiry when a criminal case is pending on identical charges.

The approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial in both the cases are entirely distinct and different. Staying of disciplinary proceedings pending criminal proceedings, should not be a matter of course. *State of Rajasthan* v. *B.K. Meena*, AIR 1997 SC 13 : (1996) 6 SCC 417.

[11179] ● ***Exercise of judicial discretion.***—The exercise of a judicial discretion on well recognised principles is the safest possible safeguards for the accused which is at the very core of criminal law administered in India. The Legislature cannot, therefore, make law to deprive the Courts of their legitimate jurisdiction conferred under the procedure established by law. *Dadu* v. *State of Maharashtra*, AIR 2000 SC 3203 : (2000) 8 SCC 437 : 2000 SCC (Cri) 1528.

[11180] ● ***Vindictiveness through legal process not to be allowed.***—Frustrated litigants ought not to be indulged to give vent to their vindictiveness through a legal process and such an investigation ought not to be allowed to be continued since the same is opposed to the concept of justice, which is paramount.

The factual matrix therefore would thus be relevant in the matter of assessment of the situation as to whether "civic profile" would outweigh the "criminal outfit". *Medchl Chemicals and Pharma (P) Ltd.*, AIR 2000 SC 1869 : (2000) 3 SCC 269 : 2000 SCC (Cri) 615 : 2000 CrLJ 1487.

[11181] ● ***Speedy trial.***—This Court has emphasised time and again, the need for speeding up the trial as undue delay in culminating the criminal proceedings is antithesis to the Constitutional protection enshrined in Art. 21 of the Constitution. Nonetheless the Court has to view it from pragmatic perspective and the question of delay cannot be considered entirely from an academic angle. The High Court and this Court when approached by accused to quash proceedings on the ground of delay, must consider each case on its own facts. Unfortunately, the delay has so permeated in our legal system that at all levels tardiness has become the *leitmotif*. Such a malady has been judicially reprobated and efforts have been made to curtail the delay which has developed as a systemic canker. *Seeta Hemchandra Shashittal* v. *State of Maharashtra*, AIR 2001 SC 1246 (1248) : (2001) 4 SCC 525 : 2001 SCC (Cri) 787 : 2001 CrLJ (SC) 1242 : 2001 CrLR (SC) 256 : (2001) 1 Crimes 248.

[11182] ● ***Suspension of proceedings till proceedings before charity commissioner disposed of.***—We are informed by the learned counsel for the parties that the matter is pending before the Assistant Charity Commissioner, who is to determined the validity or otherwise of the change report submitted by the appellants. On perusal of the record we find that a contention that in the proceeding relating to the confirmation or otherwise of the change report a contention has been raised that the documents on the basis of which the report has been submitted have been forged and fabricated by the appellants. In all probability that question will also arise for consideration by the authority. In the facts and circumstances of the case it is our considered view that in the interest of justice and for a fair trial the proceedings in the criminal case should remain suspended till the proceeding pending before the Assistant Charity Commissioner is disposed of by him. *Tukarm Annaba Chavan* v. *Machindra Yeshwant Patil*, AIR 2001 SC 994 : (2001) 3 SCC 33 : 2001 SCC (Cri) 431 : 2001 CrLJ (SC) 1164 : 2001 CrLR (SC) 164.

[11183] ● ***Right to speedy trial.***—The declaration of law made by the Constitution Bench of five learned Judges of this Court in the decision reported in *A.R. Antulay's* case [(1992) 1 SCC 225] still holds the field and its binding force and authority has not been undermined or whittled down or altered in any manner by an other decision of a larger Bench. Consequently, the Benches of lesser number of Constitution of Judges which dealt with the cases reported in "*Common Cause*" *A Regd. Society through its Director* v. *Union of India*, [(1996) 4 SCC 33]; *"Common Cause" A Regd. Society through its Director* v. *Union of India*, [(1966) 6 SCC 775]; *Raj Deo Sharma* v. *State of Bihar*, [(1996) 7 SCC 507] and *Raj Deo Sharma (II)* v. *State of Bihar*, [(1999) 7 SCC 604] could not have laid down any principles in derogation of the ratio laid down in *A.R. Antulay's* case (supra) either by way of elaboration, expansion, clarification or in the process of trying to distinguish the same with reference to either the nature of causes considered therein or the consequences which are likely to follow and which, in their view, deserve to be averted. Even where necessities or justification, if any, were found thereof, there could not have been scope for such liberties being taken to transgress the doctrine of binding precedents, which has come to stay firmly in our method of Administration of Justice and what is permissible even under such circumstances being only to have had the matter referred to for reconsideration by a large Bench of this Court and not to deviate by no other means. The solitary reason would suffice by itself to overrule the above decisions, the correctness of which stand referred to for consideration by his Bench. All the more so when, there is no reason to doubt the correctness of the decision in *A.R. Antulay's* case (supra) and this Bench concurs with the principles laid down therein. *P. Ramachandra Rao* v. *State of Karnataka*, AIR 2002 SC 1856 : (2002) 4 SCC 578 : 2002 CrLJ 2547 : JT 2002 (4) SC 92 : (2002) 2 Crimes 200 (SC); (Per DORAISWAMY RAJU J.)

[11184] ● ***Prescription of limitation period amounts to judicial legislation.***—Prescribing periods of limitation at the end of which the trial Court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the further amounts to legislation, which, in our opinion, cannot be done by judicial directives and within the area of the judicial law-making power available to constitutional Courts, howsoever liberally we may interpret Articles 32, 21, 141, and 142 of the Constitution. The dividing line is fine but perceptible Courts, can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature.

It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in *Common Cause* (1976) 4 SCC 33 (I), *Raj Deo Sharma (I)*, and *Raj Deo Sharma (II),* (1996) 4 SCC 33, could not have been so prescribed or drawn and are not good law. The criminal Courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in *Common Cause Case (I)*, *Raj Deo Sharma (I)* and *(II).* At the most the periods of time prescribed in those decisions can be taken by the Courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in *A.R. Antulay's* case and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any Court as a bar to further continuance of the trial or proceedings and a mandatorily obliging the Court of terminate the same and acquit or discharge the accused.

The Criminal Courts should exercise their available powers, such as those under Sections 309, 311 and 258 of Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be better protector of such right than any guidelines. In appropriate cases jurisdiction of High Court under Section 482 of CrPC and Articles 226 and 227 of Constitution can be invoked seeking appropriate relief or suitable directions.

This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary-quantitatively and qualitatively - by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act. *P. Ramachandra Rao* v. *State of Karnataka*, AIR 2002 SC 1856 : (2002) 4 SCC 578 : 2002 SCC (Cri) 830 : JT 2002 (4) SC 92 : (2002) 2 Crimes 200 (SC).

[11185] ● ***Stay of criminal proceedings when not warranted.***—The High Court stayed the proceedings initiated by the appellants against the respondents under Section 138 of the Negotiable Instruments Act pertaining to cheques till the completion of civil proceedings between the parties. The High Court's order directed that since the subject-matter of the post-dated cheques on which the complaints were based, were subject-matter of adjudication before the arbitrator and the arbitrator had pronounced the award thereupon and the civil proceedings challenging the award were pending, it was a fit case it stay the proceedings of the criminal complaints. The Supreme Court held as under :

The complaints were filed before the award was made. It is also not in issue that objections to the award are pending. It is elementary that the civil proceedings or arbitration proceedings for recovery and the criminal proceedings under Section 138 of the Negotiable Instruments Act are based on independent cause of action. The making of the award may be a defence to such a complaint but to what extent the defence would be valid, shall depend upon the facts and circumstances of each case. Mere making of the award cannot be a ground to stall or stay the proceedings initiated under Section 138 of the Negotiable Instruments Act. That being the only ground to stay the criminal proceedings of complaint cases, we are unable to sustain the impugned order of the High Court. We are, however, expressing no opinion, one way or the other, either on the merits of complaints or that of defence that may be taken or available to the accused in accordance with law. For the aforesaid reasons, we set aside the impugned order of the High Court and direct that the complaint cases would proceed in accordance with law." *Gurcharan Singh* v. *Allied Motors Ltd.*, (2005) 10 SCC 626 : 2005 SCC (Cri) 1653 : 2006 CrLJ 360.

CRIMINAL PROCEEDINGS AND DEPARTMENTAL PROCEEDINGS

[11186] ● ***Criminal proceedings and departmental proceedings.***—Principles of natural justice do not require that the employer should wait for the decision of the criminal Court before taking disciplinary action against the employee. We may, however, add that of the case is of a grave nature or involves questions of fact or law, which are not simple it would be advisable for the employer to await the decision of the trial Court, so that the defense of the employee in a criminal case may not be prejudiced. *Delhi Cloth and General Mills Ltd* v. *Kushal Bhan*, AIR 1960 SC 806 : (1960) 3 SCR 227.

[11187] ● ***Domestic inquiry against workman in regard to certain incident.***—It is desirable that if the incident giving rise to a charge framed against a workman in a domestic inquiry is being tried in a criminal Court, the employer should stay the domestic inquiry pending the final disposal of the criminal case. It would be particularly appropriate to adopt such a course where the charge against the workman is of a grave character because in such a case it would be unfair to compel the workman to disclose the defence which he may take before the criminal Court. But to say that domestic inquires may be stayed pending criminal trial is very different from saying that an employer proceeds with the domestic inquiry in spite of the fact that the criminal trial is pending, the inquiry for that reason alone is vitiated. *Tata Oil Mills Company Ltd.* v. *Workman*, AIR 1965 SC 155 (160) : (1964) 7 SCR 555.

[11188] ● ***Immunity against testimonial compulsion.***—A criminal prosecution is not a fortress against all other actions in law. To accept the position that the pendency of a prosecution is a valid answer to a rule for *habeas corpus* would be to subvert the process and to mock at the criminal justice system. All that Art 20(3) of the Constitution, guarantees is that a person accused of an offence shall not be compelled to be a witness against himself, nothing less and, certainly, nothing more. Immunity against testimonial compulsion does not extend to refusal to examine and cross-examine witnesses and it is not open to a party proceeded against to refuse to examine himself or anyone else as a witness on his side and to cross-examine the witnesses for the opposite party on the ground of testimonial compulsion and then to contend that no relief should be given to the opposite party on the basis of the evidence adduced by the other party. We are unable to see how Art 20(3) come, into the picture at all. *Dushyant Somal (Capt.)* v. *Sushma Somal*, AIR 1981 SC 1026 : (1981) 2 SCC 977 : 1981 SCC (Cri) 413 : 1981 CrLJ 719 : 1981 CrLR (SC) 576.

[11189] ● *Disciplinary proceedings—Initiation of simultaneously with criminal proceedings.*— While there could be no legal bar for simultaneous proceedings being taken. Yet there may be cases where it would be appropriate to defer disciplinary proceedings awaiting disposal of the criminal case. In the latter class of cases it would be open to the delinquent employee to seek such an order of stay or injunction from the Court. Whether in the facts and circumstances of a particular case there should or should not be such simultaneity of the proceedings would then receive judicial consideration and the Court will decide in the given circumstances of a particular case as to whether the disciplinary proceedings should be interdicted pending criminal trial. It is neither possible nor advisable to evolve a hard and fast strait jacket formula valid for all cases and of general application without regard to the particularities of the individual situation. *Kusheshwar Dubey* v. *Bharat Coking Coal Ltd.*, AIR 1988 SC 2118 : (1988) 4 SCC 319.

[11190] ● *Stay of disciplinary proceedings will conclusion of criminal proceedings.*—There is no legal bar for both proceedings to go on simultaneously and then say that in certain situations it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary inquiry when a criminal case is pending on identical charges. The staying of disciplinary proceedings it is emphasised is a matter to be determined having regard to the facts and circumstances of a given case and that no hard and fast rules can be enunciated in that behalf. The only ground suggested in the cases of this Court as constituting a valid ground for staying the disciplinary proceedings is "that the defence of the employee in the criminal case may not be prejudiced". This ground, however, been hedged in by providing further that this may be done in cases of grave nature involving question of fact and law. It means that not only the charge must be grave but that the case must involve complicated questions of law and fact. Moreover 'advisability', 'desirability' or 'propriety' as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case—so far as criminal cases are concerned, it is well known that they drag on endlessly with where high officials or persons holding high public offices are involved. If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary inquiry order where the disciplinary proceedings are held over at an earlier stage. The interest of administration and good government demand that these proceedings are concluded expeditiously. The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. While it is not possible to enumerate the various factors for and against the stay of disciplinary proceedings, we found it necessary to emphasise some of the important consideration in view of the fact that very often the disciplinary proceedings are being stayed for long periods pending criminal proceedings. Stay of disciplinary proceedings cannot be and should not be a matter of course. All the relevant factors, for and against, should be weighed and a decision taken 'keeping in view' the various principles laid down in the ears of this Court. *State of Rajasthan* v. *K.B. Meena*, AIR 1997 SC 13 (17) : (1996) 6 SCC 417 : JT 1996 (8) SC 654.

CRIMINAL PROCEEDINGS AND PROCEEDINGS ARISING UNDER INCOME TAX ACT

[11191] ● *Criminal proceedings and proceedings arising under Income Tax Act.*—The prosecution in criminal law and proceedings arising under the Act are undoubtedly independent proceedings and, therefore, there is no impediment in law for the criminal proceedings to proceed even during the pendency of the proceedings under the Act. However, a wholesome rule will have to be adopted in matters of this nature where Courts have taken the view that when the conclusions arrived at by the appellate authorities have a relevance and bearing upon the conclusions to be reached in the case, necessarily one authority will have to await the outcome of the other authority. *I.T. Commr., Mumbai* v. *Bhupen Champak Lal Dalal*, AIR 2001 SC 1096 (1097).

CRIMINAL TRESPASS
(Sections 441 - 447, IPC)

[11192] ● *Criminal trespass.*—In a pen-down strike the employees of the bank entered the office and occupied their seats and refused to work during the office hours. The strike which was peaceful was wholly confined to regular working hours and the only act alleged against the strikers was that they refused to vacate their seats when they were called upon to do so by the superior officers. The conduct of the strikers cannot be held to amount to criminal trespass under Section 441, IPC. *Punjab National Bank* v. *A. I.P.N.B.E. Federation*, AIR 1960 SC 160.

[11193] ● *Movable property attached in execution of decree—Removal of by unlawful means.*—When the movable property belonging to any person is under the legal attachment of a civil Court and it is kept by the Court officer in the custody of any person, if the owner enters upon the house or land of the person with whom the attached property is kept with the intention of forcibly removing that movable property, his intention is to commit the offence constituted by Section 424 of the Penal Code, and therefore he is guilty of the offence of criminal trespass under Section 447 read with Section 441 of the Code. *Teeka* v. *State of U.P.*, AIR 1961 SC 803 : 1961 (1) CrLJ 859 : 1961 ACrR 198 : 1961 AWR (HC) 355 : 1961 ALJ 430 : 1961 BLJR 545 : 1961 MPC 441.

[11194] ● *Offence of criminal trespass.*—The test for determining whether the entry over property in the possession of another person was made with the "intent to annoy" is whether causing of annoyance was the aim of the entry, that is the dominant intention which prompted the entry. The offence of criminal trespass is committed, only when the main intention in effecting the entry is to cause annoyance to the person in possession. For establishing the offence it is not sufficient merely to show that the person entering upon the property of another had knowledge that his act would cause annoyance. The rule that a person must be presumed to intend the natural consequence of his act, is not a binding rule of universal application—and cannot be applied to the exclusion of circumstances showing the actual intention with which the act was done. *Matri* v. *State of Punjab*, AIR 1964 SC 986 : 1964 (2) CrLJ 57 : 1964 SCD 557.

[11195] ● *Meaning of "expression in order to" in Sections 449, 450, 451, 454 and 457, IPC.*—The question which arose in the case was, as to the meaning of the expression "in order to" in Sections 449, 450, 451, 454 and 457 of the Penal Code. It was contended that unless the offence mentioned in these sections is actually committed, the higher punishment provided for in these sections cannot be imposed. An act can be said t be committed "in order to the commission of a offence" even though the offence may not b completed. Thus if a person commits a house trespass with the purpose of committing theft bu has failed to accomplish his purpose, it will b proper to say that he has committed the hous trespass in order to the committing of theft. Hous trespass simple and apart from anything else i made punishable under Section 448 of the Pena code, and this section is followed by Section 449, 450, 451 which provide for the highe punishments for the offence of house-trespas when it is committed "in order to commit" som offence of the nature specified in these sections Similarly, Section 453 provides the punishmen for the offence of lurking house-trespass o house-breaking, but such offence is punishabl with the punishment provided in Section 45 when committed "in order to" commit an offenc punishable with imprisonment. The same patter is followed in Sections 456 and 457 in connectio with the offence of lurking house-trespass o house-breaking by night. This shows that i Sections 449, 450, 451, 454 and 457 the punishment prescribed has been graded according to the nature of the offence "in order to" the commissio of which house-trespass is committed. It is quite clear that these higher punishments for the offence of house-trespass are prescribed quite independent of the question whether the offence "in order to" the commission of which house-trespass was committed, has been actually committed or not. There can be no doubt that the words "in order to" have been used in these section to mean "with the purpose of". If the purpose in committing house-trespass is the commission of the offence mentioned in Sections 449, 450, 451, 454 or 457, the house-trespass committed is punishable with the punishment provided in such section. Whether or not the purpose of committing the house-trespass was actually accomplished, is quite irrelevant in these cases and the fact that the offence mentioned therein was not actually committed does not affect the applicability of these sections. *Matiullah Sheikh* v. *State of W.B.*, AIR 1965 SC 132 : 1965 CrLJ 126 : 1964 SCD 766.

[11196] ● *Trespasser is settled possession—Election of.*—It is true that no one including the true owner has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case, unless he is evicted in due course of law, he is entitled to defend his possession even against the rightful owner. But stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against a rightful owner must be a settled possession extending over a sufficiently long period and acquiesced in by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than necessary. Such entry will be viewed only as a resistance to an intrusion upon possession which has never been lost. The persons in possession by a stray act of trespass, a possession which has not matured into settled possession, constitute an unlawful assembly, giving right to the true owner, though not in actual possession at the time to remove the obstruction even by using necessary force. *Munshi Ram* v. *Delhi Admn*, AIR 1968 SC 702 : 1968 CrLJ 806 : (1968) SCWR 30 : (1968) SCJ 521 : 1968 SCD 244 : (1968) 2 SCR 455 : 1968 MLJ (Cri) 577 : 1968 MLW (Cri) 90.

[11197] ● ***Intention to annoy.***—Where the complainant obtained a decree for possession of the disputed land and the same was confirmed on appeal, and the complainant obtained actual physical possession of the land with police help and thereafter the accused were found making preparations for construction of bamboo structures thereon about 13 days thereafter during night time after trespassing on the said land, the intention of the accused was to annoy the complainant who was in possession of the land. Though the land was lying vacant, after the complainant obtained possession, the actual possession must be held to be of the complainant. The law does not require, that the intention must be to annoy a person who is actually present at the time of the trespass. *Rash Behari Chatterjee* v. *Fagu Shaw*, AIR l970 SC 20 : 1970 CrLJ 4 : 1969 SCD 1008 : (1969) 2 SCJ 864 : 1970 SCCrR 239 : (1970) 1 SCR 425 : 1969 MLJ (Cri) 860 : 1969 ACrR 439.

[11198] ● ***Accused committing house-breaking at night with object of abducting woman.***—The offence of abduction being an offence punishable with imprisonment, where the accused commit house-breaking by night with the object of committing abduction, the offence falls under Section 457, IPC. *Nasiruddin* v. *State of Assam*, AIR 1971 SC 1254 : 1971 CrLJ 1073 : 1971 SCD 872 : 1971 UJ (SC) 642 : 1971 CrAppR (SC) 400 : 1971 CurLJ 836 : 1971 ACrR 407 : 1971 AWR (HC) 541 : AssamLR (1971) SC 51.

[11199] ● ***Trespasser—Dispossession of by true owner.***—A true owner has every right to dispossess or throw away a trespasser, while the trespasser is in the act or process of trespassing, and has not accomplished his act of possession. But this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. True owner then can dispossess the trespasser by taking recourse to law. It is not possible to lay down a rule of universal application as to when the possession of a trespasser becomes complete and accomplished. But one test is to find out who had grown the crop. *Ram Rattan* v. *State of U.P.*, AIR 1977 SC 619 : (1977) 1 SCC 188 : 1977 CrLJ 433.

[11200] ● ***Appeal with Special Leave—No intention to commit offence intimidate insult or annoy any person in possession.***—The appellant feeling aggrieved by the judgment of the High Court filed the present appeal with special leave. In order to satisfy the conditions of Section 441, IPC, it should be established, that the widow entered in possession over the premises with intent to commit an offence. A bare perusal of the complaint made it abundantly clear, that there was absolutely no allegation about the intention of the appellant to commit any offence or to intimidate, insult or annoy any person in possession. The widow might be fondly thinking that she had a right to occupy the premises even after the death of Sood. If a suit for eviction were filed in a civil Court, she might be in a position to vindicate her right and justify her possession. This was essentially a civil matter which could be properly adjudicated upon by a competent civil Court. To initiate criminal proceedings in the circumstances appeared to be only an abuse of the process of the Court. The appeal was allowed. *Kanwal Sood* v. *Nawal Kishore*, AIR 1983 SC 159 : (1983) 2 SCC 25 : 1983 SCC (Cri) 555 : 1983 CrLJ 173.

[11201] ● ***Trespassers should be given reasonable opportunity before force is used to expel them.***—There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any persons" which is the gist of the offence of "criminal trespass" under Section 441 of the IPC. They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice. Trespass is a tort. But, even the law of torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion and what is even more important "the trespassers should be asked and given a reasonable opportunity to depart before force is used to expel him." *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180 : (1985) 3 SCC 545.

[11202] ● ***Intimidating, insulting or annoying person in possession of property—Criminal trespass.***—When entry in or upon property in possession of another is lawful then unlawfully remaining in possession of such property with the object of intimidating, insulting or annoying the person in possession of the property would be criminal trespass. The offence would be continuing so long as the trespass is not lifted or vacated and intimidation, insult annoyance of the person legally in possession of the property is not stopped. *Galak Patel Valkart* v. *Dundayya*, (1991) 2 SCC 141 : (1991) 1 Crimes 556 (558, 559).

CRIMINAL TRIAL

[11203] ● ***Criminal trial.***—A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus and witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is *ex facie* trustworthy on grounds which are fanciful or in the nature of conjectures. *State of Punjab* v. *Jagir Singh Baljit Singh and Karam Singh*, AIR 1973 SC 2407 : (1974) 3 SCC 277 : 1973 SCC (Cri) 886 (894, 895) : 1973 CrLJ 1589 : 1973 CrLR (SC) 570.

[11204] ● ***Administration of justice in criminal cases.***—"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to by established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced is consistent only with. With the hypothesis of the guilt of the accused and in inconsistent with that of his innocence the Court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the Court entertain reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations." *Kali Ram* v. *State of Himachal Pradesh*, AIR 1973 SC 2773 : (1973) 2 SCC 808 : 1973 SCC (Cri) 1048 (1060) : 1974 CrLJ 1 : 1973 CrLR (SC) 705 : (1974) 1 SCR 722.

[11205] ● ***State as party entitled to equal treatment.***—Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions. The community or the State is not a *persona-non-grata* whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passion being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National economy and National interest. *State of Gujarat* v. *Mohanlal Jitarralji Porwal*, AIR 1987 SC 1321 : 1987 CrLJ 1061 : (1987) 2 SCC 364 : 1987 SCC (Cri) 364 (370, 371).

[11206] ● ***Accused cannot assert any right to joint trial with co-accused.***—An accused person cannot assert any right to joint trial with his to co-accused. Normally it is the right of the prosecution to decide whom its prosecutes. It can decline to array a person as a co-accused and instead examine him as a witness for the prosecution. What weight is to be attached to that evidence as it smack of the testimony of a guilty partner in crime is a different matter. Prosecution can enter *rolle proseque* against an accused person. *A.R. Antulay* v. *R. S. Nayak*, AIR 1988 SC 1531 : (1988) 2 SCC 602 : 1988 SCC (Cri) 372 (467) : 1988 CrLJ 1661 : 1988 CrLR (SC) 366 : JT 1988 (2) SC 325.

[11207] ● ***Purity of public life one of cardinal principles.***—'….. purity of public life is one of the cardinal principles which must be upheld as a matter of public policy. Allegations of legal infractions and criminal infractions must be investigated in accordance with law and procedure established under the Constitution. Even if he has been wronged, if he is allowed to be left in doubt that would cause more serious damage to the appellant. Public confidence in public administration should not be eroded any further. One wrong cannot be remedied by another wrong.' *A.R. Antulay* v. *R.S. Nayak*, AIR 1988 SC 1531 : (1988) 2 SCC 602 : 1988 SCC (Cri) 372 (443) : 1988 CrLJ 1661 : 1988 CrLR (SC) 366 : JT 1988 (2) SC 325.

[11208] ● ***Criminal trial—Importance and object.***—The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the Courts are required to adopt rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hyper-technicalities or figment of imagination should not be allowed to divest the Court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstances keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of the life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The Courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hyper-technical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a Utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The Courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and the mankind. *State of Himachal Pradesh* v. *Lekhraj*, AIR 1999 SC 3916 : (2000) 1 SCC 247 : 2000 SCC (Cri) 147 : 2000 CrLJ 44.

[11209] ● ***Findings must be based on evidence produced before Court.***—The Court is not permitted to conjecture and surmise. It must base its findings on the evidence produced before it by the parties. The enquiry by the Court is restricted to the evidence on record and the case pleaded by the parties. It is not permissible to the Court to conjecture and surmise and make out a third case not pleaded by the parties only to answer the query such as the one posed to us. *Deb Narayan Halder* v. *Anushree Haldar*, AIR 2003 SC 3174 : 2004 SCC (Cri) 164 : 2003 CrLJ 4470 : 2003 (4) Crimes 74 (SC).

[11210] ● ***Adding a new story in criminal prosecution.***—By introducing or adding a new story in a criminal prosecution, in most of the cases, it adversely affects or destroys the prosecution case. Not only it creates doubts with regard to that part of the prosecution version but on occasions casts doubt about the motive. Result is, under our criminal jurisprudence, benefit of doubt may go to the accused. *Ram Narain Poply* v. *CBI*, AIR 2003 SC 4748 : (2003) 3 SCC 641 : 2003 SCC (Cri) 869 : 2003 CrLJ 4801.

[11211] ● ***How a person reacts in a given case is determinative factor.***—How a person reacts in a given case may be the determinative factor so far as that case is concerned. That cannot be applied as a rule of universal application to all cases irrespective of the fact situation in that particular case. There can be no empirical formula as to how one reacts in a given situation and its effect and impact. It would be almost like trying to put a square peg on a round hole. To imprint fact situation of one decided case upon another of observations made in the peculiar facts of a given case to any or every other case notwithstanding dissimilarity in effect and the distinctive features, is legally impermissible. Each case, more particularly a criminal case depends on its own facts and a close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. *Parasa Raja Manikyala Rao* v. *State of Andhra Pradesh*, AIR 2004 SC 132 :

(2003) 12 SCC 306 : 2004 CrLJ 390 : 2003 (4) Crimes 375.

[11212] ● ***Criminal Trial—Meaning and Scope.***—A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny. *Himanshu Singh Sabharwal* v. *State of Madhya Pradesh*, AIR 2008 SC 1943 : (2008) 3 SCC 602 : 2008 (4) SCR 783 : JT 2008 (3) 550 : 2008 (4) Scale 93 : 2008 (2) Supreme 718. **To the same effect** : *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2006 SC 1367 : (2006) 3 SCC 374 : 2006 (2) SCC (Cri) 8 : 2006 CrLJ 1694 (SC) : 2006 (2) Crimes 36 (SC).

[11213] ● ***Role of Court in Criminal Trial.***—If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators. *Himanshu Singh Sabharwal* v. *State of Madhya Pradesh*, AIR 2008 SC 1943 (1946, 1947) : (2008) 3 SCC 602 : 2008 (2) SCC (Cri) 106 : 2008 (2) Crimes 127 (SC).

[11214] ● ***Criminal Trial has to be fair to all concerned.***—It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial. *Himanshu Singh Sabharwal* v. *State of Madhya Pradesh*, AIR 2008 SC 1943 (1947) : (2008) 3 SCC 602 : 2008 (2) SCC (Cri) 106 : 2008 (2) Crimes 127 (SC).

[11215] ● ***Failure to accord fair trial.***—Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. *Himanshu Singh Sabharwal* v. *State of Madhya Pradesh*, AIR 2008 SC 1943 (1948, 1949) : (2008) 3 SCC 602 : 2008 (2) SCC (Cri) 106 : 2008 (2) Crimes 127 (SC).

[11216] ● ***Role of Court.***—The Courts have to take a participatory role in a trial. They are no expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even of the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective *i.e.* truth is arrived at. This become more necessary where the Court has reasons to believe that prosecuting agency on the prosecutor is not acting in the requisite manner. *Himanshu Singh Sabharwal* v. *State of Madhya Pradesh*, AIR 2008 SC 1943 (1949, 1950) : (2008) 3 SCC 602 : 2008 (2) SCC (Cri) 106 : 2008 (2) Crimes 127 (SC).

[11217] ● ***Purpose of criminal trial.***—One of the purposes of criminal Trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. *Amarinder Singh* v. *Prakash Singh Badal*, (2009) 6 SCC 260 : 2009 (3) Crimes 174 (SC) : JT 2009 (7) SC 187.

[11218] ● ***Objectives of criminal Trial.***—One of the objectives of a criminal trial is that delay should be arounded. *Jawahar Singh* v. *State of G.N.C.T. of Delhi*, AIR 2009 SC 2391 : (2009) 6 SCC 490 : 2009 CrLJ 2860 (2863) : JT 2009 (11) SC 268.

[11219] ● ***Criminology.***—Initiation of a criminal trial is a process which carries an implicit degree of coercion and it should not be triggered by false and powerless complaints amounting to harassment and humiliation to the accused. *S. Khushboo* v. *Kanniammal*, AIR 2010 SC 3196 : (2010) 5 SCC 600.

[11220] ● ***Burden of proof.***—Burden of proof in a criminal trial is always the burden of prosecution to prove its case beyond reasonable doubt. It never shifts. *Paramjeet Singh* v. *State of Uttrakhand*, (2010) 10 SCC 439 : 2010 (4) Crimes 165 (SC).

[11221] ● ***Criminal trial—Meaning.***—A criminal trial is a judicial examination of evidence with the object of punishing the offenders or appropriate proof of relevant facts, the core question being the guilt or innocence of the accused. *Nahar Singh Yadav* v. *Union of India*, JT 2010 (12) SC 641 : 2010 (12) Scale 199.

[11222] ● ***Conviction—Nature of evidence required.***—Law does not permit the Court to punish the accused on the basis of a moral conviction or suspicion alone. Though an offence may be gruesome and revolt the human conscience, the punishment of accused can be based on legal evidence and not on surmises and conjectures. *Paramjeet Singh* v. *State of Uttrakhand*, (2010) 10 SCC 439 : 2010 (4) Crimes 165 (SC).

[11223] ● ***Duty of Court in serious offence of brutal nature.***—In a criminal trial involving a serious offence of a brutal nature, the Court should be wary of the fact that it is human instinct to react adversely to the commission of the offence and make an effort to see that such an instinctive reaction does not prejudice the accused in any way. In a case where the offence alleged to have been committed is a serious one, the prosecution must provide greater assurance to the Court that its case has been proved beyond reasonable doubt. *Paramjeet Singh* v. *State of Uttrakhand*, (2010) 10 SCC 439 : JT 2010 (10) 260 : 2010 (10) Scale 258 : 2010 (4) Crimes 165 (SC).

[11224] ● ***False implication of persons.***—In a case of deep-rooted group rivalry and animosity between the rival parties and in the face of the fact that a large member of accused have been involved. Possibility of false implication cannot be entirely ruled out. *Prahlad Mahto* v. *State of Jharkhand*, AIR 2010 SC 3740 (3741).

CRIMINOLOGY

[11225] ● ***Criminology.***—Crime is a pathological aberration, that the criminal can ordinarily be redeemed, that the State has to rehabilitate rather than avenge. The sub-culture that leads to anti-social behavior has to be countered not by undue cruelty but by reculturisation. Therefore, the focus of interest in penology is the individual, and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today views sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defence. We therefore, consider a therapeutic, rather than an 'in terrorem' outlook, should prevail in our criminal Courts. Since brutal incarceration of the person merely produces laceration of his mind. In the words of George Bernard Shaw : If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries. We may permit ourselves the liberty to quote from judge SIR JEOFFREY STREATFIELD : "If you are going to have anything to do with the criminal Courts, you should see for yourself the conditions under which prisoners serve their sentences".

It will be seen that there is a great discretion vested in the Judge, especially when pluralistic factors enter his calculations. Even so, the Judge must exercise this discretionary power, drawing his inspiration from the humanitarian spirit of the law, and living down the traditional precedents which have winked at the personality of the crime-doer and been swept away by the features of the crime. What is dated has to be discarded. What is current has to be incorporated. Therefore innovation, in all conscience, is in the field of judicial discretion. Unfortunately, the Indian Penal Code still lingers in the some-what compartmentalised system of punishment *viz*, imprisonment, simple or rigorous, fine and, of course, capital sentence. There is a wide range of choice and flexible treatment which must be available with the Judge if he is to fulfil his tryst with curing the criminal in a hospital setting. May be in an appropriate case actual hospital treatment may have to be prescribed as part of the sentence. In another case, liberal parole may have to be suggested and, yet in a third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of the sentencing prescription. The perspective having changed, the legal strategies and judicial resources, in their variety, also have to change. Rule of thumb sentences of rigorous imprisonment or other are too insensitive to the highly delicate and subtle operation expected of a sentencing Judge. Release on probation, conditional sentences, visits to healing centres, are all on the cards. We do not wish to be exhaustive. Indeed, we cannot be. Sentencing justice is a facet of social justice, even as redemption of a crime-doer is an aspect of restoration of a whole personality. Till the new Code recognised statutorily that punishment required considerations beyond the nature of the crime and circumstances surrounding the crime and provided a second stage for bringing in such additional materials, the Indian Courts had, by and large, assigned an obsolescent backseat to the sophisticated judgment on sentencing. Now this judicial skill has to come of age.

The sentencing stance of the Court has been outlined by us and the next question is what 'hospitalization' techniques will best serve the sentence, having due regard to his just deserts, blending a feeling for a man behind the crime, defence of society by a deterrent component and a scientific therapeutic attitude at once correctional and realistic. The available resources for achieving these ends within the prison campus also has to be considered in this context. Noticing the scant regard paid by the Courts below to the soul of Section 248(2) of the Code and compelled to gather information having sentencing relevancy, we permitted Counsel on both sides in the present appeal to file affidavits and other materials to help the Court make a judicious choice of the appropriate 'penal' treatment. Both sides have filed affidavits which disclose some facts pertinent to the project. The social abhorrence of the crime is an input, since the emphatic denunciation of a crime by the community must be reflected in the punishment. From this angle we agree with the trial Court that unconscionable exploitation of unfortunately unemployed young men by heartless deception, compounded by pretension to political influence, calls for punitive severity to serve as deterrent. The crime here is doubly bad and throws light on how gullible, young men part with hard money in the hope that political influence, indirectly purchased through money, can secure jobs obliquely. But then the victims of the crime must be commiserated with and in such white-collar offences it is proper to insist upon reparation of the victims, apart from any other sentence. In the present case, four young men have been wheedled out of their little fortunes by two convicts and so, to drive home a sense of moral responsibility to repair the injury inflicted, we think it right to direct the appellant to pay a fine of Rs. 1200 which will be made over by the trial Court to PW 1 (whose case alone is the subject of the prosecution) under Section 357 of the code. That is to say, a fine of Rs. 1200 is imposed will be paid over to the aforesaid PW-1. *Mohammad Giasuddin* v. *State of A.P.*, AIR 1977 SC 1926 : (1977) 3 SCC 287 : 1977 SCC (Cri) 496 : 1977 CrLJ 1557 : 1977 CrLR (SC) 285 : (1978) 1 SCR 153.

[11226] ● ***Award of sentence—Need to personalize sentence formative angle.***—What are the other circumstances which we may look into? The appellant is a young man of 28 years. He has a degree in Bachelor of Oriental Languages and another in Commerce, which suggests that he may respond to new cultural impact. He was working as a Junior Assistant in the Government Secretariat and has now lost the post consequent on the conviction. This is a hard lesson in life. The socio-economic circumstances of the man deserve to be noticed. His parents are old and financially weak, since they and the appellant's sisters and younger brother are his dependents. The younger brother also is unemployed. These factors suggest that the economic blow, if the appellant is imprisoned for long, will be upon his brother at college and the other members of his family. Extenuation is implicit in this fact. He prays for release on probation or under Section 360 of the Code because he has no blemish by way of previous crime or bad official record. Having regard to his age (not immature) and the deliberate plan behind the crime operated in partnership upon four – perhaps more – persons, we reject his request as over-ambitious. At the same time, a contrite convict, yet in his twenties, may deserve clement treatment. A just reduction of the sentence is justified and we think that incarceration for 18 months may be adequate. But this long period has to be converted into a spell of healing spent in an intensive care ward of the penitentiary, if we may say so figuratively. How can this be achieved ? First, by congenial work which gives job satisfaction – not jail frustration, nor further criminalisation. We therefore direct the State Government to see that within the framework of the Jail Rules, the appellant is assigned work not of a monotonous, mechanical, degrading type, but of a mental, intellectual, or like type mixed with a little manual labour. This will ensure that the prisoner does work more or less of the kind he is used to. The jail, certainly, must be able to find this kind of work for him, even on its own administrative side–under proper safe guards though. *Mohammad Giasuddin* v. *State of A.P.*, AIR 1977 SC 1926 : (1977) 3 SCC 287 : 1977 SCC (Cri) 496 (499, 500, 503, 504, 506) : 1977 CrLJ 1557 : 1977 CrLR (SC) 285 : (1978) 1 SCR 153.

CROSS-APPEALS

[11227] ● ***Cross-appeals.***—We are quite amazed as to why the two appeals, which arose out of the same incident and in fact resulted in cross-sessions cases could not have been heard together. *Kulwant Singh* v. *Amarjit Singh*, AIR 2000 SC 1212 : (2000) 3 SCC 290 : 2000 SCC (Cri) 627 (630) : 2000 CrLJ 1722 : 2000 CrLR (SC) 420.

CROSS-CASE

[11228] ● ***Cross-case.***—It is difficult to comprehend as to how the High Court could decide the appeal before it by taking into account evidence recorded in another case, even though it might be what is loosely called a cross-case. It is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. Even in civil cases this cannot be done unless the parties are agreed that the evidence in one case may be treated as evidence in the other. Much more so in criminal cases would this be impermissible. It is doubtful whether the evidence recorded in one criminal case can be treated as evidence in the other, even with the consent of the accused. But here there was clearly no consent of the appellants to treat the evidence recorded in the cross case against Ganpat and Rajdhar as evidence in the case against them. The High Court was, therefore, clearly in error in taking into consideration the evidence recorded in the cross-case against Ganpat and Rajdhar. The High Court ought to have decided the appeal before it only on the basis of the evidence recorded in the present case and ought not to have allowed itself to be influenced by the evidence recorded in the cross-case against Ganpat and Rajdhar. *Mitthulal* v. *State of Madhya Pradesh*, AIR 1975 SC 149 : (1975) 3 SCC 529 : 1975 CrLJ 236 : 1974 CrLR (SC) 702 : 1975 MPLJ 137.

[11229] ● ***Counter cases exclusively triable by Sessions Court.***—The witnesses examined under Sections 200 and 202, CrPC, 1973 in the preliminary inquiry did state that it was Suraj Bhan who had shot dead Banta Singh and had also caused the serious gunshot injury to Kewal Krishan complainant. The question as to in what circumstances Banta Singh received the fatal gunshot injuries was an issue in the cross-case also, which was instituted on a police report under Section 173, CrPC against Kewal Krishan and others, and had been committed to the Court of Session for trial. That is to say the story set up by Kewal Krishan in his complaint in regard to the death of Banta Singh, was likely to be his defence version in the counter-case in which he was being tried for the murder of Banta Singh. In short both these cases exclusively triable by the Court of Session, one instituted on a Police report under S. 173, CrPC and the other initiated on a criminal complaint, arose out of the same transaction. There was, thus, a risk of two Courts coming to conflicting findings. To obviate such a risk, it is ordinarily desirable that the two cases should be tried separately, but by the same Court. *Kewal Krishan* v. *Suraj Bhan*, AIR 1980 SC 1780 : 1980 Supp SCC 499 : 1981 SCC (Cri) 438 (442) : 1980 CrLJ 1271 : 1980 CrLR (SC) 534.

[11230] ● ***Cross-cases—Trial of by same Judge one after other.***—"We think that the fair procedure to be adopted in a matter like the present where there are cross-cases to direct that the same learned judge must try both the cross-cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments, but he must reserve the judgment. Thereafter, he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but he must reserve the judgment in that case. The same learned Judge must, therefore, dispose of the matters by two separate judgments. In deciding each of the case, he can rely only on the evidence accorded in that particular case. The evidence recorded in the cross-case cannot be looked into Nor can the Judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which has been placed on record on that particular case without being influenced in any manner by the evidence or arguments urged in the cross-case. But both the judgments must be pronounced by the same learned judge one after the other". *Nathi Lal* v. *State of U.P.*, 1990 SCC (Cri) 638 : 1990 Supp SCC 145 (145-146).

[11231] ● *Power of Sessions Judge to try offence under IPC.*—"A Sessions Judge has the power to try any offence under the Indian Penal Code. It is not necessary for the Sessions Court that the offence should be one exclusively triabale by a Court of Sessions. This power of the Sessions Court can be discerned from a reading of S.26 of the IPC. When it is realized that the Sessions Judge has the power to try any offence under the Indian Penal Code and when a case involving offence not exclusively triabale by such Court is committed to the Court of Sessions, the Sessions Judge has to exercise a discretion regarding the case which he has to continue for trial in his Court and the case which he has to transfer to the Chief Judicial Magistrate. The employment of the word "may" at one place in S.228(1) of CrPC, and the word "shall" at another place in the same sub-section unmistakably indicates that when the offence is not triabale exclusively by the Sessions Court, it is not mandatory that he should order transfer of the case to the Chief Judicial Magistrate after framing a charge. In situations where it is advisable for him to try such offence in his Court, there is no legal obligation to transfer the case to the Chief Judicial Magistrate. One of the instances for not making the transfer is when a case and counter case have been committed to the Sessions Court and one of those cases involves an offence exclusively triable by the Sessions Court and the other does not involve any such offence." *Sudhir* v. *State of Madhya Pradesh*, AIR 2001 SC 826 : (2001) 2 SCC 688 : 2001 SCC (Cri) 387 (392, 393) : 2001 CrLR (SC) 212.

[11232] ● *Cross-cases—Trial of by same Court.*—"We are unable to understand why the Legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the code. The practical reasons for adopting a procedure that such cross-cases shall be tried by the same Court can be summarised thus : (1) It staves off the danger of an accused being convicted before his whole case is before the Court (2) It deters conflicting judgments being belowered upon similar facts. (3) In reality the case and the counter-case are to all interests and purposes, different or conflicting versions of one incident." *Sudhir* v. *State of M.P.*, AIR 2001 SC 826 : (2001) 2 SCC 688 : 2001 SCC (Cri) 387 (391) : 2001 CrLR (SC) 212.

[11233] ● *Cross-cases—Procedure to be adopted.*—In the instant case, it is undisputed, that the Investigating Officer submitted the challan on the basis of the complaint lodged by the accused—*Mishrilal* in respect of the same incident. It would have been just fair and proper to decide both the cases together by the same Court in view of the guidelines devised by this Court in *Nathilal* v. *State of U.P*, 1990 (Supp) SCC 145 : 1990 SCC (Cri) 638. The cross-cases should be tried together by the same Court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross-cases are allowed to be tried by two Courts separately there is likelihood of conflicting judgments. In the instant case, the Investigating Officer submitted the challan against both the parties. Both the complainants cannot be said to be right. Either of them must be false. In such a situation, legal obligation is cast upon the Investigating Officer to make an endeavour to find out the truth and to cull out the truth from the falsehood. Unfortunately, the Investigating Officer has failed to discharge the obligation, resulting in grave miscarriage of justice. *State of M.P.* v. *Mishrilal*, AIR 2003 SC 4089 : (2003) 9 SCC 426 : 2003 SCC (Cri) 1829 : 2003 CrLJ 2312 (SC).

CROSS-EXAMINATION

SYNOPSIS

1. **Cross-examination of witnesses 2302**
2. **Object of cross-examination 2312**
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10. **Tendering witness for cross-examination without his being examined in chief 2320**

1. CROSS-EXAMINATION OF WITNESSES

[11234] ● *Cross-examination of witnesses.*—When a witness has been examined-in-chief, the other party has a right to cross-examine him. The power of cross-examination has been justly said to be one of the principle, as it certainly is one of the most efficacious, tests, which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanour, and of determining the just weight and value of his testimony. It is not easy for a witness who is subjected to this test, to impose on a Court of jury; for, however, artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended. *Greenleaf Evidence,* p, 446.

[11235] ● *Witness—Cross examination of.*— The fundamental feature is that a witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts : (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish and impeach the personal trust worthiness of the witness. (a) the remaining and qualifying circumstances of the subjects of testimony will probably remain suppressed or undisclosed, not merely because his testimony is commonly given only by way of answer to specific interrogatories, and the counsel producing him will usually ask for nothing but the facts favourable to his party. If nothing more were done to unveil all the facts known to his witness, his testimony (for all that we could surmise) might present half truths only. Someone must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent. Cross-examination, then, *i.e.* further examination by the opponent, has for its first utility the extraction of the remaining and qualifying circumstances, if any, known to the witness, but hitherto undisclosed by him. (b) The facts which diminish and impeach the personal trustworthiness or credit of the witness will also, in every likehood, have remained undisclosed on the direct examination. There it is the further function of the opponent's examination to extract. Some of them, no doubt, could be as well or sometimes the witness himself. Particularly those which concern his personal conduct and his sources of knowledge for the case in hand. To this extent, again, cross-examination is vital, *i.e.*, it does what must be done and what nothing else can do. *Wigmore,* p. 1368.

[11236] ● *Cross-examination of witness—Skillful interrogation.*—If cross-examination is a powerful engine, it is likewise an extremely dangerous one, very apt to recoil even on those who know how to use it. If the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth that he is almost sure to recollect every material circumstance by which it was accompanied; and the more his memory is probed on the subject, the more of the circumstances will come to light, thus corroborating instead of shaking his testimony.

In dealing with a witness who is to be compelled to speak the truth against his will, the greatest success consists in drawing out what he wishes to keep back. This can only be done by repeating the interrogation in greater detail. He will give answers which he thinks do not hurt his cause; and afterwards from many things which he will have confessed, he may be led into such a strait that what he will not say, he cannot deny. For as in an oration, we generally collect scattered proofs, which singly do not appear to press on the accused, yet, by being put together prove the charge, so a witness of this sort should be asked many things as to what went before—what came after—as to place, time, and persons, and other things, so that he must fall upon some answer after which he must necessarily either confess what is desired, or contradict his former statements. If this does not happen, it may become apparent that he will not speak, or he may be drawn out and detected in some falsehood foreign to the cause; or by being led on to say more than the matter requires in favour of the accused, the judge may be led to suspect him, which will damage his cause not less than if he had spoken the truth against the accused. It sometimes happens that the testimony given by a witness is inconsistent with itself. Sometimes (and that is the more frequent case) one witness contradicts another. A skilful interrogation may produce by art that which usually happens accidentally. Apart from the cause, witnesses are usually asked many questions which may be useful, as to the lives of other witnesses, as to their own character and position, any crimes they have committed, their friendship or enmity to the parties—in the answers to which, they may either make some useful admission, or be detected either in a falsehood or the desire of injuring the opposite party." *Meer Sujad Ali* v. *Kashee Nath Dass,* 6 WR Cr 181.

[11237] ● *Examination of witness—In-chief.*— One of the important branches of advocacy is the examination of a witness-in-chief. One fact should be remembered to start with, and it is this : the witness whom he has to examine has probably a plain straightforward story to tell, and that upon the telling it depends the belief or disbelief of the jury, and their consequent verdict. If it were to be told amid social circle of friends, it would be narrated with more or less circumlocution; and considerable exactness. But all the facts would come out; and that is the first thing to insure, if the case be, as I must all along assume it to be, an honest one, I have often known half a story told, and that the worst half, too, the rest having to be got out by the leader in re-examination if he has the opportunity. If the story were being told, as I have. suggested, in private, all the company would understand it, and, if the narrator were known as a man of truth, all would believe him. It would require no advocate to elicit the facts or to confuse the dates; the events would flow putting much in the natural order. Now change the audience, let the same man attempt to tell the same story in a Court of Justice. His first feeling is that he must not tell it in his own way. He is going to be examined upon it; he is to have it dragged out of him piecemeal, disjointedly, by a series of questions – in fact, he is to be interrupted at every point in a worse manner than if everybody in the room, one after another, had questioned him about. What he was going to tell, instead of waiting till he had told it. It is not unlike a post-mortem; only the witness is alive, and keenly sensitive to the painful operation........ Now the best thing the advocate can do under these circumstances is to remember that the witness has something to tell, and that but for him, the advocate, would probably tell it very well, in his own way. The fewer interruptions, therefore, the better; and the fewer interruptions, the less questions will be needed. Watching should be the chief work; specially to see that the story be not confused with extraneous and irrelevant matter." *Harris on Hints on Advocacy,* p. 29.

[11238] ● ***Delay in holding identification parade.***—In the instant case, there was delay of three months in holding the identification parade. But there was no cross examination of the police officer or the Magistrate on the point of delay. Validity of test identification parade cannot be challenged. *Bharat Singh* v. *State of H.P.*, AIR 1972 SC 2478 : (1973) 3 SCC 896 : 1972 CrLJ 1704 : 1973 CrLR (SC) 317.

[11239] ● ***Failure to cross-examine witness.***—Failure to cross examine the witness to explain omission in previous statement to police does not amount to contradiction and therefore cannot be confronted to the witness. *Laxman* v. *State of Maharashtra*, AIR 1974 SC 308 : (1974) 3 SCC 704 : 1974 CrLJ 369 : 1974 Mah LJ 229.

[11240] ● ***Cross-examination not only method of discrediting witness.***—Cross-examination is not the only method of discrediting a witness. Court is not bound to accept the testimony of a witness which on the face of it is not acceptable merely because there was no cross-examination. *Juwar Singh* v. *State of M.P.*, AIR 1981 SC 373 : 1980 Supp SCC 417 : 1980 CrLJ 1418 : 1980 CrLR (SC) 605 : 1980 Cr AppR (SC) 362.

[11241] ● ***Appreciation of evidence FIR mentioning names of seven out of thirteen.***—In this case the prosecution beyond reasonable doubt established the prosecution case that the miscreants broke open the front door of the house of one *G*, inflicted injuries on the person of *G*'s wife and *G*'s brother's wife : out of fear the inmates of the house left the house which was set to fire by the miscreants. The only dent in the proof was that the names of seven out of thirteen miscreants were not mentioned in the FIR. The accused examined three defence witnesses who admitted of the house being gutted by fire but deposed to the effect that they did not see any of the accused persons there and none prevented anyone from trying to extinguish the fire. The DW's were not subjected to any cross-examination. Defence case as proved cannot be accepted; cross-examination is not the only method of discrediting a witness. If the oral testimony of certain witnesses is contrary to proved facts their evidence might be discarded on this ground. *Jawar Singh* v. *State of M.P.*, AIR 1981 SC 373 (375) : 1980 Supp SCC 417 : 1980 CrLJ 1418 (1420) (SC) : 1980 CrLR (SC) 605 : 1980 Cr AppR (SC) 362.

[11242] ● ***Property when in custody of Head Constable not tampered with.***—PW-15, the Muharrir Head Constable of Police Station, who was in charge of the property stated that the empty cartridges were deposited with him on January 11, 1973 and the pistol was deposited with him on January 16, 1973 and that when the property was in his custody nobody tampered with them. He was offered for cross-examination but no question was put in cross-examination.

There was, therefore, no basis for the High Court to suspect that the empty cartridges were those which must have been fired from the pistol after it was produced by Bakshish Singh. *Gurnam Kaur* v. *Bakshish Singh*, AIR 1981 SC 631 : 1980 Supp SCC 567 : 1981 SCC (Cri) 496 (501) : 1981 CrLJ 34 : 1980 CrLR (SC) 686.

[11243] ● ***Witness admitting in cross-examination that he had gone to hospital after deceased taken there.***—True, that in cross-examination, the witness admitted that he had also gone to the Hospital on a cycle after Mahaderao (deceased) had been taken there; but he asserted that he did not see the Police Sub-Inspector there. Nothing was brought out further in cross-examination to show that he had met the police Sub-Inspector in the Hospital. The Police Sub-Inspector also was not asked as to whether he had met this witness in the Hospital. There was absolutely no reason to reject his sworn word on this point. The witness had, thus, no opportunity of making a statement to the Police in the Hospital, about the occurrence. The mere fact that he did not, of his own accord, go forthwith to the Police Station and tell them that he had also seen the occurrence, was no ground to brush aside his evidence. *State of Maharashtra* v. *Krishnamurti Laxmipati Naidu*, AIR 1981 SC 617 : 1980 Supp SCC 455 : 1981 SCC (Cri) 364 (370) : 1981 CrLJ 9 : 1981 CrLR (SC) 145.

[11244] ● ***Evidence of Prosecution witness that he received amounts not from accused but from other person not challenged in cross-examination.***—The defence of this respondent in this case was that the three amounts alleged to have been misappropriated by him had been paid to PW 2, Executive officer of the Bank to be deposited with the Bank, but according to the evidence of PW 2 these amounts had been received by him not from the accused but from other person. The evidence of PW 2 was not challenged in cross-examination. No suggestion was made to him and there is no justification to reach the conclusion that these amounts were the very amounts which the accused was alleged to have misappropriated. *State of Karnataka* v. *Marigowda*, AIR 1982 SC 1171 : (1981) 4 SCC 429 : 1981 SCC (Cri) 849 (850) : 1982 CrLJ 1397 : 1982 CrLR (SC) 39.

[11245] ● ***Sample of milk found deficient in fat contents.***—The Public Analyst found the sample of milk deficient in fat contents to the extent of the 0.5 per cent. The appellant submits that it was not possible to detect 0.5 percent deficiency of fat content in the milk. It was not put to the Food Inspector or the Public Analyst who would have been the proper person to answer the question. *Amathabhai Arjanbhai* v. *C.D. Patel*, AIR 1982 SC 782 : (1982) 3 SCC 234 : 1983 SCC (Cri) 17 (18) : 1982 CrLJ 628 (1) : 1983 CrLR (SC) 523.

[11246] ● ***Identification of ornaments and clothes belonging to deceased—Testimony of witness admissible.***—The prosecution witnesses categorically stated that the seized ornaments belonged to the deceased. There is no reason why the testimony of these witnesses should not be relied upon particularly when PW-2 was not cross-examined at all as regards her identification of the seized ornaments and clothes as belonging to the deceased. *Earabhadrappa* v. *State of Karnataka*, AIR 1983 SC 446 : (1983) 1 SCC 330 : 1983 SCC (Cri) 447 (457) : 1983 CrLJ 846 : 1983 CrLR (SC) 268 : (1983) 2 SCR 552 : (1983) 1 Crimes 784.

[11247] ● ***Question put to witness in cross-examination misleading question.***—In cross-examination, it was elicited from Syed Abbas that he did not tell the Police that Parubai came to the Durgah and told him that the accused had killed Janabai and her daughter, Shashikala in the field of Nana with an axe, the statement made by Syed Abbas to the Police is part of the record. Before us and we find that Syed Abbas had in fact told the Police that Parubai had come to the Durgah and told him that the accused had killed Janabai and her daughter Shashikala by assaulting them with an axe and that he had also chased her. It is clear that the question put to the witness, Syed Abbas in cross-examination was a misleading question and it is a pity that the learned Additional Sessions Judge was not more watchful and allowed such a misleading question to be put to the witness. *Amruta* v. *State of Maharashtra*, AIR 1983 SC 629 : (1983) 3 SCC 50 : 1983 SCC (Cri) 570, 571 : 1983 CrLJ 1057 : 1983 CrLR (SC) 325 : 1983 UJ (SC) 570.

[11248] ● ***Prosecution witness examined for proving inquest Panchnama.***—In this connection it is also necessary to refer to the evidence of PW 11 who was examined to prove the inquest Panchnama. In the cross-examination a suggestion was made to him that the respondent was keen to take his wife to Kerala and, therefore, he had got the pass issued and obtained reservation. He deposed that on February 27, 1973 at about 6-6.30 a.m. a quarrel had taken place between respondent and the ticket collector about the time when the application was presented. It is very surprising that this witness should have been asked these questions though obviously he was not a witness called by the prosecution to prove anything with regard to the reservation obtained by the respondent. *State of U.P.* v. *M.K. Anthony*, AIR 1985 SC 48 (58) : (1985) 1 SCC 505 : 1985 SCC (Cri) 105 : 1985 CrLJ 493 : 1985 CrLR (SC) 41.

[11249] ● ***Failure of prosecution to examine Inspector as witness.***—Some comments was made during the course of trial about the failure of prosecution to examine Inspector Sharma, the prosecution offered him for cross-examination and kept Inspector Sharma ready in Court. The counsel for the accused stated that since witness had already been dropped by the prosecution, he did not want to examine him unless the Court directed him to do so. After the failure of the Counsel of the accused to take advantage of the offer made by the prosecution we do not think that it is open to comment upon the so called failure of the prosecution to examine Inspector Sharma a witness. Nor can we draw any adverse inference against the prosecution. *State of Gujarat* v. *Raghunath Vamanrao Baxi*, AIR 1985 SC 1092 (1095) : (1985) 3 SCC 45 : 1985 SCC (Cri) 304 : 1985 CrLJ 1357 : 1985 CrLR (SC) 260.

[11250] ● *Testimony of prosecution witness totally inconsistent with medical evidence.*—In his examination-in-chief PW-6 sought to support the prosecution case, but in cross-examination he stated in clear and unequivocal term that he did not see deceased receiving any injury at the hands of the accused. No reliance, therefore, can be placed on the evidence of PW-6. *Amar Singh* v. *State of Punjab*, AIR 1987 SC 826 : (1987) 1 SCC 679 : 1987 SCC (Cri) 232 (236) : 1987 CrLJ 706 : 1987 CrLR (SC) 225 : (1987) 1 UJ (SC) 671.

[11251] ● *Identification of accused at night.*—PW-4, Sube Singh, stated in his cross-examination that the accused-Dharam Vir was wearing a shirt of white colour. It was suggested to him on behalf of the accused that Dharam Vir was wearing a shirt of cream colour. In answer to that suggestion, PW-4 said "It is not correct that Dharam Vir-accused was wearing a shirt of cream colour and not a white colour at that time." The learned Sessions Judge has rightly observed that the above suggestion at least proves the presence of accused-Dharam Vir, on the spot at the time of occurrence. *Rakesh Kumar alias Babli* v. *State of Haryana*, AIR 1987 SC 690 : (1987) 2 SCC 34 : 1987 SCC (Cri) 256 (258) : 1987 CrLJ 535 : 1987 CrLR (SC) 184 : JT 1987 (1) SC 305 : (1987) 1 UJ (SC) 490 : (1987) 1 Crimes 386.

[11252] ● *Witness stating in cross-examination that he identified accused.*—"PW-3, Bhagat Singh, stated in his examination-in-chief that he had identified the accused at the time of occurrence. But curiously enough, he was not cross-examined as to how and in what manner he could identify the accused. No suggestion was also given to him that the place was dark and it was not possible to identify the assailants of the deceased". *Rakesh Kumar Alias Babli* v. *State of Haryana*, AIR 1987 SC 690 : (1987) 2 SCC 34 : 1987 SCC (Cri) 256 (258) : 1987 CrLJ 535 : 1987 CrLR (SC) 184 : JT 1987 (1) SC 305 : (1987) 1 UJ (SC) 490 : (1987) 1 Crimes 386.

[11253] ● *Action of committee in asking witnesses to be cross-examined at beginning of enquiry discretionary.*—If three persons to whom notice under S.8-B of the Commission of Inquiry Act, 1952 have been issued are to be examined even according to the Committee at the end of the inquiry there is no justifiable reason to deny the same treatment to the petitioners Ms. Kiran Bedi and Jinder Singh who are in the same position as those three persons. The action of the Committee in asking them to be cross-examined at the beginning of the inquiry appears to be discriminatory. Mere non-issue of notices to them under S. 8-B ought not to make any difference if they otherwise satisfy the conditions mentioned in S. 8-B. The issue of such a notice is not contemplated under S. 8-B of the Act. It is enough if at any stage the Commission considers it necessary to inquire into the conduct of any person. Such person would thereafter be governed by S.8-B of the Act. . . . If the Committee had found that the petitioners were covered under S. 8-B, then perhaps they would not have been asked to get into the witness-box for being cross-examined till the end of the inquiry. The committee would have then asked them to give evidence alongwith others who were similarly placed at the end of the inquiry. Taking into consideration all the aspects of the case we feel the Committee should not have in the circumstances of the case directed the filing of a complaint against either of the petitioners for an offence punishable under s. 178, IPC. *Kiran Bedi* v. *Committee of Inquiry*, AIR 1988 SC 2252 : (1988) 4 SCC 49 : 1988 SCC (Cri) 895 (899) : 1989 CrLJ 303 : 1988 CrLR (SC) 796 : JT 1988 (2) SC 372 : (1988) 2 UJ (SC) 731.

[11254] ● *Witnesses filing affidavit first be examined-in-chief before cross-examined.*—Even those witnesses who may have filed affidavits already may first be examined-in-chief before they are cross-examined, since it is stated that when the affidavits were filed the deponents did not know what the other parties who have also filed affidavits had stated in their affidavits. *Kiran Bedi* v. *Committee of Inquiry*, AIR 1988 SC 2252 : (1988) 4 SCC 49 : 1988 SCC (Cri) 895 : 1989 CrLJ 303 : 1988 CrLR (SC) 796 : JT 1988 (3) SC 372.

[11255] ● *Packets containing cartridges received properly sealed.*—According to the Ballistic Expert, PW-11, the packets when received by him were properly sealed and the seals were intact and tallied with the specimen of the seal sent to him. None of these witnesses were at all cross-examined. No suggestion even was made to anyone of them that the sealed packets had allegedly been tampered with while in their custody. No such suggestion was even made to SHO, PW-6, that he had either substituted the cartridges sent to the Ballistic Expert or otherwise tampered with the sealed packets. It is, therefore, futile to contend that the possibility of the substitution of the cartridges could not be ruled out. *Mani Ram* v. *State of Rajasthan*, AIR 1993 SC 2453 : 1993 SCC (Cri) 853 (859) : 1993 CrLJ 2530 : JT 1993

(4) SC 520 : (1993) 1 Crimes 1144 : (1993) 2 UJ (SC) 9.

[11256] ● *Witness in examination stating whole report in correct.*—The witness in the examination itself stated that the whole of the report is not correct. In the cross-examination by the accused, it is clearly stated that PW-7 did not tell anything to the Police patel in the presence of PW-5 This is a serious infirmity regarding the present version that has been put forward. *Jaising Wamar Patil* v. *State of Maharashtra,* AIR 1994 SC 1683 (1685).

[11257] ● *Food-Inspector deposing in cross-examination that report of analyst sent to accused by registered post.*—When the Food Inspector was examined, he deposed in his chief-examination that the report of the Analyst was sent to the accused by registered post. He was not cross-examined. The only inference that can be drawn is that the accused received the report. In such a case the question whether it was sent by registered post or otherwise, does not assume importance. *Khem Chand* v. *State of Himachal Pradesh*, AIR 1994 SC 226 (227) : (1994) Supp (1) SCC 7 : 1994 SCC (Cri) 212 : 1994 CrLJ 253.

[11258] ● *Tendering witness for cross-examination without he being examined-in-chief.*—To permit the prosecution to tender a witness for cross-examination only would be wrong and the effect of their being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial. *Tej Prakash* v. *State of Haryana,* 1996 SCC (Cri) 412 : (1996) 7 SCC 322 : 1996 CrLJ 394 : 1995 (4) CCR 132.

[11259] ● *Absence of cross-examination.*—In the present case part of the statement of PW-1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence of PW-1 remained unchallenged and ought to have been believed by the High Court. S. 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by S. 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity;

(2) to discover who is and what is his position in life; or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

The of quoted observation of LORD HERSCHELL, L.C. in *Browne* v. *Dunn,* (1893) 6 The Reports 67, clearly elucidates the principle underlying those provisions. It reads thus:

> "I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, and perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give any opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. *State of Uttar Pradesh* v. *Nahar Singh*, AIR 1998 SC 1328 (1331) : (1998) 3 SCC 561 : 1998 SCC (Cri) 850 : 1998 CrLJ 2006 : 1998 CrLR (SC) 224 : JT 1998 (2) SC 41.

[11260] ● *No cross-examination regarding workability of firearm.*—"We have gone through the evidence of both these witnesses. Nothing was brought out in the cross-examination to create any doubt regarding the identity of the weapon. There was no cross-examination regarding working condition of the pistol. Considering the fact that the two Police Officers were competent enough to depose about the condition of the weapon and the circumstances that the pistol was loaded with cartridges, it can be said with reasonable certainty that it was in working condition. *Harnek Singh* v. *State of Punjab*, AIR 1999 SC 316 : (1999) 1 SCC 132 : 1999 SCC (Cri) 25 : 1999 CrLJ 452 : 1999 CrLR (SC) 14.

[11261] ● *Contraband seized if was "Charas".*—The Analyst who tested the contraband in the laboratory, to a question in cross-examination has said that he could not answer whether the contra band contained cowdung also. In the certificate which he issued after analysis, as well as in the examination-in-chief, the witness has stated in definite terms that the contraband was "charas". Hence, the aforesaid isolated answer is hardly sufficient to destroy the probative value of the evidence of that witness. *Joseph Fernandez* v. *State of Goa*, AIR 2000 SC 3502 : (2000) 1 SCC 707 : 2000 SCC (Cri) 300 : 2000 CrLJ 3485.

[11262] ● ***Deceased son—Non-cross-examination of.***—Hardip Singh was not cross-examined if he was not telling the truth that his deceased father had an account in the Bank in Jagatpur. He was not questioned if he was not going on the cycle with has father (deceased) sitting on the carrier. He was asked a question about the passbook of the Bank and his reply was that the passbook was in the bag which was slung on the handle of the cycle and that he did not produce the passbook before the Police. No. question was asked from the Investigation Officer, as to why he did not take into possession the cycle or the passbook. In fact, there has been no cross-examination by the appellant of the statement of Investigating Officer. *Narinder Singh* v. *State of Punjab*, AIR 2000 SC 2212 : (2000) 4 SCC 603 : 2000 SCC (Cri) 855 : 2000 CrLJ 3462 : 2000 CrLR (SC) 581.

[11263] ● ***Search and seizure—Non-availability of independent witness—Effect.***—The opium was not found from the person of the appellant but from the bedding which he was carrying. The evidence of the Investigating Officer and other witnesses discloses that he had requested many independent witnesses to witness the search but they all refused and, therefore, he had to search the accused in the absence of any independent witness. Though they were cross-examined on this point, the evidence has remained unshaken and worthy of acceptance. In that view of the matter, the evidence regarding the search could not have been discarded. *Jal Singh* v. *State of Haryana*, (2000) 2 SCC 119 : 2000 SCC (Cri) 337 (338).

[11264] ● ***Contradiction if elicited in course of cross-examination—Duty of Court.***—If any contradiction is elicited in the course of the cross-examination, it cannot be stated that it is the duty of the Court to get the same clarified. Of course the proviso of the Court in this regard are wide but there is a duty cast on the prosecution also to elicit appropriate answers on any aspect of the matter. *Jagdish* v. *State of M.P.*, AIR 2000 SC 2059 : (2000) 9 SCC 155 : 2000 SCC (Cri) 1188 (1192) : 2000 CrLJ 2955.

[11265] ● ***Non-completion of cross-examination of witness due to passing away defers—Counsel midway of trial.***—"Normally at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during the trial of passing away of the defence counsel midway of the trial. The Counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new Counsel took up the matter, he would certainly be under the disadvantage that he could not ascertain from the erstwhile Counsel as to the scheme of the defence strategy which the pre-deceased Advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in S. 311 of the CrPC. After all the trial is basically for the prisoners and Courts would afford the opportunity to them in the fairest manner possible. We think that the plea of the defence that a further opportunity to put more question to the three prosecution witnesses can be permitted on account of the unfortunate death of the defence Counsel *pendente lite,* and a new Counsel has to evolve his defence strategy afresh." *Hoffman Andreas* v. *Inspector of Customs*, *Amritsar*, (2000) 10 SCC 430.

[11266] ● ***Recalling of witnesses already examined.***—As the prosecution evidence was closed the trial Judge proceeded to question the accused under Section 313 of the CrPC. On completion thereof, the trial Court posted the case for defence evidence. As the appellant did not produce any defence evidence nor presented any list of defence witnesses, the case again to a future date. On that day also the appellant did not produce any defence witness nor any list of defence witnesses to be examined. It was hence posted on the next day for the same purpose. As nothing happened on that day, the Court closed the evidence for defence. In the meanwhile appellant filed an application for recalling some of the witnesses already examined for the prosecution under S. 311 of the CrPC. The Trial Court did not find the necessity for recalling such witnesses for a just decision of the case. The order dismissing the application for recalling prosecution witnesses as well as the order closing the defence evidence had been challenged by the appellant before the High Court of Madras under S. 482 of the CrPC. True, the appellant was given opportunities to present the defence evidence or to produce the list of defence witnesses and the appellant has not availed herself of those opportunities. Yet as a Court of justice we are of the view that one more opportunity can be granted to the appellant for examining the defence witnesses if she proposes to do so. . . The trial Court should afford an opportunity to the appellant to examine those witnesses. As the 1st among the witnesses shown in the list is the appellant herself, permission need by granted only if a separate application in that behalf is filed under S. 315 of the Code because it has to be done at the risk of the appellant herself. *Selvi J. Jayalalitha* v. *State by Deputy Supdt. of Police/Chennai*, (2000) 9 SCC 754 : 2000 SCC (Cri) 1480 (1480, 1481).

[11267] ● ***Extra-judicial confession cross-examination of appellant.***—In his examination-in-chief the witness after vividly explaining the manner in which the extra-judicial confession was made, stated that after walking on foot for about 4 kilometers he, in the company of others, reached Police Station Karanpur at about 12.00 noon and lodged the report but the Police Station did not register a case on the pretext that it was a family matter and that the report would be registered only after making an enquiry in the village. Finding such a statement to be resiling from the earlier testimony, the Public Prosecutor sought the permission of the Court to declare the witness hostile and "cross-examine him on the ground that he had not stated that Ex P-2 was not registered at once". The Trial Court obliged the Public Prosecutor by permitting him to cross-examine to that extent. The cross-examination by the Public Prosecutor is restricted to the lodging of the first information report and not with respect to the factum of his deposition in so far as it relates to the making of extra-judicial confession by the appellant. The defence also appears to be conscious of the fact that the Public Prosecutor had sought the permission to cross-examine the witness to a limited extent. The witness was subjected to lengthy and detailed cross-examination with respect to the making of extra-judicial confession by the appellant. The trial as well as the High Court rightly relied upon his testimony to hold that the appellant had voluntarily made the extra-judicial confession to the aforesaid witness. *Gura Singh* v. *State of Rajasthan*, AIR 2001 SC 330 : (2001) 2 SCC 205 : 2001 SCC (Cri) 323 (330-331) : 2001 CrLJ 487 : 2001 CrLR (SC) 22.

[11268] ● ***Cross-examination of witness not completed—Court did not cross-examine him for one or other reason—Effect.***—Jiyawoo was examined as PW-1, but his cross-examination was not completed on the same day. Hence, the Trial Court adjourned the case to some other day and then to some other day and like that to so many days. PW-1, Jiyawoo, had appeared in Court on 9th and 15th of November, 1994, 8th December, 1994, and then on 12th January, 7th February, 24th June, 25th August and 25th September of 1995, In spite of the fact that the witness turned upon on those days, he was not cross-examined due to one reason or the other for which the witness is not at fault.

The provision of Section 309, CrPC has not been complied with so in this case a miscarriage of justice has occasioned due to the failure of the Trial Court to comply with the mandatory directions contained in the Code. Criminal justice cannot be allowed to be defeated solely on account of inaction of lapses of the Court in adhering to the mandates of law.

The Supreme Court setting aside the order of acquittal directed the trial Court to proceed with the further examination of PW-1 and examination of other witnesses to whom the Court should issue process, if so requested by the prosecution. *State of Uttar Pradesh* v. *Shambhu Nath Singh*, AIR 2001 SC 1403 : (2001) 4 SCC 667 : 2001 SCC (Cri) 798 : 2001 CrLJ 1740.

[11269] ● ***Cross-examination of witness who had come down from New York unnecessary harassment to witness by unreasonable demand.***—As per the version of the appellant, he had to come down from New York for being cross-examined on that day, but the second respondent advocate sought for an adjournment on the ground that it was not possible to conduct the cross-examination unless all the other witnesses for the prosecution were also present in Court. We have no doubt that such a demand was not made with good faith. It was aimed at causing unnecessary harassment to witnesses. *M.G. Dastane* v. *Shrikant S. Shinde*, AIR 2001 SC 2028 : (2001) 6 SCC 135.

[11270] ● ***Evidence of witness—No question put to him in cross-examination—Value of evidence.***—The evidence of PW-1, Dr. Basant Lal, was not even controverted by the defence as no question was put to him in cross-examination by the defence Counsel. His testimony ought to have been given due probative value particularly when nothing was shown to doubt the evidence of that medical practitioner. Defence Counsel was not able to pick out even a single answer from his evidence which could at least throw a modicum of doubt about the correctness of his evidence. *State Government of NCT of Delhi* v. *Sunil*, 2001 CrLJ 504 : (2001) 1 SCC 652 : (2001) 1 Crimes 176.

[11271] ● ***Expunging adverse remarks.***—Both the Trial Court and the High Court should have avoided making such unsavoury comments against a witness in such a manner as to entail serious implications on his career, merely because the answers which were extracted from him through cross questions contained contradictions or inconsistencies. It should have been remembered that PW-30 (Devendra Kumar Sharma) was cited by the prosecution and the chief examination was conducted by a Public Prosecutor. Once the witness was cross-examined, the Public Prosecutor had an opportunity under law to put such questions as were necessary for "explanation of matters referred to in cross-examination". It is ununderstandable to us why the Public Prosecutor did not put a single question at re-examination stage, at least for the purpose of giving him opportunity to explain such incongruities which fell from his mouth during cross-examination. If the Trial Court felt that some of the answers given by that witness during cross-examination were so inconsistent or contradictory and that such answers *per se* required judicial castigation the Court also had a duty to invoke its powers envisaged in S.165 of the Evidence Act. The width of the powers of the Court to put questions is almost plenary and no party can possibly raise an objection thereto. This can be discerned from the language employed in the first limb of the section. In the present case, when the Public Prosecutor failed to utilize the opportunity afforded by law to ask PW-30 (Devendra Kumar Sharma) such questions as are necessary for explanation of the matters referred to in cross-examination, and when the Trial Judge also failed to invoke the plenary powers to put such questions as he should have put regarding the answers given in cross-examination, it was unfair, and we may say uncharitable to a witness to shower him with judicial reprobations in the judgment. Such disparaging remarks and the direction to initiate departmental action against him could have very serious impact on his official career. *Manish Dixit* v. *State of Rajasthan*, AIR 2001 SC 93 : (2001) 1 SCC 596 : 2001 SCC (Cri) 235 (246) : 2001 CrLJ 133.

[11272] ● ***Court witnesses required to state about certain documents.***—If the Court has permitted the accused to lead the evidence, the mere denial of cross-examining the man by the accused cannot *per se* be a vulnerable factor. In the present case, the three Police officials were not required to speak about the case at hand in general. They were in fact required to state about certain documents in terms of Section 174 of the Code. It is of course true that when the permission had been granted to cross-examine, the accused could have produced some materials to support his case. *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble*, AIR 2003 SC 4567 : (2003) 7 SCC 749 : 2003 SCC (Cri) 1918 (1932-33) : 2003 CrLJ 4548 : (2003) 4 Crimes 106.

[11273] ● ***Cross-examination—Questions which cannot be put to witness therein.***—Surprisingly, to PW-3 a suggestion was made by the cross-examining counsel that the appellant was in love with her daughter-in-law and that is why he used to go to her house. This was of course stoutly denied by PW-3. This fact has been noticed by the learned Magistrate but counsel for the respondent in the course of his argument before the Magistrate did not pursue this line any further and stated that the respondent had no grievance about the character of the appellant. This Court is surprised that the counsel for the respondent put such a question to the witness when such was not the complaint in the application under Section 125, CrPC nor had the respondent as PW-1 or her mother as PW-2 stated anything to the effect that the appellant had an affair with any other lady. Without there being any basis in the pleadings, or even in the evidence examined by the applicant, the learned Magistrate should not have permitted such a question to be put to the witness, particularly when it reflected not only on the character of the appellant but also on another lady who was not a party to the proceedings. The learned Magistrate was remiss in permitting such a question to be put to the witness and in recording the answer given by the witness. He should not have permitted such matters to go on record. *Deb Narayan Halder* v. *Anushree Halder*, AIR 2003 SC 3174 : (2003) 11 SCC 303 : 2004 SCC (Cri) 164 (173) : 2003 CrLJ 4470.

[11274] ● ***Statement recorded under Section 3(3), CrPC not evidence.***—The statement recorded under Section 313, CrPC is not evidence. It is only the accused's stand or version by way of explanation, when incriminating materials appearing against him are brought to his notice. Absence of any suggestion during cross-examination cannot be made up by a statement under Section 313, CrPC. At that stage, the prosecution does not get an opportunity to question the accused about his stand in the statement under Section 313, CrPC. *Devender Kumar Singla* v. *Baldev Krishan Singla*, 2004 CrLJ 1774 : JT 2004 (2) SC 539 : (2004) 2 Crimes 100.

[11275] ● ***Section 145, Evidence Act—Applicability.***—Section 145 of the Indian Evidence Act applies when the same person makes two contradictory statements. It is not permissible in law to draw adverse inference because of alleged contradictions between one prosecution witness *vis-a-vis* statement of other witnesses. It is not open to the Court to completely demolish the evidence of one witness by referring to the evidence of other witnesses. Witness can only be contradicted of Section 145 of the Evidence Act by his own previous statement and not with the statement of any other witness. Section 145 applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under Section 145 of the Evidence Act only. Section 145 has no application where a witness is sought to be contradicted not by his own statement but by the statement of another witness. *Chaudhari Ramjibhai Narasingbhai* v. *State of Gujarat*, AIR 2004 SC 313 : (2004) 1 SCC 184 : 2004 CrLJ 280.

[11276] ● ***Application for recalling victim for further cross-examination rejected.***—In the instant case under Section 376 IPC, after the evidence of the parties had been recorded and the case was posted for arguments, an application purported to be under Section 311 of the Code was filed for recalling of the victim for further cross-examination on the ground that the parties have settled the dispute outside the Court at the intervention of the well wishers and also the informant could not identify the persons who allegedly committed the offence due to darkness. The trial Court rejected the application. The trial Court was of the view that in view of the circumstances indicated it would not be proper to allow the application of the accused for recalling the victim. The order of rejection was confirmed by the High Court and the Supreme Court. The Supreme Court held that since Section 376 IPC is not compoundable in terms of Section 320 of the Code, the trial "Court and the High Court rightly rejected the prayer." *Rama Paswan* v. *State of Jharkhand*, (2007) 11 SCC 191 : 2007 CrLJ 2750 (2752) : 2007 (5) SCR 83.

[11277] ● ***Witness called by Court for giving evidence against complainant—opportunity to cross-examine.***—If a witness is called by the Court to give evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, CrPC, but under the Evidence Act, which gives a party a right to cross-examine a witness who is not his own witness. *Rama Paswan* v. *State of Jharkhand*, (2007) 11 SCC 191 : 2007 CrLJ 2750 (2752) : 2007 (5) SCR 191.

[11278] ● ***Questions put in cross-examination—Relevancy.***—The questions put in the cross-examination to a great extent probabilise the prosecution version. Though questions put in cross-examination are not always determinative in finding an accused guilty, they are certainly relevant. *Jesar Asir Singh* v. *State*, AIR 2007 SC 3015 : (2007) 12 SCC 19 : 2007 CrLJ 4310 (4313) : 2007 (3) Crimes 333.

[11279] ● ***Testimony of eye-witness not challenged in cross-examination.***—"PW-1, the informant was not an eye-witness. He was informed about the occurrence by PW-2. PW-2 in his evidence has categorically stated that when they were going together, he walked ahead of the deceased and was talking with one Giyasuddin who had been coming from opposite direction. When he looked behind he found that the appellant had stabbed the deceased with a knife on his chest and he had been fleeing away. PW-3 in his deposition substantially corroborated the statement of PW-2 stating that while he was talking to Samir Seikh Alimat (the deceased) was standing about 60 cubits, away from him near the house of Surat Dewan, the incident occurred and he saw the appellant stabbing the deceased, whereafter the appellant fled away.

We may furthermore notice that the veracity of the testimony of PW-2 had not been questioned in the cross-examination. There has hardly been any cross-examination of the said witnesses. Except making some stray suggestions that the appellant did not stab the deceased, no other question in regard to the veracity of his statement had been put. Nothing has elicited by the defence from the cross-examination of PW-2.

When the testimonies of two eye-witnesses had been believed by the learned Trial Judge as also by the High Court and in view of the fact that we did not see any reason to differ with the findings of the two Courts, in our opinion, the fact whether the bloodstains collected from the place of occurrence by the Investigating Officer had been sent to the Forensic Expert for chemical examination or not, pales into insignificance. We are furthermore of the opinion that whether the knife was recovered or not is also not of much importance.

Our attention was drawn to the statement of Dr. Chakrabarty (PW-9) to the fact that according to the said witness, the injury suffered by the deceased could be caused if anybody falls on iron railing. Such a statement made by PW-9 does not lead us anywhere. It was not the case of the defence that there was any iron railing or the deceased had fallen on any iron railing. Even such a question was not put to PW-2 and PW-3 in the cross examination.

For the aforementioned reasons, we are of the opinion that there is no merit in this appeal. It is dismissed accordingly." *Tamo* v. *State of West Bengal*, AIR 2008 SC 12 : (2007) 10 SCC 493 : 2007 CrLJ 4724 (4725) : 2007 (9) SCR 917.

2. OBJECT OF CROSS-EXAMINATION

[11280] ● ***Object of cross-examination.***—By means of cross-examination the situation of the witness with respect to the parties and to the subject of the litigation, his interests, his motives, his inclination, his prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description, are all fully investigated and ascertained and submitted to the consideration of the jury, who have an opportunity of observing his demeanour and of determining the just value of his testimony.—*Taylor.*

[11281] ● The objects of cross-examination are to impeach the accuracy, credibility and general value of the evidence given in-chief; to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examinating party. *Powell Evidence*, 532.

[11282] ● ***Cross-examining the witness—Tantamount to.***—The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party with the leave of the Court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultiness of the memory in the case of such a witness would be another object of cross- examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross-examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic attitude or otherwise, the Court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way. The matter can be viewed yet from another angle. Section 154 speaks of permitting a party to put to his own witness "questions which might be put in cross-examination". It is not necessarily tantamount to "cross-examining" the witness. Cross-examination', strictly speaking means cross-examination by the adverse party as distinct from the party calling the witness. (Section 137, Evidence Act). That is why Section 154 uses the phrase "put any questions to him which might be put in cross-examination by the adverse party". Therefore, neither the party calling him, nor the adverse party is, in law, precluded from relying on any part of the statement of such a witness. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294 : (1976) 1 SCC 727 : 1976 SCC (Cri) 160 : 1976 CrLJ 295 : 1975 CrLR (SC) 597.

3. RIGHT OF ACCUSED TO CROSS-EXAMINE

[11283] ● ***Right of accused to cross-examine.***—There can be no doubt that each accused is entitled in law to test the evidence given against him by a prosecution witness by cross-examination. Section 137 does not say that such cross-examination has to be limited only to what has been stated by the prosecution witness in examination-in-chief. Indeed Section 138 mentions categorically that "the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief" nor is there anything to justify the conclusion that once the right of cross-examination has been exercised after charge it cannot be exercised again. While it is true that Section 137 and Section138 do not in words speak of a further rounds of cross-examination there is neither in these sections nor anywhere else in the Evidence Act anything to bar the accused from exercising his right of cross-examination afresh if and when the prosecution witness makes a further statement of facts prejudicial to him. *C.T. Muniappan* v. *State of Madras*, AIR 1961 SC 175 : 1961 (1) CrLJ 315 : 1962 All WR (SC) 31.

[11284] ● ***Accused right to call Public Analyst to be examined and cross-examined.***—It is true that sub-section (2) of Section 13 of the Act has given a right both to the accused as well as the complainant on payment of the prescribed fee to apply to the Court after the prosecution has been instituted to send part of the sample preserved as required under sub-clause (i) or sub-clause (iii) of Clause (c) of sub-section (1) of Section 11 to the Director of the Central Laboratory for a certificate and the Court is bound to send it under its seal to the said director who has to submit a report within one month from the date of the receipt. This certificate under sub-section (3) supersedes the Public Analyst's certificate and is conclusive and final under sub-section (5). But nothing contained in these sub-sections relating to certificate of the Director of the Central Food Laboratory in any way limits the right of the accused under Section 257 of the Code of Criminal Procedure to require the Public Analyst to be produced. The Court may, reject the prayer for good and sufficient reasons such as for instance where it is made for the purpose of vexation or delay or for defeating the ends of justice. *Ram Dayal* v. *Municipal Corporation of Delhi*, AIR 1970 SC 366 : (1969) 3 SCC 35 : 1970 CrLJ 515 : 1970 (2) SCR 682.

[11285] ● ***When person accused alongwith others voluntarily steps in witness box.***—When a person accused along with others voluntarily steps in the witness, box as a witness in defence, he is in the same position as an ordinary witness and is, therefore subject to cross-examination by the prosecution counsel and evidence brought out in such cross-examination can be used against his co-accused. If such a witness incriminates his co-accused, the other accused jointly tried with him, has the right to cross- examine him if he wants so to do. This has been the position in England after 1898 when accused persons were made competent witnesses. The same consequences must also flow after accused person have been made competent witnesses for the defence under Section 342-A of the Code of Criminal Procedure. *Tribhuvan Nath* v. *State of Maharashtra*, AIR 1973 SC 450 : (1972) 3 SCC 511 : 1972 SCC (Cri) 604 (616) : 1972 CrLJ 1277 : 1972 UJ (SC) 826.

[11286] ● ***Deposition before committing Court—Admissibility of at Session Trial.***—The true reading of Section 33 of the Evidence Act is that the adverse party must have had both the right and the opportunity of cross-examining. Mere opportunity without the right of cross-examination cannot bring the case within the term of Section 33. But Sections 207 and 207-A, CrPC Show that the accused has the right to cross-examine the witness examined by the prosecution in the Committing Court. In the present case the appellant declined to cross-examine the witness in the Committing Court and stated that he would reserve the cross-examination of the witness for Sessions Court. There is no substance in the appellants contention that it was the Committing Magistrate who had reserved the cross-examination of the witness for the Court of Sessions and that thereby the appellant was deprived of an opportunity to cross-examine the witness. *Mulkha Raj Sikka* v. *Delhi Administration*, AIR 1974 SC 1723 : (1975) 3 SCC 2 : 1974 SCC (Cri) 698 (703) : 1974 CrLJ 1171 : 1974 CrLR (SC) 512.

[11287] ● ***Witness neither examined by Police nor cited in charge-sheet.***—In a grave charge it will not be proper to place reliance on a witness who never figured during the investigation and was not named in the charge-sheet. The accused who are entitled to know his earlier version to the Police are naturally deprived of an opportunity of effective cross-examination and it will be difficult to give any credence to a statement which was given for the first time in Court after about a year of the occurrence. The High Court was wrong in accepting the evidence of this witness as leading assurance to the testimony of other witnesses. *Ram Lakhan Singh* v. *State of Uttar Pradesh*, AIR 1977 SC 1936 : (1977) 3 SCC 268 : 1977 SCC (Cri) 474 (485) : 1977 CrLJ 1566 : 1977 CrLR (SC) 294 : (1978) 1 SCR 125.

[11288] ● ***Witnesses on behalf of detaining authority cannot be cross-examined by detenu.***—The witnesses on behalf of the detaining authority cannot be cross-examined by the detenue. It is not stated in any judgment of this Court that the witnesses on behalf of the detenue produced in rebuttal of the allegation against him cannot be cross-examined. Cross-examination of such witnesses has to be by the detaining authority and that right cannot be denied to them. *Harbans Lal* v. *M.L. Madhwan*, AIR 1987 SC 217 : (1987) 1 SCC 151 : 1987 SCC (Cri) 47 (54) : 1987 CrLJ 324 : 1987 CrLR (SC) 23 : 1987 (1) Crimes 89.

[11289] ● ***Opponent declining to avail himself of opportunity to put his case in cross-examination.***—It is a rule of essential justice that wherever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted. *Sarwan Singh* v. *State of Punjab*, AIR 2002 SC 3652 : (2003) 1 SCC 240 : 2003 SCC (Cri) 282 : 2003 CrLJ 21 : 2002 (4) Crimes 414.

[11290] ● ***Right to cross-examine a witness.***—A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief. cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be curved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. *Jayendra Vishnu Thakur* v. *State of Maharashtra*, 2009 (7) SCC 104 : 2009 (8) SCR 591 : 2009 (4) Supreme 667 : 2009 (3) Crimes 76 (SC).

4. CROSS-EXAMINATION AS TO PREVIOUS STATEMENT

[11291] ● ***Cross-examination as to previous statement.***—Any statement made in the Panchanama cannot be used in evidence except for the purposes of contradicting the witness whose statement is contained in Panchnama but if it is intended to contradict him by the writing, his attention must before the writing can be proved, be called to those parts of it which are to be used for contradicting him. This is what is required under Section 145 of the Evidence Act but even where a witness is confronted by his previous statement and given an opportunity to explain, that part of the statement that is put to him does not constitute substantive evidence. *Kanu Ambu Vish* v. *State of Maharashtra*, AIR 1971 SC 2256 : (1971) 1 SCC 503 : 1971 CrLJ 1547.

[11292] ● ***Statement made by witness to Police—Court not allowing cross-examination.***—When a witness is not allowed to be cross-examined with reference to his earlier statement to Police he remains untested in cross-examination and he cannot be taken as corroborating the evidence of other. *Badri* v. *State of Rajasthan*, AIR 1976 SC 560 : (1976) 1 SCC 442 : 1976 CrLJ 496.

[11293] ● ***Statement of witness under Section 161, CrPC contradictions or omissions in.***—One curious practice not known to law adopted by him was that whenever a witness was asked about an omission with reference to the statement of the witness recorded by the investigating officer under Section 161, CrPC, the learned Public Prosecutor would make a statement whether the statement referred to in evidence was to be found or was not to be found in the statement under Section 161, CrPC and no attempt was made to prove the omission. Such concession for proof of contradiction or omission lacks support of law and is likely to be unfair to the witness in that when the investigating officer is questioned with regard to the contradiction or omission, a further opportunity will be available to him to explain the contradiction or omission. *Muthu Naicker* v. *State of Tamil Nadu*, AIR 1978 SC 1647 : (1978) 4 SCC 385 : 1978 SCC (Cri) 14 : 1978 CrLJ 1713.

[11294] ● ***Statements by witnesses made during investigation cannot be used as substantive evidence.***—Section 162 of the Code of Criminal Procedure imposes a bar on the use of any statement made by any person to a Police Officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradicting the witness in the manner provided by Section 145 of the Indian Evidence Act. Where any part of such statement is so used any part thereof may also be used in the re-examination of the witness for the limited purpose of explaining any matter referred to in his cross-examination. The only other exception to this embargo on the use of statements made in the course of an investigation relates to the statements falling within the provisions of Section 32(1) of the Indian Evidence Act or permitted to be proved under Section 27 of the Indian Evidence Act. Section 145 of the Evidence At provides that a witness may be cross-examined as to previous statements made by him in writing and reduced into writing and relevant to matters in question, without such writing being shown to him or being proved but, that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Court below were clearly wrong in using as substantive evidence statements made by witnesses in the Court of investigation. *Hazari Lal* v. *State (Delhi Admn.)*, AIR 1980 SC 873 : (1980) 2 SCC 390 : 1980 SCC (Cri) 452 : 1980 CrLJ 564 : 1980 CrLR (SC) 242 : 1980 Mad LJ (Cri) 756.

[11295] ● ***Two contradictory statement made by one person.***—It is obvious from a perusal of Section 145 that it applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under Section 145. In other words, where the statement made by a person or witness is contradicted not by his own statement but by the statement of another prosecution witness, the question of the application of Section 145 does not arise. To illustrate, we might give an instance—suppose *A*, a prosecution witness, makes a particular statement regarding the part played by an accused but another witness *B* makes a statement which is inconsistent with the statement made by *A*, in such a case Section 145 of the Evidence Act is not at all attracted. Indeed, if the interpretation placed by the High Court is accepted, then it will be extremely difficult for an accused or a party to rely on the *inter se* contradiction of various witnesses and every time when the contradiction is made, the previous witness would have to be recalled for the purpose of contradiction. This was neither the purport nor the object of Section 145 of the Evidence Act. *Mohanlal Gangaram Gehani* v. *State of Maharashtra*, AIR 1982 SC 839 : 1980 Supp SCC 467 : 1982 SCC (Cri) 334 : 1982 CrLJ 630 (2) : 1982 CrLR (SC) 77.

[11296] ● ***Copies of statements made before Police not supplied to defence.***—Even the statements made before the Police were recorded four months after the occurrence. Copies of these statements were not made available to the defence on the spacious plea that the prosecution did not seek to rely on these statements. The Trial Court was wholly wrong in taking the view that it was not necessary to make available these statements to the defence for the purposes of cross-examination inasmuch as the prosecution did not wish to rely on these statements. The defence cannot be deprived of or denied the right to avail of these statements in order to test the evidence of the concerned witness or confront him with his earlier version in case the evidence in Court is inconsistent with the earlier statements made before the Police. Evidently the High Court did not realise that the defence had been wrongly deprived of a very valuable right. Even though a grievance was made in this behalf. The High Court might have directed the prosecution to make available the copies to the defence. Failing compliance the High Court could have drawn an adverse inference. In case the copies were furnished, the High Court upon a request being made in this behalf could have directed the learned Sessions Judge to record additional evidence by recalling PW-5 for cross-examination in the light of the said statements if the High Court was satisfied that the ends of justice so demanded. *Lalchand* v. *State of Haryana,* AIR 1984 SC 226 : (1984) 1 SCC 686 : 1984 SCC (Cri) 355 (358) : 1984 CrLJ 164 : (1984) 1 Crimes 337.

[11297] ● ***Statement of accused—Recording of under Section 161, CrPC.***—Section 162, CrPC, 1973 permits the cross-examination of the witness in any trial, with reference to his previous statement, to establish a contradiction and the manner in which such contradiction can be established. Section 155 of the Evidence Act provides that the previous statement of a witness can be made use of during the cross-examination of that witness for the purpose of impeaching the credit of the witness. Thus, it is seen it is the right of a party in a trial to use the previous statements of a witness either for the purpose of establishing a contradiction in his evidence or for the purpose of impeaching the credit of the witness. This right given to a party in a trial under Section 145 of the Evidence Act is some what controlled in criminal trials by the provisions made in the Code. Section 161 of the Code provides that the Police Officer investigating a case is entitled to examine any person and reduce the statement of such person in writing. This statement recorded by a Police Officer under Section 161 even though is a previous statement for the purpose of Section 145 of the Evidence Act, such statement can be used for the purpose of establishing a contradiction or impeaching the credit of the witness only in the manner provided for in Section 162 of in Code. *State of Kerala* v. *Babu*, AIR 1999 SC 2161 : 1999 SCC (Cri) 611 : 1999 CrLJ 3491 : 1999 (3) Crimes 27.

5. CONTRADICTION WITH REFERENCE TO PREVIOUS TAPE-RECORDED STATEMENT

[11298] ● ***Contradiction with reference to previous tape-recorded statement.***—A tape recorded statement is neither a statement in writing nor reduced to writing. In the present it has been contended that such statement can be utilised only for corroboration and not for contradiction. This contention is liable to be rejected. The tape recording of a former statement of a witness can be admitted in evidence to shake the credit of a witness under Section 155(3) of the Evidence Act. It is clear that a previous statement made by a person and recorded on tape can be used only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration the evidence is admissible in respect of the other three matters mentioned under Section 161(1) Exception 2 to Section 153 and Section 155(3) of the Evidence Act. Therefore, it is not possible to accept the contention that the previous statement can be used only for the purpose of corroboration but not for the purpose of contradicting the evidence before the Court. If a previous statement made by a person can be used to corroborate his evidence given before the Court on principle there is not reason why such previous statement cannot be used to contradict and also for the other purpose referred to above. As to contradict the witness with reference to earlier tape recorded statement resort should be taken to Section 145, Evidence Act. *N. Rama Reddy* v. *V.V. Giri*, AIR 1971

SC 1162 : (1970) 2 SCC 340 : (1971) SCR 399 : (1971) 1 SCA 394 : (1971) 1 SC J 483 : 1971 SCD 546.

[11299] ● ***Evidence of witness—Impeachment.***—It is provided in the first limb of Section 145 that a witness may be cross-examined as to previous statement made by him without such writing being shown to him. But the second limb provides that "if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him." There is thus a distinction between the two vivid limbs, though subtle it may be. The first limb does not envisage impeaching the credit of a witness, but it merely enables the opposite party to cross-examine the witness with reference to the previous statements made by him. He may at that stage succeed in eliciting materials to his benefit through such cross-examination even without resorting to the procedure laid down in the second limb. But if the witness disowns having made any statement which is inconsistent with his present stand his testimony in Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145. *Binay Kumar Singh* v. *State of Bihar*, AIR 1997 SC 322 : 1997 SCC (Cri) 333 : 1997 CrLJ 362 : 1997 (100) Bom LR 159.

[11300] ● ***Previous statement not substantive evidence.***—The previous statement cannot be treated as substantive evidence. The contradictions with earlier statement should be considered only if these have been brought or recorded by confronting the witnesses. *Chinnamal* v. *State of Tamil Nadu*, AIR 1997 SC 145 : 1997 (4) Crimes 211 (SC).

6. CROSS-EXAMINATION AS TO IDENTIFICATION

[11301] ● ***Cross-examination as to identification.***—In the present case there was delay in holding Test Identification Parade. Police officer or the Magistrate was not offered on the point of delay. Validity of Test Identification Parade cannot be challenged. *Bharat Singh* v. *State of U.P.*, AIR 1972 SC 2478 : (1973) 3 SCC 896 : 1972 CrLJ 1704 : 1973 CrLR (SC) 317.

[11302] ● ***Appellants identification unchallenged.***—The evidence of Magistrate (PW-1) shows that he held the parade on March 11, 1966 at which several witnesses identified the appellant, accused-Lal Singh and accused- Bhagwan Singh. Some questions were asked to him in cross-examination regarding the identification of Bhagwan Singh and Lal Singh, but none was asked regarding the appellant's identification. That must mean that the appellant had no grievance to make regarding the manner in which the parade had been held. *Chander Singh* v. *State of U.P.*, AIR 1973 SC 1200 : (1973) 3 SCC 55 : 1973 SCC (Cri)133 (136) : 1973 CrLJ 926 : 1973 UJ (SC) 254.

[11303] ● ***Evidence of witness participating in test identification parade but not examined at trial.***—In the present case, it was contended by the learned counsel for the respondent that the son of the deceased is not examined at the trial but he had identified articles at the identification parade, and the learned counsel attempted to contend that this evidence could be used as a piece of corroboration. Unfortunately this evidence, could not be looked into because. . . (i) What he identified and stated to the Magistrate who conducted the identification parade is only a hearsay evidence as that evidence could only be used to corroborate his testimony if he was examined at the trial, and (ii) what he stated to the Magistrate at the time of the test identification parade is not subjected to cross examination and was at the back of the accused and could not be used as evidence against the accused. *Chandan* v. *State of Rajasthan*, AIR 1988 SC 599 : (1988) 1 SCC 696 : 1988 SCC (Cri) 238 (242) : 1988 CrLJ 842 : 1988 CrLR (SC) 163 : JT 1988 (1) SC 141 : (1988) 1 Crimes 582.

[11304] ● ***Statement of appellant on question of identity to wriggle out of what he stated earlier.***—The High Court came to the conclusion and in our opinion rightly that during the one month period that elapsed since recording of examination-in-chief something transpired which made him shift his evidence on the question of identity to help the appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. *Khujji alias Surendra Tiwari* v. *State of Madhya Pradesh*, AIR 1991 SC 1853 : (1991) 3 SCC 627 : 1991 SCC (Cri) 916 (925) : 1991 CrLJ 2653.

7. HOSTILE WITNESS

[11305] ● ***Hostile witness.***—When a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294 : 1976 SCC (Cri) 160 : 1976 CrLJ 295 : 1975 CrLR (SC) 579 : 1976 Mah LJ 174.

[11306] ● ***Cross-examination of his own witness by party.***—In India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared 'adverse' or 'hostile'. Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the Court.

The discretion conferred by Section 154 on the Court is unqualified and untrammeled, and is apart from any question of "hostility". It is to be liberally exercised whenever the Court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the Court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion and conflict that had so long vexed the English Courts. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294 : 1976 SCC (Cri) 160 : 1976 CrLJ 295 : 1975 CrLR (SC) 579 : 1975 CAR 387.

[11307] ● ***Hostile witnesses—Cross-examination—Value of his evidence.***—The prosecution could have even avoided requesting for permission to cross-examine the witness under Section 154 of the Evidence Act. But the fact that the Court gave permission to the Prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. We are satisfied in this case that the evidence of Jagat Singh, but for whose prompt assistance the case would not have seen the light of day and whose statement had immediately been recorded by the DSP, is amply corroborated by other evidence mentioned above to inspire confidence in his testimony. Apart from that the fact of recovery of the gold coins in the pocket of the appellant gave a seal of finality to the truth of the charge against the appellant. If Jagat Singh had accepted the bribe he would have been guilty under Section 161, IPC. There is, therefore, clear abetment by the appellant of the offence under Section 161, IPC and the ingredients of Section 165-A, IPC are established against him. *Bhagwan Singh* v. *State of Haryana*, AIR 1976 SC 202 : (1976) 1 SCC 389 : 1976 SCC (Cri) 7 : 1976 CrLJ 203 : 1976 CrLR (SC) 48.

[11308] ● ***Cross-examination of his own witness—Judicial discretion of Court to permit.***—The section confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. It is, however, well-settled that the discretion must be judiciously and properly exercised in the interests of justice. The law on the subject is well settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. Before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed. In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the Judge concerned may lock into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the pervious authorities. The Court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention. *Rabindra Kumar Dey* v. *State of Orissa*, AIR 1977 SC 170 : (1976) 4 SCC 233 : 1977 CrLJ 173 : 1976 CrLR (SC) 436 : 1976 CAR 266.

[11309] ● ***Evidence of witness—Unreliable in cross-examination.***—PW-18, was examined for proving the recovery of "*ballam*" and "*lathis*". But during their cross-examination they tried to support the accused and had gone out of their way in deposing that the accused were not present on the scene of offence at the relevant time. The evidence of witness-Badley in his cross-examination was clearly unreliable and was rightly rejected by the High Court. The High Court was equally justified in taking the view that witness, PW-18, was required to be cross- examined by the prosecution as he had turned hostile to the prosecution and that request was wrongly rejected by the Trial Court. *Hari Chand* v. *State of Delhi*, AIR 1996 SC 1477 : (1996) 9 SCC 113 : 1996 SCC (Cri) 950 (968) : 1996 CrLJ 1701 : JT 1996 (2) SC 140 : (1996) 1 Crimes 109.

[11310] ● ***Examination of approver as witness object.***—On 4.11.1992 both the accused were present in the chamber of the learned Magistrate and in their presence the statement of *Sudipa* was recorded under Section 306(4) till 5 p.m. and the police was directed to keep all of them present on 9.11.1992 for recording her further statement on 9.11.1992 her further statement was recorded and copies of the evidence of Sudipa were supplied to both the accused and that fact was ascertained by the Learned Magistrate on 25.11.1992 when all of them were produced before him. The learned Magistrate has therefore fixed 6.1.93 as the date for cross-examination of approver Sudipa. On that day, and application was given on behalf of the appellant for local inspection of the place of offence before cross-examining Sudipa. That application was granted and the accused were directed to be produced on 3.2.93 for further cross examination. The cross-examination of Sudipa was then for different reasons adjourned from time to time and last date fixed for that purpose was 30.3.1993. On that day the Advocate of the appellant did not remain present. The appellant Krishnanandu also declined to cross-examine her. The lawyer representing accused also declined to cross-examine her. Therefore there is no justification in the grievance made by the learned Counsel that Sudipa was examined by the Magistrate in the absence of the appellant and the appellant was not afforded an opportunity to cross-examine her. For this reason it is also not possible to agree with the conditions raised by him that the mandatory requirement of S. 306(4), CrPC was not complied with. *Ranadhir Basu* v. *State of West Bengal*, AIR 2000 SC 908 : (2000) 3 SCC 161 : 2000 SCC (Cri) 587 (598) : 2000 CrLJ 1417 : 2000 CrLR (SC) 364.

[11311] ● ***Cross-examination—Right of.***—At the stage of investigation, inquiry or trial of the offence, the person to whom pardon is to be granted, is to be examined for collection the evidence of a person who is directly or indirectly concerned in or privy to an offence. At the time of investigation or inquiry into an offence, the accused cannot claim any right under law to cross-examine the witness. The right to cross-examination would arise only at the time of trial. During the course of investigation by the Police, question of cross-examination by the accused does not arise. Further the person to whom pardon is granted in examined but is not offered for cross- examination and thereafter during trial if he is examined and cross-examined then there is no question of any prejudice caused to the accused. In such cases, at the most, the accused may lose the chance to cross-examine the approver twice, that is to say, one before the committal and other at the time of trial. *State of H.P.* v. *Surender Mohan*, AIR 2000 SC 1862 : (2000) 2 SCC 396 : 2000 SCC (Cri) 400 (407) : 2000 CrLJ 1429 : 2000 CrLR (SC) 328 : 2000 (1) Crimes 218.

[11312] ● ***Approver—Cross-examination of.***—Before or after the case was committed to the Sessions Court, the accused had not raised any objection that they were not permitted to cross-examine the approver nor did they contend so when the approver was examined and cross-examined during the trial. Therefore, at the stage of final arguments the accused cannot raise the said contention. Further after cross-examining the approver in detail, there is no question of failure of justice nor any prejudice being caused to the accused on account of that omission. *State of H.P.* v. *Surender Mohan*, AIR 2000 SC 1862 : (2000) 2 SCC 396 : 2000 SCC (Cri) 400 (410) : 2000 CrLJ 1429 : 2000 CrLR (SC) 328 : 2000 (1) Crimes 218.

[11313] ● ***Non-examination of approver—Trial not vitiated.***—By not examining the approver, the trial would not get vitiated. Such evidence may have to be scrutinised with great circumspection. If in such scrutiny, the evidence is found reliable the Court cannot be inhibited from using the evidence. *State of H.P.* v. *Surender Mohan*, AIR 2000 SC 1862 : (2000) 2 SCC 396 : 2000 SCC (Cri) 400 (410) : 2000 CrLJ 1429 : 2000 CrLR (SC) 328 : (2000) 1 Crimes 218.

[11314] ● ***Hostile witness—Permission for cross-examination in terms of Section 154 of Evidence Act.***—Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness. Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence, cannot as a matter of law be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stand thoroughly discredited or case still be believed on regard to a part of his testimony. If he Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record that part of his testimony which he finds to the creditworthy and act upon it. It in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence discard his evidence *in toto*. *Gura Singh* v. *State of Rajasthan*, AIR 2001 SC 330 : (2001) 1 SCC 205 : 2001 SCC (Cri) 323 : 2001 CrLJ 487.

[11315] ● ***Cross-examination and contradiction of his own witness by party.***—It is important to note that the English Statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English Law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In India, this can be done with the consent of the Court under S. 155, Evidence Act. Under the English law a party calling the witness can cross-examine and contradict a witness in respect of his previous inconsistent statements. With the leave of the Court, only when the Court considers the witness to be adverse are such condition has been laid down under Sections 154, 155 of Indian Evidence Act and the grant of such leave has been left completely to the discretion of the Court. *Gura Singh* v. *State of Rajasthan*, AIR 2001 SC 330 : (2001) 2 SCC 205 : 2001 SCC (Cri) 323 : 2001 CrLJ 487.

8. DYING DECLARATION

[11316] ● ***Dying declaration.***—It is true that the Doctor who had recorded the dying declaration had stated that the deceased was in a state of shock because he had received a serious injury in the abdomen which had to be stitched. The Doctor was, however, not cross-examined as to the facts whether or not despite the shock, the deceased had retained his mental faculties. *Kusa* v. *State of Orissa*, AIR 1980 SC 559 : (1980) 2 SCC 207 : 1980 SCC (Cri) 389 (391) : 1980 CrLJ 408 : 1980 CrLR (SC) 200 : 1980 Cr App R (SC) 66 : (1980) 2 SCR 801.

[11317] ● ***View of medical expert not put to Doctor in cross-examination.***—We are unable to place any reliance on the observation in the books on medical jurisprudence in absence of any question put to the doctor by the accused in his cross-examination regarding the view expressed by the author regarding the state of mind of the deceased. *Kusa* v. *State of Orissa*, AIR 1980 SC 559 : (1980) 2 SCC 207 : 1980 SCC (Cri) 389 (391) : 1980 CrLJ 408 : 1980 CrLR (SC) 200 : (1980) 2 SCR 801.

9. RAPE VICTIM

[11318] ● ***Rape victim.***—There has been lately, lot of criticism of the treatment of the victims of sexual assault in the Court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts not withstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or the test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The Court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defense. It must effectively control the recording of evidence in the Court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination. The Court must also ensure that cross-examination, not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings, what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence. *State of Punjab* v. *Gurmit Singh*, AIR 1996 SC 1393 (1404-1405) : (1996) 3 SCC 289.

10. TENDERING WITNESS FOR CROSS-EXAMINATION WITHOUT HIS BEING EXAMINED IN CHIEF

[11319] ● ***Tendering witness for cross-examination without his being examined in chief.***—Section 138 Evidence Act envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is no meaning in tendering a witness for cross-examination only. Tendering of witness for cross-examination as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief. There is no procedure whereby the prosecution is permitted to tender a witness for cross-examination only without there being any examination-in-chief in relation to which such a witness can be cross-examined. The effect of their being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial. Their non-examination seriously affects the credibility of the prosecution case and detracts materially from its reliability. *Sukhwant Singh* v. *State of Punjab*, AIR 1995 SC 1601 (1603, 1605, 1606) : (1995) 3 SCC 367.

CRUEL MANNER

[11320] ● ***Offender acting in a cruel manner.***—For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage" as used in the provision means "unfair advantage". *Sachchey Lal Tiwari* v. *State of Uttar Pradesh*, AIR 2004 SC 5039 : (2004) 11 SCC 410 : 2004 CrLJ 4660 (4663). TO THE SAME EFFECT : *Sridhar Bhuyan* v. *State of Orissa*, AIR 2004 SC 4100 : (2004) 11 SCC 395 : 2004 CrLJ 3875 (3876, 3877) : 2004 (3) Crimes 277.

[11321] ● ***Thrusting spear in abdomen of deceased in a cruel manner.***—In the instant case the accused thrust the spear in the abdomen of deceased. PW-1, father of the deceased disposed that when his son was cutting banana leaves, the accused came there and picked up a quarrel with him and he saw the accused thrusting the spear in the abdomen of his son. PW-2, brother of PW-1 also came to the place of incident and saw the accused causing injury to the deceased. The accused was convicted by the Sessions Court under Sections 302/34, IPC but the High Court converted the same to one under section 304, IPC without specifying, whether it comes under Part I and II of Section 304, IPC. The evidence of the prosecution showed that the appellant caused death of the young boy in a cruel and brutal manner. The Supreme Court declined to interfere with the sentence of seven years' imprisonment imposed on him. *Naval Kishore Singh* v. *State of Bihar*, AIR 2004 SC 4421 : (2004) 7 SCC 502 : 2004 CrLJ 4252 (4254) : 2004 (3) Crimes 373.

CRUELTY

[11322] ● ***Cruelty.***—The accused was alleged to have treated the deceased with cruelty and harassed her and his behaviour and ill-treatment compelled her to commit suicide by consuming poison. The evidence, when scrupulously examined, showed that the deceased was not subjected to cruelty or harassment by the accused for or in connection with any demand of dowry. The letters written by the family members of the deceased to her after her marriage showed that the relations between the accused and the deceased and the relatives of accused were cordial. The prosecution failed to produce any letters written by the deceased to her family members and this was fatal to the prosecution case and supported the defence case. In view of the above facts of the case, no offence under Section 304-B is made out. *Rajnesh Tandon* v. *State of Punjab*, 1955 SCC (Cri) 817.

[11323] ● ***Impotency of husband amounts to cruelty.***—Where it is proved to the satisfaction of the Court that a husband is impotent and is unable to discharge his marital obligations, this would amount to both legal and mental cruelty which would undoubtedly be a just ground as contemplated by the second proviso to sub-s. (3) of S. 125 of the CrPC, 1973, for the wife's refusal to live with her husband and the wife would be entitled to maintenance from her husband according to his means. *Sirajmohmedkhan Janmohamadkhan* v. *Hafizunnisa Yasinkhan*, AIR 1981 SC 1972 : (1981) 4 SCC 250 : 1981 SCC (Cri) 829 : 1981 CrLJ 1430 : 1981 CrLR (SC) 554 : (1982) 1 SCR 695.

[11324] ● ***Dowry death by burning.***—In this case, the deceased became a victim of constant ill treatment by her mother in law. Ten months after her marriage, the dead body of the bride with burns from kerosene fire was found. In a case such as this, the death of a young wife must be attributed either to the commission of a crime or to the fact that, mentally tortured, by the suffocating circumstance surrounding her, she committed suicide, young women of education, intelligence and character do not set fire to themselves to welcome the embrace of death unless provoked and compelled to be that desperate by to intolerance of their misery. *Bhagwant Singh* v. *Commissioner of Police*, AIR 1983 SC 826 : (1983) 3 SCC 344 : 1983 CrLJ 1081.

[11325] ● ***Cruelty on wife—Persistent demand of Television scooter etc.***—Persistent demand by husband for television, scooter *etc.* coupled with the fact that the wife was rehabilitated in her matrimonial home on certain amount of money being paid to her husband reflects cruelty on the wife. *Ramesh Kumar* v. *State of Punjab*, 1986 CrLJ 2087 : (1987) 1 DMC 108 (Punj).

[11326] ● ***Ill-treating of wife—Burning by pouring kerosene.***—In the present case the accused was in the habit of ill-treating her and that on the morning in question he had abused her and beat her and or the top of everything he had also poured kerosene oil over her and set fire to her *Surinder Kumar* v. *State (Delhi Administration),* AIR 1987 SC 692 : (1987) 1 SCC 467 : 1987 CrLJ 537.

[11327] ● ***Suicide—Presumption under Section 113-A—Evidence Act.***—In case of suicide caused by abetment, committed prior to November 11, 1986, Section 113-A, Evidence Act is attracted. Section 113-A, Evidence Act introduced by the Dowry Prohibition (Amendment) Act, 1983 (Act 45 of 1983) lays down that (a) if a married lady commits suicide within seven years of her marriage; (b) if her husband or his relative had subjected her during her converter to cruelty within the meaning of the term as defined in Section 498-A, IPC, then the Court may raise the presumption of fact that the husband or such relative of her husband abetted the suicide. Although the section came into force on 25-12-1983, since the Evidence Act which is an adjective law is retrospective in operation, the presumption can be raised even when the suicide was committed before 25-12-1983. *Gurbachan Singh* v. *Satpal Singh*, AIR 1990 SC 209 : (1990) 1 SCC 371 : 1990 CrLJ 562 : (1989) 3 Crimes 526.

[11328] ● ***Death of deceased within seven years of marriage.***—When the wife dies within seven years of marriage and the dead body is cremated hurriedly even without informing the parents of the bride and particularly when the father and brother of the bride earlier were driven out by the husband and his relatives, the conduct indicates the death was unnatural and the cruelty related to demand of dowry, the accused husband was convicted under Section 304-B, IPC. *Shanti* v. *State of Haryana,* AIR 1991 SC 1226 : (1991) 1 SCC 371 : 1991 CrLJ 1713 (SC).

[11329] ● ***Dowry death.***—Inserted by the Dowry Prohibition (Amendment) Act, 1986 with a view to combat the increasing menace of dowry deaths, Section 304-B lays down that where the death of a woman is caused by burns or bodily injury or occurs otherwise than under normal circumstances within seven years of marriage and it is shown that soon before the death of the woman she was subjected to cruelty or harassment by her husband or his relations for or in connection with any demand for dowry, such death shall be called "dowry death" and the husband or relatives shall be deemed to have caused her death. *Shanti* v. *State of Haryana*, AIR 1991 SC 1226 : (1991) 1 SCC 371 : 1991 SCC (Cri) 191 : 1991 CrLJ 1713.

[11330] ● ***Dowry death—Civil treatment to deceased.***—Section 304-B and Section 498-A are mutually exclusive : These provisions deal with distinct offences. It is true that "cruelty" is a common essential to both the sections and that has to be proved. The explanation to Section 498-A gives the meaning of "cruelty". In Section 304-B there is no such explanation about the meaning of "cruelty" but having regard to the common background to these offences the meaning of "cruelty of harassment" will be the same as given in explanation to Section 498-A under which "cruelty" by itself amounts to an offence and is punishable. Under Section 304-B it is the "dowry death" that is punishable and such death should have occurred within seven years of the marriage. No such period is mentioned in Section 498-A and the husband or his relative would be liable for subjecting the woman to "cruelty" any time after the marriage. Further a person charged and acquitted u/s. 304-B can be convicted u/s. 498-A without charge being there, if such a case is made out. But from the point of view of practice and procedure and to avoid technical defects it is necessary in such cases to frame charges under both the Sections and if the case is established they can be convicted under both the Sections but no separate sentence need be awarded u/s. 498-A in view of the substantive sentence being awarded for the major offence u/s. 304-B, IPC. *Shanti* v *State of Haryana*, AIR 1991 SC 1226 : (1991) 1 SCC 37 : 1991 SCC (Cri) 191 : 1991 CrLJ 1713

[11331] ● *Suicide by wife—Relationship between spouses strained over dowry.*—The relations between the husband and the wife were strained. The husband had consistently been keeping up the pressure of extra dowry since her marriage. The demand for dowry was stepped up after the death of his father-in-law when his mother-in-law received the settlement dues. The husband also tried to frustrate the efforts of his wife to seek transfer from the school where she was serving. The wife also apprehended harm to her children. She was severely beaten up on the day prior to the day of occurrence. This all provoked her into taking extreme step to kill herself and her children. In the circumstances of the case, the trial Court has rightly convicted the husband under Section 306, IPC. *State of Punjab* v. *Iqbal Singh*, AIR 1991 SC 1532 : (1991) 3 SCC 1 : 1991 CrLJ 1897.

[11332] ● *Demand of dowry not supported by evidence.*—A newly wed bride died one and half years after her wedding. It was alleged that her husband, her sister-in-law, mother-in-law and maternal uncle-at-law had murdered her by throttling. On receipt of information of her death when women folk reached Jaitu the deceased was dead. When the body was being taken to the cremation ground, in the way when her face was seen by the women folk her eyes and tongue were bulging out and were in an indifferent manner. Even on the insistence of the women folk the husband did not accede to their wish and hurriedly burnt her in the cremation ground without informing the police, not even informing the father of the deceased bride. The FIR was recorded long after the incident. The alleged demand for dowry as mentioned in FIR was not supported by evidence. There was no evidence to prove that the victim before her death was subjected to ill-treatment of torture. Nobody took objection to her cremation. The Supreme Court held that no adverse inference of guilt can be drawn for not having informed her father about death, who lived away. The prosecution failed and the accused acquitted. *Lekh Ram* v. *State of Punjab*, AIR 1992 SCW 1292 : 1992 CrLJ 1930 (SC) : (1992) 2 Crimes 66 (SC).

[11333] ● *Malicious and vexatious litigation instituted against wife.*—Cruelty has no definable parameters. It involves acts the result of which cause hurt and often agony to the opposite party, be it mental or physical, which in turn has further damaging consequences, the most serious of which is an ultimate suicide. In the instant case, in the supercharged atmosphere of hostility, malicious and vexatious litigation were instituted against wife out of a sense of vindictiveness. As the wife was at the receiving end, she would be justified in presenting the husband for an offence under Section 498-A, IPC if the harassment and torture, which she went through in the course of those unjustified proceedings were so serious as to drive into a fit of desperation or push her to suicide. *Madhuri Mukund Chitnis* v. *Mukund Martand Chitnis* , 1992 CrLJ 111 (Bom) : (1991) 1 Bom Cr 683 : (1991) 93 Bom LR 157.

[11334] ● *Bride burning—Husband and in-laws unhappy over dowry.*—A young woman in a case aged about 24 years was burnt to death that the house of her husband within one year of her marriage. It was proved that the accused persons namely, deceased's husband and his father and sister, were unhappy about the cash and articles given by way of dowry at the time of the 'tilak' ceremony. The accused taunted, tormented and tortured the deceased for the insufficiency of the dowry amount. A few days before the incident while at their home town there was heated argument and then the husband of the deceased returned to the place of his posting without deceased. Deceased entreated her father-in-law to permit her to join her husband but the latter refused saying she will have to rot alone unless the dowry amount was made good. Ignoring her father-in-law's refusal the deceased went to her husband. The father-in-law and his daughter followed her. Then all the three ill-treated her. The deceased was found on fire at about 2.30 a.m. or 2.45. a.m. on the fateful day. While she was burning the three accused who alone were inside came out of the room and stood in the verandah chitchatting unconcerned about her plight. None of them tried to help the deceased. Soon after that the house was locked and the accused absconded. The witnesses to the incident were persons living in the same building in which the deceased lived with her husband. However their names were not mentioned in the FIR filed by the father of deceased. It was held that the witnesses had no reason to falsely implicate the accused. There was no reason to disbelieve their testimony. Absence of their names in FIR was also of no consequence. That was quite natural because the father was rushed to the place of incident had not enquired of their names having regard to the strain, stress and tension in which he was at the relevant point of time. The witnesses could not be said to be falsely set up by father of deceased. Supreme Court upheld the conviction of the accused namely the husband and the in-laws of the deceased. *State of U.P.* v. *Ashok Kumar Srivastava*, AIR 1992 SC 840 : (1992) 2 SCC 86 : 1992 SCC (Cri) 241 : 1992 CrLJ 1104 (SC) : (1992) 1 Crimes 576 (SC) : 1992 All LJ 1115.

[11335] ● ***Bride burning—Failure to bring sufficient dowry.***—The positive case of the prosecution is that both the accused sprinkled kerosene oil and set fire. The motive is that the deceased did not bring sufficient dowry. PW-4 has given a clear and cogent evidence in this regard. There is absolutely no reason to doubt the same. His evidence establishes that the accused were ill-treating her in a cruel manner. Of course, this by itself is not clinching for such treatment might have led her to commit suicide also. *Harbans Lal* v. *State of Haryana,* AIR 1993 SC 819 (822) : 1993 Supp (4) SCC 641 : 1993 CrLJ 75 : (1992) 3 Crimes 758.

[11336] ● ***Suicide—Abetting wife to commit.***—The wife was ill treated and mother-in-law used to call her lady of ill luck and husband used to assault her for bringing the bridal presents of inferior quality. However wife did not make any complaint of this treatment to others except her own mother and one day committed suicide. It was held by the Session Judge that the accused were guilty of offence u/s. 306/498A but High Court in the absence of sufficient proof acquitted all of them. Thereupon State went in appeal to Supreme Court where it was held that prosecution had failed to prove its case u/s. 406. However on the basis of available evidence accused were convicted u/s. 498A as it was their wilful conduct which had compelled the deceased to end her life. *State of West Bengal* v. *Orilal Jaiswal*, AIR 1994 SC 1418 : (1994) 1 SCC 73 : 1994 CrLJ 2104 (SC).

[11337] ● ***Dowry demand—Abetment of suicide.***—If the wife had been subjected to cruelty, as defined in Section 498-A. Its the Court may presume having regard to all the circumstances that the suicide has been abetted by husband or any of his relatives. A reference to *Explanation* (b) of S. 498-A, I.P.Code shows that if there be harassment of the woman with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security, the same would amount to cruelty. The case of the prosecution being that the accused party had demanded television, electric fan, *etc*., let us see whether there is reliable evidence to establish the same. The learned Trial Court has dealt with this matter in Para 25 of the Judgment and it has been observed that neither PW-5 nor PW-8 has stated about any of the alleged demands and though PW-1 deposed that Batholi and Kamala had made illegal demands of electric fan and television, *etc.* from PW-4, Sant Ram, the father of Roshani, the latter did not say anything about the same. The Court, therefore, rightly disbelieved this part of the prosecution case. There is thus no reliable evidence to hold that Roshani was being harassed within the meaning of Explanation (b) of Section 498-A. *State of Himachal Pradesh* v. *Nikku Ram*, AIR 1996 SC 67 (69-70) : (1995) 6 SCC 219 : 1995 SCC (Cri) 1090 : 1995 CrLJ 4184.

[11338] ● ***Demand of dowry—Abetting wife to commit suicide.***—In a case the accused was alleged to have abetted the wife to commit suicide by ill-treating her and subjecting her to cruelly. The evidence of one of the brothers of deceased was that there was enmity or ill will between the spouses. Convicting the accused on weak evidence is not proper and acquittal is justified as point raised by parents of deceased about demand of dowry was not found reliable and death was caused due to accidental fall in the well. *State of Haryana* v. *Rajinder Singh*, AIR 1996 SC 2978 : (1996) 8 SCC 77 : 1996 CrLJ 1875 (SC).

[11339] ● ***Appellant's impotence—Amounted to cruelty.***—Appellant was impotent and he was not capable of giving sexual satisfaction to the respondent, in consequence, it amounts to cruelty and that, therefore, the respondent is entitled to live separately from the appellant. Since she was unable to maintain herself, she is entitled to seek maintenance from the appellant. The woman would go to the marital home of her husband, with a fond hope and expectation that she would have not only a happy but also peaceful conjugal society with her husband. When she found that her husband is unable to perform sexual obligation, which is one of the important factors to cement bondage of affection and cordial relationship in marital home, it would be perpetual agony for the wife to continue to live in peace in the conjugal home. Cruelty is a ground for divorce or judicial separation in civil law. Under these circumstances, she would be well justified to live separately from the husband and at the same time keep maintaining married status. The respondent had not immediately rushed to sever her marital relations with the appellant. She had sufficiently waited for long time to see whether there would be any improvement in the potency of the appellant. Having found no hope, she chose to live separately from the appellant. Therefore, it could safely be concluded that the respondent having tried all means to sustain the marital relations but having found that it was impossible for the appellant to gain potency, she had chosen to live apart from the appellant. Therefore, there was sufficient ground for the wife to live separately. *Ashok Kumar Singh* v. *VIth Additional Sessions Judge, Varanasi*, AIR 1996 SC 333 (333, 334) : (1996) 1 SCC 554 : 1996 SCC (Cri) 361 : 1996 CrLJ 392 : JT 1995 (7) SC 151

[11340] ● ***Death of deceased wife by burning within seven years of her marriage.***—The primary requirements for finding the accused guilty of the offence under Section 304-B, IPC are that death of the deceased was caused by burns within seven years of her marriage and that since before the death she was subjected to cruelty or harassment by the accused for or in connection with any demand for dowry. It is imperative for the legal presumption under Section 113-B to prove that soon after her death. She was subjected to such cruelty or harassment. In the instant case the prosecution achieved in proving at the most was that there was persisting dispute between the two sides regarding the dowry paid or to be paid, both in kind and cash, and on account of the failure to meet the demand for dowry the deceased was taken by her parent to their house about one and a half years before her death. An attempt was made to patch up between the two sides for which a panchayat was held in which it was resolved that she would go back to the nuptial home pursuant to which she was taken by the husband to his house. This happened about 10 to 15 days prior to the occurrence. There was nothing on record to show that she was either treated with cruelty or harassed with the demand for dowry during the period between her having been taken to the parental home and her tragic end. It was held that in the absence of any such evidence it was not permissible to take recourse to the logical presumption envisaged in Section 113-B of the evidence. That rule of the evidence is prescribed in law to obviate the prosecution of the difficulty to further prove that the offence was perpetrated by the husband, as then it would be burden on the accused to rebut the presumption. However the accused was covered under Section 498-A, IPC for which there was overwhelming evidence. *Sham Lal* v. *State of Haryana*, AIR 1997 SC 1873 : 1997 CrLJ 1927 : JT 1997 (3) SC 91 : 1997 (1) CCR 231 (SC) : 1997 (2) Scale 328 : 1997 (1) Crimes 245 (SC) : 1997 (2) Supreme 614.

[11341] ● ***Act of coming late at night by husband not amount to cruelty.***—The act of coming late at night by the husband cannot be said to amount to an act of cruelty. *Meka Ramaswamy* v. *Dasari Mohan*, AIR 1998 SC 774 (775) : 1998 SCC (Cri) 604 : 1998 CrLJ 1105 : JT 1998 (1) SC 161.

[11342] ● ***Dowry death—Cruelty and harassment.***—Since before the date of marriage the appellant had been insisting upon dowry and on the betrothal day itself certain land had to be transferred in his favour. The evidence further establishes that at the time of marriage some gold ornaments were given to the deceased. Then again, it is the concurrent finding of the Courts below that since the 3rd day after marriage the appellant was making further demands of dowry which ultimately compelled PWs-1 and 2 to give him a sum of Rs. 50,000 on September 10. 1986. The evidence on record also demonstrates that from before marriage and even till two years thereafter the appellant was continuing with his demand for dowry and that the deceased was subjected to cruelty, both mental and physical, on that score since marriage. If in the background of the above facts and circumstances, the relevant evidence of PWs-1 and 2 and PW-5 a cousin of the deceased, is read there cannot be escape from the conclusion that the appellant continued with his demands for dowry and ill-treated the deceased till the month of September 1987. Having analysed the entire evidence on record we are in complete agreement with the High Court that the deceased was subjected to cruelty by the appellant for payment of dowry soon before her death for which she committed suicide. The conviction of the appellant under S. 304-B, IPC Code must, therefore, be upheld. *Rajayyan* v. *State of Kerala,* AIR 1998 SC 1211 (1213) : (1998) 4 SCC 85 : 1998 SCC (Cri) 811 : 1998 CrLJ 1633 : 1998 CrLR (SC) 345 : JT 1998 (2) SC 248.

[11343] ● ***Dowry death with seven years of marriage.***—In a case of dowry death within seven years of marriage, no effort was made by the accused (husband) to send a message to deceased parental family informing of the death. He did not even report the matter to the Magistrate. The mother and brother of deceased in their evidence stated that she was subjected to cruelty by her husband for demand of dowry. The defence of the accused that she had died a natural death was not accepted in the circumstances of the case in the absence of any evidence and he was held guilty of offence under Section 304-B, IPC. The sentence of life imprisonment was reduced to seven years. *Sant Raj* v. *State of Haryana*, (1998) 8 SCC 605 : 1998 SCC (Cri)1600.

[11344] ● ***Demand for dowry—Ill-treatment of wife.***—Even before the marriage there was demand for dowry of jewels and Rs. 50,000 in cash and only a part thereof was paid. The remaining part was being paid in instalments. The appellant was repeatedly demanding payment of dowry in cash and also jewels. He was treating his wife with cruelty as evident from letters written by her to her relations. Though there were two children, the appellant did not stop the ill-treatment of his wife. *C.V. Govindappa* v. *State of Karnataka*, AIR 1998 SC 792 (793) : (1998) 2

SCC 763 : 1998 SCC (Cri) 683 : 1998 CrLJ 1107 : 1998 CrLR (SC)79 : JT 1998 (1) SC 193.

[11345] ● ***Additional demand for dowry—Death of deceased due to burn injuries.***—The accused had ill treated the deceased and evidence of witnesses regarding demand of additional amount of dowry by accused was consistent and corroborated. Mere fact that accused took deceased to hospital does not demolish prosecution case as regards unnatural death of the deceased. It was held that conviction of accused was proper as his guilt was proved beyond doubt. However, accused mother-in-law of deceased was given benefit of doubt as she was living separate from her son. *Prem Singh and Shanti* v. *State of Haryana*, AIR 1998 SC 2628 : (1998) 8 SCC 70 : 1998 CrLJ 4019 (SC).

[11346] ● ***Cruelty proved.***—The respondent was never interested in living with his wife. He was not only making demands for various household things but also insisting on resigning her job. There is ample evidence to show that he was treating her cruelly. The respondent was responsible for Nagammal's suffering. It is in this background that the evidence relating to her death should be appreciated. *State of Tamil Nadu* v. *P. Muneappan*, AIR 1998 SC 504 : 1998 SCC (Cri) 417 : 1998 CrLJ 694 : (1998) 1 Crimes 74 : (1998) 1 SCC 515.

[11347] ● ***Dowry death—Evidence in rebuttal.***— The fact that "Muklawa" ceremony of the younger sister of deceased who was married to the brother of husband of deceased was performed about 1-1/2 months, before the occurrence does not belie the evidence of harassment for demand of dowry. *Ram Kumar* v. *State of Haryana,* AIR 1999 SC 1491 : (1998) 9 SCC 1 : 1999 CrLJ 462.

[11348] ● ***Dowry death—Appreciation of evidence.***—The deceased wife was not only harassed by the appellant but was also ill treated and beaten many times. Sometime before the incident which led to her death there was a quarrel between husband and the wife and therefore she wanted to leave his house but because of persuasion by a neighbour not to leave at midnight she had agreed to remain there till next day morning. Ten minutes after deceased had returned to her room the witness heard some noise coming from the appellant's room and when a witness went there and enquired as to what had happened the appellant said 'Sorry Sister' and closed the door. After sometime the witnesses again heard more noise coming from the appellant's room and therefore, the witness again went there. At that time they found that some other neighbours had also gathered there. The appellant then opened the door. It was noticed that the deceased was sitting under a tap with her body fully burnt. Their evidence thus clearly established that soon before her death she was ill treated by her husband. The defence of the appellant was that she committed suicide. The High Court accepting the version of suicide thought it fit to acquit the appellant under Section 302 and convict him under Section 304-B because harassment was proved and the death had taken place within about a year and half from her marriage with the appellant. There is nothing to disagree with the High Court. *Venugopal* v. *State of Karnataka*, AIR 1999 SC 146 : 1999 (1) SCC 216 : 1999 CrLJ 129 : 1998 (3) Crimes 116.

[11349] ● ***Dowry death—Wife committed suicide within seven years of marriage.***—The death of wife was occasioned not on account of any demand of dowry but because of various factors. Whatever demands of dowry arose after the marriage over which there were differences between the parties were settled or got receded when the deceased resumed cohabitation with her husband. There was no whisper thereafter of any demand of dowry. The cruelty otherwise inflicted on the deceased would be a relevant circumstance to maintain the conviction of the appellant under Section 498-A of the Indian Penal Code. Unless there was evidence of dowry demand, Section 304-B of the Indian Penal Code would not be attracted. For the kind of treatment meted out to the deceased Section 304-B, Indian Penal Code could not be attracted and therefore the appellant was not held guilty for the said offence. He was accordingly acquitted and therefore the appellant was not held guilty for the said offence. He was accordingly acquitted of the charge under Section 304-B, Indian Penal Code. On the other hand his conviction and sentence under Section 498-A, Indian Penal Code was sustained. *Pyare Lal* v. *State of Haryana*, AIR 1999 SC 1563 : (1997) 11 SCC 552 : 1998 SCC (Cri) 197.

[11350] ● ***Wife subjected to cruelty.***—The essence of the offence in S. 498-A, IPC is cruelty as defined in the *Explanation* appended to that section. It is a continuing offence and on each occasion on which the respondent was subjected to cruelty, she would have a new starting point of limitation. *Arun Vyas* v. *Anita Vyas,* AIR 1999 SC 2071 (2075) : (1999) 4 SCC 690 : 1999 SCC (Cri) 629 : 1999 CrLJ 3479 : 1999 CrLR (SC) 392 : JT 1999 (4) SC 421.

[11351] ● ***Beating of wife for want of dowry.***—In the instant case the accused was alleged to have beaten the wife for want of dowry and witnesses had fully supported the prosecution version and defence plea of suicide was found unreliable. Conviction of accused under Section 304-B/ 498-A is proper. *Venu Gopal* v. *State of Karnataka*, AIR 1999 SC 146 : (1999) 1 SCC 216 : 1999 CrLJ 29 (SC).

[11352] ● ***Demand for dowry—Harassment and ill-treatment.***—The deceased used to complain to her parents about her harassment and dowry demand of her husband. However, the younger sister of deceased was married in the same family a month before the incident and no letter written by the deceased to her parents were produced in the Court. These facts do not make the case of harassment and conviction of accused under Section 498 A is proper *Ram Kumar* v. *State of Haryana,* AIR 1999 SC 1491 : (1998) 9 SCC 1 : 1999 CrLJ 462 (SC).

[11353] ● ***Dowry death.***—In the instant case the death of the wife had occurred within seven years of her marriage as due to persistent demand of dowry she had committed suicide. Death of wife by suicide occurring within seven years of marriage cannot be stated to have occurred in normal circumstances and conviction of accused under Section 304-B/498 is proper. *Kans Raj* v. *State of Punjab,* AIR 2000 SC 2324 : (2000) 5 SCC 207 : 2000 CrLJ 2993 (SC).

[11354] ● ***No evidence of cruelty—Conviction on oral testimony of younger brother of deceased not maintainable.***—There is not even a slightest assertion in any of the letters complaining against the husband that either he was making any demand at any point of time or he has assaulted or treated the wife with cruelty or torture. In that view of the matter, when in so many letters (Ex 11 to 17) the deceased has not reflected any cruelty alleged to have been meted out to her by the husband. It is difficult to maintain a conviction on the oral testimony of the younger brother of the deceased. *State of Maharashtra* v. *Ashok Narayan Dandalwar*, AIR 2000 SC 3568 (2) : (2000) 9 SCC 257 : 2000 CrLJ 4993 : (2000) 4 Crimes 100.

[11355] ● ***Dowry death—Beating by husband and mother-in-law.***—There is evidence that husband and mother-in-law used to beat the deceased for not bringing the sufficient amount of dowry, but participation of husband's brother is doubtful. He is given benefit of doubt but husband is convicted. *Asokan and M. Balasubramanium* v. *State of Tamil Nadu,* (2000) 4 SCC 68 : 2000 CrLJ 2988 (SC).

[11356] ● ***Cruelty—Suicide note of deceased wife.***—We have gone through the entire writing contained in the suicide note. It makes a serious castigation against her husband for being an addict to narcotic drugs. Then she made a general allegation against her mother-in-law and in a lesser degree towards the appellant. But unfortunately she did not advert to any concrete instance which can be termed as cruelty as defined in S. 498-A of the I.P.Code. The utterances said to have been made by the appellant towards the deceased were to her chagrin and she had taken them very seriously in the suicide note she described such utterances as not worthy of reproduction. It is not enough that the deceased felt those words hurting, it must be subjected to judicial scrutiny and the Court must be in a position to hold that those words were sufficiently hurting enough as to amount to "cruelty" falling within the parameters fixed in S. 498-A of the IPC. The area remains grey and vague. Not a single word said to have been spoken to by the appellant as against the deceased had been put on record by the deceased in the suicide note in spite of the fact that the said note is a very lengthy letter running into several paragraphs. The tenor and language of the suicide note would reflect that she was not an illiterate lady. As the Court is rendered helpless to Judge whether the words which deceased heard from the appellant would amount to cruelty, it is far from possibility for the Criminal Court to hold that she is guilty of the offence of cruelty as envisaged in the section. It is also to be pointed out that the deceased did not mention a single deed which the appellant would have done against her. All that is said against the appellant were that she spoke something which she took objectionable. In the aforesaid circumstances, it is not possible to hold her guilty of the offence of which she was found guilty by the High Court. No offence at all has been proved against her. She is entitled to be acquitted of the charge, as well as the offence now found against her by the learned single Judge' *Raj Rani* v. *State (Delhi Administration)*, AIR 2000 SC 3559 (3559, 3560) : (2000) 10 SCC 662 : 2000 CrLJ 4672.

[11357] ● ***No demand of dowry or subjecting deceased to cruelty for.***— There was no evidence of demand of dowry or subjecting the deceased to cruelty for or in connection with, dowry and also deceased had not mentioned about demand of dowry in her letter to her parents written soon before the death. Conviction is liable to be se aside. *Sunil Bajaj* v. *State of M.P.,* AIR 2001 SC 3020 : (2001) 9 SCC 417 : 2001 CrLJ 4700 (SC).

[11358] ● ***Cruelty—Act of accused tantamount to.***—The act of accused was alleged to have driven the deceased to railway track for ending her life. Act of accused tantamounted to cruelty which is expressly made punishable u/s. 498A. However he was not held liable under Section 511 as it was not applicable. *Satvir Singh* v. *State of Punjab,* AIR 2001 SC 2828 : (2001) 8 SCC 633 : 2001 CrLJ 4625 (SC).

[11359] ● ***Dowry death—Wife committing suicide.***—The wife committed suicide within a year of her marriage but evidence relied on was a letter written by deceased to her father in which she had mentioned that she was beaten and pushed out of the house by the accused. The cause of beating as per evidence was her forgetful nature. It was held that inference about demand for dowry by the accused was wrongly drawn as there was no evidence to show that accused had ever made demand for dowry. Therefore conviction of accused u/s. 306 for abetment to commit suicide was set aside but conviction under Section 498A was maintained by holding that merely because an accused had been held liable to be punished under Section 498A it does not follow that on some evidence he must also and necessarily be held guilty of having abetted the commission of suicide. *Ramesh Kumar* v. *State of Chattisgarh,* AIR 2001 SC 3837 : (2001) 9 SCC 618 : 2001 CrLJ 4724 (SC).

[11360] ● ***Death by poisoning.***—The accused was alleged to have beaten his wife who deposed in clear terms that her husband had administered her poison for which she received treatment in hospital where she was taken by her brother-in-law. She told everything to her father who had come to see her at the hospital. The evidence of father and victim was found reliable even though no direct evidence in the case was ignored by the Court below. In view of direct evidence which is supported by chemical examination report the accused was liable u/s. 307, 324/498A *i.e.* attempt to kill, for causing injuries and subjecting the victim wife to cruelty. The acquittal order of High Court is set aside. *Mangilal* v. *State of Rajasthan,* AIR 2001 SC 2937 : (2001) 8 SCC 519 : 2001 CrLJ 4760 (SC).

[11361] ● ***Material omission in statement of witness recorded under Section 161, CrPC.***—In the instant case, PW-1, the maid servant stated in her evidence-in-Chief that the accused used to assault the deceased almost daily on the instigation of his sister, but in her cross-examination it has been elicited that she has not stated so in her statement to the Police recorded under Section 161 CrPC. Such material omission would discredit her version in Court. If her evidence is taken out from the purview of consideration, then the evidence of PWs-2 and 5 cannot be held to be of such nature which would establish the cruelty on the part of the husband to bring home the offence under Section 498-A, IPC. Therefore, the High Court was in error in upholding the conviction under Section 498, IPC. *Tarun alias Gautam Mukherjee* v. *State of West Bengal,* (2001) 10 SCC 754 : 2001 CrLJ 4937 : (2004) 4 Crimes 260.

[11362] ● ***Dowry death—No notice given to accused calling upon him to entry his defence.***—The accused husband, his brother and mother used to harass and ill treat the deceased and one day accused husband and his brother poured kerosene and set her on fire. The evidence produced was sufficiently connecting the accused with the offence charged for and the conviction of all three accused u/s. 498 A was held proper. Accused husband and his brother were also convicted u/s. 302 and awarded life imprisonment and a fine of rupees 200/- each but sentences imposed against the accused were to run concurrently. The accused husband in a dowry related death was acquitted for the offences u/s. 302 and 498A but was convicted for alternative charge u/s. 304B Penal Code. It was held that in the absence of notice to the accused the conviction u/s. 304B Penal Code was unjustified as it would result in failure of justice. *Shawnsaheb Multani* v. *State of Karnataka,* AIR 2001 SC 921 : (2001) 2 SCC 577 : 2001 CrLJ 1075 (SC).

[11363] ● ***Cruelty—Subjecting woman to.***—Section 306, IPC, read with Section 113A of the Evidence Act has only enabled the Court to punish a husband or his relative who subjected a woman to cruelty as envisaged in Section 498-A, IPC if such woman committed suicide within seven years of her marriage. It is immaterial for Section 306, IPC whether the cruelty or harassment was caused "soon before her death" or earlier. If it was caused "soon before her death" the special provision in Section 304-B, IPC would be invokable, otherwise resort can be made to Section 306, IPC. *Satvir Singh* v. *State of Punjab,* AIR 2001 SC 2828 : (2001) 8 SCC 633 : 2001 CrLJ 4625 (SC).

[11364] ● ***"Soon before her death"—Expression indicating that there must be perceptible nexus between death and dowry related harassment.***—There should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide, the Court would be in a position to gauge that in all probabilities the harassment would not have been the immediate cause of her death. It is hence for the Court to decide, on the facts and circumstances of each case whether the said interval in that particular case was sufficient to snuff its cord from the concept "soon before her death". *Satvir Singh* v. *State of Punjab,* AIR 2001 SC 2828 : (2001) 8 SCC 633 : 2001 CrLJ 4625 (SC).

[11365] ● ***Appreciation of evidence—Death by poisoning.***—The appellant, father of Munki, has given evidence as PW-3. He also corroborates the fact that Munki was regularly beaten by her husband. He deposed that on hearing that she had been admitted to the hospital, he went to the hospital. he deposed that she had informed him that her husband had administered poison to her. His testimony has also not been shaken in cross-examination. This is direct evidence, which was available before the Court. The Second Additional District and Sessions Judge was wrong to have ignored this evidence. This evidence was supported by the fact that on chemical examination organo-phosphorus, *i.e.*, an insecticide poison, was found in the gastric lavage and blood sample of Munki. The evidence showed that this substances was dangerous to life. Through the evidence of these two witnesses the prosecution had also conclusively proved that 2nd respondent had subjected Munki to cruelty. *Mangilal* v. *State of Rajasthan*, AIR 2001 SC 2937 : (2001) 8 SCC 519 : 2002 SCC (Cri) 16 (18) : 2001 CrLJ 4760 : 2001 CrLR (SC) 766.

[11366] ● ***Bride burning—Torture of deceased for dowry.***—Further evidence records that there has been no improvement the behavioural pattern and she was subjected to dowry torture as also various abusive treatment by reason of not being able to bear a child. The evidence however tells a different story.

The torture continued and reached its peak in July 1985, by reason of a booking of a Maruti Van by the complainant which was asked to be delivered to the accused/ appellant, on refusal, however, to comply with the demand of delivery of the Van by the complainant, the relationship was further estranged and PW-3 was given a warning as regards the events to follow and it is only thereafter that this incident of burn injury took place. The death was caused by burn injuries only and having considered the nature of injuries and since one cannot but rule out an accidental death as discussed hereinbefore, the death of Ekta cannot but be attributed to be suicidal on the basis of the circumstances as are available on record. With the situation existing and having regard to statutory presumption, this Court cannot but lend concurrence to the opinion of passed by the High Court. *Pawan Kumar* v. *State of Haryana*, AIR 2001 SC 1324 : (2001) 3 SCC 628 : 2001 SCC (Cri) 594 : 2001 CrLJ 1679 : 2001 CrLR (SC) 309 : JT 2001 (3) SC 475 : (2001) 2 Crimes 1.

[11367] ● ***Dowry torture—Circumstantial evidence.***—It was contended that the factum of the hospitalization of Ekta in any event negates any ill-treatment or torture, but to be treated as positive evidence of goodwill and affection. We are however unable to record concurrence therewith having due regard to the evidence and other materials available on record. There is thus preponderance of evidence of dowry torture. *Pawan Kumar* v. *State of Haryana*, AIR 2001 SC 1324 : (2001) 3 SCC 628 : 2001 SCC (Cri) 594 (599) : 2001 CrLJ 1679 : 2001 CrLR (SC) 309 : JT 2001 (3) SC 475 : (2001) 2 Crimes 1.

[11368] ● ***"Cruelty" is essentially a question of fact.***—Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education, etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not. *Mohd. Hoshan* v. *State of Andhra Pradesh*, AIR 2002 SC 3270 : (2002) 7 SCC 414 : 2002 SCC (Cri) 1765 : 2002 CrLJ 4124.

[11369] ● ***Concept of cruelty—Varies from individual to individual.***—The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under Section 498-A, IPC need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case. *Gananath Pattnaik* v. *State of Orissa*, (2002) 2 SCC 619 : 2002 (1) Crimes 309.

[11370] ● ***Statement on record with aid of Section 32, Evidence Act not admissible in evidence for offence under Section 498, IPC.***—A statement taken on record with the aid of Section 32 of the Indian Evidence Act at a time when the appellant was being tried for the offence under Section 304-B, IPC was admissible under Clause (1) of the said section as it related to the cause of death of the deceased and the circumstances of the transaction which resulted in her death. Such a statement is not admissible in evidence for the offence punishable under Section 498-A of the IPC and has to be termed as being only a hearsay evidence. Section 32 is an exception to the hearsay rule and deals with the statements or declarations by a person, since dead, relating to the cause of his or her death or the circumstances leading to such death. If a statement which otherwise is covered by the hearsay rule does not fall within the exceptions of Section 32 of the Evidence Act, the same cannot be relied upon for finding the guilt of the accused. *Gananath Pattnaik* v. *State of Orissa*, (2002) 2 SCC 619 : 2002 (1) Crimes 309.

[11371] ● ***Wilful act or conduct to be proximate cause to attract Section 498-A, IPC.***—The wilful act or conduct ought to be the proximate cause in order to bring home the charge under Section 498-A and not *de hors* the same. To have an event sometime back cannot be termed to be a factum taken note of in the matter of a charge under Section 498-A. The legislative intent is clear enough to indicate in particular reference to *Explanation (b)* that there shall have to be a series of acts in order to be a harassment within the meaning of *Explanation (b)*. The letters by itself though may depict a reprehensible conduct, would not, however, bring home the charge of Section 498-A against the accused. Acquittal of a charge under Section 306, though not by itself a ground for acquittal under Section 498-A, but some cogent evidence is required to bring home the charge of Section 498-A, as well, without which the charge cannot be said to be maintained. *Girdhar Shankar Tawade* v. *State of Maharashtra*, AIR 2002 SC 2078 : (2002) 5 SCC 177 : 2002 SCC (Cri) 971 : 2002 CrLJ 2814 : 2002 (2) Crimes 360.

[11372] ● ***No evidence that at the time of marriage there was demand of dowry.***—There was no evidence against accused No. 1 that at the time of marriage, there was any demand or settlement for giving dowry in cash or by way of transfer of property. The father of the deceased has not stated that cash, ornaments and the land were given at the time of marriage pursuant to any demand of dowry by the parents of the husband. He merely stated that according to the custom of the community declaration was made of gift of five acres of land to the deceased as her "Stridhana" called in the community as *pasupukumkuma*. As promised and declared in the ritual at the time of marriage, the land was transferred in the name of the wife. The couple lived happily thereafter. It was only 2-3 months thereafter that the husband started harassing the wife to force her to transfer the land to him. It was held that the harassment or cruel treatment to pressurize her to transfer the land could not be said to be "in connection with any alleged dowry demand." *K. Prema S. Rao* v. *Yadla Srinivasa Rao*, AIR 2003 SC 11 : (2003) 1 SCC 217 : 2003 CrLJ 69 : JT (2002) 8 SC 502 : (2003) 1 Crimes 62.

[11373] ● ***Cruelty—Consequences of—Meaning of cruelty or harassment.***—Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical, of the woman is required to be established in order to bring home the application of Section 498-A, IPC. Cruelty has been defined in the *Explanation* for the purpose of Section 498-A. Substantive Section 498-A, IPC and presumptive Section 113-B of the Evidence Act have been inserted in the respective statutes by the Criminal Law (Second Amendment) Act, 1983. It is to be noted that Sections 304-B and 498-A, IPC cannot held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the sections and that has to be proved. The *Explanation* to Section 498-A gives the meaning of "cruelty". In Section 204-B, there is no such *Explanation* about the meaning of "cruelty". But having regard to the common background to these offences, it has to be taken that the meaning of "cruelty" or "harassment" is the same as prescribed in the *Explanation* to Section 498-A under which "cruelty" by itself amounts to an offence. Under Section 304-B, it is "dowry death" that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Section 498-A. A person charged and acquitted under Section 204-B can be convicted under Section 398-A without that charge being there, if such a case is made out. If the case is established, there can be a conviction under both the sections. *Kaliyaperumal* v. *State of Tamil Nadu*, AIR 2003 SC 3828 : (2004) 9 SCC 157 : 2004 SCC (Cri) 1417 (1423) : 2003 CrLJ 4321 : (2003) 4 Crimes 210.

[11374] ● ***Accused pressurising and harassing deceased to part with Stridhan.***—The accused pressurised and harassed the deceased to part with the land received by her from her father as "Stridhana". As a method adopted for harassment, the Postal Mail of her relatives sent to her was suppressed by the husband who was in a position to do so being a Branch Post Master in the village. When the letters were discovered by the wife and she handed them over to her father, she was driven out of the house. This cruel conduct of the husband led the wife to commit suicide.

The Trial Court and the High Court were, therefore, perfectly justified on this evidence to hold accused No. 1 guilty of the offence of "cruelty" under Section 498-A. *K. Prema S. Rao* v. *Yadla Srinivasa Rao*, AIR 2003 SC 11 : (2003) 1 SCC 217 : 2003 CrLJ 69 : 2003 (1) Crimes 62.

[11375] ● ***Section 498-A, IPC.—Object and Scope.***—There is no doubt that the object of introducing Chapter XX-A containing Section 498-A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of Indian Penal Code. *B.S. Joshi* v. *State of Haryana*, AIR 2003 SC 1386 : (2004) 4 SCC 675 : 2003 CrLJ 2028 : 2003 (2) Crimes 284.

[11376] ● ***Demand of additional dowry—Wife committing suicide.***—"The evidence on record to would our attention has also been drawn by the learned counsel sufficiently makes out the case of persistent and unabated harassment and acts of cruelty meted out to the deceased by not only pestering her and her relatives to give more and more by way of additional dowry from time to time, but that she had been ill-treated physically and, consequently, the challenge made to the concurrent findings is not only bereft of substance but does not merit countenance in our hands." *Moti Lal* v. *State of M.P. (Now Chattisgarh)*, (2004) 2 SCC 469 : 2004 SCC (Cri) 573 (577) : 2004 CrLJ 907 : JT 2004 (1) SC 353 : (2004) 1 Crimes 341.

[11377] ● ***Deceased wife's annoyance due to relative children looked after in husbands home—Not amount to cruelty or harassment.***—In this case the father of the deceased, (PW-1) in his deposition, stated that misunderstandings arose between his daughter and her husband on account of the fact that the three children of the deceased sister of the appellant were being brought up, in the house of the appellant which was objected to by the deceased. If in those unfortunate circumstances, the three children of the deceased sister of the appellant were being brought up in his family, one cannot blame the appellant or his parents for having shown compassion towards the children of his deceased sister. If that is what caused annoyance to the deceased, one cannot equate such conduct with cruelty or harassment. *Lella Srinivasa Rao* v. *State of A.P.*, AIR 2004 SC 1720 : (2004) 9 SCC 713 : 2004 SCC (Cri) 1479 (1483-84) : JT 2004 3 SC 12 : (2004) 1 JCC 645.

[11378] ● ***Agreement entered into by parties for compromise—Ex facie settlement between parties appeared genuine—wife cannot plead that she was unaware of contents of settlement.***—In proceedings under Sections 406, 498-A, IPC it was settled that a sum of Rs. 2,75,000/- would be paid by the petitioner to his wife in full and final settlement of stridhan, dowry, mehr, present past and future maintenance, and Rs. 50,000/- would be paid at the time of complainant on making statement and no objection for quashing the FIR. The wife accepted the amount of Rs. 2,75,000/-. *Held*, the wife cannot plead that she was not aware of the contents of settlement. *Ex facie* the settlement between the parties appears to be genuine. If the contention of the complainant wife is to be accepted, she would not have filed an application in that behalf before the Additional Sessions Judge. What was least expected of her was that she would return the said sum of Rs. 2,25,000/- to the husband. Continuance of proceedings under Sections 498-A and 406 would be abuse of the process of the Court and therefore liable to be quashed. *Mohd Shamim* v. *Nahid Begum*, AIR 2005 SC 757 : (2005) 3 SCC 302 : 2005 CrLJ 889 (892) : 2005 (1) Crimes 108.

[11379] ● ***Demand of dowry—Evidence.***—Where witnesses have deposed about the demand of money and cruelty by the accused respondents, the Court would not reject the prosecution evidence merely because there was no consistency as to the exact demand raised by the respondent accused. Noticing the evidence on record, the High Court opined that there was no consistency as to the exact demand made by the respondent. The High Court, therefore, found the evidence of all these witnesses to be unreliable. The Supreme Court found this approach to be wholly unreasonable. Apart from the fact that the respondent used to press the deceased to get money from her mother, there was also clear evidence on record to establish the fact the she was being ill treated by the respondent. The evidence in that regard was consistent and had been deposed to by a large number of witnesses, some of whom were family members and others were the residents of Shimoga and were family friends. Even as to the amount demanded, there could be no consistency because if the respondent demanded different amounts at different times, the witnesses could not have deposed otherwise. The evidence on record clearly established the fact that the respondent had been making demands and the quantum differed form time to time. On some occasion he had demanded Rs. 10,000/- and on other occasions Rs. 15,000/- or Rs. 1,00,000/-. It appears wholly unreasonable to reject the evidence of such witnesses merely on the ground that there is no consistency as to the exact amount demanded by the respondent. *State of Karnataka* v. *K. Gopalakrishna*, AIR 2005 SC 1014 : (2005) 9 SCC 291 : 2005 CrLJ 1436 (1439) : 2005 (1) Crimes 271.

[11380] ● *Demand of dowry—Proof.*—In the instant case, the High Court rejected the evidence of witnesses that the respondent had been making demands of and the amount differed from time to time, merely on the ground that there was no consistency as to the exact amount demanded by the respondent.

Another reason given by the High Court that in Exhibit D-3 a letter written by the deceased to her husband quite sometime back, there is no mention of any ill treatment meted out to her by the respondent, and no other letter has been produced to show that she had even mentioned in any such letter that she was being ill treated. This approach of the High Court is again highly unreasonable. Merely because in one of the letters written to her husband she had no complained about ill treatment, is no ground to hold that she was never ill treated. Letter from which it appeared that it was one of those letters written by her in which there was no reference to bitterness in their marital life. However it is not expected that in every letter that a wife writes to the husband, she must complain to him about his ill treatment. Merely because in one solitary letter there is no reference to ill treatment by the respondent would be no ground to arrive at the conclusion that she was never ill-treated by her husband particularly in the face of the evidence of large number of witnesses. *State of Karnataka* v. *K. Gopalakrishna*, AIR 2005 SC 1014 : (2005) 9 SCC 291 : 2005 CrLJ 1436 (1439) : 2005 (1) Crimes 271.

[11381] ● *Section 498-A, IPC is not ultra vires.*—Section 498-A is neither unconstitutional nor *ultra vires*. It cannot be said that Section 498-A has no legal basis nor constitutional foundation. Merely because the provision is constitutional and *intra vires*, does give a licence to unscrupulous persons to wreck personal vendetta or unleash harassment, it may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the Courts have to take care of the situation within the existing frame work. The object is to strike at the roots of dowry menace. But by misuse of the provisions a new legal terrorism can be unlashed. *Sushil Kumar Sharma* v. *Union of India*, AIR 2005 SC 3100 : (2005) 6 SCC 281 : 2005 CrLJ 3439 (3442).

[11382] ● *No case under Sections 498-A, 406, 28 and Section 4, Dowry Prohibition Act made out.*—In the instant case looking at the allegations in the FIR and the contents of charge-sheet, the Supreme Court held that "none of the alleged offences, *viz.* Sections 498-A, 406 of the IPC and Section 4 of the Dowry Prohibition Act are made out against her. She is the married sister of the informant's husband who is undisputedly living in Delhi with her family. Assuming that during relevant time, i.e. between March and October, 1997, when the 6th respondent (informant) lived in Mumbai in her marital home, the said lady stayed with them for some days, there is nothing in the complaint which connects her with an offence under Section 498-A or any other offence of which cognizance was taken. Certain acts of taunting and ill-treatment of informant by her sister-in-law (appellant) were alleged but they do not pertain to dowry demand or entrustment and misappropriation of property belonging to the informant. What was said against her in the FIR is that on some occasions, she directed the complainant to wash W.C. and she used to abuse her and use to pass remarks such as 'even if you have got much jewellery, you are our slave'. It is further stated in the report that Gowri would make wrong imputations to provoke her husband and would warn her that nobody could do anything to her family. These allegations, even if true, do not amount to harassment with a view to coercing the informant or her relation to meet an unlawful demand for any property or valuable security. At the most, the allegations reveal that her sister-in-law Gowri was insulting and making derogatory remarks against her and behaving rudely against her. Even acts of abetment in connection with unlawful demand for property/dowry are not alleged against her. The bald allegations made against her sister-in-law seem to suggest the anxiety of the informant to rope in as many of the husband's relations as possible. Neither the FIR nor the charge-sheet furnished the legal basis to the Magistrate to take cognizance of the offences alleged against the appellant Gowri Ramaswamy. The High Court ought not to have relegated her to the ordeal of trial. Accordingly, the proceedings against the appellant Gowri Ramaswamy are hereby quashed". *Ramesh* v. *State of Tamil Nadu*, AIR 2005 SC 1989 : (2005) 3 SCC 507 : 2005 CrLJ 1732 (1734) : 2005 (1) Crimes 366.

[11383] ● ***No material to convict accused.***—The accused A1 husband was married to the deceased on 27.5.1990. On 4.10.1990, her dead body was found near a river. On next day morning at 10 AM, A1 lodged FIR at the police station to the effect that on the earlier night the deceased had gone out of the house to clean utensils but did not return, and since it was raining, the search did not yield the result. In the morning they found the dead body near the river. The autopsy revealed on the body of the deceased.

The trial Court found A1 husband guilty of charge under Section 498-A, but acquitted him of other charges and other two accused were acquitted of all other charges. *Held*, that there was no material to convict the appellant A1 on charge under Section 498-A. The evidence only disclosed that the accused husband A1 entertained a suspicion about her chastity and that was the reason why she was harassed by him. The conviction of the appellant accused A1 under Section 498-A was set aside. *K.R. Sorachari* v. *State of Karnataka*, AIR 2005 SC 2674 : (2005) 11 SCC 214 : 2005 CrLJ 3082 (3083, 3084) : 2005 (2) Crimes 128.

[11384] ● ***Difference between Sections 306 and 498-A.***—The basic difference between the two sections *i.e.* Section 306 and Section 498-A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the woman concerned to commit suicide, while under the former provision suicide is abetted and intended. *Sushil Kumar Sharma* v. *Union of India*, AIR 2005 SC 3100 : (2005) 6 SCC 281 : 2005 CrLJ 3439.

[11385] ● ***Consistent demand of dowry within a short period of marriage.***—In the instant case, the evidence clearly established that the accused persons were consistent in their demand regarding additional amount of Rs. 10,000/- even after their initial demand of tape recorder was fulfilled. The evidence clearly establishes that the deceased was harassed at her matrimonial home and her staying there had become miserable. The deceased on several occasions, within a short span of four months of her marriage, informed her father that she was being troubled by her husband and his elder brother. They also insulted and taunted her father in her presence and asked PW-1 to take her back to his home for his inability to fulfill their unlawful demand. The reluctance shown by the deceased to go to her matrimonial home within a short period of her marriage was indicative of the fact of the treatment given to her. At her matrimonial home, she was harassed and constantly nagged for non-payment of additional amount by her father. The facts clearly established that husband and his elder brother subjected the deceased to cruelty and their conviction under Section 498-A, IPC is based on cogent reliable evidence. *Subbarao* v. *State of Maharashtra*, AIR 2006 SC 2002 : 2006 CrLJ 2881 (2885, 2886) : 2006 (2) Crimes 195.

[11386] ● ***Compromise in non-compoundable offences.***—Though permission cannot be granted to record the compromise, the effect of compromise can be taken into consideration while awarding sentence. In the instant case, where the accused had been in an custody for a period of more than two months and the parties had amicable settled the matter, it was held that ends of justice would be met, if the sentence is reduced to already undergone. *Badal Dev* v. *State of Assam*, (2006) 10 SCC 540 : 2007 (1) SCC (Cri) 139.

[11387] ● ***Demand of dowry leading to suicide.***—It has come in the evidence of PW-2 and PW-4 and PW-10 that the deceased had been harassed due to the demands of dowry. About six months prior to the occurrence, the accused visited the house of PW-4 (maternal uncle of deceased) and demanded Rs. 80,000/- for purchase of tractor. When PW-4 refused to pay the amount, the accused started beating the deceased and ultimately she was turned out of the matrimonial house, and went to her parents house where she stayed for about 3 months. Thereafter she was taken back by the accused but 10 days thereafter she committed suicide. It has come in evidence that the accused gave beating to his wife to such an extent that she became unable to walk. Defence plea that the deceased committed suicide due to tension of pregnancy was not accepted. Conviction under Sections 306 and 498-A was upheld. *Surender* v. *State of Haryana*, (2006) 12 SCC 375 : 2007 (2) SCC (Cri) 210 : 2007 CrLJ 779 (782) : 2006 (4) Crimes 428 (SC).

[11388] ● ***Cruelty—Meaning.***—The Shorter Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

"Mental Cruelty—As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

The concept of cruelty has been summarized in Halsbury's laws of England [Vol. 13, 4th Edition Para 1269] as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty, for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The Court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse Malevolent intention is not essential to cruelty but it is an important element where it exits."

In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse." *Samar Ghosh* v. *Jaya Ghosh*, (2007) 4 SCC 511 : 2007 (4) SCR 428 : 2007 (5) Scale 1 : 2007 (3) Supreme 26.

[11389] ● ***Sufficient evidence for conviction.***—The statements of PW-1 and PW-4, mother and brother of deceased respectively conclusively established the fact that the accused was all treating the deceased as his demand for bringing money from her parents had not been fulfilled. There witnesses had also deposed that the deceased had given a statement when she was admitted in the hospital that it was the accused who had poured Kerosene upon her and had set her on fire. A formal dying declaration was recorded by PW-10. Head constable in the presence of PW-9, Deputy Medical officer in the Hospital. There was absolutely no reason to cast any doubt on the testimony of PW-10 and PW-9. Both were Government servants and they did not at all know the accused and had absolutely to reason to fabricate a document *viz.*, the dying declaration. The prosecution case was fully established and the charges were proved. *Dayal Singh* v. *State of Maharashtra*, (2007) 12 SCC 452 : 2007 CrLJ 3265 (3268) : 2007 (3) Crimes 129.

[11390] ● ***Dowry death—Totality of circumstances to be considered.***—The prosecution evidences brought on records clearly suggest that she had been subjected to cruelty both physical and mental. Existence of discord between the parties in regard to torture at least at one point of time is not in dispute. She had been driven out of her house. She had to come back to her parents house again and again. Her husband did not even make any enquiry about her, when she was staying with her parents. A settlement had been arrived at wherefor intervention of the members of the panchayat had been sought for. Only upon the said settlement, the deceased came back to her matrimonial home. Unnatural death of the deceased, in our opinion, must be considered from that point of view.

The deceased categorically stated that even the garments which had burn presented by her parents were not liked by her husband and she had been abused and insulted by her husband. In some of the letters, it appears that she expressed her vent that she had thought of committing suicide but then consoled her mother that she would not do so. The contents of those letters had not been dented or disputed. Even in one of the letters Ex. A-1, she made allegations against her in-laws during her stay at matrimonial home. Her mental condition during the stay at her matrimonial home can be well-imagined. For establishing a charge of cruelty, it is not necessary that the husband must always stay in the matrimonial home. Systematic torture of the deceased is evident in this case. We do not find any reason to differ from the findings of the learned Trial Judge or the High Court. *Ananda Mohan Sen* v. *State of West Bengal*, (2007) 10 SCC 774 : 2007 CrLJ 2770 (2774).

[11391] ● ***Insufficient evidence.***—There is no evidence on record on this aspect of any such demand. Even in the letters, on which prosecution placed heavy reliance, there is no reference to any demand of dowry or for that matter of any nature. In fact in Ex. P-2, the deceased had written to her mother that she had promised to pay for some articles which the mother-in-law *i.e.* A-1 had purchased. She had stated that she was embarrassed that her parents were not paying the money, though A-1 had never asked for it. This was not a case of any demand for property or valuable security. On the contrary, the deceased had objected to her parents not paying for something which the A-1 had spent the money. To similar effect was letter Ex. P-3. It is evident from the evidence on record that half of the marriage expenses were borne by the accused-appellant and his family. Even Ext. P.-4 on which learned counsel for the State placed strong reliance does not speak of any demand. It only speaks of apprehension of a second marriage. Though he submitted that the demand of dowry is in the background and has to be inferred, the plea is clearly unacceptable in the absence of any maleval to substantiate that plea. The letter was also written three years prior to the occurrence. The prosecution has failed to establish its accusations so far as Section 498-A is concerned to hold the accused guilty. *Shivanand Mallappa Koti* v. *State of Karnataka*, AIR 2007 SC 2314 (2316) : 2007 (7) SCR 930 : JT 2007 (8) SC 462.

[11392] ● ***Scope of section 498, IPC.***—Section 498-A, IPC makes "cruelty" by husband or his relatives a punishable offence. *State of Andhra Pradesh* v. *M. Madhusudhan Rao*, (2008) 14 SCC 582 : 2008 (4) Crimes 350 : JT 2008 (1) SC 454.

[11393] ● ***Object of Section 498-A.***—The object for which Section 498-A, IPC was introduced is amply reflected in the Statement of Objects and Reasons while enacting the Criminal Law (Amendment) Act 46 of 1983. As clearly stated therein the increase in the number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the work of the Dowry Prohibition Act, 1961. In some cases, cruelty of the husband and the relatives of the husband which culminate in suicide by or murder of the helpless woman concerned, constitute only a small fraction involving such cruelty. Therefore, it was proposed to amend IPC, the Code of Criminal Procedure, 1973 and the Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by the husband, in-laws and relatives. The avowed object is to combat the menace of dowry death and cruelty. *Noorjahan* v. *State*, AIR 2008 SC 2131 : (2008) 11 SCC 55 : 2008 (3) SCC (Cri) 915 : 2008 (8) SCR 903 : JT 2008 (6) 220 : 200 (6) Scale 423 : 2008 (2) Crimes 210 (SC).

[11394] ● ***Ingredients of offence.***—The tern cruelty has been defined in the explanatior appended to the said section, to mean: (1) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical of the woman; or (ii harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet such demand. The above consequences of "cruelty" are required to be established in order to bring home an offence under Section 498-A, IPC. *Onkar Nath Mishra* v. *State (NCT of Delhi)*, (2008) 2 SCC 561 : JT 2008 (1) SC 20 : 2008 CrLJ 1391 (1394). **TO THE SAME EFFECT** : *Shivanand Mallappa Koti* v. *State of Karnataka*, AIR 2007 SC 2314 : 2007 (7) SCR 930 : JT 2007 (8) SC 462.

[11395] ● ***Cruelty—Meaning.***—For purpose of Section 498-A, IPC, harassment simpliciter is not "cruelty" and it is only when harassment is committed for the purpose of coercing a woman or any other person related to her to meet an unlawful demand for property etc., that it amounts to "cruelty" punishable under Section 498-A, IPC. *State of Andhra Pradesh* v. *M. Madhusudhan Rao*, JT 2008 (11) SC 454 : 2008 (4) Crimes 350 (SC).

[11396] ● ***Case under Section 498-A—Parties living separately for the last more than 10 years.***—Indisputably, the parties had been living separately for more than ten years. How then a case under Section 498-A, IPC can be said to have made out and that too at such a distant point of time is the question, particularly in view of the bar of limitation as contained in Section 468, CrPC. Even otherwise it is unbelievable that the appellant was really harassed by her husband or her in laws. *M. Saravana Porselvi* v. *A.R. Chandrasekar*, 2008 CrLJ 3034 (3035) (SC).

[11397] ● ***Compromise petition during pendency of appeal against conviction.***—Pending appeal against conviction of accused under section 498-A, the parties sorted out the difference and moved an application for compromise in criminal proceedings. The compromise petition was rejected by Courts below. *Held*, the parties accused at a settlement and the complainant did not want to prosecute the accused. Considering the peculiar facts of the case, the continuation of criminal proceedings amounted to abuse of process of law. Criminal proceedings were quashed. *Arvind Bar-*

saul v. *State of Madhya Pradesh*, (2008) 5 SCC 794 : 2008 (3) SCC (Cri) 88.

[11398] ● ***Trial Court discharged in-laws—High Court not set aside discharging—No reasons recorded.***—Where the trial Court found no case under Section 498-A, IPC and discharged the in-laws, the High Court was not justified in setting aside the discharge order merely by observing that mother-in-law and father-in-law are persons "who could misappropriate" and "who could practice cruelty" without indicating any reason and as such the discharge order of High Court was set aside. *Ram Singh* v. *State of Haryana*, AIR 2008 SC 1294 : (2008) 4 SCC 70 : 2008 CrLJ 1941 (1943).

[11399] ● ***Complaint by wife against her husband and in-laws.***—As regards the applicability of Section 498-A, IPC, in the complaint dated 8.11.1994 there is not even a whisper of a wilful conduct of appellants No. 1 and 2 of harassment of the complainant at their hands with a view to coercing her to meet any unlawful demand by them so as to attract the provisions of Section 498-A read with Explanation thereto. The complaint refers to the talk the complainant purports to have had with her husband, appellant No. 3, who is alleged to have told her to come to Bijnore if she apologizes to his father, keeps him happy; obeys his sister and talks to her father (complainant's) to give her Rs. 50,000/- and V.C.R. and brings these articles to Bijnore. We are convinced that the allegation of misbehaviour on the part of appellant Nos. 1 and 2 and the demand of Rs. 50,000/- and V.C.R. by them made by the complainant in her subsequent statement, dated 4.4.1995, was an after thought and not *bona fide*. Section 498-A, IPC was introduced with the avowed object to combat the menace of dowry deaths and harassment to a woman at the hands of her husband or his relatives. Nevertheless, the provision should not be used as a device to achieve oblique motives. Having carefully glanced through the complaint, the F.I.R. and the charge-sheet, we find that charge under Section 498-A, IPC is not brought home insofar as appellant Nos. 1 and 2 are concerned.

Consequently, we allow the appeal partly; quash the charge framed against all the appellants under Section 406, IPC: quash the charge framed against appellant Nos. 1 and 2 under Section 498-A, IPC and dismiss the appeal of appellant No. 3 against framing of charge under Section 498-A, IPC. Needless to add that the trial Court shall now proceed with the trial untrammeled by any observation made by the Additional Sessions Judge and upheld by the High Court in the impugned order or by us in this judgment. *Onkar Nath Mishra* v. *State (NCT of Delhi)*, (2008) 2 SCC 561 : 2008 SCC (Cri) 507 : 2008 CrLJ 1391 (1394) : 2008 (1) Crimes 42(SC).

[11400] ● ***Sections 304-B and 498-A, IPC.***—These provisions deal with two districts offences. It is true that cruelty is common essential to both the sections and that has to be proved. The Explanation to Section 498-A gives the meaning of "cruelty". But having regard to common background to these offences it has to be taken that the meaning of "cruelty" or "harassment" is the same as prescribed in the Explanation to Section 498-A, under which "cruelty" by itself amounts to an offence. *Satish Kumar Batra* v. *State of Haryana*, AIR 2009 SC 2180 : (2009) 2 SCC 491 : 2009 CrLJ 2447 (2449) : JT 2009 (5) SC 433.

[11401] ● ***Section 498-A—Scope.***—One of the reasons for ill-treatment to the deceased was that the deceased gave birth to a female child, which was considered to be inauspicious and after the birth of the said female child, the Rajendran's brother's wife died and the appellants thought that the birth of the said female child was the reason for various debacles in the family and consequently, she was tortured by the appellants.

Section 498-A IPC has two limbs. The first limb of Section 498-A provides that whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished. 'Cruelty' has been defined in Clause (a) of the Explanation to the said Section as any wilful conduct which is of such a nature as is likely to drive to a woman to commit suicide. When there is demand of dowry, the case comes under Clause (b) of the Explanation to Section 498-A. Clause (a) of the Explanation has definite application to the facts of the present case. Additionally, effect of Section 113-A of the Indian Evidence Act cannot be lost sight of.

Further as per Section 113-A of the Evidence Act when the question as to whether commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume that such suicide had been abetted by her husband or by such relative of her husband. This has not been rebutted by the appellants.

Above being the position we find no merit in these appeals, which are accordingly dismissed. *Rajendran* v. *State, Assistant Commissioner of*

Police, AIR 2009 SC 855 : (2008) 17 SCC 501 : (2009) 1 Crimes 135 : 2008 (16) SCR 1005.

[11402] ● ***Demand of money—Wife and husband having no cordial relations.***—In the instant case, there was demand that property in the name of wife be sold out and wife should bring more money from her parents.

The independent witnesses deposed that when they came to know that Malathi Devi had died, they reached the place of occurrence and witnessed that the room in which her dead body was found, had been opened by lifting the lever from inside. The body of the deceased was in a sitting posture on a double cot on her knees, and hanging from a fan tied with a sari. It was, therefore, inferred that it was a case of suicide as otherwise, there was no occasion to bolt the room from inside. The trial Court taking into consideration the circumstances concluded that the relations between husband and wife were not cordial and that she had been harassed to meet the unlawful demand of the appellant as he wanted to dispose of the immovable property and compel the deceased to fetch more money from her parents. The execution of the deed dated 15.6. 1999 (Ex. P-1) was enough to show that it had been executed in order to restrain the family members of the deceased to launch criminal prosecution against the appellant. The Court also took other circumstances into account, that the death of the deceased was in the house of the appellant; neither the appellant nor his mother made any attempt to inform the family members of the deceased about the death; her dead body had been cremated hurriedly without any autopsy having been conducted; there were independent witnesses like Sunkara Nagaraju (PW-5) *etc.* and came to the conclusion that she had been harassed/coerced to the extent that Malathi committed suicide. The Court rightly found the charge under Section 498-A fully proved against the appellant. *Undavali Narayana Rao* v. *State of Andhra Pradesh*, AIR 2010 SC 3708 : (2009) 14 SCC 588 : 2009 (11) SCR 660 : 2009 (5) Supreme 608 : 2009 (3) Crimes 265.

[11403] ● ***Relative of husband of a woman—Meaning.***—In the absence of any statutory definition, the term 'relative' must be assigned a meaning as is commonly understood. Ordinarily it would include father, mother, husband or wife, son, daughter, brother, sister, nephew or niece, grandson or grand-daughter of an individual or the spouse of any person. The meaning of the word 'relative' would depend upon the nature of the statute. It principally includes a person related by blood, marriage or adoption.

By no stretch of imagination a girl friend or even a concubine in an etymological sense would be a 'relative'. The word 'relative' brings within its purview a status. Such a status must be conferred either by blood or marriage or adoption. If no marriage has taken place, the question of one being relative of another would not arise. *U. Suvetha* v. *State*, 2009 (6) SCC 757 : 2009 CrLJ 2974 ((2977, 2979) : 2009 (7) SCR 902 : 2009 (2) Crimes 357 (SC).

[11404] ● ***Insufficient evidence.***—In the instant case there is no such allegation either in the FIR or in the charge sheet making out a *prima facie* case as narrated under *Explanation (a)* of Section 498-A which defines cruelty. There is no allegation that there is any such conduct on the part of the appellant which could be said to be amounting to cruelty of such a nature as is likely to cause the Respondent No. 2 to commit suicide or to cause any injury to her life. The ingredient to constitute an offence under *Explanation (a)* of Section 498-A, IPC are not at all mentioned either in FIR or in charge sheet and in absence thereof, no case is made out. Therefore, *Explanation (a)* as found in Section 498-A, IPC is clearly not attracted in the present case.

In order to constitute cruelty under the said provision there has to be harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or a case is to be made out to the effect that there is a failure by her or any person related to her to meet such demand. When the allegation made in the FIR and charge sheet is examined in the present case in the light of the aforesaid provision, it is found that no *prima facie* case even under the aforesaid provision is made out to attract a case of cruelty.

The marriage between the appellant and Respondent No. 2 was performed on 23.10.1997 when it is alleged that Rs. 5 lakhs was given by the parents of Respondent No. 2 to the family of appellant as dowry. The FIR was filed in the month of April, 2002 and in the said FIR there is no allegation that subsequent thereto any harassment was made by the appellant with a view to coercing her or any person related to Respondent No. 2 to meet any unlawful demand or any property.

In that view of the matter neither *Explanation (a)* nor *Explanation (b)* of Section 498-A of IPC is attracted in the present case. It is crystal clear that neither in the FIR nor in the charge sheet there is any ingredient of Section 498-A IPC, which could *prima facie* constitute a case of cruelty as defined in that section.

It is thus established that on a reading of the FIR as also the charge sheet filed against the appellant no case under Section 498-A is made out on the face of the record, and therefore, both the FIR as also the charge sheet are liable to be quashed in exercise of the powers under Section 482 of the CrPC. Clearly, the High Court failed to appreciate the facts in proper perspective, and therefore, committed an error on the face of the record. *Shakson Belthissor* v. *State of Kerala*, 2009 (9) SCR 1187 : 2009 (5) Supreme 281.

[11405] ● ***Abetment of offence under Section 498-A, IPC.***—Appellant had not been charged for abetment of a crime. Any conspiracy amongst the accused persons has also not been alleged. A woman in terms of the aforementioned provision must be subjected to cruelty by her husband and/or his relative. The word 'cruelty' has also been defined in the explanation appended thereto. It is in two parts. Clause (a) of the said explanation refers to a conduct which is likely to drive the woman to commit suicide or to cause grave injury or danger to her life, limb or health (whether mental or physical); Clause (b) provides for harassment of the woman, where such harassment, is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security.

It is not the case of the first informant that the appellant had any role to play with regard to demand of dowry. *U. Suvetha* v. *State*, (2009) 6 SCC 757 : 2009 CrLJ 2974 : 2009 (7) SCR 902 : 2009 (3) Supreme 797 : 2009 (2) Crimes 357 (SC).

[11406] ● ***Insufficient evidence.***—The only evidence to bring home charge under Section 498-A, IPC, is that of PW-4 and PW-5. In their deposition PW-4 and PW-5 stated that their sister told them that accused was torturing her as he wanted that her brothers arrange a job for him or the house at Ganj Basoda is given to him or a cash of Rs. 1 lac is given to enable him to do some business. They deposed that as and when their sister come to their house, she would tell them that accused used to insert cloth in her mouth and give beatings for dowry. The trial Court as well as the High Court **relied on** the evidence of PW-4 and PW-5 and held that charge under Section 498-A, IPC, against the accused was proved. Apart from the statement attributed to the deceased, none of the witnesses had spoken anything which they had seen directly insofar as torture and harassment to Ranjana Rani @ Raj Kumari was concerned.

What has been deposed by PW-4 and PW-5 has no connection with any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498-A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of PW-4 and PW-5 is hardly an evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted.

Section 6 of the Evidence Act, in the facts and circumstances of the case, insofar as admissibility of a statement of PW-4 and PW-5 about what the deceased had told them against the accused of the treatment meted out to her is concerned, is not at all attracted. [Appeal allowed] *Bhairon Singh* v. *State of Maharashtra*, AIR 2009 SC 2603 : 2009 CrLJ 3738 : 2009 (3) Crimes 199 (SC) : 2009 (9) SCR 875.

[11407] ● ***Object of Section 498-A, IPC.***—The object for which Section 498-A, IPC was introduced is amply reflected in the Statement of Objects and Reasons while enacting the Criminal Law (Second Amendment) Act 46 of 1983. As clearly stated therein the increase in the number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the work of the Dowry Prohibition Act, 1961. In some cases, cruelty of the husband and the relatives of the husband which culminate in suicide by or murder of the helpless woman concerned, constitute only a small fraction involving such cruelty. Therefore, it was proposed to amend IPC, the Code of Criminal Procedure, 1973 (in short "CrPC") and the Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by the husband, in-laws and relatives. The avowed object is to combat the menace of dowry death and cruelty. *Satish Kumar Batra* v. *State of Haryana*, AIR 2009 SC 2180 : (2009) 12 SCC 491 : 2009 CrLJ 2447 : JT 2009 (5) SC 403 : 2009 (5) SCR 451.

[11408] ● ***Ingredients of Section 498-A.***—Section 498-A, IPC has two limbs. The first limb of Section 498-A provides that whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished. 'Cruelty' has been defined in Clause (a) of the Explanation to the said Section as any wilful conduct which is of such a nature as is likely to drive to a woman to commit suicide. When there is demand of dowry, the case comes under Clause (b) of the Explanation to Section 498-A. Clause (a) of the Explanation has definite application to the facts of the present case.

Additionally, effect of Section 113-A of the Indian Evidence Act cannot be lost sight of. *Gopal* v. *State of Rajasthan*, AIR 2009 SC 1928 (1929, 1930) : (2009) 11 SCC 314 : 2009 (2) SCR 423 : 2009 (2) Scale 704 : 2009 (2) SLT 193.

[11409] ● ***Section 498-A—Ingredients.***—The following are the essential ingredients of Section 498-A, IPC: "Essentials (i) That there was a married woman; (ii) that such woman was subjected to cruelty; (iii) that such cruelty consisted of any wilful conduct of such nature as was likely to drive such woman – to commit suicide, or to cause grave injury or danger to her life, limb or health, whether mental or physical; harassment of such woman where such harassment was – with a view to coercing such woman or any person related to her to meet any unlawful demand for any property or valuable security, or on account of failure by such woman, or any person related to her to meet the unlawful demand in able and the woman was subjected to such cruelty by – the husband of that woman; or any relative of the husband of that woman." *State of Uttar Pradesh* v. *Santosh Kumar*, (2009) 9 SCC 626 : (2009) 14 SCR 106 : 2009 (6) Supreme 448 : 2009 (3) Crimes 448 (SC).

[11410] ● ***Demand of dowry.***—PW-1 stated that his daughter and son-in-law came to his house and his daughter told that there was no ill treatment by her husband but stated that there was no ill-treatment by accused Nos. 4 to 6. Another version given by this witness is that accused No. 4-Geeta had no issues and she was insisting the deceased Ratnavva to give her son in adoption to her, to which she refused and so accused No. 4 started ill-treating her. This version is unbelievable, simply because, accused No. 4 has no issues, it does not mean that she same will insist her brother or her brother's wife to give their only son in adoption to her. Even assuming that she has demanded so, it does not mean that is demand of dowry so as to attract the provisions of Section 498-A, IPC. *Bhaskar Ramappa Madar* v. *State of Karnataka*, (2009) 11 SCC 690 : 2009 CrLJ 2422 : 2009 (5) SCR 256 : 2009 (5) Scale 100 : 2009 (3) Supreme 5 : 2009 (2) Crimes 80 (SC).

[11411] ● ***Demand of dowry—Scanty evidence.***—So far as Section 498-A is concerned according to learned counsel for the appellants the evidence is scanty but it is to be noticed that both the trial Court and the High Court having regard to the evidence of relatives concluded that the dowry demand was made. We do not find any infirmity with the conclusions arrived at more particularly in view of the evidence of PW-1 and 2 and therefore there is no scope for interference with the conclusions relating to Section 498-A, IPC. *Syed Hakkim* v. *State*, (2009) 4 SCC 324 : 2009 CrLJ 1891 (1893) : 2009 (2) SCR 1060 : 2009 (3) Scale 277 : 2009 (2) SLT 632.

[11412] ● ***Sufficient proof.***—From the evidence of record available before us, we find that the prosecution witnesses have in their testimonies stated that the deceased was tortured both physically and mentally by the appellant for the first time after his marriage with the deceased when he was refused permission for marriage with said Anita by the deceased. On having been refused the permission for his second marriage with Anita, the appellant again, after a few days requested the deceased to accede to his request for marriage with Anita, which request was again refused by the deceased. Consequent to the said position and due to the adamant position taken by the deceased, cruelty was meted out to her by the accused which fact is sufficiently proved from the evidence on record. Therefore, we find no reason to take a different view than what has been taken by the trial Court and the High Court as far as Section 498-A, IPC is concerned. Hence, conviction recorded under Section 498-A, IPC by Courts below is proper. *Amalendu Pal* v. *State of West Bengal*, AIR 2010 SC 512 : 2009 (13) Scale 663 : 2009 (7) Supreme 289 : 2009 (4) Crimes 190 (SC).

[11413] ● ***Conviction upheld by High Court—Held proper.***—In the instant case, the evidence of PWs-1, 5 and 6 clearly established the offence of accused so far as accused No. 1 as concerned and, therefore, there is nothing infirm in the judgment of the High Court in upholding the conviction of accused. *Satish Kumar Batra* v. *State of Haryana*, AIR 2009 SC 2180 (2183) : (2009) 2 SCC 491 : 2009 CrLJ 2447 : 2009 (5) SCR 451.

[11414] ● ***Sections 498-A and 304-B.***—It is true that cruelty is a common essential to both the sections and that has to be proved. The Explanation to Section 498-A gives the meaning of "cruelty". In Section 304-B there is no such explanation, about the meaning of "cruelty". But having regard to common background to these offences it has to be taken that the meaning of "cruelty" or "harassment" is the same as prescribed in the Explanation to Section 498-A under which "cruelty" by itself amounts to an offence. *Satish Kumar Batra* v. *State of Haryana*, AIR 2009 SC 2180 : 2009 (12) SCC 491 : 2009 CrLJ 2447 : 2009 (5) SCR 451.

[11415] ● ***Section 498-A—Applicability.***—Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman are required to be established to bring home the application of Section 498-A. *Rajendran* v. *State, Assistant Commissioner of Police*, AIR 2009 SC 855 (857) : (2008) 17 SCC 501 : (2009) 1 Crimes 135 : 2008 (16) SCR 1005. TO THE SAME EFFECT : *Satish Kumar Batra* v. *State of Haryana*, AIR 2009 SC 3180 : (2009) 12 SCC 491 : 2009 CrLJ 2447.

[11416] ● ***Existing of valid marriage—Necessity.***—The question as to who would be covered by the expression "husband" and "marriage" as given in the various law lexicons and dictionaries, the existence of valid marriage may appear to be a *sine qua non* for applying a penal provision. *Kapiseth Subbarao* v. *State of Andhra Pradesh*, AIR 2009 SC 2684 (2687) : (2009) 12 SCC 331 : 2009 CrLJ 3480.

[11417] ● ***Word "Cruelty"—Applicability.***—The word "cruelty having been defined in terms of Explanation appended to Section 498-A, no other meaning can be attributed thereto. Living with another woman may be an act of cruelty on the part of the husband for the purpose of judicial separation or dissolution of marriage, but the same would not attract the wrath of Section 498-A, IPC. *U. Suvetha* v. *State*, (2009) 6 SCC 757 : 2009 CrLJ 2974 (2977) : 2009 (2) Crimes 357 (SC).

[11418] ● ***Petty quarrels.***—Petty quarrels cannot be said as cruelty to attract provisions of Section 498-A. *Manju Ram Kahta* v. *State of Assam*, (2009) 13 SCC 330 : 2009 (9) SCR 902 : JT 2009 (7) SC 485.

[11419] ● ***Sufficient evidence.***—In the present case there are certain material aspects which were lost sight of by the trial Court but have been noted by the High Court. The dead body was detected in the morning of 14.2.1994. Parents of the deceased informed the police and not the inmates. The parents were informed by neighbours and not by the inmates. DW2 has been disbelieved as he was nearly 70 years of age. It was highly improbable that he was in employment as a watchman. The trial Court had held that the evidence of PWs. 6 to 8 regarding pressing mark on the neck and injuries on the fore arms of the deceased are not corroborated by the medical opinion. This is factually incorrect. The doctor (PW2) had categorically stated that he was of the opinion that death was due to result of compression of the neck, and the post mortem report was accordingly issued. PW6 has stated that second opinion was sought for and then the report was given. The falsity of alibi is an additional link. *Narendra* v. *State of Karnataka*, AIR 2009 SC 1881 : (2006) 6 SCC 61 : 2009 (7) SCR 585 : 2009 (2) Crimes 415 (SC).

[11420] ● ***Cruelty to wife—"Husband"—Interpretation.***—The concept of 'dowry' is intermittently linked with a marriage and the provisions of the Dowry Act, apply in relation to marriages. If the legality of the marriage itself is an issue further legalistic problems do arise. If the legality of the marriage itself is under legal scrutiny, the demand of dowry in respect of an invalid marriage would be legally not recognizable. Even then the purpose for which Sections 498-A and 304-B, IPC and Section 113-B of the Indian Evidence Act, 1872 (for short the 'Evidence Act') were introduced cannot be lost sight of. Legislations enacted with some policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with certain element of realism too and not merely pedantically or hyper-technically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise? Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money. The nomenclature 'dowry' does not have any magic charm written over it. It is just a lable given to demand of money in relation to martial relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Section 498-A. Legislature has taken care of children born from invalid marriages. Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that legislature which was conscious of the social stigma attached to children of void and voidable marriages closed eyes to plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship. If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. The first exception to Section 494 has also some relevance. According to it, the offence of bigamy will not apply to "any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction". It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions—Sections 304-B/498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498-A and 304-B, IPC. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of 'husband' to specifically include such persons who contract marriages ostensibly and cohabitate with such woman, in the purported exercise of his role and status as 'husband' is no ground to exclude them from the purview of Section 304-B or 498-A, IPC, viewed in the context of the very object and aim of the legislations introducing those provisions. *Koppi Seth Subbarao* v. *State of Andhra Pradesh*, AIR 2009 SC 212 : (2009) 12 SCC 331 : 2009 CrLJ 3480 (3484, 3485).

[11421] ● ***Sections 304-B and 498-A—Distinction.***—Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman are required to be established in order to bring home the application of section 498-A, IPC. Cruelty has been defined in the Explanation for the purpose of Section 498-A. Substantive Section 498-, IPC and presumptive Section 113-B of the evidence Act have been inserted in the respective statutes by Criminal Law (Second Amendment) Act, 1983. It is to be noted that Sections 304-B and 498-A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Sections and that has to be proved. The Explanation to Section 498-A gives the meaning of 'cruelty'. In Section 304-B there is no such explanation about the meaning of 'cruelty'. But having regard to common background to these offences it has to be taken that the meaning of 'cruelty' or 'harassment' is the same as prescribed in the Explanation to Section 498-A under which 'cruelty' by itself amounts to an offence. *Gopal* v. *State of Rajasthan*, AIR 2009 SC 1928 : (2009) 11 SCC 314 : 2009 (2) SCR 423 : JT 2009 (2) 419.

[11422] ● ***Dowry death—No sufficient evidence to establish the prosecution case.***—"A bare reading of the letter (Ext. PF) clearly shows that there is not even a whisper about demand but the deceased had categorically stated that she had asked for the money and the articles on her own. The trial Court erroneously held that in the letter there was reference to demand of dowry. Strangely, the High Court held that even though the letter Ex. PF was inconsequential but the evidence of the relatives about the harassment for dowry cannot be brushed aside. As rightly submitted by learned counsel for the appellant there were improvements in the statements recorded in Court. The witnesses PWs 6 and 7 introduced certain aspects for the first time. Significant statement in this regard is that of Sham Lal (PW-6). In Court he stated that the deceased told him in the hospital that kerosene oil was poured on her by the accused. He accepted during his examination that no such allegation was made in his statement recorded in terms of Section 161 of the Code of Criminal Procedure, 1973 (in short the 'Code'). Similarly, Surinder Kanta (PW-7) in Court stated that the deceased informed her about the demand of Rs. 1,00,000/- by her-in-laws and about her giving Rs. 20,000/-. This was not stated during investigation under Section 161 of Code as is evident from Ex.DA. In Court PW-7 stated that the deceased was beaten and mistreated on 14.8.1992 and 15.8.2002 and no such statement was made during investigation. Additionally, no such allegation was made by PW-8 the complainant about this aspect in the FIR.

"In the statement in Court PW-7 stated that the deceased had told him that A-1 and A-2 caught hold of her and A-1 poured oil over her body and set her on fire by throwing match stick. No such statement was made during investigation. Similarly, that is not also the version of PW-6. In Court PW-7 stated that all the accused person *i.e.* the present appellant and the acquitted accused persons maltreated her. No such allegation was made while the witness was examined under Section 161.....

"The High Court's judgment is not only sketchy but also devoid of reasons. Various factors highlighted above would go to show that the prosecution has squarely failed to establish the accusation so far as the appellant is concerned. Therefore, the appeal deserves to be allowed which we direct. The appellant is to be set at liberty forthwith unless to be required in connection with any other case." *Raman Kumar* v. *State of Punjab*, 2009 CrLJ 3034 : 2009 (6) SCR 933 : JT 2009 (8) 422.

[11423] ● ***Inadequate evidence.***—The deceased and her parents had never complained to him that the accused or any member of his family was raising any demand of any kind when confronted with the statement made during investigation, PW-5 accepted that he had no stated many vital things during investigation which for the first time he was speaking in Court. Similar is the position with PW-7 the brother of the deceased. He also accepted on being confronted with the statement made during investigation that he had not stated particularly certain relevant aspects. Similar is the position with the evidence of mother of deceased (PW-6).

There was no evidence towards the claim regarding any demand of dowry. That being so the High Court ought not to have interfered with the well reasoned judgment of the trial Court directing acquittal. The reasoning of the High Court that something must have happened and otherwise deceased would not have committed suicide is clearly indefensible. That certainly could not have been a reason to set aside the trial Court's judgment of acquittal. *Nepal Singh* v. *State of Haryana*, AIR 2009 SC 2913 : (2009) 12 SCC 351 : 2009 (6) SCR 982 : JT 2009 (7) 172.

[11424] ● ***No evidence on record to establish accusation.***—In the instant case, there was no material brought no record by the prosecution to establish the accusations so far as the present appellant is concerned. It is to be noted that there was a dying declaration recorded by the Executive Magistrate, Chandigarh who was present at PGI hospital. The authenticity of the dying declaration has not been questioned. It is the stand of the prosecution that police officer should have recorded it. But that cannot be a ground to discard the dying declaration recorded by the Executive Magistrate. Additionally, the prosecution laid great emphasis on the letters purported to have been written by the deceased to her relatives. Here again, handwriting expert's report clearly shows that the letters were not in the handwriting of the deceased.

Above being the position, there is no evidence brought on record by the prosecution to establish the accusations. That being so, the appeal deserves to be allowed which we direct. The conviction of the appellant is set aside. *Rakesh Kumar* v. *State of Haryana*, (2009) 11 SCC 81 : 2009 CrLJ 1895 : 2009 (3) SCR 1190 : JT 2009 (3) 377 : 2009 (2) Crimes 119 (SC).

[11425] ● ***Nothing on record to show that any demand of dowry was made.***—No evidence was brought on record to show that the cruelty or harassment was meted out to her for bringing insufficient dowry, in absence whereof the ingredients of Section 304-B of the Indian Penal Code cannot be said to have been proved. The legal fiction sought to be created must be raised only on fulfillment of the conditions precedent therefore. All the requisite ingredients of the offence must be brought home before the presumptive evidence is put to use by the Court for holding the accused guilty of an offence under section 304-B of the Indian Penal Code.

It is true that two injuries were noticed on the person of the deceased by the Autopsy Surgeon, but we could have considered this aspect of the matter had the appellant been not accused. The FIR was lodged against others also. Three more persons being sisters and cousin of the appellant were also charged for commission of the said offence. If the deceased was forced to take poison, they must have some hand in it. As they have been acquitted, it is difficult for us to come to the conclusion that it was the appellant and the appellant alone who was responsible for her death.

For the aforementioned reasons, the impugned judgment cannot be sustained and it is set aside accordingly. The appeal is allowed. The appellant who is in custody is directed to be set at liberty and released forthwith unless wanted in connection with any other case. *Tarsem Singh* v. *State of Punjab*, AIR 2009 (SC) 1454 : 2008 (17) SCR 379 : JT 2008 (13) 185.

[11426] ● ***Word "relative" in Section 498-A, IPC.***—In order to be covered under section 498-A, IPC one has to be a "relative" of the husband by blood, marriage or adoption. *U. Suvetha* v. *State of Inspector of Police*, AIR 2009 SC 1451 : 2009 AIR SCW 3491 : (2009) 6 SCC 757. **TO THE SAME EFFECT** : (1) *T. Ashok Pai* v. *CIT*, 2007 AIR SCW 4088 : (2007) 7 SCC 1621; (2) *Shivcharan Lal Verma* v. *State of M.P.*, (2007) 15 SCC 369.

[11427] ● ***Sections 300, 304-B, 498-A, IPC—Cruelty and murder.***—The allegation against the accused persons was that they committed the murder of deceased for dowry and also subjected her to cruelty on account of demand of dowry. The trial Court acquitted Sitaram Sharma and his wife Gyatri Devi Sharma but convicted Arun Kumar Sharma of substantive offence under Section 302, IPC. The three eye witnesses did not inspire confidence. It was alleged that the deceased was being severely beaten by firsts and steps by the accused persons, but no ante-mortem injuries were found on the other hand even her glass bangles were not broken. The doctor suggested that the injury was on account of asphyxia as a result of injury No. 1 due to forcible pressure over neck. There was no mark of fingers and thumb on either side of the wind pipe. The evidence of the doctor suggested that there multiple bruises which could be due to the forcible pressure of fingers. There was no convincing evidence that it was the accused alone who throttled the deceased to death. The copy of FIR was not sent to the Magistrate. In view of the above, the accused was given benefit of doubt, and was acquitted of all the charges. *Arun Kumar Sharma* v. *State of Bihar*, (2010) 1 SCC 108 : 2010 CrLJ 428 (431, 432, 433).

[11428] ● ***Section 498-A, IPC—No specific allegations in complaint filed by wife against husband and his relatives.***—In this case appellant No. 1 was admittedly a permanent resident of Navasari, Surat, Gujarat and had been living with her husband for more than seven years. Similarly Appellant No. 2 is a permanent resident of Goregaon, Maharashtra. They had never visited the place where the alleged incident had taken place. They had never lived with respondent No. 2 and her husband. Their implication in the complaint was meant to harass and humiliate the husband's relatives. It was held that permitting the complainant to pursue the complaint would be an abuse of process of law. *Preeti Gupta* v. *State of Jharkhand*, AIR 2010 SC 3363 : (2010) 7 SCC 667 : 2010 CrLJ 4303 (4309) : (2010) 4 Crimes 19.

[11429] ● ***Complaint under Section 498-A, IPC—Conduct and responsibility of advocates—Advocates Act, Section 35.***—The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the Courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law and Justice to take appropriate steps in the larger interest of the society. *Preeti Gupta* v. *State of Jharkhand*, AIR 2010 SC 3363 : (2010) 7 SCC 667 : 2010 CrLJ 4303 (4309) : (2010) 4 Crimes 19.

[11430] ● ***Section 498-A, IPC—Cruelty and harassment—Serious look of entire provision of Section 498-A by Legislature warranted.***—The learned members of the Bar have enormous social responsibility and obligation to ensure that the social fiber of family life is not ruined or demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The learned members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint under Section 498-A as a basic human problem and must make serious endeavour to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fiber, peace and tranquility of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases. *Preeti Gupta* v. *State of Jharkhand*, AIR 2010 SC 3363 : (2010) 7 SCC 667 : 2010 CrLJ 4303 (4309) : (2010) 4 Crimes 19.

[11431] ● ***Sections 498-A, 406, IPC—Cruelty to wife—Allegations against foster sister of husband—Section 498-A not attracted.***—In the instant case, FIR was lodged by wife against foster sister of husband. Accused was not in any manner a relative of husband is referred to in Section 498-A, IPC. In order to be covered under Section 498-A, IPC one has to be a relative of the husband by blood, marriage or adoption. Therefore, the FIR in so far as it concerned Section 498 is if not consequence and the appellant shall not be tried for offence under Section 498-A.

The allegations made under Section 406, IPC for the offence of criminal breach of trust in respect of Jewellery are extremely wild and disgusting. However, how far those allegations can be used to meet the requirements for the offence under Section 406, IPC is a most question whatever the form in which the allegations under Section 406, IPC are made the fact is that there is an FIR and the Court concerned has taken cognizance thereof. Under these circumstances the Supreme Court would only protect the interest of the appellant by directing that she would not be required to attend the proceedings unless specifically directed by the Court to do so and that too in the case of extreme necessity. Similarly no coercive step shall be taken against her. She shall be granted bail by the Court trying the case if it decides to try the offence by framing charge. *Vijeta Gajra* v. *State of NCT of Delhi*, AIR 2010 SC 2712 : 2010 CrLJ 3841 (3843) : (2010) 3 Crimes 160.

[11432] ● ***Witness not describing the exact "harassment" and "tortured"—Effect.***—A prosecution witness who merely uses the word "harassment" or "tortured" and does not describe the exact conduct of the accused which, according to him, to amounted to harassment and torture may not be believed by the Court in cases under Section 498A and 304, IPC. *Amar Singh* v. *State of Rajasthan*, AIR 2010 SC 3391 (3397) : (2010) 9 SCC 64.

[11433] ● *Scope of Section 498-A, IPC.*—Section 498-A, IPC, as extracted hereinabove, is clear and unambiguous that only the husband or his relative could be proceeded against under the said Section for subjecting the wife to 'cruelty', which has been specially defined in the said section in the explanation thereto. The question as to who would be a relative of the husband for the purpose of Section 498-A has been considered in detail in U. Suvetha's case (*supra*). We are entirely in agreement with the views expressed in the said case and we agree with the submissions made on behalf of the Appellant that the learned Judge of the High Court committed an error in bestowing upon the Appellant the status of wife and, therefore, a member of Mukund Chandra Pandit's family. The doctrine of acknowledgement would not be available in the facts of this case. No doubt, there is direct allegation against the Appellant of cruelty against the Respondent No. 2, Asha Rani Pal, but as indicated in U. Suvetha's case (*supra*), the same would enable the Respondent No. 2 to proceed against her husband under Section 498-A, IPC and also against the Appellant under the different provisions of the Hindu Marriage Act, 1955, but not under Section 498-A, IPC. *Sunita Jha* v. *State of Jharkhand*, (2010) 10 SCC 190 : JT 2010 (10) 72 : 2010 (9) Scale 395 : 2010 (4) Crimes 116 (SC).

[11434] ● *Cruelty—Cruel some nature of accused—Enhancement of sentence.*—The deceased suffered serious burn injuries in the Kitchen of the house and ultimately died of those injuries. In the dying declaration she stated that she had a quarrel with her husband over the house-hold chores and over the feeding of the children and she had therefore, poured kerosene oil on herself and then burnt herself. The trial Court convicted the accused for offences under Section 498-A, IPC to a sentence of one year and under Section 306 IPC to a sentence of four years. In appeal filed by the State, the sentence awarded by the trial Court under Section 306, IPC was enhanced on the ground that husband was of quarrelsome nature. The Apex Court held that the enhancement of sentence was improper. *Ravindra Tukaram Hiwale* v. *State of Maharashtra*, AIR 2010 SC 3492 (3493) : 2010 (4) Crimes 10 (SC).

CULPABLE HOMICIDE

[11435] ● *Culpable homicide.*—In the present case, there was a violent exchange of abuses between two parties which were both armed with lathis, before they came to blows. Then in course of the fight which ensued the accused gave one lathi blow on the head of the deceased which fractured the skull and resulted in death. The opinion of the doctor was that the injury was sufficient in the ordinary course of nature to cause death and that it was caused either by a heavy weapon used with moderate force, or by a light weapon used with great force. In view of the fact, that the accused had given only one blow, it cannot be held that he gave it with such intention as fell either under the third clause of Section 300 or the second clause of Section 299. All that can be said was that he gave it only with the knowledge that it was likely to cause death, and the offence falls under Section 304 Part II. Intention of the accused can be gathered from proved circumstances and not from medical opinion as to the seriousness of the injury. *Chamsu Budhwa* v. *State of M.P.*, AIR 1954 SC 652 : 1954 CrLJ 1676.

[11436] ● *Lathi blow—Knowledge of bodily injury likely to cause death.*—In the present case, it was established that the accused had given six blows with a lathi on the head of the deceased, one of which, had fractured the skull. The deceased died three weeks after the incident. The medical evidence was, that the injury which broke the skull had caused a depression in the brain and that death was due to haemorrhage which had gradually developed at the site of the injury to the brain. Even though the blows given were on the head which was a vital part, and were given with a lathi which was 5 feet in length and 1 1/2 inches in diameter, in view of the fact that the lathi was not iron-shod and that the deceased was strongly built young man who had survived the injuries for three weeks, it could not be held that the intention of the accused was to cause death, nor could it be held that the bodily injury inflicted was "sufficient in the ordinary course of nature to cause death". The accused could be held only to have had the intention to cause such injury as was "likely to cause death". Conviction under Section 302 is converted to one under Section 304, Part I, and the sentence of imprisonment for life is reduced to one of imprisonment for 10 years. *Inder Singh Bagga Singh* v. *State of Pepsu*, AIR 1955 SC 439 : 1955 CrLJ 1014 : ILR (1954) Patiala 380.

[11437] ● *Death caused by single blow.*—In the present case death was caused by a single blow on the head with a hockey stick which fractured the skull, but the deceased lived for ten days after the incident. It cannot be held, that the injury was caused with such intention as would bring the case either under the third clause of Section 300 or the second clause of Section 299. All that could be said was that the accused knew that his act was likely to cause death. Conviction under Section 302 was reduced to one under Section 304 Part II. *Wille (William) Slaneej* v. *State of M.P.*, AIR 1956 SC 116 : 1956 CrLJ 291 : 1956 SCJ 182 : 1956 SCA 183 : (1955) 2 SCR 1140 : 1956 AWR (Sup) 38 : 1956 (1) MLJ SC 100.

[11438] ● ***Inference of intention from nature of injury.***—In adjudging whether the injuries inflicted are sufficient in the ordinary course of nature to cause death, the possibility that skilful and efficient medical treatment might prevent the death is wholly irrelevant. *Kishore Singh* v. *State of Punjab*, AIR 1958 SC 465 : 1958 CrLJ 818.

[11439] ● ***Culpable homicide—Conditions to be satisfied.***—Under Clause 3 of Section 300, culpable homicide is murder if both the following conditions are satisfied, namely, (a) that the act which causes death is done with the intention of causing bodily injury, and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. Therefore, in order to bring a case under clause 3, the prosecution must establish,—

1. that the accused inflicted injury on the body of the deceased,
2. that the intention of the accused was to inflict the very injury which has been actually found on the person of the deceased,
3. that the injury was of a particular nature, that is, its spot, penetration and depth and the vital organs which have been cut, if any, and
4. that the injury was sufficiently serious to cause death in the ordinary course of nature.

Of these four elements of the offence, it is only the second element which is subjective, and so far as the intention of the assailant is concerned, all that is required to be considered under clause 3 of Section 300 is whether, he had or had not the intention to cause the *very* injury actually found on the body of the deceased. If such intention is established the rest of the inquiry is purely objective and has nothing to do with the intention of the offender, so that the prosecution is not required to prove that his intention was to inflict an injury of a particular serious nature. Sufficiency of the injury inflicted for causing death in the ordinary course of nature is a matter of inference and deduction from proved facts, and the inquiry into this question is entirely unrelated to the intention of the offender or the state of his mind at the time when he inflicted the injury in question. No doubt, if the circumstances of the case justify the inference that the blow intended to be inflicted was of a different and lighter nature than the one actually found on the person of the deceased, then, the offence committed cannot fall under clause 3 of the Section 300, even though it is established, that the injury caused by that blow is sufficient to cause death in the ordinary course of nature. Such cases arise when, on the facts proved in the case, the possibility that a blow which was actually aimed on a non-vital part of the body fell accidentally on a vital part, cannot be altogether ruled out. Such a thing may happen if the deceased has stumbled or has suddenly turned or bent down while the blow was being given, or has accidentally dashed against the weapons used, and as a result has been hit on the chest or the abdomen, though the assailant may actually have intended to hit him, say, on the leg or hand. In such a case, it must be noted, that the accused escapes the charge of murder, not because of any question as to his intention regarding the seriousness or otherwise of the injury which he intended to inflict, but because, on the facts and circumstances of the case, it is not clearly established that he intended to inflict the very injury which was actually inflicted, and there is a possibility that he had in mind an injury of quite a different nature. *Virsa Singh* v. *State of Punjab*, AIR 1958 SC 465 : 1958 CrLJ 818 : 1958 SCJ 772 : 1958 AWR (HC) 572 : 1958 ACrR 373 : (1958) MLJ (Cri) 579.

[11440] ● ***Culpable homicide—Preposition of law to be kept in mind.***—When considering the applicability of clause 3 of Section 300, the following propositions of law must be kept in mind:

(i) The burden of proving all the four elements of the offence under clause 3 lies on the prosecution, and that burden never shifts. This burden includes the burden of proving the intention of the accused.

(ii) The intention required to be proved is the intention to inflict the very injury which was actually inflicted on the person of the deceased. It is not required to be proved that the intention of the accused was to inflict an injury of a particular serious nature. In other words the question of intention cannot be linked up with the gravity of the injury, and the prosecution does not have to establish that the accused intended to cause an injury of a kind which is sufficient in the ordinary course of nature to cause death or that he knew that his act was of a kind which would be sufficient in the ordinary course of nature to cause death.

(iii) If circumstances exist in the case which show that there is a possibility that the accused might have intended to inflict an injury other than the one which was actually inflicted then the accused must be given the benefit of the doubt that exists, and the charge under Section 302 based upon clause 3 of Section 300 must fail.

(iv) If the injury which results in death is of such a nature that it is sufficient in the ordinary course of nature to cause death, and there are no circumstances in the case which would justify the inference that the accused intended to inflict any other injury, it must be presumed that the intention of the accused was to cause the very injury which has resulted in death, and the prosecution must be held to have discharged the burden of proving the intention of the accused in relation to his act.

(v) To sum up, once it is proved that the death of any person was caused by any injury inflicted by the accused, and that such injury is of a character which is sufficient to cause death in the ordinary course of nature, it must be presumed that the accused intended to cause that very injury, and the conditions of clause 3 of Section 300 must be held to have been satisfied, unless there are circumstances to show that he might have intended a different injury and that the one which was caused was inflicted accidentally.

The injury caused in the present case was the result of a blow with a knife in the stomach which was given with such force that the weapon had penetrated the abdomen and had injured the bowels. According to the doctor the injury was sufficient in the ordinary course of nature to cause death. In the absence of any circumstances to show that the injury was caused accidentally or unintentionally, it has to be presumed that the accused had intended to cause the inflicted injury and the conditions of clause 3 of Section 300 were satisfied. Conviction under Section 302 is upheld. *Virsa Singh* v. *State of Punjab*, AIR 1958 SC 465 : 1958 CrLJ 818 : 1958 SCJ 772 : (1958) MLJ (Cri) 579.

[11441] ● ***Several offenders by assaulting deceased to death.***—Conviction under Section 304, second part, read with Section 34 is perfectly legal where it is established that several accused had assaulted the victim with the common intention of doing the criminal act of giving him a beating, and that, each of them had acted with the knowledge that the beating was likely to cause death, that is, that death was the likely consequence of the criminal act of beating. What Section 304 excludes is, intention to cause death or fatal bodily injury; it does not exclude common intention shared with the other accused to commit the criminal act of giving a beating to the victim of the assault. *Afrahim Sheikh* v. *State of W.B.*, AIR 1964 SC 1263 : 1964 (2) CrLJ 350 : (1964) 2 SCWR 344 : 1964 AWR (HC) 275 : 1964 ACrR 187 : 1964 BLJR 361 : 1964 CurLJ (SC) 152 : 1964 ALJ 437.

[11442] ● ***Several persons when beating man with heavy lathis.***—When several persons beat a man with heavy lathis, each hitting his blow with the common intention of severely beating the victim, they may not have the intention specified in the first part of Section 304, and yet if each possesses the knowledge that death is the likely result of the beating, then, the conditions for the application of Section 34 are satisfied, and all the accused can be convicted under the second part of Section 304 read with Section 34. In such a case, the common intention shared by all the accused is with regard to the criminal act of beating the victim, and if the beating results in the death of the victim, and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act of beating, there is no reason why all the accused cannot be convicted under the second part of Section 304 read with Section 34. *Afrahim Sheikh* v. *State of West Bengal*, AIR 1964 SC 1263 : 1964 (2) CrLJ 350 : (1964) 2 SCWR 344.

[11443] ● ***Severe beating of deceased by six persons.***—In the present case, it was established beyond doubt, that the six persons had chased the victim and had attacked him after throwing him down on the ground, and had given him such severe beating on various parts of his body that he had ultimately died of the injuries which he had received at their hands. In such a case, the conditions for the application of Section 34 were clearly satisfied and conviction under Section 304 read with Section 34 was justified. *Afrahim Sheikh* v. *State of West Bengal,* AIR 1964 SC 1263 : 1964 (2) CrLJ 350 : (1964) 2 SCWR 344.

[11444] ● ***No intention to cause death but accused having knowledge that his act likely to cause death.***—Where the prosecution evidence disclosed, that the accused inflicted an injury on the victim with a weapon and ran away, which weapon was not described, though the injury was a serious one cutting the auxiliary artery and veins but was not on the vital part of the chest and had not reached the lungs and the incident itself, was as a result of a sudden quarrel, the requirements of Section 300 are not satisfied as death was not intended. The case also does not come under the first and the second part of Section 299 for the same reason but the matter falls under the third part of Section 299 since the accused had the knowledge that the act was likely to cause the death of the victim and the accused is, therefore, liable under Section 304, Part II, IPC. *Laxman Kalu* v. *State of Maharashtra,* AIR 1968 SC 1390 : 1968 CrLJ 1647 : (1968) 2 SCJ 930 : (1968) 2 SCWR 557 : 1969 MLJ (Cri) 3.

[11445] ● ***Sudden commotion—Accused stabbing deceased with knife—Offence of culpable homicide.***—There was a sudden commotion and when the deceased intervened in the fight, the accused took out a knife and stabbed the deceased and the deceased was in a crouching position presumably to intervene when he received the blow. Though the injury was found sufficient in the ordinary course of nature to cause death, he was convicted for the offence of culpable homicide. The intention to cause that particular injury was not present. *Harijinder Singh alias Jinde* v. *State (Delhi Administration)*, AIR 1968 SC 867 : 1968 CrLJ 1023 : (1968) 2 SCR 246.

[11446] ● ***Injury caused on vital part of body—Intention to kill.***—Where the injury was on a region of the head which is a vital part and medical evidence disclosed that the injury proved fatal, the intention to kill can certainly be attributed to the assailant, even though he used only his lathi. *Chahat Khan* v. *State of Haryana*, AIR 1972 SC 2574 : (1972) 3 SCC 408 : 1973 CrLJ 36.

[11447] ● ***Attack pre-meditated and not accidental.***—Where in a premeditated attack the accused gave only one blow with a lathi on the head of the deceased with such great force that it immediately resulted in the latter's death, he was clearly guilty of culpable homicide amounting to murder under clause 3rdly of S. 300 IPC. *Ginder Duradh* v. *State of Bihar*, AIR 1972 SC 952 : (1972) 3 SCC 505 : 1972 CrLJ 587 (SC).

[11448] ● ***Connection between 'act' and death caused thereby must be direct and distinct.***—The connection between the 'act' and the death caused thereby must be direct and distinct; and though not immediate it must not be too remote. If the nature of the connection between the act and the death is in itself obscure, or if it is obscured by the action of concurrent causes, or if the connection is broken by the intervention of subsequent causes, or if the interval of time between the death and the act is too long, the above condition is not fulfilled. But where as many as 34 injuries had been caused to the deceased with axe and sticks and some of which has damaged the kidneys and lungs and some resulted in compound fracture the intention to kill could be easily inferred from the number and nature of injuries caused. *Laxman* v. *State of Maharashtra,* AIR 1974 SC 1803 : (1974) 3 SCC 490 : 1973 SCC (Cri) 1093 : 1974 CrLJ 1271.

[11449] ● ***Injuries caused on abdomen of deceased sufficient to cause death in ordinary course of nature.***—In the present case it was not clearly established, that the injury caused on the abdomen of the deceased was sufficient to cause death in the ordinary course of the nature. The doctor who conducted the autopsy stated in cross-examination, that the abdomen injury was only likely to cause death. The prosecution did not question him specifically as to whether all or any of the injuries found on the deceased was sufficient to cause death in the ordinary course of nature. The act of the appellant will be culpable homicide, not amounting to murder. If one of the special Exceptions in Section 300 applies the offence will be culpable homicide not amounting to murder. This is not such a case; the act of the appellant fell under Clause (b) of Section 299 and, therefore, punishable under Section 304, Part I IPC. *Jayaraj* v. *State of T.N.*, AIR 1976 SC 1519 : (1976) 2 SCC 788 : 1976 SCC (Cri) 293 : 1976 CrLJ 1186 : 1976 CrLR (SC) 236 : 1976 SCCrR 261 : 1976 CrAppR (SC) 176

[11450] ● ***Murder—Death caused by shock and haemorrhage resulting from multiple injuries.***—In the instant case, the respondents indiscriminately pounded the legs and arms of the deceased with heavy sticks till he became unconscious. The deceased had 19 injuries, out of which 9 were grievous. The doctor who conducted the autopsy was of opinion that the injuries found on the deceased were cumulatively sufficient to cause death in the ordinary course of nature. The cause of death was, according to the doctor shock and haemorrhage resulting from multiple injuries. The trial Judge convicted them under Section 302 as well as under Section 302 read with Section 34, Penal Code. On appeal by the convicts, the High Court altered their conviction to one under Section 304, Part II Penal Code. Hence this appeal by the State after obtaining Special Leave. The formidable weapons used by the accused in the beating, the savage manner of its execution, the helpless stage of the unarmed victim, the intensity of the violence caused, the callous conduct of the accused in persisting in the assault even against the protest of feeling bystanders—all, viewed against the background of previous animosity between the parties, irresistibly lead to the conclusion that the injuries were intentionally inflicted and were not accidental. Thus, the presence of the first element of clause Thirdly of Section 300 has been cogently and convincingly established. The doctor's evidence established satisfactorily, that the second element of clause (3) of S. 300 is satisfactorily established when she testified that the injuries of the deceased were cumulatively sufficient in the ordinary course of nature to cause death. There is, therefore, no escape from the conclusion that the offence committed by the accused is 'murder' notwithstanding the fact that the intention of the accused to cause death, has not been shown beyond doubt. *State of A.P.* v. *R. Punnayya*, AIR 1977 SC 45 : (1976) 4 SCC 382 : 1976 SCC (Cri) 659 : 1977 CrLJ 1 : 1976 CrLR (SC) 485 : 1977 SCCrR 19 : (1977) 1 SCR 601 : (1976) 2 SCWR 297 : 1977 Chand LR (Cri) (SC) 65 : 1976 CrAppR (SC) 320.

[11451] ● ***Murder and culpable homicide not amounting to murder—Points of distinction.***— Whenever a Court is confronted with the question whether the offence is 'murder' or "culpable homicide not amounting to murder" on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused had done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. It the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of Section 300, Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative, the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the 2nd or the 3rd clause of Section 299 in applicable. If this question is found in the positive, but the case comes within any of the Exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first Part of Section 304, Penal Code. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the Court. But some times the facts are so intertwined and the 2nd and the 3rd stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages. *State of A.P.* v. *R. Punnayya*, AIR 1977 SC 45 : (1976) 4 SCC 382 : 1976 SCC (Cri) 659 : 1977 CrLJ 1 : 1976 CrLR (SC) 485 : 1977 SCCrR 19 : (1977) 1 SCR 601 : (1976) 2 SCWR 297 : 1977 Chand LR (Cri) (SC) 65 : 1976 CrAppR (SC) 320.

[11452] ● ***Two stab injuries inflicted on deceased with slightest provocation.***—Thus where the accused went armed with a dagger to bring his wife from his father-in-law's house but he said that she would go with him the next day morning. At this accused inflicted two stab injuries on her person, one of which cut through the liver and the colon and in the opinion of the doctor was sufficient in the ordinary course of nature to cause death, it was held that the whole affair appears to be pre-planned and the case squarely fell within the 3rd clause of S. 300 IPC. The plea that by having recourse to proper treatment her life could be saved was of no avail to the accused in view of Explanation 2 to S. 299, IPC. *Marcha* v. *State of Rajasthan*, AIR 1979 SC 80 : (1979) 1 SCC 161 : 1978 CrLJ 1710 (SC).

[11453] ● ***Accused deliberately caused injury with knife—Sufficient in ordinary course of nature to cause death.***—Where the accused deliberately caused an injury with a knife on the chest of the deceased and on opening of the body the doctor found that the wound was going deep into the heart cutting the auricle and root of the aorta and according to the doctor that injury was certainly sufficient in the ordinary course of nature to cause death, the case did not fall under any of the Exceptions in Section 300, IPC, and the accused's conviction under Section 302, IPC, was proper. *Pappu* v. *State of U.P.*, AIR 1978 SC 1455 : 1978 CrLR (SC) 347 : 1978 UJ (SC) 595 : 1978 BLJR 595 : 1978 ALJ 669 : 1978 ACrC 332 (1) : 1978 CrAppR (SC) 272.

[11454] ● ***Victim jumping in will to save himself—Death not caused by act of accused.***— Where a person being pursued closely on his heels in an open field by his enemies who had already killed one of his relations in the incident jumped into a well in order to save himself and in the process met with his death, it was held that the act of the accused did not constitute an act which was done with the intention or knowledge specified in S. 299, IPC and as such they had to be acquitted. *Jogindra Singh* v. *State of Punjab*, AIR 1979 SC 1876 : (1980) 1 SCC 493 : 1979 CrLJ 1406.

[11455] ● ***Murder knife injury inflicted on deceased.***—In a murder case, the knife injury inflicted on the deceased was as much as 3 inches deep and manifestly and clearly intended to kill the deceased and that too on some very paltry matter, that is to say, the refusal of the deceased to supply goods to the appellant on credit. Case fell under Section 302, IPC, and not under Section 304. *Abdul Waheed* v. *State of Maharashtra*, AIR 1979 SC 1828 : (1979) 3 SCC 477 : 1979 SCC (Cri) 651 : 1979 CrLJ 1196 : 1979 CrLR (SC) 450.

[11456] ● ***Murder—Injury sufficient in ordinary course of nature to cause death.***—In a case the medical evidence disclosed an injury on the chest which cut a part of the thoracic aorta with the main portion of the heart and also fractured the 8th and 9th ribs on the right side of the chest. According to the doctor, the injury was sufficient in the ordinary course of nature to cause death. *Mariadasan* v. *State of T.N.*, AIR 1980 SC 573 : (1980) 3 SCC 68 : 1980 CrLJ 412.

[11457] ● ***Stabbing unarmed deceased twice in abdomen—Injuries sufficient in ordinary course of nature to cause death.***—Where the evidence is that the respondent stabbed the unarmed deceased twice in his abdomen and caused such injuries as were sufficient in the ordinary course of nature to cause death and did cause his death, it is for the respondent to establish with a balance of probability circumstances which will bring his case within any Exception. Since the deceased was unarmed and the assault could not be said to be sudden and unpremeditated, Exception II or any other Exception in Section 300, IPC will not apply. He caused those injuries before he received the stick blows given by S. It cannot be said that the deceased was the aggressor and that the respondent caused those fatal injuries to the deceased to ward off any imminent apprehension of death or grievous hurt to himself. In his statement the respondent did not even admit, that he had inflicted any wound on the deceased. He asserted that the son of the deceased had come out armed with a knife, thereby obliquely suggesting that it was the son who had stabbed his father. This was a patently false and absurd position taken by him. Appeal is allowed. *State of Maharashtra* v. *Krishnamurti*, AIR 1981 SC 617 : 1980 Supp SCC 455 : 1981 SCC (Cri) 364 : 1981 CrLJ 9 1981 CrLR (SC) 145.

[11458] ● ***'Intention' and 'Knowledge' of accused subjective and invisible states of mind.***—The "intention" and "knowledge" of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the, weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he, must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge' 'intention ' requires something more than the mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end. *Jagdeep Singh* v. *State of Haryana*, AIR 1981 SC 1552 : (1981) 3 SCC 616 : 1981 CrLJ 1136 : 1981 CrLR (SC) 462.

[11459] ● ***Blow with stick on vulnerable part.***—In a case in a quarrel between the accused and the victim, the accused gave a blow with a stick which fell on a vulnerable part of the victim's body, resulting in his death, the accused is liable to be convicted under Section 304, Part-II, IPC. *Om Prakash* v. *State of Haryana*, AIR 1981 SC 6482 : 1980 SCC (Cri) 694 : 1981 CrLJ 30 : 1981 UJ (SC) 578.

[11460] ● ***Altercation arising out of minor dispute one blow given.***—In a case one blow was given by the accused and that too by the blunt side of the weapon pursuant to an altercation on a minor dispute. Conviction was altered by the Supreme Court to culpable homicide not amounting to murder under Section 304, Part-II, IPC. *Suba Singh* v. *State of Punjab*, AIR 1982 SC 690 : (1982) 3 SCC 226 : (1982) 3 SCC (Cri) 694 : 1982 CrLJ 626.

[11461] ● ***No pre-meditation—No prior enmity—One blow with dagger.***—In a murder case the accused was about 20 years old at the time of the offence. There was no pre-meditation and no prior enmity but a short quarrel preceded the assault. One blow given with a dagger landed in the epigastrium area and the deceased succumbed to the injury. In such a case, Section 300 cl. Thirdly would not be attracted. Conviction was altered from one under Section 302 to that under Section 304 Part II, Penal Code. *Kulwant Rai* v. *State of Punjab*, AIR 1982 SC 126 : (1981) 4 SCC 245 : 1981 SCC (Cri) 826 : 1982 CrLR (SC)

23 : 1982 (UP) CrC (SC) 54 : 1982 Bih CrC (SC) 54.

[11462] ● ***Murder—Proof—Offence under Section 304, Part II, IPC—Not under Section 302, IPC.***—On the previous day to the occurrence, A4 cut an indecent joke with the wife of B. Next day B and his brother G went to the house of the accused to complain about A4's misbehavior. Deceased T was nowhere in the picture and nor there was animosity against him. T appeared on the scene after the accused assaulted B and G. T attempted to intervene to save B and G from further harm. Then a blow with a barchha, was given by A1 which landed on T. As there is nothing to indicate that Al intended to cause any injury to T, the offence falls under Section 304, Part II, IPC, and not under Section 302, IPC. *Gurmail Singh* v. *State of Punjab*, AIR 1982 SC 1466 : (1982) 3 SCC 185 : 1982 CrLJ 1946 : 1982 CrAppR (SC) 318 : 1982 BBCJ (SC) 174 : 1982 ACrR 441.

[11463] ● ***Murder—Only one injury—Altercation between deceased and father.***—In a murder case altercation between the deceased and the father of the accused took place. The accused arrived there with a sharp-edged weapon. The father exhorted the accused to attack the deceased. The accused gave one blow with the sharp-edge on the head of the deceased, which proved fatal after six days. There was no pre-meditation. The accused, a young college going boy, must be attributed only with the knowledge that he was likely to cause an injury which was likely to cause death. Conviction is altered from Section 302 to Section 304, Part II, IPC. *Randhir Singh* v. *State of Punjab*, AIR l982 SC 55 : (1981) 4 SCC 484 : 198l SCC (Cri) 856 : 1982 CrLJ 195 : 1981 CrLR (SC) 543 : 1982 ACrLJ (SC) 4 : 1981 CrAppR (SC) 356 : 1981 UJ (SC) 850 : l981 Chand CrC (SC) 26 : 1982 SCCrR 106.

[11464] ● ***Accused with pre-meditation gave solitary blow on deceased head.***—The accused gave a solitary blow on the deceased's head with the blunt side of the gandhala in the heat of the moment and without pre-meditation and in a sudden fight. Case is covered by Exception 4 to Section 300. Conviction is altered from one under Section 302 to one under Section 304, Part II of the IPC. *Jagrup Singh* v. *State of Haryana*, AIR 1981 SC 1552 : (1981) 3 SCC 616 : 198l SCC (Cri) 768 : 1981 CrLJ 1136 : 1981 CrLR (SC) 462 : 1981 Chand CrC 163 (SC) : 1981 BBCJ (SC) 213 : 1981 CurLJ (Cri) 194.

[11465] ● ***Conviction under Section 304, Part II—IPC Propriety.***—In a case the deceased received three contused lacerated wounds on the head, extensive subdural haematoma due to head injuries. Even accepting doctor's opinion, that injuries were not sufficient in the ordinary course of nature to cause death, they were clearly of a nature likely to cause death. However, as there is no State appeal to the Supreme Court, it could not be held that acts of the appellants resulting in injuries to the deceased were done with knowledge that they would cause such bodily injury as was likely to cause death, conviction u/s 304, Part-II is proper. *Jayappa Dutta* v. *State of Maharashtra,* AIR 1982 SC 1183 : (1982) 2 SCC 453 : 1982 SCC (Cri) 476 : 1982 CrLJ 1394.

[11466] ● ***Murder—Death of victim on spot by injuries.***—The limited question in this appeal by special leave was whether the offence committed by the appellant would fall under Section 302, IPC. The undisputed facts in this case are that the appellant who was a constable fired several shots at another constable who came out of his office that he fired them at the victim who was trying to run away to save his life, that the victim collapsed on the floor after one shot hit him, that even after he collapsed the appellant fired another shot at him though it did not hit the victim, that the total number of used cartridges which were recovered from the scene of offence were five in number, that the Ballistic Expert opined that all the five cartridges were fired from the rifle which was seized from the appellant, that the Medical Officer noted ten injuries on the victim, that there was one entry wound but that there were four exit wounds, and that injuries Nos. 1 to 3 were sufficient in the ordinary course of nature to cause death. It was argued that the intention of the appellant was merely to frighten the deceased or to cause grievous hurt especially in view of the fact that the bullet hit him just below the knee of his right leg and that, therefore, the offence would at the highest fall under Section 304, Part I of the Penal Code. It is naïve, to argue, that the intention was merely to frighten or to cause grievous hurt for it overlooked two salient features, namely (1) as many as five shorts were fired from his rifle and (2) the appellant fired a shot even after the victim had collapsed on the ground. The appellant should have known, that the rifle was a deadly weapon and no other inference was possible, but that he intended to cause such bodily injury as he knew to be likely to cause death of the person to whom the harm was caused. Further, it was not possible to come to any other conclusion, except that the appellant intended to inflict such bodily injuries to the deceased, which were sufficient in the ordinary course to nature to cause death. In any view of the matter, it would fall under clause

4thly, which provides, that if the person committing the act knew that it was so imminently dangerous that it should, in all probability, cause death or such bodily injury as was likely to cause death, and committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid, it would amount to murder. The appeal was, therefore, dismissed. *Sehaj Ram* v. *State of Haryana*, AIR 1983 SC 614 : (1983) 3 SCC 280 : 1983 SCC (Cri) 621 : 1983 CrLJ 993 : 1983 CrLR (SC) 240 : 1983 ITJ (Cri) 122 : (1983) 2 SCJ 63 : 1983 MLJ (Cri) 587 : 1983 CrAppR (SC) 366.

[11467] ● ***Murder—Solitary blow of knife by accused following trivial quarrel.***—The first appellant was aged 19 years at the time of the occurrence. He gave only one blow with a knife. On receipt of the blow, the deceased fell on the ground and there was not the slightest suggestion that the first appellant ever attempted to cause any more harm to the deceased. The motive was a trivial dispute and the incident occurred at about 10-00 P.M. The light available was from an electric lamp post in the street. Could it be said that the injury which was inflicted was the particular injury which was intended to be inflicted. If the answer was in the negative, and it ought to be so, the important requirement in the first part of para 3 of Section 300, IPC, would not be satisfied. Merely because the blow landed on a particular spot on the body (chest), divorced from the circumstances in which the blow was given, it would be hazardous to say that the first appellant intended to cause that particular injury. The weapon used was the usual handy weapon. A Punjabi generally carries a knife. In those circumstances, it would be difficult to say that the first appellant intended to cause that particular injury. Even if the injury proved to be fatal, the case will not be covered by para 3 of Section 300. The conviction under Section 302 cannot be sustained. He is guilty of an offence under Section 304 Part II, IPC, only. *Jawahar Lal* v. *State of Punjab*, AIR 1983 SC 284 : (1983) 4 SCC 159 : 1983 SCC (Cri) 805 : 1983 CrLJ 429 : 1983 CrLR (SC) 168 : (1983) 2 CrLC 427.

[11468] ● ***Verbal altercation—Accused assaulting deceased with great force.***—Where the accused administered a single knife blow right on the chest of the accused with such great force that the ribs were cut and both the heart and the lung were punctured, it could not be said that the offence did not amount to culpable homicide amounting to murder under S. 302 but only amounted to culpable homicide not amounting to murder under S. 304-Part II, IPC. *Vasanta* v. *State of Maharashtra*, AIR 1983 SC 361 : 1984 Supp SCC 648 : 1983 SCC (Cri) 335 : 1983 CrLJ 693 : 1983 CrLR (SC) 174 : 1983 (1) Crimes 728.

[11469] ● ***Accused armed with different weapons—Caused two types of head injuries.***—In the instant case the accused armed with a dang and his son armed with *gandasa* made a joint assault on the deceased who fell down unconscious at the spot. Later he died while being taken from one Hospital to another. The accused also gave two blows to the daughter of the deceased when she laid herself on her father in order to save his life. The Doctor found a vertical lacerated wound and a transverse incised wound both on the head. While convicting the main accused the High Court acquitted the son observing that only two injuries were inflicted on the deceased and the same could have been caused by one weapon like Dang which were attributable to the main accused. The acquittal of the son caused manifest miscarriage of justice. There is no basis for the assumption made by the High Court that both the head injuries caused to the deceased can be inflicted by one weapon like a Dang and therefore could be attributed to main accused. According to the Doctor, the lacerated wound was caused by a blunt-edged weapon and the incised wound was caused by a sharp-edged weapon. The unimpeachable testimony of the three eye-witnesses clearly showed that both the accused made a joint assault on the deceased with their weapons. *State of Punjab* v. *Mann Singh*, AIR 1983 SC 172 : (1983) 1 SCC 207 : 1983 SCC (Cri) 165 : 1983 CrLJ 229 : 1983 CrLR (SC) 138 : 1983 UJ (SC) 244 : 1983 (1) Crimes 645 : 1983 CrAppR (SC) 179 : 1983 ACrR 387 : 1983 SCCrR 257.

[11470] ● ***Murder—Only one blow with knife.***—In this case the accused started abusing certain organisers of a chit fund who had no connection with the deceased, in front of the house of the deceased. The deceased came out of his house and asked the accused to go away and cautioned him not to indulge in abusive language as the ladies were present. Both were remonstrating with each other when the accused took out knife from his waist and stabbed the deceased and pushed him to some distance and went away. He was convicted of an offence under Section 302, IPC, and sentenced to suffer imprisonment for life. In the circumstances of this case, no malice is alleged to have been entertained by the accused towards the deceased and the accused gave only one blow with a knife on the spur of the moment; the requisite intention to commit murder cannot be attributed to him. In such a situation, he would be guilty of committing an offence under Section 304 Part II, IPC and sentence of 5 years is awarded. *Tholan* v. *State of Tamil Nadu*, AIR

1984 SC 759 : (1984) 2 SCC 133 : 1984 CrLJ 478.

[11471] ● *Deceased mercilessly beaten resulting in death—Conviction under Section 304, Part II, IPC.*—Where a person for his audacity in complaining against the thana staff to the Superintendent of Police was falsely arrested in a dacoity case and thereafter mercilessly beaten at the police station which resulted in his death and the Doctor gave clear evidence that there were 19 injuries on various parts of the body of the deceased and these injuries caused his death, the case clearly fell within clause 2ndly of S. 300 and as such the Daroga and the constables could be held guilty under S. 302 but as the Sessions Judge convicted them only under S. 304 Part-II IPC, and the State did not file any appeal against that order of the Sessions Judge though it did file an appeal against the outright acquittal of the accused by the High Court, the Supreme Court in setting aside the order of acquittal passed by the High Court restored the conviction under S. 304 Part-II, IPC, though it felt that it was a clear case of murder. *State of U.P.* v. *Ram Sagar Yadav*, AIR 1985 SC 416 : (1985) 1 SCC 550 : 1985 SCC (Cri) 127 : 1986 CrLJ 836.

[11472] ● *Blow given by accused not correlated to internal injury causing death of victims.*—Where the evidence does not correlate the blow with the internal injury which according to medical evidence led to death, the accused should appropriately be convicted under Section 325, IPC, and not under Section 304, Part II. *Mohinder Singh* v. *State (Delhi Admn.)*, AIR 1986 SC 309 : 1985 Supp SCC 473 : 1985 SCC (Cri) 488 : 1985 CrLJ 1903.

[11473] ● *Murder—Intention.*—The nature of the offence does not depend, merely on the location of the injury caused by the accused. The intention of the person causing the injury has to be gathered from a careful examination of all the facts and circumstances of each given case. In the instant case, the appellant did not merely swing his knife towards the leg of the deceased during some struggle nor did it happen by sheer misfortune to cut an artery. That the appellant had intended to cause injury to vital parts of the deceased is clear from the fact that he had administered a stab wound on the chest of the deceased on the back side. The blow on the groin of the deceased had caused a wound 8 cm. deep piercing both the femoral blood vessels. Further when PW-6 tried to intervene, the appellant inflicted two stab wounds on him which were of identical pattern, one on the back of the chest and one in the groin region but fortunately both injuries did not prove fatal. Taking into account all those circumstances, the appellant is clearly guilty of the offences under Section 302, IPC, and Section 307, IPC. *Jaspal Singh* v. *State of Punjab*, AIR 1986 SC 683 : (1986) 2 SCC 100 : 1986 SCC (Cri) 119 : 1986 CrLJ 488 : 1986 CrLR (SC) 111 : 1986 (1) Crimes 435.

[11474] ● *Culpable homicide not amounting to murder—Accused giving lathi blow on head of deceased resulting in his death.*—The accused and the deceased had bad blood between them over the grazing of cattle on the date of occurrence having heard a hue and cry raised from near the house of the accused witnesses ran there and saw the deceased lying on the ground in a pool of blood with a bleeding head injury. On questioning the accused he stated that during the day time his bell-metal utensil was stolen and he was keeping a watch for the thief. He saw a person coming inside his premises and thinking him to be a thief he dealt a lathi blow but subsequently discovered that it was the deceased. On being taken back to his house, the deceased told his wife that he had been assaulted by the respondent in the presence of the deceased's son and grandson. The doctor found in his autopsy multiple injuries on the body. The doctor deposed that the head injury, resulting in a depressed comminuted fracture over the right parietal bone and a transverse fracture extending below the left parietal prominence, could have been caused by a single stroke with a lathi used with great force. Under Section 79, if an act is done under a mistake of fact, although not justified by law, in the belief in good faith that it is justified by law, it will not be an offence. As per Section 52, IPC, the question of good faith does not require logical infallibility but due care and attention. The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case. In this case there is complete absence of good faith on the part of the accused. There were strained feelings on the part of the accused with the deceased. Apparently, the accused was waiting for an opportunity to settle the account when he assaulted him and there was no occasion for him in the circumstances proved to have believed that he was striking at a thief. This was not a case where a person being ignorant of the existence of the relevant facts or mistaken as to them, was guilty of conduct which might produce harmful result which he never intended. Even if he was a thief, that fact by itself would not justify the accused dealing a lathi blow on the head of the deceased. The deceased had not effected an entry into the house nor was he anywhere near it. It appeared that the accused stealthily followed him and took the opportunity to settle the scores by dealing him a lathi blow with great force on a vulnerable part of the body like the head resulting in his death. There was no suggestion, that he wielded the lathi in the right of self-defence. In this view of the matter the accused is guilty of culpable homicide not amounting to murder. *State of Orissa* v. *Bhaga Barik*, AIR 1987 SC 1265 : (1987) 2 SCC 498 : 1987 CrLJ 1115 : (1987) 2 SCJ 188.

[11475] ● ***Murder—Assistant giving repeated blows with sharp edged weapon on vital part of victim body.***—Where the injuries clearly disclosed that the assailant went on giving blows after blows with his Kirpan, a sharp edged weapon, on the part of the body where vital organs are situated resulting in the death, the offence is one under Section 302, IPC. It is not a case where a blow was inflicted in the heat of passion. Hence, it could not be said that the accused committed an offence other than the one under Section 302. *Narendra Singh* v. *State of U.P.*, AIR 1987 SC 1337 : (1987) 2 SCC 236 : 1987 CrLJ 1070 : 1987 (1) Crimes 705 : (1987) 1 (1) IJRep 578 : 1987 East CrC 271.

[11476] ● ***Accused causing injuries to victim one being sufficient in ordinary course to cause death.***—Where the evidence created considerable doubt, as to whether the appellant clearly intended to kill the deceased or whether his misconduct pushed them to wreak revenge against the deceased and so attacked him, the appellant would be guilty under Section 304, Part I, and not under Section 302, IPC. The conviction is accordingly altered. *Gurdip Singh* v. *State of Punjab,* AIR 1987 SC 1151 : (1987) 2 SCC 14 : 1987 CrLJ 987 : (1987) 1 (1) IJ Rep 521 : 1987 Raj LR 135.

[11477] ● ***Injuries caused by hard blunt object on hands or feet—Not fatal.***—Where two of the appellants sentenced for murder, were alleged to have caused injuries to the deceased on hands or feet with lathis, at best they could be convicted under Section 325, IPC. The third appellant was carrying a barchi (spear) and two injuries found on the persons of the deceased are described as incised injuries Nos. 1 and 2. According to evidence, this appellant inflicted a barchi injury on the right arm on the upper part but there is no injury at that place. Even if any other injury could be attributed to him, it could only be either injury No. 1 or No. 2, none of which as per medical evidence is fatal, which resulted in the death of the deceased. Even if injury No. 2 is attributed to this appellant, at best he could be convicted under S. 326, or if injury No.1 is attributed to him also, he could be convicted under S. 324 only. In either case sentence of 5 years could be said to be sufficient. Even if their conviction is maintained under S. 325 and S. 326, sentence already undergone will meet the ends of justice. *Rattan Singh* v. *State of Punjab*, AIR 1988 SC 2147 : 1988 SCC (Cri) 708 : 1989 CrLJ 287 : (1988) 2 SCWR 24 : 1988 ACrC 225 : (1988) 14 ALR 555 : 1988 Supp SCC 456 : 1988 BLJR 459 : 1988 CalCrLR (SC) 137.

[11478] ● ***Accused when inflicting blow with deadly weapon—Presumption as to infliction of injury.***—In all the cases the approach has been to find out whether the ingredient namely the intention to cause the particular injury was present or not and it is held that circumstances like sudden quarrel in a fight or when the deceased intervenes in such a fight would create a doubt about the ingredient of intention as it cannot definitely be said in such circumstances that the accused aimed the blow at a particular part of the body. When an accused inflicts a blow with a deadly weapon the presumption is that he intended to inflict that injury but there may be circumstances like those, as mentioned above, which rebut such presumption and throw a doubt about the application of clause thirdly. The answer much depends on the facts and circumstances of each case. *Jai Prakash* v. *State (Delhi Adm.)*, (1991) 2 SCC 32 : (1991) 1 Crimes 474 (481) SC.

[11479] ● ***Infliction of injury without premeditation.***—In the instant case the accused-appellant was having an illicit relation with the wife of the deceased and his visits to her house were resented and objected. On the day of occurrence, the accused visited the house when the deceased was not there and he went there armed with a kirpan. When the deceased came and objected to his presence there was only an altercation and exchange of hot words and not a fight. Thereupon he took out the Kirpan, a knife and stabbed on the chest of the deceased resulting in instantaneous death of the deceased. It can be held that the accused intentionally inflicted that injury though it may not be premeditated one. All the above circumstances would certainly indicate such a state of mind, namely, that he aimed and inflicted that injury with a deadly weapon. The accused is guilty under Section 302, IPC. *Jai Prakash* v. *State (Delhi Adm.)*, (1991) 2 SCC 32 : (1991) 1 Crimes 474 SC.

[11480] ● ***Common intention to cause death not proved beyond reasonable doubt.***—The Court in the present case found that the two accused alone were not responsible to cause all the injuries to the deceased and that too with the common intention of causing his death. The act was found to have been committed by the accused with the knowledge that it was likely to cause death or to cause such bodily injury as was likely to cause death of deceased. The conviction of accused is altered from Section 302 to Section 304 Part II. *Nadodi Jayaraman* v. *State*, AIR 1993 SC 777 : 1992 Supp (3) SCC 161 : 1993 CrLJ 426 (SC).

[11481] ● ***Culpable homicide not amounting to murder—Injuries inflicted not on vital part.***—In a case it has been held that though it may not be possible to attribute to appellant the necessary intention to cause death of deceased so as to hold him guilty of an offence of murder under Section 302, IPC, since the injuries inflicted by him were not found to be sufficient in the ordinary course of nature to cause death of deceased but looking to the weapon with which he was armed and the nature, number and set of injuries inflicted by him though not on any vital part, he can certainly be attributed with the knowledge that with those injuries it was likely that death of deceased may be caused and, therefore, he can be clothed with the liability of causing culpable homicide not amounting to murder and that the case of the appellant, fell within Section 299, IPC, punishable under Section 304 Part I, IPC. *Subran* v. *State of Kerala*, (1993) 3 SCC 32 : 1993 SCC (Cri) 583 : 1993 CrLJ 1387 (SC) : 1993 (2) Crimes 15.

[11482] ● ***Two blows on chest by stick resulting into death.***—There was no intention to cause the death as weapons used were lathis and only two blows were given on the chest of the accused. The conviction of accused is altered from under Section 302 to one under Section 304, IPC. *Karan Singh* v. *State of Punjab*, AIR 1993 SC 2870 : 1993 CrLJ 3673 (SC).

[11483] ● ***Murder—Conviction of accused for.***—The conviction of accused for murder by invoking clause 1 of S. 300, IPC is proper. *Venu* v. *State of T.N.*, AIR 1993 SCW 2870 : 1993 CrLJ 3671 (SC).

[11484] ● ***Injuries inflicted on unvital part of deceased.***—The accused inflicted the injuries on unvital part of the deceased which were not found to be sufficient in the ordinary course of nature to cause death but it was proved that he inflicted the injuries with a knowledge that with these injuries the victim was likely to die. The case will fall under Section 299 and will be punishable under Section 304, Part, I. *Subran* v. *State of Kerala*, (1993) 3 SCC 32 : 1993 CrLJ 1387 (SC).

[11485] ● ***Injury on accused—Only abrasion.***—Where the accused was injured in an assault and medical report showed that it was only an abrasion as only one blow was inflicted with blunt side of the axe and no sharp edge of the axe was used and incident had occurred in a sudden manner during a quarrel conviction of accused would be for culpable homicide not amounting to murder. It is difficult to hold that he intended to cause the particular injury which the doctor found to be sufficient in the ordinary course of nature to cause death. *Hardev Bhanji Joshi* v. *State of Gujarat*, AIR 1993 SC 297 : 1992 Supp (2) SCC 561 : 1993 CrLJ 64 (SC).

[11486] ● ***Multiple injuries caused on victim—Death caused on account of.***—Multiple injuries were caused to the victim who died after a fortnight. Medical evidence gave cause of death as short supply of blood to kidneys as a result of multiple injuries suffered by the victim. Pathologist also stated that the short supply of blood can be on account of various reasons including multiple injuries in question. The death has been caused on account of injuries. *Pritam Singh* v. *State of Punjab*, AIR 1993 SC 2604 : 1994 SCC (Cri) 705 : 1994 Supp (1) SCC 532.

[11487] ● ***Two blows on chest by stick resulting in death.***—The accused gave two blows on chest by stick resulting into the death of the victim and as per medical opinion injuries had ruptured spleen and liver which proved fatal. It was also revealed from other evidences that there was no intention to cause death. So having regard to the nature of the weapon used and the parts of body on which blows were dealt it was held that conviction u/s. 304 Part II, IPC would meet the ends of justice as the accused must be attributed to have the knowledge that by dealing such blows he was likely to cause the death of the deceased. *Karan Singh* v. *State of Punjab*, 1993 CrLJ 3673 (SC).

[11488] ● ***Injuries caused by fist and blows—Intention to cause death—Inference.***—The accused without using their weapons caused injuries on the deceased by fist blows and kicks. Medical report indicated that the death was caused due to shock, hemorrhage and strangulation, and other circumstances showed that there was intention to assault and not to cause such injury which in the ordinary course of nature was sufficient to cause death of the accused. The offence committed by the accused will amount to culpable homicide not amounting to murder which is punishable u/s. 304 part II/34. An additional fine of Rs. 2500/ is imposed on each accused which on realisation is to be paid to the son of the deceased. *Ramesh Kumar* v. *State of Bihar*, AIR 1993 SC 2317 : 1994 Supp (1) SCC 116 : 1993 CrLJ 3137 (SC).

[11489] ● *Death caused in free-fight between two groups forming unlawful assembly.*—There was free fight between two groups which had formed unlawful assembly and accused persons, as alleged by the prosecution, had caused two deaths and some injuries to the persons of complainant side. The dispute and with regard to some landed property over which none was enjoying the possession. So there was no question of availability of any private defence to any party. Circumstances disclosed that the object was to fight only and not to cause death or grievous injury to any person. It was held that since it was well within their knowledge that at least an offence of culpable homicide was likely to be committed, the accused persons could be convicted under Section 304, Part II r/w Section 149 for offence of culpable homicide not amounting to murder. *Ekhar Bahera* v. *State of Orissa*, 1994 Supp (1) SCC 493 : 1993 CrLJ 3664 (SC).

[11490] ● *Case based on circumstantial evidence.*—The witness had not seen the accused beating his wife inside the house but he had simply drawn the inference that it was accused who was inside the house. The woman's shrieks were coming out of the room which was bolted from the inside and when people standing outside shouted the accused opened the door and ran away. It was held that conviction of accused based on circumstantial evidence was proper. *State of M.P.* v. *Ratan Lal*, AIR 1994 SC 458 : 1994 CrLJ 131 (SC).

[11491] ● *Culpable homicide—Murder of accused.*—The accused was charged of committing the murder of the deceased but in FIR it was described that the co-accused was responsible for causing the sole injury on the deceased and prosecution witness stated in Court that it was accused who had caused fatal injury. Apart from this the witnesses differed in their version and Court found them unreliable. It was held that the appellant accused's conviction was liable to be set aside as there was no reason for High Court to convict the appellant only by singling out him. *Ramesh Maruti Patil* v. *State of Maharashtra*, AIR 1994 SC 28 : 1994 CrLJ 8 (SC).

[11492] ● *Injuries caused by stick portion of spear and other weapon—On non-vital part.*—The evidence showed that injuries were caused by stick portion of spear and other weapon and all injuries were almost on vital part of the body and injured deceased was left unattended for nearly 20 hours at the site itself. It cannot be said that intention of accused was to cause death or such bodily injuries as were sufficient in the ordinary course of nature to cause the death and conviction of accused is liable to be altered from Section 302 to one u/s. 304. *Chuttan* v. *State of M.P.*, AIR 1994 SC 1398 : 1994 Supp (1) SCC 594 : 1994 CrLJ 2097 (SC).

[11493] ● *Culpable homicide—Alteration and reduction of sentence.*—In another case the accused assaulted and caused the death of the victim with Bhala and relying on the prosecution witnesses the High Court convicted him u/s. 304 part I. On appeal Supreme Court found that there was only one injury on the head that proved to be fatal and weapons used were not deadly but the accused had knowledge that injuries caused by them were likely to cause death. It was held that the accused was guilty of culpable homicide only and his conviction u/s. 304 Part II would meet the ends of justice. *Madhusudan Satpathy* v. *State of Orissa*, AIR 1994 SC 474 : 1994 CrLJ 144.

[11494] ● *Framing of charge—Material relied upon by prosecution for.*—In view of S. 299, IPC, the material relied upon by the prosecution for framing a charge under Section 304, Part II, IPC, must indicate that the accused had done an act which had caused death with at least such a knowledge that he was by such act likely to cause death. *Keshab Mahendra* v. *State of M.P.*, (1996) 6 SCC 129 : 1996 (3) Crimes 288 (SC).

[11495] ● *Death due to haemorrhage and shock caused by rupture of spleen.*—Where the accused persons though armed with deadly weapons did not cause grievous injuries on vital parts and the death was due to haemorrhage and shock caused by rapture of spleen, conviction was altered to Section 304, Part II, IPC. *Ranjha* v. *State of Punjab*, AIR 1996 SC 2741 : (1996) SCC (Cri) 1163 : 1996 CrLJ 3991 : (1996) 3 Crimes 205.

[11496] ● *No motive for committing offence—Only one blow in sudden quarrel.*—The High Court has recorded a finding that the incident took place at the spur of a moment. There was no motive for committing the offence. The respondent had given only one blow in the sudden quarrel which took place between him and the deceased. Considering the facts and circumstances of the case it cannot be said that the High Court was wrong in acquitting him under S. 302, I.P.C and convicting him only under S. 304, Part I, IPC. *State of Punjab* v. *Gurcharan Singh*, AIR 1998 SC 3115 (3116) : (1998) 7 SCC 446 : 1998 SCC (Cri) 1682 : 1998 CrLJ 4560 : JT 1998 (6) SC 191 : (1998) 3 Crimes 229.

[11497] ● *Culpable homicide or murder—Knife hitting brother of complainant causing*

death.— "In our opinion the prosecution had established beyond doubt that the respondent had given a knife blow to Kesar Lal and that he died as a result of the injuries caused by that blow. Though the injury was sufficient in the ordinary course of nature to cause death, the evidence discloses that the respondent had not aimed the blow on any vital part of Ram Gopal or Kesar Lal. The blow was aimed at Ram Gopal but as he moved aside, it landed on the stomach of Kesar Lal. The dispute was not such which would have prompted the accused to cause the death of Kesar Lal, particularly when he had no dispute with Kesar Lal. The dispute was with Bhima, the brother of Kesar Lal. This aspect was not at all considered by the Trial Court or by the High Court. In our opinion view of the facts and circumstances of the case, the appellant should have been convicted under S. 304, Part I, IPC and not under S. 302.." *State of Rajasthan* v. *Satyanarayan*, AIR 1998 SC 2060 (2062) : (1998) 8 SCC 404 : 1998 SCC (Cri) 1539 : 1998 CrLJ 2911 : 1998 CrLR (SC) 183 : JT 1998 (1) SC 426 : 1998 (1) Crimes 156.

[11498] ● ***Sudden quarrel—Infliction of single knife injury.***—The accused inflicted a single knife blow to the deceased which caused his death whereas the injury was not aimed at a particular part of body of deceased and medical evidence did not state that the injury was sufficient in the ordinary course of nature to cause the death. It was held that consequences were outcome of the sudden quarrel and the accused is liable to be convicted u/s. 304 and not u/s. 302 as it was culpable homicide not amounting to murder. *Ram Prakash Singh* v. *State of Bihar*, AIR 1998 SC 1190 : (1998) 9 SCC 497 : 1998 CrLJ 1622 (SC).

[11499] ● ***Prosecution failing to prove motive.***—The prosecution has not been able to establish any motive strong enough to induce Ramnath to kill any of those five persons even if some enmity with Bishwanath Prasad Rajgaria is assumed. He did not have any enmity with others. If really his intention was to kill them, he would not have given that poisonous substance (proved) so openly and in presence of others. It is, therefore, not possible to infer from the facts and circumstances of the case that Ramnath had given the same to Bishwanath Prasad with any intention to cause his death. However, he ought to have known that as what he had given to Bishwanath Prasad Rajgaria and others was a poisonous substance, it was likely to cause grievous hurt and even death. We, therefore, hold him guilty for committing the offence punishable under Section 304, Part II, IPC for causing the death of Bishwanath Prasad Rajgaria and for the offence punishable under Section 326, IPC for causing grievous hurt to Bigu Ram, Ram Narayan Prasad, Ram Gopal Prasad Rajgaria, Jagnnath Prasad and Hari Naraya. *State of Bihar* v. *Ram Nath Prasad*, AIR 1998 SC 466 : (1998) 9 SCC 49 : 1998 SCC (Cri) 972 : 1998 CrLJ 679 : 1997 (4) Crimes 424.

[11500] ● ***Evidence of injured witness reliable—Corroborated by medical evidence.***—Where the prosecution case was that the accused armed with lethal weapons assaulted the deceased and the members of his family, the evidence of injured eye witness was found reliable, corroborated by medical evidence, however, fatal injury was inflicted by one accused the appellant, conviction of the accused appellants under Section 304, Part 2/149 was held proper. *Suresh Singh* v. *State of Haryana*, AIR 1999 SC 1773 : (1999) 9 SCC 127 : 1999 SCC (Cri) 560 : 2007 CrLJ 4717 (4721).

[11501] ● ***Court to decide whether death homicidal or not.***—Court should be circumspective over the broader features in deciding whether death was homicidal or not. *State of Maharashtra* v. *Damu*, AIR 2000 SC 1691 : (2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 CrLJ 2301.

[11502] ● ***No evidence for showing that accused had knowledge that by manufacturing bomb death likely consequence.***—No evidence has been led in by the prosecution to show that mere manufacture of bomb was likely to cause death of any person nor any evidence for showing that accused had the knowledge that by manufacturing bombs death would possibly be caused to any human being without any other act being done. There is no scope to bring the proved facts within the ambit of Section 299, IPC. *Shamsher Khan* v. *State(N.C.T. of Delhi)*, AIR 2000 SC 3662 : (2000) 8 SCC 568 : 2001 CrLJ 119 : 2000 (4) Crimes 186 (SC).

[11503] ● ***Sudden quarrel—No pre-meditation crude bomb used for causing injury.***—The learned counsel for the appellant lastly contended before us that the entire incident had happened on a sudden quarrel and there was no premeditation or serious intention on the part of the appellant to cause death of the deceased Dama, and, therefore, the offence, if any, committed by the appellant, would only come within the purview of S. 304, Part I, IPC. It was also pointed out that the appellant has been undergoing imprisonment since 1992. Of course, the incident must have happened on a sudden quarrel but the weapon used for causing injury is a crude-bomb and in all probability, the appellant being a person residing in the village must be aware of the serious consequences of explosion of a bomb. Moreover, the bomb was thrown on the head of the deceased and it caused extensive injuries to the deceased. The head of the deceased was completely smashed and his brain part came out and it resulted in the instant death of the deceased. The bomb was thrown from a close range and the fact that appellant too sustained injuries is indicative of that fact. This being the factual scenario we do not think that the gravity of the offence committed by the appellant is not in any way lessened so as to come under S.304, Part I, IPC. *Rama Mangaruji Chacherkar* v. *State of Maharashtra*, AIR 2000 SC 283 (285) : (2002) 1 SCC 724 : 2001 CrLJ 573 : (2002) 1 Crimes 202.

[11504] ● ***Sudden quarrel—Lathi used to cause injury resulting in death.***—As the entire incident happened pursuant to a quarrel between two groups of people and that the appellant had no deliberate intention to cause death of Sher Singh, we do not think that an offence under S. 302, IPC had been made out against the appellant. The incident was the result of a sudden quarrel between the two groups and in that melee the appellant must have used a lathi which caused injury to Sher Singh which ultimately resulted in his death. In that background, it is difficult to hold that the appellant committed the offence of murder. The offence would only come under S. 304, Part II of the IPC, Therefore we acquit the appellant of the offence under S. 302, IPC and find him guilty of offence punishable under S. 304, Part II, IPC. *Addha* v. *State of Maharashtra*, AIR 2001 SC 3973 (3975) : (2001) 9 SCC 488 : 2001 CrLJ 4675.

[11505] ● ***Land dispute—Culpable homicide not amounting to murder.***—There was some dispute in respect of land which was in possession of the accused. When the deceased, alongwith his father, was ploughing field at the relevant time, the accused and his son attacked deceased and others in exercise of right of private defence of their property. However, they continued attack even after the deceased fell on the ground and caused his death. The High Court in regard to this incident having come to the conclusion that the possession of the disputed field was with the appellant, held that the appellant had a right to private defence to the extent of protecting the property of which he was in possession but after examining the evidence available on record., it came to the conclusion that so-far as the appellant and Bhajan son of Latel are concerned, they have exceeded this right and are liable to be punished under S. 304,' Part I, IPC for having committed the murder of Ashok Tiwari. Here we are in unison with the finding of the High Court from the evidence of the witness which have been discussed by the High Court, in regard to this incident, it is clear that the High Court was justified in coming to the conclusion that the act of these two persons, namely, the appellant and Bhajan came under Exception II to S. 300, I.PC and amounted to culpable homicide not amounting to murder because the same was done in exercise of the right of private defence of their property and taking into consideration nature of attack, it held that their act does not come under S. 302, I.P.C but only under S. 304, Part I, IPC. *Latel* v. *State of Chattisgarh*, AIR 2001 SC 3747 (3750) : (2001) 9 SCC 135.

[11506] ● ***Sudden fight—Act of accused amount to culpable homicide not amounting to murder.***—The cause of death in the opinion of Dr. Solanki was shock due to acute peritonitis. None of the two Doctors has deposed if the injury was grievous or sufficient in the ordinary course of nature to cause death or that the injury was so imminently dangerous that it must have in all probability resulted in death or was likely to cause death. The exact cause of peritonitis is not known. That negligence to treat the wound could be a contributing factor cannot be ruled out. In such state of medical evidence, it will not be proper to draw an inference against Magansing, accused No. 2 of his having committed murder of Sabuji Viraji punishable under S. 302, IPC. The injury dealt by him by a sharp weapon had cut into the intestine. Though, an intention to cause death or such bodily injury as is likely to cause death cannot be attributed to him, knowledge is attributable to accused No. 2 that an injury by knife into the abdomen was likely to cause death. As it was a case of sudden fight, the act of this accused would amount to culpable homicide not amounting to murder punishable under Part II of S. 304, IPC. The other injuries on the person of Sabuji are not attributed to accused No. 2, Magansing. *Takhaji Hiraji* v. *Thakore Kubersing Chamansing*, AIR 2001 SC 2328 : (2001) 6 SCC 145 : 2001 SCC (Cri) 1070 (1081) : 2001 CrLJ 2602 : JT 2001 (1) (Supp) SC 415.

[11507] ● ***Culpable homicide not murder—Transparent malice.***—The only accused whose act needs to be determined for the purpose of finding out what offence, if any, he has committed, is accused Ramesh. Exception II to Section 300 IPC provides that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defense of person or property, exceeds the power given to him by law and causes the death of the person against whom he has exercised such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. We have found the deceased Brindawan having sustained injury by gunshot fired by accused Ramesh. Such injury was caused when the members of the prosecution party were fleeing away, though to begin with the accused Ramesh had available to him the right to private defence of person. The right was exceeded and therefore the act of accused Ramesh would be covered by Exception II to Section 300 IPC. The injuries caused to Brindawan show the pellets having injured the lower part of the body of Brindawan. It cannot be said that accused Ramesh intended to cause death or cause such bodily injury as was likely to cause death thought he should be attributed with the knowledge that the injury caused by him was likely to cause death. His individual act of causing injury to deceased Brindawan is therefore punishable under Section 304 Part II IPC. So also his subsequent fire aimed at complainant Sundera but which accidentally hit Jamuni Bai Dhoban would also be punishable under Section 304 Part II IPC with the aid of Section 301, IPC. If he had injured the complainant Sundera, he would have been liable to be convicted under Section 304 Part II IPC. In spite of complainant Sunder alias Sundera having escaped unhurt and yet Jamuni Bai Dhoban having been injured though not aimed at, on the doctrine of "transferred malice" as contained in Section 301 IPC the liability of the accused remains the same. In the FIR, the version of Sundera was that Jamuni Bai had intervened to rescue him when she got injured. This story was abandoned by Sundera whilst in witness box and he maintained that though the second shot by accused Ramesh was aimed at him it hit Jamuni Bai instead of him. No prosecution witness states where the gun held by accused Ramesh was aimed at. Prosecution version coming through the three eyewitnesses that accused Ramesh was in a standing posture, facing them, when he fired the gun, is not supported by, rather belied by, medical evidence. The fact remains that Jamuni Bai was neither aimed at nor intended to be harmed by accused Ramesh. In case of accidental injury attracting applicability of "transferred malice" under Section 301, IPC and having held that the act of the accused was covered by Section 304 IPC, the Court should lean in favour of convicting the accused under Part II of Section 304 if it is in doubt as to which one of the two parts of Section 304, IPC would he attracted. This would be consistent with the basic tenet of extending benefit of doubt in criminal jurisprudence. Accordingly, we hold the accused Ramesh guilty under Section 304 Part II for causing the death of Jamuni Bai. *Kashiram* v. *State of M.P.*, AIR 2001 SC 2902 : 2002 (1) SCC 71 : 2002 SCC (Cri) 68 (83, 84).

[11508] ● ***Culpable homicide when murder.***—Culpable homicide is murder if the act by which the death is caused is done with the intention of causing death and is not covered by any of the exceptions of Section 300 of the Indian Penal Code. As already noticed, in this case there is no evidence to show that the aforesaid, accused persons proved to have been involved in the occurrence, had intended to cause the offence of murder within the meaning of Section 300 as punishable under Section 302 of the Indian Penal Code. However, on proof of the commission of offence of gang rape found to have been committed in a violent manner, they are assumed to be having the knowledge that by their action it was likely that the deceased would have died. The aforesaid accused are, therefore, guilty of the offence, punishable under Part II of Section 304 of the Indian Penal Code. *State of Orrisa* v. *Dibakar Naik,* AIR 2002 SC 2148 : (2002) 5 SCC 323 : 2002 SCC (Cri) 1128 : 2002 CrLJ 2826.

[11509] ● ***Clause thirdly of Section 300, IPC not attracted.***—In an action described by the eyewitnesses where the deceased sometimes was standing up and at other times was running and was surrounded by the assailants, one particular injury on the humerus cannot be said to be a wound which was specifically intended by the assailant at whose hand that injury was caused. If that be so, it is difficult to bring the offence within the purview of clause thirdly of Section 300, IPC. *Chanda Jivanji Chelaji* v. *State of Gujarat*, (2002) 9 SCC 576 : 2002 SCC (Cri) 437 : 2001 CrLJ 3299.

[11510] ● ***Pre-meditation—Culpable homicide not amounting murder.***—In the instant case, the appellants went to the place of occurrence with guns and deadly weapons. This would clearly indicate that there was premeditation on the part of the appellants and from the acts committed by the appellant, it is evident that they had intention of doing more harm than was necessary for the purpose of self-defence. Therefore, the acts committed by the appellants will not come within Exception 2 of S. 300, IPC so as to make it culpable homicide not amounting to murder. There were disputes between the parties and there was also pending litigation. The appellants had also resorted to civil remedies. That apart the evidence also does not indicate that there was a serious apprehension that death or grievous hurt would be the consequence of the act allegedly committed by Surmukh Singh and others. Therefore, the assailants had no right to take away the life of

Surmukh Singh in exercise of the alleged right of private defence. *Jassa Singh* v. *State of Haryana*, AIR 2002 SC 520 (525) : (2002) 2 SCC 481 : 2002 CrLJ 563 : 2002 (1) Crimes 236.

[11511] ● ***Incised wound on right side of scalp just above left ear—Cause of death.***—Based on the evidence of the doctor, the learned Sessions Judge hold that an incised wound of 3 x I/2 x 1/4 inches on the right side of the scalp just above the left ear which caused the fracture of left parietal and left temporal bone extending to the frontal and occipital region could never be treated as an injury contemplated under S. 325, IPC but should be held to be one that would cause death which knowledge the appellant must have had. Thus, the conviction of accused under Section 304 Part II is proper. *Tarsem Singh* v. *State of Punjab*, AIR 2002 SC 760 : (2002) 2 SCC 673 : (2002) 2 SCC 673 : 2002 CrLJ 1021 (1022) : (2002) 1 Crimes 290.

[11512] ● ***Infliction of knife injuries on vital part of body of deceased.***—There is nothing on record to show that the offence was committed without premeditation in sudden fight or in the heat of passion upon a sudden quarrel or that the accused had not taken the advantage of his position. The prosecution has successfully established that the accused alongwith others were agitating against the anti-reservation, he was preventing the students from attending the school, had physically obstructed the complainant from going to the class and upon intervention of Iliyasbhai inflicted injuries with his knife on the vital part of his body. The intention of the accused is apparent from the facts and circumstances of the case, the nature of the injuries inflicted and location of the body where the injuries are caused. The arguments for giving the benefit of *Exception* 4 to the appellant is misconceived. *Kalpesh Kumar* v. *Bhajiyu Gunvantlal Seni* v. *State of Gujarat*, (2002) 3 Crimes 197.

[11513] ● ***Armed offender took undue advantage of weapon against unarmed person.***—The appellant was armed with a lethal weapon whereas the deceased was unarmed. In such a situation, when the armed offender took undue advantage of that weapon against an unarmed person, he cannot get the benefit of *Exception* 4 of S. 300, IPC. *Virender* v. *State (NCT) of Delhi*, (2002) 3 SCC 341 : (2002) 3 SCC 341.

[11514] ● ***Sudden fight—Death by strangulation.***—Fight between two parties started all of a sudden as a result of obstruction caused for digging of the foundation and there is no evidence to show that the accused attacked the deceased with-deadly or dangerous arms [or weapons]. It was only in a fight, hand to fist, that both Gainda Singh and the appellant have held the neck of the deceased Shishupal Singh with such force as to ultimately result in strangulation and his death. It is very difficult to conceive as to how much pressure was applied either by Gainda Singh or the appellant on the deceased's neck so as to cause death. It would be reasonable to hold that the injuries were caused by the appellant on the deceased in a sudden fight where no arms [or weapons] were used and that fight took place in a heat of passion and no common intention to kill the deceased could be inferred. We cannot definitely conclude who actually inflicted fatal injury as evidence on record discloses that Gainda Singh and the appellant both strangled the deceased, which action is part of sudden unarmed fight nor can we conclude that the appellant had an intention to cause death or cause such bodily injury as is likely to cause death, though we attributed to him knowledge that such act is likely to cause death. Thus, the appellant and Gainda Singh are guilty of culpable homicide not amounting to murder. In the circumstances, we set aside the conviction recorded by the Trial Court as affirmed by the High Court under S, 302 read with S. 34 and instead convict him under S. 304, Part II and reduce the sentence to imprisonment for a period of seven years. *Uday Singh* v. *State of U.P.*, AIR 2002 SC 3143 (3144, 3145) : (2002) 7 SCC 79 : 2002 SCC (Cri) 1597 : 2002 CrLJ 4655 : 2002 (4) Crimes 427.

[11515] ● ***Gang rape and murder—Commission of rape established.***—In this case of gang rape, there was no evidence to show that the accused persons proved to have been involved in the occurrence, had intended to cause the offence of murder within the meaning of S. 300 as punishable under S. 302 of the IPC. However, on proof of the commission of offence of gang rape found to have been committed in a violent manner, they were assumed to be having the knowledge that by their action it was likely that the deceased would have died. The aforesaid accused were, therefore, guilty of the offence, punishable under Part II of S. 304 of the IPC. *State of Orissa* v. *Dibakar Naik*, AIR 2002 SC 2148 : (2002) 5 SCC 323 : 2002 SCC (Cri) 1128 (1140) : 2002 CrLJ 2826 : JT 2002 (4) SC 303.

[11516] ● ***Right of private defence whether available to accused.***—The right of a person to private defence of property would extend to the causing of the death only against certain crimes which are mentioned in Section 103, IPC. If the appellant's case is that PW2 and others had committed mischief, it should have been committed under such circumstances as may cause reasonable apprehension that death or grievous hurt will be the consequence and then only the right of private defence would extend to causing the death of person who committed the mischief. PW-2 was alone in the field when all the appellants came there. All the appellants were armed with gandasa, bhala, kudali and other weapons. It is evident that all the appellants came with a premeditation and the evidence also would indicate that they had done more harm than was necessary. The conduct of the appellants would indicate that they were not entitled to the benefit of *Exception* 2 to S. 300, so as to make the offence of murder as culpable homicide. *Ram Bilas Yadav* v. *State of Bihar*, AIR 2002 SC 530 (532, 533) : (2002) 2 SCC 131 : 2002 CrLJ 978 : JT 2001 (2) (Supp) SC 31 : 2002 (1) Crimes 225.

[11517] ● ***Free-fight—Knife injury—Fatal blow.***—The injury sustained by the deceased, though in the ordinary course is sufficient to cause death, would not have been intended to be inflicted by the assailant. The situs at which the fatal blow fell was not chosen or intended by the assailant according to the High Court and even as per facts narrated. It happened on account of fortuitous circumstances. Therefore, the conviction to S. 304, Part I of the IPC. *Valson* v. *State of Kerala*, AIR 2002 SC 2339 (2339) : (2002) 9 SCC 727 : 2003 SCC (Cri) 1177.

[11518] ● ***Incident occurred all of sudden in heat of passion without pre-meditation.***—A usual brawl between the persons living as husband and wife resulted in the death of the deceased. There is nothing on record to show that the accused had preplanned the execution of the offence. It is admitted even by the prosecution witnesses that the appellant had come unarmed at the residence of the parents of the deceased and after altercation he picked up a kitchen knife from that house by which he inflicted one injury on the person of the deceased. It appears that the appellant committed the offence without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel which was not provoked by him. It has also come on record that the appellant was not taking any undue advantage during the occurrence. The offence cannot be said to have been committed in a cruel or unusual manner. The appellant-accused was, therefore, entitled to the benefit of Exception 4 of Section 300 of the Indian Penal Code. *Keshav Lal* v. *State of M.P.*, AIR 2002 SC 1012 : 2002 SCC (Cri) 641 (644) : 2002 (3) SCC 254.

[11519] ● ***Murder—Charge of Scorching Woman to death.***—In the present case, the appellant did not even make an effort to bring the case within any of the four exceptions enumerated in Section 300. Hence the only question to be answered is whether he did the act with the intention of causing such bodily injury as he knew "to be likely to cause death of the deceased". It is inconceivable that the appellant would not have known that setting a human being ablaze after soaking her clothes with inflammable liquid would cause her death as the type of burns resulting therefrom would at least be "likely" to cause her death (it not, they are sufficient in the ordinary course of nature to cause her death). The fact that she died only after a fortnight of sustaining those burn injuries cannot evacuate the act out of the contours of the 2ndly clause of Section 300 IPC. There was a little abatement of the ferocity of the flames which engulfed her as she, in the instinctive human thirst of getting extricated from the gobbling tentacles of the fire, succeeded in tracing out a waterflow. Such a reflex action performed by her had mitigated the conflagration of the flames but did not save her from the fatality of the calamity. Hence the interval of fourteen days between the attack and her death is not a cause for mitigation of the offence perpetuated by the offender. We are therefore, not impressed by the alternative argument advanced by the learned Senior Counsel for appellant. *Patel Hiralal Joitram* v. *State of Gujarat,* AIR 2002 SC 1056 : 2002 (1) SCC 22 : 2002 SCC (Cri) 1 (11).

[11520] ● ***Armed offender when took undue advantage of weapon against unarmed person.***—In this case appellant was armed with a lethal weapon whereas the deceased was unarmed. In such a situation, when the armed offender took undue advantage of that weapon against an unarmed person, he cannot get the benefit of *Exception* 4 of S. 300, IPC. *Virender* v. *State (NCT) of Delhi,* (2002) 3 SCC 341.

[11521] ● ***Death caused by strangulation.***—Fight between two parties started all of a sudden as a result of obstruction caused for digging of the foundation and there is no evidence to show that the accused attacked the deceased with deadly or dangerous arms [or weapons]. It was only in a fight, hand to fist, that both Gainda Singh and the appellant have held the neck of the deceased Shishupal Singh with such force as to ultimately result in strangulation and his death. It is very difficult to conceive as to how much pressure was applied either by Gainda Singh or the appellant on the deceased's neck so as to cause death. It would be reasonable to hold that the injuries were caused by the appellant on the deceased in a sudden fight where no arms [or weapons] were used and that fight took place in a heat of passion and no common intention to kill the deceased could be inferred. We cannot definitely conclude who actually inflicted fatal injury as evidence on record discloses that Gainda Singh and the appellant both strangled the deceased, which action is part of sudden unarmed fight nor can we conclude that the appellant had an intention to cause death or cause such bodily injury as is likely to cause death, though we attributed to him knowledge that such act is likely to cause death. Thus, the appellant and Gainda Singh are guilty of culpable homicide not amounting to murder. In the circumstances, we set aside the conviction recorded by the Trial Court as affirmed by the High Court under S. 302 read with S. 34 and instead convicted him under S. 304, Part II and reduce the sentence to imprisonment for a period of seven years. *Uday Singh* v. *State of U.P.,* AIR 2002 SC 3143 (3144, 3145) : (2002) 7 SCC 79 : 2002 CrLJ 4655 : 2002 SCC (Cri) 1597 : 2002 (4) Crimes 427.

[11522] ● ***Gang rape and murder.***—In this case of gang rape, there was no evidence to show that the accused persons proved to have been involved in the occurrence, had intended to cause the offence of murder within the meaning of S. 300 as punishable under S. 302 of the IPC. However, on proof of the commission of offence of gang rape found to have been committed in a violent manner, they were assumed to be having the knowledge that by their action it was likely that the deceased would have died. The aforesaid accused were, therefore, guilty of the offence, punishable under Part II of S. 304 of the IPC. *State of Orissa* v. *Dibakar Naik,* AIR 2002 SC 2148 : (2002) 5 SCC 323 : 2002 SCC (Cri) 1128 (1140) : 2002 CrLJ 2826 : JT 2002 (3) SC 303.

[11523] ● ***Unlawful assembly with object of taking possession of land.***—Our independent analysis of the evidence on the record shows that the appellants had formed an unlawful assembly with the object of taking forcible possession of the land and if necessary, to give beating to the complainant party to achieve their object. During the fight, Narain, belonging to the accused party received a fatal blow at the hands of Gajraj Singh, the deceased, whereafter the complainant party was assaulted and Gajraj Singh received injuries to which he later on succumbed. Looking to the manner in which the assault took place over the land, which was in the possession of the complainant party, it appears to us that the appellants did not intend to cause the murder of deceased Gajraj Singh. The offence committed by the appellants in the established facts and circumstances of the case, resulting in the death of Gajraj Singh was only culpable homicide not amounting to murder. The appellants can definitely be clothed with the knowledge that the injuries caused by then were likely to cause death or such bodily injury as was likely to cause the death of Gajraj Singh. The offence under the circumstances, would fall under Sections 304 (Part II)/149, IPC and not under Sections 302/149, IPC. We, therefore, accept these three appeals partly and hold that the offence committed by the 13 appellants is not one under Sections 302/149, IPC but one under Sections 304 (Part II)/149, IPC. *Chhidamilal* v. *State of M.P.,* (2002) 9 SCC 369 : 2003 SCC (Cri) 1198 (1200).

[11524] ● ***Appellant never gave blow with intention of causing murder.***—To appreciate the correctness of the rival submissions we have examined the evidence of PW 4. Her evidence categorically indicates that there was some quarrel between the son of the deceased and the accused persons sometime prior to the occurrence and the son had come back home. Then the accused persons came to the front of the house of the deceased and started abusing the wife of the deceased, she protested, thereupon the deceased himself came forward and asked the accused persons to go to the house and abuse but should not abuse in front of the house of the deceased. This intervention by the deceased and altercation, ultimately enraged the appellant who gave one blow with the weapon which he was holding in his hand, namely, the axe and ultimately the deceased succumbed to the injury sustained by the said weapon. The very fact that the accused persons came to the place in front of the house of the deceased and did not enter into the house or assaulted the deceased or any family members though they had the respective weapon in the hand and merely abused the wife of the deceased but later on, on account of intervention of the deceased there was some hot exchange of words and ultimately the appellant gave the blow in question, is indicative of the fact that the appellant never gave the blow with the intention of causing murder of the deceased so as to bring the offence under Section 302. On the other hand, the appellant must be held to have known the consequence of the blow being given and since it was a single blow the offence would be one under Part I under Section 304, IPC. We, accordingly, set aside the conviction of the appellant under Section 302 and instead convict him under Section 304 Part I and sentence him to undergo rigorous imprisonment for 10 years. *Pandurang Punappa Karpe* v. *State of Maharashtra,* (2002) 9 SCC 539 : 2003 SCC (Cri) 1240 (1241, 1242).

[11525] ● ***No evidence as to who started aggression.***—As regards the role played by A-1 to A-3 there is no satisfactory evidence as to who started the aggression. The prosecution case shows that both sides exchanged attack and counter attack. Both sides sustained injuries. The case can justifiably be brought within the ambit of Exception 4 of Section 300, IPC. The conviction of A-1 to A-3 is to be altered to Section 304, Part II. *Resham Singh* v. *State of Punjab*, AIR 2002 SC 2625 : (2002) 10 SCC 151 : 2004 SCC (Cri) 452 (455).

[11526] ● ***Interested witness—One particular injury humorous not wound.***—In an action described by the eye-witnesses where the deceased sometimes was standing up and at other times was running and was surrounded by the assailants, one particular injury on the humorous cannot be said to be a wound which was specifically intended by the assailant at whose hand that injury was caused. If that be so, it is difficult to bring the offence within the purview of clause thirdly of Section 300, IPC. *Chavda Jivanji Chelaji* v. *State of Gujarat*, (2002) 9 SCC 576 : 2004 SCC (Cri) 437 (439) : 2001 CrLJ 3299.

[11527] ● ***Shots fired in inebriated condition.***—Keeping in view the fact that both the appellant and the deceased had consumed considerable amount of alcohol which is established from the evidence of the Doctor and the service revolver being next to the place where the fight took place and was not kept there by a planned act by the appellant, it cannot be altogether ruled out that the shots were fired not with an intention of taking any undue advantage by the appellant. It is probable that in an inebriated condition, the appellant used the service revolver because of the physical fight between the two. Having considered the material on record, the appellant could only be found guilty of an offence punishable under S.304, Part II. *Manke Ram* v. *State of Haryana,* AIR 2003 SC 4147 : (2003) 11 SCC 238 : 2003 CrLJ 2328 (SC) (2330).

[11528] ● ***Death due to neurogenic shock resulting from injury in testicles and scrotum.***—The evidence of the eyewitnesses, namely, PWs 1, 5, 6 and 7 establishes beyond a reasonable doubt that the respondent came to the house of the deceased Amiruddin, caught hold of the deceased by his banian, lifted him up, hit him on the cheek and thereafter on the back of the neck. The evidence establishes that when he saw neighbours coming, he stated to Amiruddin that he would not leave him alive and then kicked Amiruddin with his right knee on the private parts. This resulted in the death of Amiruddin. The evidence of the doctor has also not been disbelieved. The evidence of the doctor clearly shows that the death was caused due to neurogenic shock resulting from injury to the testicles and scrotum. Thus the death is directly due to the injury caused by the respondent to the deceased. The injury was such that it was sufficient in the normal course to cause death. The injury resulted in death. The High Court was in error in stating that there was no injury. The High Court noted that death resulted from neurogenic shock but failed to note that the neurogenic shock was a result of the injury to the testicles and scrotum. The High Court omitted to note that such injury could be caused by a kick and was sufficient in normal course to cause immediate death. This was not a case where in a fit of anger or in a scuffle some act had taken place. We fail to understand how under such circumstances the High Court can conclude that the conviction can only be under Section 323, IPC. The injury caused was not event a simple injury. Section 323 would be wholly inapplicable. This was a case where the conviction should have been under Section 302, IPC. In any event, this was a case where the High Court should never have interfered with the conviction under Section 304 (Part II), IPC. *State of Karnataka* v. *Mohamed Nazeer*, AIR 2003 SC 999 : (2003) 2 SCC 444 : 2003 SCC (Cri) 556 (560) : 2003 CrLJ 1240.

[11529] ● ***Murder or culpable homicide—Proof—Incident happened all of sudden.***—There were as many as 9 injuries on the body of deceased. Injury No. 1 was an incised wound on the top of right shoulder and injury No.2 was an incised wound on the right armpit. Injury No.3 was an incised wound on the abdomen. There were incised wounds on the left side of the head and various other abrasions and contusions on his body. It is clear that a group of people attacked deceased and caused him several injuries. Moreover, the incident happened all of a sudden when the accused persons saw deceased and PW-1 to PW-3. Having regard to the peculiar nature of the circumstances which led to the death of deceased, we are of the view that the offence committed by A-7, A-8 and A-11 would only come within the ambit of the offence punishable under S. 304, Part I. *Kunhimodeenkutty* v. *State of Kerala*, AIR 2003 SC 836 (836) : (2002) 10 SCC 352 : 2003 CrLJ 4941.

[11530] ● ***Single blow inflicted on head of deceased.***—At the dead of night, the respondents and their father went to the house of PW-3 with a country-made pistol and with force inflicted such injuries on head which resulted in death of wife of PW 3. The mere fact that only a single blow was inflicted on the head by itself is not enough to alter the conviction from Section 302 to 304, IPC. *State of U.P.* v. *Premi,* AIR 2003 SC 1759 : (2003) 9 SCC 122 : 2003 CrLJ 1554 (SC).

[11531] ● *Exception 4 to Section 300, IPC—Not applicable.*—Where the deceased and his father objected to the dismantling by the accused of demarcating line between the fields of the parties, exchange of hot words ensued and the accused fired with pistol at the deceased causing instantaneous death of the deceased, it was held that Exception 4 to Section 300, IPC was not applicable. *Sachchey Lal Tiwari* v. *State of Uttar Pradesh*, AIR 2004 SC 5039 : (2004) 11 SCC 410 : 2004 CrLJ 4660 : 2004 (4) Crimes 170.

[11532] ● *Clause thirdly of Section 300, IPC—Culpable Homicide when murder.*—Under clause thirdly of Section 300, IPC, culpable homicide is murder, if both the following conditions are satisfied, *i.e., (a)* that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and *(b)* that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, *viz.*, that the injury found to be present was the injury that was intended to be inflicted.

Thus, even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder, Illustration *(c)* appended to Section 300 clearly brings out this point. *State of Uttar Pradesh* v. *Virendra Prasad*, AIR 2004 SC 1517 : (2004) 9 SCC 37 : 2004 CrLJ 1373 : 2004 (2) Crimes 30.

[11533] ● *Exception 4 to Section 300, IPC—Requirements for applicability.*—For bringing in operation of Exception 4 to Section 300, IPC it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle. But, while in the case of Exception 1 there is total deprivation of self control, in case of Exception 4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing.

A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by its own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter.

The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight.

Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning.

A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be sown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision mean 'unfair advantage'. *Sachchey Lal Tiwari* v. *State of Uttar Pradesh*, AIR 2004 SC 4100 : (2004) 11 SCC 395 : 2004 CrLJ 4660 (4663) : 2004 (3) Crimes 277.

[11534] ● *Benefit of Exception 4 to Section 300, IPC.*—There was an altercation followed by assault on PWs-1 and 4 and brick batting from both sides. When tempers ran high, in the heat of passion, upon sudden quarrel, the appellant assaulted the deceased though unarmed but without premeditation. He caused only one injury to the deceased by picking up the "gainti" (pick-axe) lying there, and the fact that he did not repeat the blow is indicative of the fact that he did not intend to cause the death of the deceased. The High Court gave to the appellant the benefit of Exception 4 to Section 300 and found the appellant guilty of the offence under Section 304, Part I, IPC. There is no error with the finding recorded by the High Court. *Bagdi Ram* v. *State of Madhya Pradesh*, AIR 2004 SC 387 : (2004) 12 SCC 302 : 2004 CrLJ 632 (634) : (2004) 1 Crimes 108. **TO THE SAME EFFECT** : (1) *State of Uttar Pradesh* v. *Virendra Prasad*, AIR 2004 SC 1517 : (2004) 9 SCC 37 : 2004 CrLJ 1373 : JT (2004) 2 SC 89 : (2004) 1 JCC 370 : (2004) 2 Crimes 30. (2) *State of Madhya Pradesh* v. *Deshraj*, AIR 2004 SC 2764 : (2004) 13 SCC 199 : 2004 CrLJ 1415 : JT (2004) 2 SC 146 : (2004) 1 JCC 367 : (2004) 1 Crimes 375.

[11535] ● ***Murderous assault—Alteration of conviction from Section 302, IPC to Section 304, Part I.***—Over a trifle issue of damage of crop by goats there was altercation between the two parties. The accused noticing that the goats of the accused had damaged part of the crop, there was exchange of hot words and the accused surrounded the deceased with the intention to kill him, started beating him with lathis and axes resulting his instantaneous death. The doctor who conducted the post-mortem found 34 injuries including several facture injuries. Accordingly, the trial Court convicted the accused persons under Section 302, IPC. In appeal the High Court noted the fact that the fracture injuries were all seen on the hands and other non-vital parts of the body and the conviction was accordingly altered to Section 304, Part I, IPC.

Held: The High Court has not recorded adequate reasons for altering conviction. The number of injuries is always not determinative of the offence. It would depend on the weapon used, place where the injuries were inflicted and the nature of the injuries. Further, the assaults appear to have been made in the course of quarrel. That being so, no serious infirmity is noticed in the High Courts' view regarding the conviction. In fact the case falls under Section 304, Part II, IPC. *Adu Ram* v. *Mukna*, AIR 2004 SC 5064 : (2005) 10 SCC 597 : 2004 CrLJ 4674 (4677) : 2004 (4) Crimes 175.

[11536] ● ***Culpable homicide and murder—Distinction.***—In the scheme of IPC culpable homicide is the genus and "murder" its specie. All "murder" is "culpable homicide" but not *vice versa.* Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, IPC practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. *Thangaiya* v. *State of T.N.*, AIR 2005 SC 1142 : (2005) 9 SCC 650 : 2005 SCC (Cri) 1284 (1287) : 2005 CrLJ 684 : 2005 (1) Crimes 319. **TO THE SAME EFFECT :** *Abdul Waheed Khan* v. *State of A.P.*, AIR 2002 SC 2961 : (2002) 7 SCC 175 : 2002 SCC (Cri) 130 (1308-09) : 2002 (4) Crimes 46.

[11537] ● ***Conviction for appellant for offence under Section 304, II, read with Section 34, IPC—Held proper.***—The accused A3 and A4 came on cycle from Cuddalore Road and took up a quarrel with PW-1, PW-2 and deceased Nagamuni. Though the deceased and PW-1 and PW-2 ignored the assault and proceeded further, the appellants chased them towards the west on Pondy-Villianur Road and took up a quarrel again. A1 came there along with others and used violence and injuries were caused to deceased Nagamuni due to which he ultimately died. It was thus a clear case of doing of a criminal act in furtherance of the common intention. It was in the evidence of Dr. Balaraman that injury No. 5 was sufficient in the ordinary course of nature to cause death. Taking into consideration the concession by the learned Public Prosecutor that the case would not be covered by Section 300, IPC, accused Nos. 1, 3 and 4 were convicted by the trial Court for an offence punishable under section 304, II read with Section 34, IPC. By applying Section 34, IPC and convicting appellants for an offence under Section 304, II read with Section 34, IPC, no error of law has been committed either by the trial Court or by the High Court. *Saravanan* v. *State of Pondichery*, AIR 2005 SC 57 : (2004) 13 SCC 238 : 2005 CrLJ 117 (120) : (2004) 4 Crimes 323.

[11538] ● ***Benefit of Exception 4 to Section 300, IPC.***—The fact that the other two accused who were said to have exhorted the three appellants to attack the members of the other party were acquitted has no material bearing on the question whether the appellants could be given the benefit of Exception 4. On the facts of this case, it was held is only Section 302, IPC that was attracted. *Suresh Chandra* v. *State of Uttar Pradesh*, AIR 2005 SC 3120 : 2005 6 SCC 130 : 2005 CrLJ 3449 (3451).

[11539] ● ***Conviction under Section 304, Part I sustained—Sentence reduced.***—The case was registered on the basis of information lodged by Piara Singh (PW-6), which was recorded on 10.11.1989 at about 2.00 a.m. According to the informant, he and his son Sham Singh's wife Sito (PW-7) were sitting in the courtyard of the house of Sham Singh deceased. It was about 11.00 a.m. on 9.11.1989 when deceased was coming from the village after purchasing vegetables. When he reached near the house of Janta Singh, son of Dharam Singh, Harbans Kaur (A-1) armed with a Gandasi and Mitta Singh (A-2) armed with a lathi were present there. Mitta made an obscene gesture. At this Mitta Singh and the deceased exchanged hot words and abused each other. Harbans Kaur gave a Gandasi blow on the right hand of the deceased, which caused a grievous injury. Mitta Singh gave a lathi blow on the left foot of the deceased and also gave a thrust blow of lathi on the left side of his head. Deceased fell down on the ground. The deceased in injured condition was taken to Primary Health Centre where he expired at about 1.50 a.m. on 10.11. 1989. Placing reliance on prosecution witnesses the Additional Sessions Judge found the accused persons guilty and the High Court confirmed the conviction. Conviction under Section 304, Part I, IPC was sustained by the Apex Court but sentence was reduced from 7 years to 4 years. *Harbans Kaur* v. *State of Haryana*, AIR 2005 SC 2989 : (2005) 9 SCC 195 : 2005 CrLJ 2199 (2201) : 2005 (2) Crimes 7.

[11540] ● ***Acts random and not pre-planned.***—Coming to the act of the 2nd accused in throwing a burning kerosene lamp soon after the attack of A1 with bottle, the Supreme Court took the view that it was a random act resorted to by the 2nd accused at the spur of the moment, apparently to cause harm to the deceased. It was not a preplanned act done with the definite intention of causing death. It was not the case of the prosecution that A2 went close to the deceased and lit up his clothes with the kerosene lamp. Hurling a small burning lamp towards a person may not definitely cause fire to the clothes. No doubt it was a dangerous act and it was likely to cause fire. But in view of the fact that the candle like lamp comes into contact with the clothes of the targeted person for a split second, it may or may not be in a position to ignite the fire. A person throwing the kerosene lamp in that fashion cannot at any rate be imputed with the intention to cause the death or causing such bodily injury as is likely to cause death. He can only be imputed with the knowledge that by such a dangerous act, he was likely to cause death. The overt act of accused N. 2 in throwing the burning kerosene lamp at the deceased would, give rise to the offence of culpable homicide not amounting to murder punishable under Part II of Section 304. *Sri Vijaya Kumar* v. *State*, (2005) 10 SCC 737 : 2005 CrLJ 3085 (3090, 3091) : 2005 (3) Crimes 55.

[11541] ● ***Accused acting under grave and sudden provocation—Sentence.***—Where the accused respondents having acted under grave and sudden provocation were convicted and sentenced to 10 years R.I. for offence, under Section 304, Part I, and the occurrence took place 16 years ago, the sentence was not interfered with. *State of Uttar Pradesh* v. *Shyam Veer*, AIR 2005 SC 4108 : (2005) 10 SCC 611 : 2005 CrLJ 2606 (2607).

[11542] ● ***Absence of grievous injuries on vital parts of body.***—Where the doctor found that the injuries were confined to the *skin and upper level of the body*, grievous injuries were not found on vital parts of the body like head, liver, spleen, heart, lungs etc., the duration of the injuries were widely variant, the right lung of the deceased was TB affected, the combined effect of alcohol and the injuries shortened the period of death and resulted in a quicker death. That being so, the conviction in terms of Section 304, Part II, IPC cannot be faulted. *Munshi Singh Gautum* v. *State of Madhya Pradesh*, AIR 2005 SC 402 : (2005) 9 SCC 631 : 2005 CrLJ 320 (330) : (2005) 9 Crimes 631.

[11543] ● ***Grave and sudden provocation.***—Deceased Ghamandi Lal, a dhobi by caste was also a resident of the village. At about 7.00 p.m. Rajvir Singh, who appeared to be under the influence of liquor, came in front of his house and allegedly started abusing Ghamandi Lal (deceased) calling him a dhobi, etc. To this, Indal (deceased) son of Ghamandi Lal objected. Rajvir Singh did not pay any heed and continued to abuse Ghamandi Lal by his caste. This infuriated Indal, son of Ghamandi Lal who went inside his house brought out the licensed gun of his father and fired 2/3 shots at Rajvir Singh, as a result of which Rajvir Singh died on the spot. Immediately, the message reached the family members of Rajvir Singh. Respondents 1 to 3 his brothers, and respondents 4 and 5 his cousins reached the house of Ghamandi Lal. They lifted the body from in front of the house of Ghamandi Lal and placed it under a Neem tree. They were infuriated and vowed to avenge the murder of their brother, and in that mood they approached the house of Ghamandi Lal, Ghamandi Lal apprehending death at their hands, entered his house and bolted the door from inside. The aforesaid respondents climbed on the roof of his house, broke opened a portion of the roof and threw inside the room straw and other inflammable materials. Thereafter, they set fire to the house. The admitted case is that all this took place within 15 minutes of the murder of Rajvir Singh.

Held, The time gap of only 15 minutes between the two incidents supports the case of the respondents that what they did was under grave provocation whilst deprived of their power of self-control on account of the murder of their brother by Indal. According to her the time gap of 15 minutes was not sufficient for the members of the family of the Rajvir Singh to gain their self-control particularly, when they saw the dead body of their brother who was murdered by Indal. It must have taken some time for them to reach the house of Ghamandi Lal, and within no time thereafter the second occurrence took place. The accused were convicted under Section 304, Part I, IPC and sentenced to 10 years RI 9. *State of Uttar Pradesh* v. *Shayam Veer*, AIR 2005 SC 4108 : (2005) 10 SCC 611 : 2005 CrLJ 2606 (2607) : 2005 (2) Crimes 155.

[11544] ● ***Exception 4 to Section 300—Requirement.***—An important requirement of Exception 4 to Section 300 that the offender should not have taken undue advantage or acted in a cruel or unusual manner should be satisfied. The very fact that the accused-appellants *used the fire arms* in the course of a frivolous quarrel triggered off by the sarcastic remarks of RS (one of the deceased) would demonstrate beyond doubt that the appellants acted in a cruel manner and it would further demonstrate the intention to cause death or at any rate, to cause a bodily injury of the nature mentioned in clause thirdly of Section 300. Such intention was writ large on the acts done by the accused. Thus, it was a case in which Clauses I to III of Section 300, IPC were attracted and, as already observed, Exception 4 would not come to the rescue of the appellants for the reason that they have acted in a cruel and unusual manner by shooting at unarmed victims who merely indulged in a verbal duel with them. *Suresh Chandra* v. *State of Uttar Pradesh*, AIR 2005 SC 3120 : (2005) 6 SCC 130 : 2005 CrLJ 3449 (3450, 3451).

[11545] ● ***Exception 4 to Section 300—Section 304, Part I.***—The only doubt that arose was whether A-3 in causing three axe injuries to the deceased B, acted in cruel manner? In examining this point, we have to take note of the fact that A-3 (2nd appellant), in spite of having an axe with him, had suffered quite a severe injury viz., contusion of 8"x1" over chest which could have been caused, according to the Doctor, by an object like cycle chain. It was not possible to say at what stage A-3 had received such injury at any rate there was no clarification bearing on this aspect from the prosecution side. The deceased B was wielding an axe. The 2nd appellant, probably already injured, might have become apprehensive that he would be attacked by B with the axe. Though three injuries were noted, they are all on the left parietal region causing the fracture of skull bone. Looking at the nature of injuries, it is quite possible to say that all the injuries would have been caused by one or two axe blows, but not necessarily there. In fact, PW-6 stated in cross-examination that she had seen one axe blow being given by accused No. 3 on the neck of B. No doubt he had used excessive force against B by causing injury with the axe on a vital part, may be more than once. However, taking an overall picture, it could not be said beyond doubt that the 2nd appellant acted in a cruel or atrocious manner by attacking the deceased with the axe once or twice. We are, therefore, not inclined to deprive the 2nd appellant of the benefit of Exception No. 4. At the same time, we are of the view that it would be appropriate to convict him under Part I of Section 304, IPC because having regard to the gravity of the injuries caused with a dangerous weapon, each one of which was fatal, the 2nd appellant must be imputed with the intention to cause such bodily injury as was likely to cause death, if not the intention of causing death. Accordingly the Supreme Court convicted the 3rd accused appellant No. 2 under Section 304, Part I. *Duttu Shamrao Valake* v. *State of Maharashtra*, AIR 2005 SC 2331 : 2005 CrLJ 2555 (2560) : 2005 (2) Crimes 119.

[11546] ● ***Single blow.***—It cannot be laid down as a rule of universal application that whenever death is caused by single blow, Section 302, IPC is ruled out. *V. Subramani* v. *State of Tamil Nadu*, AIR 2005 SC 1983 : (2005) 10 SCC 358 : 2005 CrLJ 1727 (1732) : 2005 (1) Crimes 379.

[11547] ● ***Single blow on head.***—Where a single blow was given on the head of the deceased by a small wooden yoke, the dispute was relating to the grazing of the cattle on the land, considering the background facts, the conviction of the appellants under Section 302 was altered to one under Section 304, Part I, custodial sentence of ten year was found sufficient. *Subramani* v. *State of Tamil Nadu*, AIR 2005 SC 1983 : (2005) 10 SCC 358 : 2005 CrLJ 1327 (1332) : 2005 (1) Crimes 379.

[11548] ● *Distinction between murder and culpable homicide not amounting to murder.*— The academic distinction "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The following comparative table will be helpful in appreciating the points of distinction between the two offences "culpable homicide not amounting to murder" and murder—Distinction between

Section 299		*Section 300*	
A person commits culpable homicide if the act by which the death is caused is done—		Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done—	
INTENTION			
(a)	with the intention of causing death; or	(1)	with the intention of causing death; or
(b)	With the intention of causing such bodily injury as is likely to cause death; or	(2)	with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
		(3)	with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
KNOWLEDGE			
(c)	with the knowledge that the act is likely to cause death.	(4)	with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

Thangaiya v. *State of T.N.*, 2005 SCC (Cri) 1284 (1287). TO THE SAME EFFECT : *Abdul Waheed Khan* v. *State of A.P.*, AIR 2002 SC 2961 : (2002) 7 SCC 175 : 2005 SCC (Cri) 1301 (1309) : 2002 (4) Crimes 46.

[11549] ● *Conviction under Section 304, Part I instead of Section 302, IPC—Held proper.*— Counsel for the appellant contended that evidence of PW 1 cannot be relied on as he was tutored by the relatives and that it was highly improbable that he has gone to the house of his uncle during the night and informed the incident. PW 1 in his evidence has given the details of the incident and he deposed that while he was in the room the appellant had a quarrel with the deceased and thereafter he hit his mother with the hammer. This witness also says that the appellant demanded earrings of the deceased and on her refusal he snatched them and put in his trouser pocket. PW 1 does not seem to have given any false statement. The bloodstained hammer was recovered. In the course of investigation earrings were also recovered from the appellant and these items of evidence clearly corroborate with the evidence pf PW 1, PW 2 supports the case of PW 1. However, it is improbable that he had seen the actual hitting made by the appellant. There is satisfactory evidence to prove the prosecution case.

The medical report shows that the deceased had injuries on her nose, chin and upper part of the face. Though there are multiple injuries, they could have been caused by a single blow and the doctor who conducted the post-mortem does not dispute this fact. PW 1 child witness speaks about the quarrel between the appellant and his wife. It is quite possible that there must have been a sudden quarrel and in the heat of passion the appellant hit the deceased which resulted in her death. Therefore offence, would only come within the purview of Section 304 Part I, IPC.*Jasram* v.

State of Madhya Pradesh, (2005) 12 SCC 176 : 2006 (1) SCC (Cr) 540.

[11550] ● *Conviction under Section 304, Part I.*—We perused the evidence of PW-1. He has given the details of the incident and he deposed that while he was in the room the appellant had a quarrel with the deceased and thereafter he hit his mother with the hammer. This witness also says that the appellant demanded earrings of the deceased and on her refusal he snatched them and put in his trouser pocket. We do not think that PW-1 had given any false statement. The blood-stained hammer was recovered. In the course of investigation earrings were also recovered from the appellant and these items of evidence clearly corroborate with the evidence of PW-1. PW-2 supports the case of PW-1. However, it is improbable that he had seen the actual hitting made by the appellant. There is satisfactory evidence to prove the prosecution case.

The medical report shows that the deceased had injuries on her nose, chin and upper part of the face. Though there are multiple injuries, they could have been caused by a single blow and the doctor who conducted the post-mortem does not dispute this fact. PW-1 child witness speaks about the quarrel between the appellant and his wife. It is quite possible that there must have been a sudden quarrel and in the heat of passion the appellant hit the deceased which resulted in her death. Therefore offence in our view, would only come within the purview of Section 304, Part I, IPC. *Jasram* v. *State of Madhya Pradesh*, (2005) 12 SCC 176 : 2006 (1) SCC (Cri) 540.

[11551] ● *Pre-requisite conditions for conviction under Section 304, Part I and II.*—If the offence is covered by any one of the clauses of Section 299, IPC but does not fall within the purview of clauses firstly to fourthly, of Section 300, IPC, it will not be murder. If the offence is such which is covered by Clauses (i) and (ii) of Section 299, IPC the offender would be liable to be convicted under Section 304, Part I, IPC. However, if the offence is covered by Clause (iii) of Section 299, IPC, the offender would be liable to be convicted under Section 304, Part II. *Arun Nivalaji More* v. *State of Maharashtra*, AIR 2006 SC 2886 : (2006) 12 SCC 613 : 2006 CrLJ 4057 (4060) : 2006 (3) Crimes 210.

[11552] ● *Arrows shot by accused from distance.*—The fact situation showed that arrows were being shot from a distance not with any accuracy, one of such arrows hit the deceased. As established by the evidence of eye-witnesses the appellant had shot the arrow. There was no sudden quarrel as stated by the appellant. The evidence showed otherwise. Considering the background of facts, the appellants had to be convicted in terms of Section 304, Part I, IPC and not under Section 302, IPC. *Laxman* v. *State of Madhya Pradesh*, AIR 2006 SC 3240 : 2006 CrLJ 4626 (4629, 4630) : 2006 (4) Crimes 328 (SC).

[11553] ● *Accused having no intention to Kill—Explanation 4 to Section 300 attracted.*—In the instant case, the cattle belonging to the accused damaged the standing crop of the deceased. There had been exchange of hot words and a scuffle ensued. Rajendra Singh the elder brother of the accused allegedly exhorted that the deceased has been creating trouble and should be killed, whereupon the accused is said to have fired a shot from his gun which hit him on the left plank of the abdomen resulting into his death. The fire was not repeated and the accused fled away. The accused had no intention to kill the deceased, and the offence would fall under Section 304, Part II, IPC, and not under Section 302, IPC. The conviction of the appellant was modified as falling under *Exception 4* to Section 300, IPC. *Surendra Singh* v. *State of Uttranchal*, AIR 2006 SC 1920 : (2006) 9 SCC 531 : 2006 CrLJ 2461 (2464) : 2006 (3) Crimes 167.

[11554] ● *Murder or culpable Homicide—Proof.*—In the instant case, the appellant No. 1 to 3 were seen standing with weapons in their hands. On seeing the deceased, the appellant No. 1, removing a knife, which he had kept concealed, cut him on the left side of the head, which caused an injury on the left eyebrow. He was also inflicted an injury on the right ear by the said appellant. The deceased fell down. The appellant No. 1, once again inflicted cut on the head of the deceased. The appellant No. 2 cut the deceased on his back as well as on his right knee. P.W. 12 intervened and he also sustained injury on account of the assault by the appellant No. 2, which warded off. P.W. 12 suffered an injury on the right wrist. The appellant No. 3 beat the deceased on the right hand causing grievous injury.

It is the prosecution case that the fatal injuries are attributable to Appellant No. 1. It is the prosecution case that the fatal injuries are attributable to him. He had assaulted the deceased with a knife which was concealed by him. Taking note of the weapon used by the appellants and the place where injuries were inflicted, appellant No. 2 has to be convicted under Section 304, Part I, IPC. So far as appellant No. 3 is concerned, he is to be convicted in terms of Section 326, IPC. The conviction of appellant No. 2 in terms of Section 324, IPC is in order. The custodial sentence of 10 years would meet the ends of justice so far as appellant No. 2 is concerned. For appellant No. 3, the custodial sentence would be three years' rigorous imprisonment. The sentence awarded by the trial Court as affirmed by the High Court so far as appellant No. 2 is concerned in respect of his conviction in terms of Section 324, IPC remains unaltered. The two sentences imposed on him shall run concurrently. The appeal is allowed to the aforesaid extent, so far as appellant Nos. 2 and 3 are concerned. *Settu* v. *State of Tamil Nadu*, AIR 2006 SC 2986 : (2006) 10 SCC 549 : 2006 CrLJ 3889 (3894) : 2006 (3) Crimes 300.

[11555] ● *Exception 4 to Section 300, IPC—Applicability.*—For the application of *Exception 4* to Section 300, IPC it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302, IPC is ruled out. It would defend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body it was given and several such relevant factors considering the factual background in the instant case it will be appropriate to convict the appellant under Section 304, Part II, IPC instead of Section 302, IPC. *Pappu* v. *State of Madhya Pradesh*, AIR 2006 SC 2659 : (2006) 7 SCC 391 : 2006 CrLJ 3640 (3643).

[11556] ● *Prosecution evidence reliable—Private defence plea not sustainable.*—From the above evidence it is evident that the deceased Prafulla died due to the wound in his abdomen which was 4 inches deep. In our opinion this shows the intention of the assailant to kill or to cause such bodily injury as is likely to cause death. There is no reason to disbelieve the evidence of the prosecution witnesses that it was the appellant Sukumar who caused the injury on Prafulla, the deceased. The prosecution evidence of the eye-witnesses is corroborated by the medical evidence.

From the evidence it is clear that the deceased and his men were unarmed and there was no provocation on their part. It also seems that the deceased and the appellant are co-sharer in the land being plot No. 743. There is no evidence on record to show that the deceased and his men assaulted the appellant and his family members. Hence, in our opinion the conviction under Section 304, Part I read with Section 34, IPC was fully justified. *Sukumar Roy* v. *State of West Bengal*, AIR 2006 SC 3406 : (2006) 10 SCC 635 : 2006 CrLJ 4776 : 2006 (4) Crimes 245.

[11557] ● *Complete chain of circumstantial evidence.*—In the instant case, the Court below must be held to have correctly come to the conclusion that the prosecution case has been proved as against the accused in view of the extra-judicial confession of the Appellant before the Village Administrative Officer, recovery of the air gun from Pappannan Thottam canal, the conduct of the Appellant and that he was last seen with the deceased.

Each one of the aforementioned circumstances although may not by itself be sufficient to prove the guilt of the Appellant, we are satisfied that the cumulative effect thereof satisfies the test of proof of the guilt of the Appellant on the basis of circumstantial evidence for the commission of the offence under Section 304, Part II of the Indian Penal Code. The appeal being devoid of any merit is, thus, dismissed. *Sivakumar* v. *State*, AIR 2006 SC 653 : (2006) 1 SCC 714 : 2006 (1) SCC (Cri) 470 : 2006 CrLJ 536 : 2006 (1) Crimes 158.

[11558] ● *Single fire arm—offence fell under Section 304, Part-I.*—Where the accused causes single fire arm injury on the *thigh* of the deceased, the offence falls under Section 304, Part I and not under Section 300. AIR 2006 SC 2257 : (2006) 5 SCC 425 : 2006 CrLJ 2926 (2930, 2931).

[11559] ● *Culpable Homicide and murder—Distinction.*—The crucial question is as to which was the appropriate provision to be applied. In the scheme of the IPC culpable homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. *Rajender* v. *State of Haryana*, AIR 2006 SC 2257 : (2006) 5 SCC 425 : 2006 CrLJ 2926 (2928) : 2006 (2) Crimes 303.

[11560] ● ***Clause (b) of Section 299, IPC corresponds to Sections (2) and (3) of Section 300, IPC.***—The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused; if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Clause (b) of Section 299 corresponds with Clauses (2) and (3) of Section 300. The distinguishing feature of the *mens rea* requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of Clause (2) is borne out by illustration (b) appended to Section 300. *Rajender* v. *State of Haryana*, AIR 2006 SC 2257 : (2006) 5 SCC 425 : 2006 CrLJ 2926 (2928). **TO THE SAME EFFECT** : (1) *Abbas Ali* v. *State of Rajasthan*, AIR 2007 SC 1239 : (2007) 9 SCC 129 : 2007 CrLJ 1667. (2) *Sunder Lal* v. *State of Rajasthan*, (2007) 10 SCC 371 : 2007 SCC (Cri) 601 : 2007 CrLJ 3281. (3) *Kalegura Padma Rao* v. *State of Andhra Pradesh*, AIR 2007 SC 1299 : (2007) 12 SCC 48 : 2007 (2) Crimes 217. (4) *Mohammed Rafique* v. *State of West Bengal*, (2008) 15 SCC 289 : 2008 (16) SCR 523.

[11561] ● ***Clause (b) of Section 299, IPC—Scope.***—Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In Clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding Clause (b) of Section 299, the words "sufficient in the ordinary course of nature to cause death" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in Clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury.....sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature. *Rajender Singh* v. *State of Haryana*, AIR 2006 (SC) 2257 : (2006) 5 SCC 425 : 2006 CrLJ 2926 (2929) : 2006 (2) Crimes 303. **TO THE SAME EFFECT** : (1) *Abbas Ali* v. *State of Rajasthan*, AIR 2007 SC 1239 : (2007) 9 SCC 129 : 2007 CrLJ 1667. (2) *Phulia Tudu* v. *State of Bihar*, AIR 2007 SC 3215 : (2007) 14 SCC 588 : 2007 CrLJ 4690. (3) *Sellappan* v. *State of Tamil Nadu*, (2007) 15 SCC 327 : 2007 CrLJ 1442 : 2007 (1) Crimes 289 (SC). (4) *Sunder Lal* v. *State of Rajasthan*, (2007) 10 SCC 371 : 2007 (3) SCC (Cri) 601 : 2007 CrLJ 3281. (5) *Kalegura Padma Rao* v. *State of Andhra Pradesh*, AIR 2007 SC 1299 : (2007) 12 SCC 48 : 2007 (2) Crimes 217. (6) *Harendra Nath Borah* v. *State of Assam*, (2007) 15 SCC 249 : 2007 (1) Crimes 303 (SC) : JT 2007 (2) SC 404. (7) *Settu* v. *State of Tamil Nadu*, AIR 2006 SC 2986 : 2006 CrLJ 3889.

[11562] ● ***Sudden fight—Death as a result of single knife blow on back of deceased.***—The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. *Sandhya Jadhav* v. *State of Maharashtra*, (2006) 4 SCC 653 : 2006 (2) SCC (Cri) 394 : 2006 CrLJ 2111 (2112, 2113) : 2006 (2) Crimes 5 (SC).

[11563] ● ***Occurrence taking place in the course of sudden fight—Death as a result of single knife blow.***—Looking at the matter objectively, the injury, which Bunnilal Chaudhary intended to cause, did not include specifically the cutting of the left lungs but to wound Shambhu Raut in the neighbourhood of the nipple on left side of chest. Therefore, we are of the opinion that Clause (iii) of Section 300 does not cover the case. Inasmuch as death has been caused, the matter must still come within at least culpable homicide not amounting to murder. There again, Section 299 is in three parts. The first part takes in the doing of an act with the intention of causing death. As we have shown above, Bunnilal Chaudhary did not intend causing death and the first part of Section 299 does not apply. The second part deals with the intention of causing such bodily injury as is likely to cause death. Here again, the intention must be to cause the precise injury likely to cause death and that also, as we have shown above, was not the intention of Bunnilal Chaudhary. The matter, therefore, comes within the third part. The Act which was done with the knowledge that Bunnilal Chaudhary was likely by such act to cause the death of Shambhu Raut. The case falls within the third part of Section 299 and will be punishable under the second part of Section 304, IPC as culpable homicide not amounting to murder.

"We, accordingly, alter the conviction of Bunnilal Chaudhary from Section 302 to Section 304, Part II, IPC and in lieu of the sentence of imprisonment for life imposed on him, we impose a sentence of rigorous imprisonment for five years and to pay a fine of Rs. 1,000/- with default stipulation of two months simple imprisonment. Criminal Appeal No. 605/2005 preferred by Bunnilal Chaudhary (A-1) is partly allowed to the extent indicated above". *Bunni Lal Chaudhary* v. *State of Bihar*, AIR 2006 SC 2531 : (2006) 10 SCC 639 : (2006) 3 Crimes 46 : 2006 CrLJ 3297 (3300, 3301).

[11564] ● ***Conviction under Section 304, Part II held justified.***—Looking at the matter objectively, the injury, which Bunnilal Chaudhary intended to cause, did not include specifically the cutting of the left lungs but to wound Shambhu Raut in the neighbourhood of the nipple on left side of chest. Therefore, we are of the opinion that Clause (iii) of Section 300 does not cover the case. Inasmuch as death has been caused, the matter must still come within at least culpable homicide not amounting to murder. There again, Section 299 is in three parts. The first part takes in the doing of an act with the intention of causing death. As we have shown above. Bunnilal Chaudhary did not intend causing death and the first part of Section 299 does not apply. The second part deals with the intention of causing such bodily injury as is likely to cause death. Here again, the intention must be to cause the precise injury likely to cause death and that also, as we have shown above, was not the intention of Bunnilal Chaudhary. The matter, therefore, comes within the third part. The Act which was done with the knowledge that Bunnilal Chaudhary was likely by such act to cause the death of Shambhu Raut. The case falls within the third part of Section 299 and will be punishable under the second part of Section 304 IPC as culpable homicide not amounting to murder.

"We, accordingly, alter the conviction of Bunnilal Chaudhary from Section 302 to Section 304 Part-II, IPC and in lieu of the sentence of imprisonment for life imposed on him, we impose a sentence of rigorous imprisonment for five years and to pay a fine of Rs. 1,000/- with default stipulation of two months simple imprisonment. Criminal Appeal No. 605/2005 preferred by Bunnilal Chaudhary (A-1) is partly allowed to the extent indicated above". *Bunnilal Chaudhary* v. *State of Bihar*, AIR 2006 SC 2531 : (2006) 10 SCC 718 : 2006 CrLJ 3297 : JT 2006 (7) 245 : 2006 (3) Crimes 46.

[11565] ● ***Conviction under Section 304, Part I, IP instead of under Section 302, IPC held proper.***—The statements of the prosecution witnesses in regard to the genesis of occurrence and the presence of the prosecution witnesses at different stages are not uniform. It is, therefore, a case where it is likely that sudden fight between the parties erupted which would attract Section 304 of the Indian Penal Code and not Section 302 thereof. It is also a case where an inference can safely be drawn that the blows were initially not hurled on the deceased by the Appellants. They did so at a later stage. But, Appellant No. 1 suffered minor injuries. He had not been able to show that the situation was such that he could reasonably apprehend his death. They have exceeded their right of private defence in using more force upon the deceased than was necessary.

For the reasons aforementioned, we are of the opinion the conviction of the Appellants under Section 302 read with Section 34 of the Indian Penal Code cannot be sustained. They are held guilty for commission of an offence under Part I, Section 304 of the Indian Penal Code. *Surendra* v. *State of Maharashtra*, AIR 2006 SC 3063 : (2006) 11 SCC 434 : 2006 (3) Crimes 330 (SC) : JT 2006 (8) SC 445.

[11566] ● ***Conviction under Section 304, Part II instead of under Section 302, IPC.***—The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. *Sandhya Jadhav* v. *State of Maharashtra*, (2006) 4 SCC 653 : 2006 (2) SCC (Cr) 394 : 2006 CrLJ 2111 : JT 2006 (4) 316 : 2006 (2) Crimes 5 (SC).

[11567] ● ***Plea of private defence—Not sustainable.***—From the facts it is evident that the deceased Prafulla died an unnatural death which was homicidal due to injuries which were anti mortem in nature and it is the appellant. Sukumar who inflicted injury upon the body of the deceased with bhali (ballam) causing his death.

It is evident that there is no dispute that the deceased Prafulla was assaulted by the appellant Sukumar Roy with a bhali (ballam) which pierced the abdomen of Prafulla as a result of which his intestine and omentum came out through the wound.

It is also evident that the deceased Prafulla died due to the wound in his abdomen which was 4 inches deep. This shows the intention of the assailant to kill or to cause such bodily injury as is likely to cause death. There is no reason to disbelieve the evidence of the prosecution witnesses that it was the appellant Sukumar who caused the injury on Prafulla, the deceased. The prosecution evidence of the eye-witnesses is corroborated by the medical evidence.

Counsel for the appellant submitted that it was a case of self-defence because the appellant had purchased the land in question from the deceased who had entered into his land in spite of warning and as a result an altercation ensued. He contended that the deceased and his men assaulted the accused person and the injury on Prafulla was an accidental one in the scuffle which followed. We do not agree.

It is clear from evidence that the deceased and his men were unarmed and there was no provocation on their part. It also seems that the deceased and the appellant are co-sharer in the land being plot No. 743. There is no evidence on record to show that the deceased and his men assaulted the appellant and his family members. Hence the conviction under Section 304, Part I read with Section 34, IPC was fully justified. *Sukumar Roy* v. *State of West Bengal*, AIR 2006 SC 3406 : (2006) 10 SCC 635 : 2006 CrLJ 4776 : 2006 (4) Crimes 245 (SC).

[11568] ● ***Culpable homicide and murder.***—In the scheme of IPC, culpable homicide is genus and murder its specie. All murder is culpable homicide but not *vice versa*. Culpable homicide sans special characteristics of murder is culpable homicide not amounting to murder. *Rajender* v. *State of Haryana*, AIR 2006 SC 2257 : (2006) 5 SCC 425 : 2006 (2) SCC (Cr) 469 : 2006 CrLJ 2926 : 2006 (2) Crimes 303.

[11569] ● ***Types of culpable homicide.***—The first is, what may be called, culpable homicide of the first degree. This is the greatest from of culpable homicide, which is defined in Section

300 as 'murder'. The second may be termed as culpable homicide of the second degree. This is punishable under the first part of section 304. Then, there is culpable homicide of the third degree. This is the lowest type of culpable homicide and the punishment provided for it is, also the lowest among the punishment for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. *Settu* v. *State of Tamil Nadu*, AIR 2006 SC 2986 : (2006) 10 SCC 549 : 2006 CrLJ 3889 : JT 2006 (7) 524 : 2006 (8) Scale 382 : 2006 (3) Crimes 300.

[11570] ● ***Circumstantial evidence—Complete chain—Guilt under Section 304, Part II proved.***—The Courts below must be proved to have correctly come to the conclusion that the prosecution case has been proved as against the accused in view of the extra-judicial confession of the Appellant before the Village Administrative Officer, recovery of the air gun from Pappannan Thottam canal, the conduct of the Appellant and that he was last seen with the deceased.

Each one of the aforementioned circumstances although may not by itself be sufficient to prove the guilt of the Appellant, we are satisfied that the cumulative effect thereof satisfies the test of proof of the guilt of the Appellant on the basis of circumstantial evidence for the commission of the offence under Section 304, Part II of the Indian Penal Code. The appeal being devoid of any merit is, thus, dismissed.*Sivakumar* v. *State*, AIR 2006 SC 653 : (2006) 1 SCC 714 : 2006 (1) SCC (Cr) 470 : 2006 CrLJ 536 : JT 2005 (10) 379 : 2006 (1) Crimes 158 (SC).

[11571] ● ***Murder and culpable homicide—Distinction.***—The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clause of Sections 299 and 300. *Rajinder* v. *State of Haryana*, AIR 2006 SC 2257 : (2006) 5 SCC 425 : 2006 CrLJ 2926 (2928) : 2006 (2) Crimes 303. **TO THE SAME EFFECT** : (1) *Shakti Dan* v. *State of Rajasthan*, 2007 CrLJ 3426 (3428) (SC) : 2007 (5) SCR 673 : JT 2007 (6) SC 503. (2) *Sellappan* v. *State of Tamil Nadu*, (2007) 15 SCC 327 : 2007 CrLJ 1442 : 2007 (1) Crimes 289 (SC) : JT 2007 (3) SC 247.

[11572] ● ***Clause fourthly of Section 300, IPC.***—Clause fourthly of Section 300, IPC would be attributed if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid that will attract Section 300 of the Code. *Vadla Chandraiah* v. *State of Andhra Pradesh*, 2007 (3) SCC (Cri) 709 : 2007 CrLJ 770 : 2006 (14) Scale 108.

[11573] ● ***Culpable Homicide—Degrees.***—For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. *Abbas Ali* v. *State of Rajasthan*, AIR 2007 SC 1239 : 2007 (3) SCC (Cri) 80 : 2007 CrLJ 1667 (1668) : 2007 (3) Crimes 164 (SC). **TO THE SAME EFFECT** : (1) *Kalegura Padma Rao* v. *State of Andhra Pradesh*, AIR 2007 SC 1299 : 2007 (2) Crimes 217 (SC). (2) *Sunder Lal* v. *State of Rajasthan*, 2007 CrLJ 3281 : 2007 (6) SCR 76. (3) *Shakti Dan* v. *State of Rajasthan*, 2007 CrLJ 3426 : 2007 (5) SCR 673. (4) *Phulia Tudu* v. *State of Bihar*, AIR 2007 SC 3215 : 2007 CrLJ 4690. (5) *Harendra Nath Borah* v. *State of Assam*, 2007 (1) Crimes 303 : (2007) 15 SCC 249.

[11574] ● ***Expression "undue advantage".***—The expression "undue advantage" as used in the provisions means "unfair advantage". Where the offender takes undue advantage or has acted in cruel or unusual manner, benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstances must be taken into consideration to decide whether undue advantage has been taken. *Naveen Chandra* v. *State of Uttranchal*, 2007 CrLJ 874 : 2007 (1) Crimes 207 (SC). **TO THE SAME EFFECT** : (1) *Ram Krishan* v. *State of Maharashtra*, AIR 2007 SC 761 : (2007) 3 SCC 89 : 2007 (2) SCC (Cri) 39 : 2007 (1) Crimes 141. (2) *Byvarapu Raju* v. *State of Andhra*

Pradesh, AIR 2007 SC 1904 : (2007) 11 SCC 218 : 2007 CrLJ 3204 : 2007 (7) SCR 815. (3) *D. Sailu* v. *State of Andhra Pradesh*, JT 2007 (13) SC 57. (4) *Salim Sahab* v. *State of Madhya Pradesh*, (2007) 1 SCC 699 : 2007 (1) SCC (Cri) 425 : 2007 (1) Crimes 251 (SC). (5) *Sukhdev* v. *State of Punjab*, (2007) 15 SCC 364 : 2007 (3) Crimes 156 (SC) : 2007 (7) SCR 1123 : JT 2007 (9) SC 257.

[11575] ● ***Conviction under Section 302 converted to one under Section 304, Part I, IPC.***—The prosecution case was that in the morning i.e. at about 7 a.m. accused started beating his wife at his house so she ran away from there and reached to the house of Idan (PW-6), the younger brother of the accused. The mother of the accused also followed her and she also reached the house of one I which was near the house of the accused. The deceased advised her son accused that he should not quarrel with his wife. On hearing this, accused caught hold of his mother and dragged her out from the house and took her in front of the temple of deity Karni Mata, where he throttled her neck, on account of which she died. The trial Court and the High Court convicted the accused for offence under Section 302, IPC. The Supreme Court held that conviction would be appropriate in terms of Section 304, Part I and custodial sentence of ten years RI would meet the ends of justice and ordered accordingly. *Shakti Dan* v. *State of Rajasthan*, 2007 CrLJ 3426 (3430) : JT 2007 (6) SC 503 : 2007 (5) SCR 673.

[11576] ● ***Deceased came intoxicated and abused his son and beat wife—Accused and his mother beat him to death.***—In the instant case the deceased came intoxicated and started abusing his son and also beat his mother (wife of the deceased. Both the son and wife of deceased (mother of accused) beat the deceased to death. The mother was acquitted by the trial Court. *Held*, the son, accused was entitled to the benefit of *Exception 4* to Section 300 and his conviction was altered to one under Section 304, Part I, custodial sentence of 10 years RI was awarded. *Byvarapu Raju* v. *State of Andhra Pradesh*, AIR 2007 SC 1904 : (2007) 11 SCC 218 : 2007 CrLJ 3204 (3206) : 2007 (7) SCR 815.

[11577] ● ***Inconsistencies in prosecution version.***—The High Court noticed several inconsistencies in the prosecution version. Apart from the fact that PW-2's conduct was unusual, the version he supposedly stated to his mother was at variance with what the mother PW-1 stated. Evidence of PW-1 was rightly discarded by the High Court. The version given in the FIR varied from the evidence given in the Court. The informant Dropadi Bai stated in her evidence that her son told her that her husband was hanged by the accused persons. Arun Das (PW-2) gives an entirely different version. Dropadi Bai had deposed that she went to the police station, and lodged the report and then she returned along with police and found dead body of her husband. This was at variance with the evidence of Kashidas (PW-12) and Ram Singh (PW-13) who had deposed that Dropadi Bai (PW-11) told them that accused had murdered her husband after seeing the dead body and then they went to the police station to lodge the report along with Dropadi Bai. Ram Singh (PW-13) had further deposed that when police returned along with Dropadi her son Banti (PW-2) had shown the hanged dead body to the police. The judgment of the High Court setting aside the conviction of the accused under Section 304, Part II, recorded by the trial Court was justified. *State of Madhya Pradesh* v. *Bacchudas*, AIR 2007 SC 1236 : (2007) 9 SCC 135 : 2007 SCC (Cri) 87 : 2007 CrLJ 1661 (1662, 1663) : 2007 (2) Crimes 58 (SC).

[11578] ● ***Culpable Homicide—Meaning.***—Doing an act with intent to kill a person or knowledge that doing an act likely to cause death of person is Culpable Homicide. *State of Rajasthan* v. *Chettarmal*, (2007) 10 SCC 792 : 2007 (3) Crimes 153 (SC) : 2007 (3) SCC (Cri) 696; *Naresh Giri* v. *State of Madhya Pradesh*, (2008) 1 SCC 791 : JT 2007 (12) SC 433.

[11579] ● ***Culpable Homicide and murder.***—In the scheme of Indian Penal Code, the legal status of culpable homicide is the genus and murder is its, specie. All murder is culpable homicide but not *Vice Versa*. Culpable homicide sans special characteristic of murder is culpable homicide not amounting to murder. *Shakti Dan* v. *State of Rajasthan*, (2007) 15 SCC 68 : 2007 CrLJ 3426 : 2007 (5) SCR 673 : JT 2007 (6) SC 503. **TO THE SAME EFFECT** : (1) *Bhagwan Bahadure* v. *State of Maharashtra*, 2007 (4) Crimes 170 (SC) : 2007 (10) SCR 397 : JT 2007 (11) SC 417. (2) *Phulia Tudu* v. *State of Bihar*, AIR 2007 SC 3215 : 2007 CrLJ 4690. (3) *Sunder Lal* v. *State of Rajasthan*, 2007 (3) SCC (Cri) 601 : 2007 CrLJ 3281.

[11580] ● ***First and Fourth Exception of Section 300, IPC—Distinction.***—The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception. after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. *Byvarapu Raju* v. *State of Andhra Pradesh*, AIR 2007 SC 1904 : 2007 CrLJ 3204 (3205, 3206) : JT 2007 (8) SC 177. TO THE SAME EFFECT : (1) *Naveen Chandra* v. *State of Uttranchal*, AIR 2007 SC 363 : 2007 CrLJ 874 : 2007 (1) Crimes 207 (SC). (2) *D. Sailu* v. *State of Andhra Pradesh*, JT 2007 (13) SC 57. (3) *Salim Sahab* v. *State of Madhya Pradesh*, AIR 2007 SC 451 : (2007) 1 SCC 70 : 2007 (1) SCC (Cri) 425 : 2007 (1) Crimes 25.

[11581] ● ***Accused beating deceased with stick on head twice—Deceased fell down and accused ran away leaving the stick.***—The deceased left the house to bring agricultural labourers and, while he was on his way, the appellant armed with a stick, the accused S armed with an aruval, appeared before him. On seeing them the deceased became panicky and shouted saying that they are about to beat him. Accused S threw the aruval, which he had in his hand at the deceased and the deceased side stepped. At that time, the appellant with the stick, which he had in his hand, beat the deceased on the head twice. The deceased fell down. The appellant leaving the stick, ran away from the place followed by accused S, who took away the aruval with him. The Supreme Court held that the offence committed by the accused appellant fell under Section 304, Part 2, and not under Section 302, IPC. *Sellappan* v. *State of Tamil Nadu*, (2007) 15 SCC 327 : 2007 CrLJ 1442 (1445) (SC) : 2007 (2) SCR 46 : 2007 (1) Crimes 289.

[11582] ● ***Sections 299(b) and 300(2), IPC—Distinction.***—The distinguishing feature of the *mens rea* requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of Clause (2) is borne out by illustration (b) appended to Section 300. *Bhagwan Bahadure* v. *State of Maharashtra*, (2007) 14 SCC 728 : 2007 (4) Crimes 170 (SC) : JT 2007 (11) SC 417.

[11583] ● ***"Likely"—Meaning.***—The word "likely" conveys the sense of probability as distinguished from a mere possibility. *Abbas Ali* v. *State of Rajasthan*, AIR 2007 SC 1239 : 2007 (3) SCC (Cri) 80 : 2007 CrLJ 1667 : 2007 (2) Crimes

164 (SC). **To the same effect** : (1) *Bhagwan Bahadur* v. *State of Maharashtra*, (2007) 14 SCC 728 : 2007 (4) Crimes 170. (2) *Phuha Tudu* v. *State of Bihar*, AIR 2007 SC 3215 : (2007) 14 SCC 588 : 2007 CrLJ 4690.

[11584] ● ***Distinction between Sections 299(b) and 300(3).***—In Section 300(3), instead of words "likely to cause death" occurring in Section 299(b), the words "sufficient in the ordinary course of nature" have been used. Thus a distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in ordinary course of nature, to cause death. *Bhagwan Bahadure* v. *State of Maharashtra*, (2007) 14 SCC 728 : 2007 (4) Crimes 170.

[11585] ● ***Benefit of sudden provocation under Exception 1 of Section 300, IPC.***—For taking the benefit of sudden provocation under Exception 1 of Section 300, IPC, it is incumbent upon the accused to prove beyond doubt that the complainant or any person of his party abused or used any other provocative words which were sufficient to provoke a reasonable person in ordinary circumstances. *Imtiaz* v. *State of Uttar Pradesh*, (2007) 15 SCC 299 : 2007 CrLJ 1663 (1666) : 2007 (2) Crimes 159 (SC).

[11586] ● ***Sudden provocation—Nineteen injuries caused in quick succession.***—Nineteen injuries inflicted on the body of deceased in quick succession cannot be said as a result of grave and sudden provocation. *Sheek Rafi* v. *State of Andhra Pradesh*, (2007) 13 SCC 76 : 2007 CrLJ 2746.

[11587] ● ***Clause fourthly of Section 300—Applicability.***—The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premediation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. *Salim Sahab* v. *State of Madhya Pradesh*, 2007 (1) SCC 699 : 2007 (1) SCC (Cri) 425 : 2006 (Supp-10) SCR 51 : 2006 (13) Scale 228 : 2007 (1) Crimes 251 (SC). **To the same effect** : (1) *Thankachan* v. *State of Kerala*, 2007 (3) Scale 69. (2) *Kalegura Padma Rao* v. *State of Andhra Pradesh*, AIR 2007 SC 1299 : (2007) 12 SCC 48 : 2007 (2) Crimes 217.

[11588] ● ***Exception 4 of Section 300, IPC—Applicability.***—Clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid. *Sunder Lal* v. *State of Rajasthan*, 2007 (3) SCC (Cri) 601 : 2007 CrLJ 3281 : 2007 (6) SCR 76 : 2007 (6) Scale 649 : 2007 (3) Supreme 984 : JT 2007 (6) SC 451. **To the same effect** : (1) *Goli Venkataiah* v. *State of Andhra Pradesh*, JT 2007 (12) 452. (2) *Kulesh Mondal* v. *State of West Bengal*, AIR 2007 SC 3228 : 2007 (3) SCC (Cri) 741 : 2007 (3) Crimes 382 (SC). (3) *Byvarapu Raju* v. *State of Andhra Pradesh*, AIR 2007 SC 1904 : (2007) 11 SCC 218 : 2007 CrLJ 3204.

[11589] ● ***Accused got enraged on decead's advice in a matter between accused and a woman and killed him by lifting plank of wood and hitting him on his head.***—According to prosecution case, the accused wanted to keep K, the widow of his brother V. as his mistress, but she refused to be his mistress, on the day of the incident the appellant was forcibly trying to drag k to his house. At that very time, he was told by his brother M (the deceased) that he could not force and drag K to his house. At this intervention, the accused got enraged by such unwarranted advice and therefore lifted a wooden plank (pat) and hit M with it on his head, and also kicked and punched him. M died on the spot. Since the incident occurred in a sudden fit of anger, the conviction of the accused under Section 302 by the Courts below was converted into Section 304, Part 2. As the accused appellant had undergone eleven years imprisonment, the sentence was reduced to the period already undergone. *Krishnamorthy* v. *State*, AIR 2007 SC

1410 : (2007) 12 SCC 518 : 2007 CrLJ 1802 (1803) (SC) : (2007) 2 Crimes 395.

[11590] ● *Single blow.*—It cannot be said as a rule of universal application that whenever one blow is given Section 302, IPC is ruled out. It would be depend upon the facts of each case. The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given are some of the factors to be considered. In the instant case admittedly one blow was given with a small stick and place was dimly lit. Inevitable conclusion is that the case is covered by Section 304, Part I, IPC and not Section 302, IPC. The conviction of the accused persons under Sections 302/34 was altered to one under Section 304, Part I. *Phulia Tudu* v. *State of Bihar*, AIR 2007 SC 3215 : (2007) 14 SCC 588 : 2007 CrLJ 4690 (4694) : 2007 (9) SCR 997.

[11591] ● *Section 300, Exception (4)—Applicability.*—Section 300(4), IPC would be applicable where the knowledge of the offender as to probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his eminently dangerous act, approximates to a practical certainty. *Phulia Tudu* v. *State of Bihar*, AIR 2007 SC 3215 : (2007) 14 SCC 588 : 2007 CrLJ 4690 : 2007 (9) SCR 997. **To the same effect** : *Bhagwan Bahadure* v. *State of Maharashtra*, 2007 (4) Crimes 170 (SC) : 2007 (10) SCR 397.

[11592] ● *Section 300, Exception 4—Applicability.*—The accused fired a gun shot from the gun, which he was carrying. There was no provocation. The shot was fired on a vital part of the body. The deceased was not carrying any arm. He merely came out probably to ascertain what was happening. The accused had taken undue advantage of his position and thus was rightly convicted under Section 302, IPC. *Anil* v. *State of Haryana*, 2007 (3) SCC (Cri) 641 : (2007) 10 SCC 274 : 2007 CrLJ 4294 : 2007 (3) Crimes 15. **To the same effect** : *Kulesh Mondal* v. *State of West Bengal*, AIR 2007 SC 3228 : 2008 CrLJ 325 : (2007) 8 SCC 578 : 2007 (3) SCC (Cri) 741 : 2007 (3) Crimes 382.

[11593] ● *Section 300, Exception 4—"Fight".*—A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. *Kulesh Mondal* v. *State of West Bengal*, AIR 2007 SC 3228 (3231) : (2007) 8 SCC 578 : 2007 (3) SCC (Cri) 741 : 2007 (3) Crimes 382 (SC). **To the same effect** : (1) *D. Sailu* v. *State of Andhra Pradesh*, JT 2007 (3) SC 57. (2) *Gopal* v. *State of Maharashtra*, AIR 2008 SC 216 : (2007) 12 SCC 718 : (2007) 4 Crimes 251 : JT 2007 (12) SC 24 : 2007 (11) SCR 173. (3) *Naveen Chandra* v. *State of Uttranchal*, AIR 2007 SC 363 : (2009) 16 SCC 449 : 2007 CrLJ 874 : 2007 (1) Crimes 207.

[11594] ● *Injuries caused in heat of passion.*—A bare perusal of the said findings of the High Court would clearly show that there has been a total misappreciation of evidence on its part and a wrong question had been posed. Participation of the appellant was not in dispute. Presence of motive was. Once it was found that there had been no clear evidence with regard to 'grudge' the Court should have taken the same to its logical end.

The question which was thus required to be posed and answered was whether in the absence of any motive and in particular the fact that the appellant was not even known to the deceased, the fight which took place was a sudden one and the injuries were inflicted in heat of passion and thus a case under Section 304, Part-II, IPC was made out or not......

"Keeping in view the peculiar facts and circumstances of this case, we are of the opinion that the conviction of the appellant should be altered from Section 302 IPC to one under Section 304 Part-II thereof. It is stated by the learned counsel that the appellant has continuously been in jail from 17.10.2000 till date. In view of the statement made by learned counsel for the appellant, we are of the opinion that the ends of justice would be met if we modify the sentence awarded to the appellant as the period already undergone by him. The appeal is allowed to the above extent.

The appellant shall be set at liberty forthwith, if not wanted in connection with any other case. *Vadla Chandraiah* v. *State of Andhra Pradesh*, 2007 (3) SCC (Cr) 709 : 2007 CrLJ 770 : 2006 (Supp-10) SCR 343.

[11595] ● *Injuries not inflicted with intention to cause death of deceased.*—The injury, which proved to be fatal, is 10cm x 3cm x 3cm on left parietal bone which fractured the underlying bone and pierced the brain matter. We do not propose to hold that such an injury, if caused, would not attract the provisions of Section 302 IPC. Nevertheless, the question which requires serious consideration is whether having regard to the peculiar circumstances in which the incident took place and the fact that the deceased and the appellants happened to be blood relations, this particular injury, which was found to be sufficient in the ordinary course of nature to cause death in the instant case, was an injury intended by the appellants. Having regard to the nature of the injuries sustained by both the closely related parties, we are of the view that the fatal injury was not inflicted with the intention to cause death or an injury likely to cause death of the deceased. We feel that in the very nature of things, the appellants could not have entertained any intention to cause death of their brother/uncle. We are, therefore, of the opinion that the offence committed by the appellants would fall within the ambit of Section 304, Part-II, IPC.

Consequently, we partly allow the appeal; set aside the conviction of the appellants under Section 302 IPC and instead convict them under Section 304, Part II, IPC. Sentence or rigorous imprisonment for seven years would meet the ends of justice. *Dharam* v. *State of Haryana*, AIR 2007 SC 397 : 2007 CrLJ 791 : JT 2007 (1) 299 : 2007 (1) Crimes 363 (SC).

[11596] ● ***Minor contradictions in testimony of witnesses.***—The occurrence took place on 05.07.1995 and the witnesses were examined in the Court after about a gap of almost five years. The evidence on record further shows that the injured witnesses had been subjected to searching lengthy cross-examination and in such type of cross-examination, some improvements, contradictions, and omissions are bound to occur in their evidence, which cannot be treated very serious, vital and significant so as to disbelieve and discard the *substratum* of the prosecution case. The evidence of the injured witnesses and other eye-witnesses has been rightly re-appreciated and accepted by the High Court and we find no cogent and sound reason to differ from the well-reasoned judgment upholding the order of the trial Court. There is therefore, no merit in the argument of the learned counsel for the appellants that the evidence of the injured witnesses and other eye-witnesses should be labelled as the evidence of the interested witnesses. On the other hand, we find that the evidence of all the eye-witnesses including injured persons is quite natural, convincing and trust-worthy. There is no material on record from which an inference can be drawn that the material witnesses have implicated the appellants Karibasappa (A-2), Halanaika (A-3), B.K. Manjunathaa (A-17), B.K. Parmeshwarappa (A-19) and B.K. Shivarajappa (A-20) in a false case. *B.K. Channappa* v. *State of Karnataka*, AIR 2007 SC 432 : (2006) 12 SCC 57 : 2007 (2) SCC (Cr) 374 : 2006 (Supp-8) SCR 810 : 2007 (2) Crimes 171 (SC).

[11597] ● ***Concurrent findings of Courts—Having heard the learned counsel for the parties.***—In our opinion, it cannot be said that by recording a finding of guilt against the appellants, any illegality can be said to have been committed either by the trial Court or by the appellant Court. Both the Courts considered the evidence on record, including substantive evidence of two injured eye-witnesses, PW-3 Daryav Singh and PW-5-Gaje Singh and believed them. Injuries have been established through the evidence of PW 11-Dr. S.C. Gupta. We are, therefore, of the opinion that both the Courts were right in recording a finding of guilt against the appellants. *Suresh Singh* v. *State of Haryana*, AIR 2007 SC 3093 : 2007 CrLJ 4717 : 2007 (10) SCR 495 : JT 2007 (11) 431 : 2007 (4) Crimes 125 (SC).

[11598] ● ***Inconsistencies in prosecution version.***—In view several inconsistencies in prosecution version, the accused was acquitted. *State of M.P.* v. *Bacchndas*, AIR 2007 SC 1236 : 2007 (3) SCC (Cr) 89 : 2007 CrLJ 1661 : 2007 (2) Crimes 58 (SC).

[11599] ● ***Sudden quarrel—Accused attacking deceased with pair of scissors.***—Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstances must be taken into consideration to decide whether undue advantage has been taken. In the instant case, scenario shows that during a quarrel between the deceased and the accused, they were grapping and during that quarrel, accused attacked the deceased with a pair of scissors. It was not a very big sized weapon though it was certainly having a sharp edged point.

In view of the factual position the applicable provision would be Section 304, part II, IPC and not Section 302, IPC. The conviction is accordingly altered. Custodial sentence of seven years rigorous imprisonment would suffice. *Salim Sahab* v. *State of Madhya Pradesh*, 2007 (1) SCC 699 : 2007 (1) SCC (Cr) 425 : 2007 (1) Crimes 251.

[11600] ● ***Single blow.***—It cannot be said as a rule of universal application that whenever one blow is given Section 302 IPC is ruled out. It would be defined upon the facts of each case. The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given are some of the factors to be considered. In the instant case admittedly one blow was given with a small stick and the place was dimly lit. Inevitable conclusion was that the case was covered by Section 304, Part I, IPC and not Section 302/34 IPC. *Tadu* v. *State of Bihar*, AIR 2007 SC 3212 : (2007) 14 SCC 588 : 2007 CrLJ 4690.

[11601] ● ***Accused hitting deceased on his head with gandasa and attack made indiscriminately.***—Considering the fact that the accused hit the deceased on his head with gandasa when the latter was sleeping in his house in the night in almost dark conditions with feeble light and attack was made indiscriminately, the appropriate conviction, would be under Section 304, Part I, IPC. *Sunder Lal* v. *State of Rajasthan*, (2007) 10 SCC 371 : 2007 (3) SCC (Cr) 601 : 2007 CrLJ 3281.

[11602] ● ***Section 300, Exception 4—Applicability.***—The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. there is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. *Kulesh Mondal* v. *State of West Bengal*, AIR 2007 (SC) 3228 : (2007) 8 SCC 578 : 2007 (3) SCC (Cr) 741 : 2007 (9) SCR 799 : JT 2007 (11) 65 : 2007 (3) Crimes 382 (SC). TO THE SAME EFFECT : *Byvarapu Raju* v. *State of A.P.*, AIR 2007 SC 1904 : (2007) 11 SCC 218 : 2007 CrLJ 3204.

[11603] ● ***Appropriate conviction—Determination.***—Even according to the prosecution there were frequent quarrels between the husband and wife. The wife left the matrimonial home and was staying with her parents. An application was filed with Women Cell and due to intervention of Rajvinder Kaur, Assistant Sub-Inspector, Incharge of Women Cell, compromise had been recorded and Rajani Bala had gone to matrimonial home. Thereafter, she had again gone to her parental home and on the date of incident, because of telephonic call by the appellant that he was not well that she along with her mother and brother's wife, went to see the appellant-accused. There also was altercation between the parties. According to the evidence of PW 5-Dr. Tejwant Singh, three injuries were sustained by the deceased. Out of three injuries, injury Nos. 1 and 2 were sufficient in the ordinary course of nature to cause death. The High Court, in the impugned judgment, has observed that both the injuries could be caused "with one blow". If it is so, in our opinion, taking into account totality of facts and circumstances, it can be said that the appellant had committed an offence punishable under Section 304, Part I, IPC. His conviction, therefore, ought to have been under the said provision and not for an offence of murder, punishable under Section 302, IPC. *Held*, "For the foregoing reasons, the appeal deserves to be partly allowed. So far as conviction recorded against the appellant for causing death of deceased Bhushan Lata is concerned, there is no infirmity and both the Courts were right in coming to the conclusion that it was the appellant who had caused the death of the deceased. But, in view of totality of circumstances, in our opinion, the appellant ought to have been convicted by the Courts below for an offence punishable under Section 304, Part I and not under Section 302, IPC. The appeal is, therefore, partly allowed and conviction of the appellant for an offence punishable under Section 302, IPC is converted to an offence punishable under Section 304, Part I, IPC and he is, therefore, ordered to undergo rigorous imprisonment for ten years." *Gurdev Raj* v. *State of Punjab*, (2007) 13 SCC 380 : 2007 (10) SCR 835 : JT 2007 (11) 555 : 2007 (4) Crimes 198 (SC) : 2008 Crimes 382.

[11604] ● ***Vital contradictions in statement of prosecution witness.***—The defence has been able to bring on records vital omissions and contradictions in her statement made before the Police and her statement before the Court but we need not to go into the details thereof. Suffice, it to say that according to the defence the deceased had committed many thefts. He was accused of stealing buffalos of somebody in the previous right and only on such suspicion he had been assaulted. In view of the contradictions and inconsistencies in the depositions of Ganeshi Bai-PW-1, we are of the opinion that the learned trial Court as also the High Court committed a manifest error in relying upon her testimony as an eye witness.

So far as Kallu-PW 3 is concerned, he was not named as a witness in the First Information Report, but the same in itself may not be of much significance. But what is important is that in his evidence he categorically stated that the investigating officer had called him to the Police Station once five days after the incident and the second time 10-11 days after the incident. He was called for the third time 1 month after the incident. Girish Bohre-the Investigating Officer P.W. 9 in his deposition denied that PW-3 was called for the first two times. According to the said witness the evidence of PW-3 was recorded for the first time after 1 month.

It is not possible for us to arrive at a definite finding by taking aid of Section 34 of the Indian Penal Code that appellants herein could be convicted for commission of an offence under Section 304(II) but having regard to the fact that both PW 1 and PW 3 had made common allegations against all the accused persons, and as despite the same, accused Nos. 5 and 6 were acquitted by the learned trial Court and accused Nos. 2 and 4 were acquitted by the High Court, we are not in a position to do so. Accused Nos. 5 and 6 were not named in the First Information Report at all. Accused Nos. 2 and 4 were not named by PW 3. If PW 3 watched the entire incident from a close distance, as he claims to have; we fail to reason as to why no overt act was attributed by him so far as accused nos. 2 and 4 are concerned. *Prem Narain* v. *State of Madhya Pradesh*, (2007) 15 SCC 485 : 2007 CrLJ 774 : 2006 (Supp-9) SCR 844 : 2006 (13) Scale 463 : 2007 (1) SLT 500 : 2007 (2) SRJ 296 : 2007 (1) Crimes 223.

[11605] ● ***Culpable homicide—Degrees.***—For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the Indian Penal Code practically recognises three degrees of culpable homicide. The first is what may be called "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as culpable homicide of the second degree. This is punishable under the first part of Section 304 IPC. Thus there is culpable homicide of the third degree. This is the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under second part of Section 304, IPC. *Shellappan* v. *State of Tamil Nadu*, (2007) 15 SCC 327 : 2007 CrLJ 1442 (1445) : 2007 (1) Crimes 289.

[11606] ● ***Injuries found sufficient in ordinary course of nature.***—Where according to the doctor two injuries caused by the accused to the deceased were sufficient in the ordinary course of nature, and both the injuries could be caused "with one blow", looking to the circumstances of the case, the Supreme Court converted the conviction under Section 302, IPC to one under Section 304, Part I, IPC, and passed ten years RI as sentence. *Gurdev Raj* v. *State of Punjab*, (2007) 13 SCC 380 : 2008 CrLJ 382 (386) : 2007 (4) Crimes 198 (SC).

[11607] ● ***Murder or culpable homicide.***—It stands proved that there being a direct causal connection between the hitting of the bullet, fired by the appellant, to the deceased and her death, the death of the deceased was caused by the appellant. However, having regard to the circumstances, briefly enumerated above, particularly the manner in which the appellant fired the shots, in our view, the appellant could not be attributed the *mens rea* requisite for bringing the case under clause (3) of Section 300 IPC. Concededly, there was no enmity between the parties and there is no allegation of the prosecution that before the occurrence, the appellant had pre-meditated the crime of murder. We are inclined to think that having faced some sort of hostile attitude from the family of the deceased over the cable connection, a sudden quarrel took place between the appellant and the son of the deceased, on account of heat of passion, the appellant went home, took out his father's revolver and started firing indiscriminately, and unfortunately one of the bullets hit the deceased on her chin. At the most, it can be said that he had the knowledge that the use of revolver was likely to cause death and, as such the present case would fall within the third clause of Section 299 IPC. Thus, in our opinion, the offence committed by the appellant was only "culpable homicide not amounting to murder". Under these circumstances, we are inclined to bring down the offence from first degree "murder" to "culpable homicide not amounting to murder", punishable under the second part of Section 304 IPC.

Consequently, we partly allow the appeal, set aside the conviction of the appellant under Section 302 IPC and instead convict him under

Section 304, Part II IPC. The sentence of rigorous imprisonment for five years would meet the ends of justice. *Vineet Kumar Chauhan* v. *State of Uttar Pradesh*, AIR 2008 SC 780 : 2008 CrLJ 1367 : 2007 (13) SCR 727 : 2007 (8) Supreme 502 : 2008 (1) SRJ 467 : 2008 (1) Crimes 66 (SC).

[11608] ● ***Culpable homicide not amounting to murder.***—Ten days prior to the occurrence, the accused sold his auto-rickshaw and cleared his debts and asked his wife to get money from her parents to purchase another auto-rikshaw. But the parents of the deceased did not comply with the demand. While deceased was in the house, there was exchange of hot words and quarrel between the accused and the deceased. Suddenly accused hacked the deceased on her back with a sickle and, the deceased fell down and the accused once again hacked on the neck and left car of the deceased causing severe bleeding injuries. The accused was held guilty and convicted under Section 304, Part I and sentenced ten years Rule 9. *Golla Yelugu Govindu* v. *State of Andhra Pradesh*, AIR 2008 SC 1842 : (2008) 16 SCC 769 : 2008 CrLJ 2607 (2610) : (2008) 2 Crimes 100.

[11609] ● ***Section 304, Part I—Exchange of abuses and altercation in marriage party on trivial issue—Accused struck knife below on stomach of deceased.***—Most of the boys participating in both the marriage parties were singing and dancing. There was some protest giving rise to exchange of abuses and altercation between the accused and Sanjeev Kumar (deceased) on a trivial issue. The accused took out knife from the pocket of his trouser and struck a blow on the stomach of Sanjeev Kumar. The deceased Sanjeev Kumar died on way to hospital. *Held*, the case fell under Section 304, Part I, the conviction of the accused appellant under Section 302, IPC was altered into one under Section 304, Part I. *Suresh Kumar* v. *State of Himachal Pradesh*, AIR 2008 SC 1973 : (2008) 13 SCC 459 : 2008 CrLJ 2247 (2249) : (2008) 2 Crimes 141.

[11610] ● ***Murder and culpable homicide—Distinction.***—The academic distinction between 'murder' and 'culpable' homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. *Daya Nand* v. *State of Haryana*, AIR 2008 SC 1823 : (2008) 15 SCC 717 : 2008 CrLJ 2975 (2977) : (2008) 2 Crime 235.

[11611] ● ***Conviction under Section 302 altere to one under Section 304, Part 2.***—On 9.9.199 Shankar (PW-5) and his brother Nain Sukh an deceased Chhajju Ram went to their fields fo irrigating the land. Amar Singh (who faced tria and was acquitted) and Daya Nand (appellan were already irrigating their fields. Shankar an others were to take turn of irrigation at 8.00 a.m from the accused. At 8.00 a.m. deceased Chhajj Ram diverted the irrigation water to his fiel Accused Daya Nand objected that his turn o water had not yet started. Chhajju Ram retorte that their turn started from 8.00 a.m. onwards. A altercation took place between Shankar and th deceased on one side and the accused on th other. Accused threatened that they will see then and both of them left towards the village. Shanka and others also went to supervise the flow o irrigation water through the water courses. In th meantime, both the accused came from the side o village. Accused Daya Nand was armed with a gun. Accused Amar Singh exhorted his so accused-Daya Nand to fire a shot. Accused Day Nand then fired a shot from his gun toward Chhajju Ram who took a turn but was hit on th right side of the waist and fell down. Bloo started oozing out from the fire shot injury Thereafter accused fled away. The deceased wa admitted to hospital where he was declared dead As it was a case of single gun shot injury, th conviction of the accused under Section 302 wa altered to one under Section 304, Part 2. Th accused had already undergone custody for 8½ years, the sentence was reduced to the perio already undergone. *Daya Nand* v. *State o Haryana*, AIR 2008 (SC) 1823 : (2008) 15 SC 717 : 2008 CrLJ 2975 (2980) (SC) : 2008 (2 Crimes 235 (SC).

[11612] ● ***Sudden quarrel.***—Where the accuse in sudden quarrel stabbed the deceased, th accused was convicted under Section 304, Part instead of Section 302, IPC and sentenced to te years RI. *D. Sailu* v. *State of Andhra Pradesh* AIR 2008 SC 505 : (2007) 14 SCC 397 : 200 CrLJ 686 (689) : 2007 (12) SCR 397.

[11613] ● ***Sudden fight.***—The appellant wa working in that shop and after opening the sho he was arranging the articles kept inside the shop At that time, the deceased Siva who used t collect waste papers from the roadside, collecte the waste paper and cardboard boxes and threw them inside the shop of the accused. On seein this the accused got angry and shouted at Siva "why do you do this everyday?" and pulled his hair. The deceased thereupon pushed the accused. Then the accused took a knife from the top of a table in the shop and stabbed Siva in the chest. Siva fell down due to this injury and died. *Held*, "The incident in question occurred in a sudden fight and a heat of passion by a sudden quarrel without the appellant having taken undue advantage and acted in a cruel or unusual manner. Hence the appellant is entitled to the benefit of Exceptions 1 and 4 and the case comes under Section 304, IPC." *Muthu* v. *State*, AIR 2008 SC 1 : 2008 CrLJ 442 (443) (SC) : (2007) 4 Crimes 240.

[11614] ● ***Accused indiscriminately attacking deceased causing his death.***—Where the case of the prosecution was that all the seven accused indiscriminately attacked the deceased causing his death, three accused 6, 4 and 7 were acquitted by the High Court by giving benefit of doubt on the ground of the name of the accused 6 in dying declaration and minor and superficial injuries said to have been caused by accused Nos. 4 and 7, the Supreme Court considered it proper to convict the remaining accused 1, 2, 3 and 5 for offence of culpable homicide not amounting to murder under Section 304, Part I. *Harimuthu* v. *State of Tamil Nadu*, (2008) 3 SCC 205 : 2008 CrLJ 1055 (1058) : (2008) 1 Crimes 263.

[11615] ● ***Distinction between murder and culpable homicide.***—For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature . ..

Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say the clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons-being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid. *Daya Nand* v. *State of Haryana*, AIR 2008 SC 1823 : 2008 CrLJ 2975 (2978) : 2008 (5) SCR 1043 : JT 2008 (5) 336 : 2008 (6) Scale 62. TO THE SAME EFFECT : *Budhi Lal* v. *State of Uttrakhand*, AIR 2009 SC 87 : 2009 CrLJ 360 : 2008 (4) Crimes 68 (SC) : JT 2008 (10) SC 572.

[11616] ● ***Murder of wife—Accused ill-treating deceased due to addiction habits—In a sudden quarrel exchange of hot words leading to murder of wife.***—Due to addiction habits, the accused ill-treated his wife demanding her to get money from her parents. About six months prior to the occurrence, the accused beat and caused fracture to the hand of the deceased and sent her alongwith her children to her parents house. The accused again asked his wife to get money from her parents to purchase auto-rickshaw but the parents did not comply with the demand. In the night on 20-6-2002 there was hot exchange of words and quarrel between the accused and the deceased in presence of children. Suddenly accused hacked the deceased on her back with a sickle and deceased fell down. The accused once again hacked on the neck and left ear of the deceased causing severe bleeding injuries. Accused was held liable to be convicted under Section 304, Part I, IPC. *Golla Yelugu* v. *State of A.P.*, AIR 2008 SC 1842 : (2008) 16 SCC 769 : 2008 CrLJ 2607 (2608, 2610) : 2008 (2) Crimes 100.

[11617] ● ***Single stick blow on head of deceased resulting in unconsciousness of deceased and death.***—In this case the accused inflicted single stick blow on the head of deceased. The deceased fell down and became unconscious. The accused did not cause any other injury. It was held that the accused had no intention to cause death or knowledge that injury inflicted by him shall cause death in ordinary course of nature. Conviction was converted from Section 302 to Section 304, Part I. *Kallu* v. *State of Maharashtra*, (2008) 13 SCC 438 : 2008 CrLJ 4574.

[11618] ● ***Conviction altered from Section 300 to Section 304, Part I.***—Though the accused were attributed overt acts of beating the deceased with sticks there were no corresponding injuries on the deceased. The motive was absence and the complaint was filed after 5 hours. The conviction was altered to Section 304, Part I read with Section 149 IPC. *Pagula Komuraiah* v. *State of A.P.*, AIR 2008 SC 1226 : (2008) 3 SCC 686 : 2008 (2) SCC (Cr) 718 : 2008 CrLJ 1644 (1645) : 2008 (1) Crimes 253.

[11619] ● ***Culpable homicide and rash and negligent driving.***—If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act is likely to cause a person death is culpable homicide. *Kuldeep Singh* v. *State of H.P.*, AIR 2008 SC 3062 : (2008) 14 SCC 795 : 2008 CrLJ 3932 (3933) : JT 2008 (8) SC 219.

[11620] ● ***Section 300, Exceptions 4, 1, IPC—Conviction under Section 304, Part I, IPC.***—In this case there was an altercation on the point of switching off the light between accused and deceased who were working in a hotel and residing in a staff room. The accused inflicted two blows on head with a wooden log. There was no previous deliberation or determination to fight, considering the factual background the inevitable conclusion was that the appropriate conviction could be under Section 304, Part I, IPC and not Section 302, IPC. *Ramesh Krishna Modhusudan Nayar* v. *State of Maharashtra*, AIR 2008 SC 927 : (2008) 14 SCC 491 : 2008 CrLJ 1023 (1024, 1025) : 2008 (1) Crimes 141.

[11621] ● ***Altercation between accused and deceased party in regard to diversion of irrigation water—Accused causing death of deceased by firing a shot.***—There was an altercation between accused and deceased party on the point of diversion of irrigation water from the field of accused by the deceased party. The accused and his father threatened the deceased and left for village and thereafter returned with gun on exportation by father, the accused fired shot towards deceased. The shot hit on right side of waist resulting in death of deceased. The conviction was altered to one under Section 304, Part II. *Daya Nand* v. *State of Haryana*, AIR 2008 SC 1823 : 2008 CrLJ 2975 : 2008 (2) Crimes 235 (SC) : JT 2008 (5) 336.

[11622] ● ***Quantum of sentence.***—As held earlier there was no pre-meditation or pre-plan on the part of the appellant to cause death of the deceased, and the occurrence had taken place when the deceased, with another had entered the field of the appellant and engaged himself in an altercation with the appellant when the appellant had refused to part with bitterguard. Having regard to the attending circumstances in which the incident had taken place, this Court is of the opinion that the interest of justice would be served if the appellant is sentenced to rigorous imprisonment for five years for commission of offence punishable under Section 304, Part II, IPC. *Chinnathaman* v. *State*, AIR 2008 SC 784 . 2008 CrLJ 1372 : 2007 (8) Supreme 417 : 2008 (1) Crimes 48 (SC) : 2008 (1) SRJ 556.

[11623] ● ***Absence of intention to cause death.***—The High Court observed that the accused did not have any intention of causing the death of Rajpal nor were the injuries caused with the intention of causing such bodily injuries as the accused knew were likely to cause death. The High Court further observed that the knowledge that death was likely to be caused could be inferred as the accused gave the blow on the head. Let us now see whether the aforesaid act would warrant a punishment under Section 302 or Section 304 of the IPC. In our view, the facts disclose that there was no premeditation and the fight resulted on drinking of water from the hand pipe after an exchange of abuses. There appeared no intention on the part of the appellants to cause the death of the deceased Rajpal. Therefore, the offence committed by the appellants, in our view, is culpable homicide not amounting to murder because it in our view falls within Section 4 to Section 300. . . .We have already gone through the evidence and the other materials on record. From the evidence on record, we cannot find any ground to discard the finding of the High Court that it cannot be said that the accused had any intention of causing the death of Rajpal, the deceased, nor were the injuries caused with the intention of causing such bodily injuries as the accused knew were likely to cause death. Therefore, in the absence of any intention of causing the death of the deceased Rajpal, we are in agreement with the High Court that the accused must be convicted of the offence under Section 304, Part II of the IPC and not under Section 302 of the IPC.

For the reasons aforesaid, we do not find any cogent reason to interfere with the judgment of the High Court converting the offence to Section 304, Part II of the IPC from Section 302 of the IPC. Accordingly, the appeal fails and is dismissed with no order as to costs. *Dharam Pal* v. *State of Uttar Pradesh*, AIR 2008 SC 920 : 2008 CrLJ 1016 : 2008 (1) SCR 65 : JT 2008 (1) 172 : 2008 (1) Supreme 242 : 2008 (1) Crimes 201 (SC).

[11624] ● ***No premeditation or preplan.***—In spite of knowing that the appellant was nurturing a feeling that the deceased and his own sister's son had facilitated elopement of Punitha with her teacher, the deceased in the company of Senthil Kumar had gone to the field of the appellant on the pretext of getting bitterguard. The appellant never knew and anticipated that the deceased would enter his field nor had prepared himself in advance to attack the deceased. Thus there was no premeditation or pre-plan on the part of the appellant, to cause the death of the deceased. The evidence led by the prosecution clearly establishes that after verbal duel, which had lasted for pretty long time, the appellant had picked up a sickle which is an agricultural implement, lying on the ground and delivered a blow on the neck of the deceased. By entering the field of the appellant on the pretext of getting bitterguard, though he was knowing fully well that the appellant was nurturing a feeling that he had played a role in the elopement of Punitha with her teacher as well as engaging himself in an altercation with the appellant, and advising the appellant to behave the deceased had offered grave and sudden provocation to the appellant as a result of which the appellant, in the heat of the moment had delivered a blow with sickle to the deceased. The medical officer who had performed autopsy on the dead body of the deceased has not stated that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause his death. It is not the case of the prosecution that the appellant had acted cruelly, in the sense that he had delivered successive blows to the deceased. There was sufficient time and opportunity to the appellant to give repeated blows. It is not the case of the prosecution that the appellant wanted to deliver other blows and that he was prevented from doing so, by any person. So, there is reasonable ground to believe that after giving the blow, the appellant had stopped and not acted cruelty. As noticed earlier, the appellant was doing his work and was not waiting for the deceased to come. On the facts and in the circumstances of the case, this Court is of the opinion that Exception 1 to Section 300 IPC would apply to the facts of the case and the offence committed by the appellant would be one punishable under Section 304 IPC. There is nothing on record to indicate that the appellant had committed culpable homicide amounting to murder by causing death of the deceased with the intention of causing death of the deceased or the causing such bodily injury as was likely to cause his death. Therefore, the provisions of Part II of Section 304 IPC would apply to the facts of the case on hand. Thus, the appeal will have to be allowed by converting the conviction of the appellant under Section 302 IPC to one punishable under Section 304, Part II, IPC. *Chinnathaman* v. *State*, AIR 2008 SC 784 : 2008 CrLJ 1372 : 2007 (14) Scale 357 : 2007 (8) Supreme 417 : 2008 (1) Crimes 48 (SC).

[11625] ● *Sudden fight, exchange of abuses and altercation in marriage party—No previous deliberation.*—In the instant case two marriage parties reached at particular place. Most of the boys participating in both the marriages parties were singing and dancing. There was protest giving rise to exchange of abuses and altercation between the accused and deceased on a trivial issue. The accused took out knife from the pocket of his trouser and struck a blow on the stomach of deceased. As a result of blood injury he fell down on the ground and became unconscious. The accused then fled from the spot. It was held that appropriate conviction would be under Section 304, Part I, IPC. *Suresh Kumar* v. *State of H.P.*, AIR 2008 SC 1973 : (2008) 13 SCC 459 : 2008 CrLJ 2247 (2249) : 2008 (2) Crimes 141.

[11626] ● *Sudden fight between Hindus and Muslims.*—"A sudden fight implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. . . .

In the instant case considering the background facts and the nature of the weapon used *i.e.* small knife the appropriate conviction would be under Section 304, Part I, IPC and not Section 302 IPC. Accordingly the conviction is altered, custodial sentence of ten years would suffice. *Shaikh Majid* v. *State of Maharashtra*, AIR 2008 SC 1091 : (2008) 11 SCC 131 : 2008 CrLJ 1062 : 2008 (1) SCR 964 : JT 2008 (1) 640 : 2008 (1) Scale 561. **TO THE SAME EFFECT** : *Shambhoo Singh* v. *State of Rajasthan*, AIR 2008 SC 3200 : (2008) 11 SCC 637 : 2008 (3) SCC (Cr) 976.

[11627] ● *Undue advantage taken by offender—Benefit of Exception 4 to Section 300.*—Where the offenders takes advantage or has acted in cruel or unusual manner. The benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailants is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs came out. In view of the aforesaid factual position Exception 4 to Section 300, IPC would not be applicable. The appropriate conviction would be under Section 304, Part I, IPC. *Bangaru Venkatarao* v. *State of*

A.P., (2008) 9 SCC 707 : 2008 (3) SCC (Cr) 876 : 2008 CrLJ 4353 (4355).

[11628] ● ***Case based on dying declaration.***—In a bride burning case, the deceased made two dying declarations. The first included husband, mother-in-law and father-in-law. In the other dying declaration, only mother-in-law was inculpated. *Held*, even of the so called interpolations are kept out of consideration, the effect of the statement made in the dying declaration cannot be lost sight of. The prosecution had established its case. It was also established that the first dying declaration was made in a fit state of mind. The conviction was altered to one under Section 304, Part II, IPC. *State of Punjab* v. *Raj Kumar*, (2008) 8 SCC 543 : 2008 (3) SCC (Cr) 566 : 2008 CrLJ 4360 (4362) : 2008 (3) Crimes 372 : JT 2008 (9) SC 53.

[11629] ● ***Three degrees of culpable homicide.***—Indian Penal Code recognizes three degrees of culpable homicide-First as murder degree is gravest from punishable under Section 300, IPC culpable homicide of second degree is punishable under Section 304, I. The third degree of culpable homicide is the lowest type of culpable homicide and is punishable under Section 304-II. *Daya Nand* v. *State of Haryana*, AIR 2008 SC 1823 : 2008 CrLJ 2975 : 2008 (2) Crimes 235 (SC). **To the same effect** : (1) *Kesar Singh* v. *State of Haryana*, JT 2008 (5) SC 407 : 2008 (6) SCR 1196. (2) *Budhi Lal* v. *State of Uttrakhand*, JT 2009 (10) SC 572 : 2008 (4) Crimes 68 (SC). (3) *Kundaswamy* v. *State of Tamil Nadu*, (2008) 11 SCC 97 : 2008 (11) SCR 1103.

[11630] ● ***Exceeding right of self defence.***—"The deceased had received 20 incised injuries caused on various parts of the body in general and on vital parts of the body in particular. The deceased was killed mercilessly by inflicting twenty incised injuries and mostly on the vital parts of the body.

Even if we accept the version of the High Court that the accused had the right of private defence, in the facts and circumstances of the case, but he had exceeded his right so he was convicted under Section 304, Part I, IPC.

On examination of the injuries on the accused it is clearly borne out that those injuries are very minor and superficial in nature whereas twenty incised injuries inflicted on the deceased were of very serious nature and character. The Sessions Court has gravely erred in acquitting the accused on the face of the testimony of the witnesses in the case. We have to examine the evidence in proper perspective why should ordinarily PW 1, mother of the deceased would falsely implicate the accused and let off the real assailant? Similarly, why PW 2, nephew of the deceased would save the real assailant and falsely name the accused? The High Court in the impugned judgment while reversing the judgment of the Sessions Court convicted the accused under Section 304, Part I, IPC. . .

"The appellant must be convicted at least under Section 304, Part I, IPC. No interference is called for. The appeal being devoid of any merit is accordingly dismissed. *Moorthy* v. *State of Tamil Nadu*, (2009) 16 SCC 443 : 2009 CrLJ 1104 (1107) : 2008 (16) SCR 271 : JT 2008 (13) 265.

[11631] ● ***Section 304, Parts I and II—Scope.***—When and if there is intent and knowledge then the same would be a case of Section 304, Part I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304, Part II. *Satish Narayan Sawant* v. *State of Goa*, 2009 CrLJ 4655 (4664) : 2009 (4) Crimes 39 (SC).

[11632] ● ***Sudden quarrel—Plea of self defence.***—Merely because there was a quarrel and some of the accused persons sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighed in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety, of their life and property that retaliation to the extent done was absolutely necessary. No evidence much less cogent and credible was adduced in this regard. The right of private defence as claimed by the accused persons have been rightly discarded. . . .

"For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage' . . . .

"Considering the background facts it is clear that the appellant cannot be said to have exercised the right of private defence. However, there is substance in the plea that the occurrence took place in the course of a sudden quarrel. That being so the conviction is altered from Section 302 IPC to 304, Part I, IPC, custodial sentence of ten years would meet the ends of justice." *Santokh Singh* v. *State of Punjab*, AIR 2009 SC 1923

(1926, 1927) : (2009) 11 SCC 197 : 2009 (2) SCR 412 : 2009 (2) JT 468.

[11633] ● *Release on probation in case of conviction under Section 304, Part I—Not permissible.*—Section 4 of the Probation of offenders Act empowers the Court to release a person on probation of good conduct, subject to the conditions that the offence is not punishable with death or imprisonment for life. Only in the event, the provisions of the said Act are applicable, Section 6 of the Act can be taken recourse to.

Appellant was charged with commission of an offence under Section 302 of the Indian Penal Code. He has been found guilty under Section 304, Part I thereof which provides for imprisonment for life or imprisonment for either description of a term which may extend to imprisonment for life. In this view of the matter, the provisions of the Act are not applicable.

Mr. Anand submits that the learned Trial Judge has not heard the appellant on the question of sentence as is provided for under sub-section (2) of Section 235 of the Code of Criminal Procedure. Although the learned counsel is correct, but keeping in view the fact that the conviction of the appellant was under Section 304, Part I of the Indian Penal Code, we are of the opinion that even otherwise the sentence imposed on him is just and proper. *Bala Baine Linga Raju* v. *State of Andhra Pradesh*, (2009) 6 SCC 706 : 2009 CrLJ 3426 : 2009 (7) SCR 595 : JT 2009 (13) 657 : 2009 (2) Crimes 394 (SC).

[11634] ● *Single lathi blow on head causing death.*—There was a clear grudge of the employee of the contractor, accused-appellant against the deceased. When on the very next day morning *i.e.* 14.10.1979, the accused-appellant saw the face of the deceased he simply picked up his lathi and with that gave one blow on the head of the deceased. The said blow was so forceful that as a consequence of which the deceased died within an hour and before he could be taken to the hospital. There is a direct nexus between the blow of lathi and death of the deceased which is immediately caused after giving the blow.

Although it is a case of culpable homicide not amounting to murder, but considering the nature of the injuries which was caused on vital part of the body, we are of the considered view that there was intention on the part of the accused-appellant to cause death of the deceased.

We, therefore, alter the conviction of the appellant from Section 302, IPC to Section 304, Part I, IPC. In our considered opinion, custody and sentence of 10 years would be appropriate and sufficient. *Indrasan* v. *State of Uttar Pradesh*, AIR 2009 SC 2760 : 2009 (9) SCR 1127 : JT 2009 (8) 680 : 2009 (9) Scale 58 : 2009 (5) Supreme 198 : 2009 (3) Crimes 217.

[11635] ● *Alteration of conviction from Section 302 to Section 304, Part I, IPC.*—Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the *mens rea* requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300, IPC.

Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heat and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice.

Considering the factual scenario and the facts that one arrow was shot the offence is covered by Section 304, Part I, IPC and not Section 302, IPC. Though it cannot be laid down that whenever one arrow is shot Section 302, IPC will not apply, on the facts of the present case it appears to be so.

Therefore conviction is altered from Section 302, IPC to Section 304, Part I, IPC. Custodial sentence of eight years would meet the ends of justice. *Laxminath* v. *State of Chhatisgarh*, AIR 2009 SC 1383 : 2009 (3) SCC 519 : 2009 (1) SCR 348 : JT 2009 (1) 365.

[11636] ● ***Stabbing of deceased following an altercation between accused and deceased inside car in night—Solitary eye-witness.***—In the first information report PW 7 stated that initially a knife blow was given by the deceased to the accused and thereafter the accused gave two knife blows to the deceased which resulted in his death and consequently his body came out of the window. The aforesaid was however altered when PW 7 deposed in the Court, that the deceased after giving two knife blows attempted to commit suicide by plunging the knife in his chest. In support of the said contention reliance was placed on the evidence of the doctor who stated during his examination that injury on the accused could have been self inflicted also PW 7 is said to be the eye-witness who allegedly saw the entire occurrence including the exchange of hot words between the accused and the deceased in a winter night and that also when it was totally dark. According to him, he could see the entire incident in the light of the head light of the car.

The aforesaid statement of PW-7 does not appear to be trustworthy and reliable for the simple reason that even though the headlight of the car was on, it would be lighting only the front portion and not the side of the car and may not even have lighted sufficiently to enable PW 7 to see as to what had happened inside the car.

The entire story sought to be put forth by the prosecution and by PW 7 particularly appears to be doubtful and full of contradictions. It will be unsafe to convict a person on the basis of such unreliable and untrustworthy evidence particularly when such statements are full of embellishment and contradictions, without corroboration in material particulars by reliable testimony, direct or circumstantial. Consequently, we set aside the order of conviction and sentence passed against the appellant and give him benefit of doubt. He stands acquitted of the charges. He shall be set free immediately, unless required in any other matter. *Jarnail Singh* v. *State of Punjab*, (2009) 3 SCC 391 : 2009 CrLJ 1141 (144, 1145, 1146) : JT 2009 (1) SC 644 : 2009 (1) SCR 311.

[11637] ● ***Single lathi blow on head of deceased causing his death.***—The cattle of deceased were found grazing in pasture of land. Deceased was permitted to take away his cattle. The accused one who was the employee of the contractor o pasture land had grudge against deceased.

On a careful consideration of the cross-examination of PW-1, PW-11 and PW-13, the possibility of the complainant party being aggressors cannot be ruled out. The defence has been able to probablise that complainant party attacked first. As a matter of fact, A-5 received six injuries and few of these injuries was grievous. A-8 sustained eight injuries while A-7 received nine injuries some of which were grievous. A-6 also received injuries. When we observe this, we are not oblivious of the fact that number of injuries on the accused side by itself may not be sufficient to establish right of private defence.

The appellant are, thus, held guilty of the offence punishable under Section 304, Part I read with 34 IPC. Their conviction under Section 302 read with Section 34 IPC is altered to Section 304, Part I read with Section 34 IPC. *Ranbir Singh* v. *State of Haryana*, 2009 CrLJ 3051 : 2009 (7) SCR 212 : 2009 (7) JT 298 : 2009 (7) Scale 310 : 2009 (4) Supreme 105 : 2009 (4) SLT 767 : 2009 (2) Crimes 418 (SC).

[11638] ● ***Appropriate punishment—Exchange of hot words and quarrel.***—In the instant case though the witnesses stated that after initial exchange of hot words and quarrel the accused persons went inside and came back, it is to be noted that they fairly accepted that while the exchange of hot words, quarrel was continuing and immediately *i.e.* in less than two and three minutes they came back.

That being so, in the peculiar facts of the case that appropriate conviction would be under Section 304, Part I read with Section 149 IPC. *Ramjit* v. *State of Uttar Pradesh*, (2009) 11 SCC 373 : 2009 CrLJ 1139 : 2009 (1) SCR 184 : JT 2009 (1) 342.

[11639] ● ***Altering of conviction under S. 304, Part I from S. 304-II, IPC without filing appeal by prosecution—Not proper.***—It is established fact that the offence of Section 304, Part 1, IPC is of a higher degree than that of the offence under Section 304, Part II, IPC, as also held in *Ruli Ram* v. *State of Haryana*, [(2002) 7 SCC 691, Para 8]. The learned Single Judge, therefore, was not justified in converting the order of conviction and altering the same from Section 304, Part II, IPC to Section 304, Part I, IPC, particularly when the prosecution did not file any appeal. By virtue of the order passed by the learned Single Judge the appellant stood convicted of higher degree of offence than that of Section 304, Part II, IPC, although the learned Single Judge altered the sentence from eight years to five years. *Jarnail Singh* v. *State of Punjab*, (2009) 3 SCC 391 : 2009 CrLJ 1141 : 2009 (1) SCR 311.

[11640] ● *Section 304, Part I—Dying declaration.*—"The deceased in clear and categorical terms stated that she poured kerosene on herself and it was the appellant who lit the match stick resulting in fire and causing 60% burns which ultimately led to her death. The appellant instead of preventing the deceased pouring kerosene upon herself lit the match stick resulting in fire and causing burns. The appellant knew very well that the body of the deceased was drenched with kerosene yet he indulged in the cruel act of lighting the match stick. In the circumstances, we find it difficult to accept the submission that the contents of dying declaration (Ex. P-4) do not disclose the commission of any offence by the appellant. Can it be said that the appellant was not aware that his act was likely cause serious burn injuries to the deceased. The appellant was in fact charged for the offences punishable under Section 498-A and 302 IPC. We do not know what view the Court would have taken had there been an appeal by the State as against the acquittal of the appellant under Section 302 IPC? Suffice it to say that the High Court took a very lenient view in convicting the appellant for the offence punishable under Section 304, Part I, IPC and sentencing him to undergo rigorous imprisonment only for a period of seven years.

For the aforesaid reasons we confirm the conviction of the appellant for the offence punishable under Section 304, Part I of IPC and the sentence awarded by the High Court". *Ongole Ravikanth* v. *State of A.P.*, AIR 2009 SC 2129 : (2009) 13 SCC 647 : 2009 CrLJ 3944 : JT 2009 (8) SC 88.

[11641] ● *Minor omissions, contradictions and discrepancies in testimony of eye-witnesses—Entire evidence cannot be discarded.*—Undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of the prosecution witnesses. A witness cannot be accepted to possess a photographic memory and to recall the deals of an incident verbatim. Ordinarily, it so happens that a witness is overtaken by events. A witness could have been anticipated the occurrence which very often has an element of surprise. The mental faculties cannot, therefore, be expected to be attuned to absorb all the details. Thus minor discrepancies are bound to occur in the statement of witnesses. *Bhola* v. *State of H.P.*, AIR 2009 SC 1338 : (2009) 11 SCC 460 : 2009 (2) SCR 750. TO THE SAME EFFECT : *Prithu* v. *State of H.P.*, AIR 2009 SC 2070 : (2009) 11 SCC 88 : JT 2009 (3) SC 440.

[11642] ● *Distinction between culpable homicide and murder—Intent and knowledge.*—Section 299 and Section 300 IPC deals with the definition of culpable homicide and murder respectively. Section 299 defines culpable homicide as the act of causing death : (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death or (iii) with the knowledge that such act is likely to cause death. The bare reading of the section makes it crystal clear that the first and the second clause of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide *i.e.* mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed. Section 300, IPC however deals with murder although there is no clear definition of murder provided in Section 300, IPC. Section 300, IPC provides for exception which will constitute culpable homicide not amounting to murder and punishable under Section 304, IPC, when if there is intent and knowledge then the same would be a case of Section 304, Part I, and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304, Part II. *Jagriti Devi* v. *State of Himachal Pradesh*, AIR 2009 SC 2869 (2872) : 2009 (3) Crimes 289 (SC) : 2009 (10) SCR 167 : JT 2009 (8) SC 648.

[11643] ● *Sections 299(b) and 300(3), IPC—Distinction.*—In Clause (3) of Section 300, IPC instead of the words "likely to cause death" occurring in the corresponding Clause (b) of %Section 299, IPC the words "sufficient in the ordinary course of nature" have been used. Obviously the distinction lies between a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and, if overlooked, may result in miscarriage of justice. The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable is of gravest, medium or the lowest degree. The word "likely" in Clause (b) of

Section 299 conveys the sense of probable as distinguished from mere probability. The words "bodily injury ….. sufficient in the ordinary course of nature to cause death" means the death will be "most probable" result of the injury, having regard to the ordinary course of nature. *Balkar Singh* v. *State of Uttarakhand*, 2009 CrLJ 2980 (2983) : 2009 (2) Crimes 73 (SC) : JT 2009 (5) SC 1. *To be same effect*: *Santhanam* v. *State of Tamil Nadu*, (2009) 12 SCC 531 : 2009 (2) Crimes 286 (SC) : JT 2009 (7) SC 12; *Pappu* v. *State of Madhya Pradesh*, (2009) 11 SCC 472 : 2009 (5) SCR 230; *Siri Kishan* v. *State of Haryana*, (2009) 12 SCC 757 : (2009) 6 SCR 1184.

The question with regard to finding out the intention on the part of the accused to cause death depends upon the facts and circumstances of each case. No hard and fast rule can be laid down therefor. *Mohammed Asif* v. *State of Uttranchal*, (2009) 11 SCC 497 : 2009 CrLJ 2789 (2794) : JT 2009 (4) SC 1 (2).

[11644] ● *Sections 299 and 300, IPC—Intention and knowledge.*—Section 299 and Section 300, IPC deals with the definition of culpable homicide and murder respectively. Section 299 defines culpable homicide as the act of causing death; (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death or (iii) with the knowledge that such act is likely to cause death. The bare reading of the section makes it crystal clear that the first and the second clause of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide *i.e.* mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed. Section 300, IPC, however, deals with murder although there is no clear definition of murder provided in Section 300, IPC. It has been repeatedly held by this Court that culpable homicide is the genus and murder is species and that all murders are culpable homicide but not vice versa. Section 300, IPC further provides for the exceptions which will constitute culpable homicide not amounting to murder and punishable under Section 304. When and if there is intent and knowledge then the same would be a case of Section 304, Part I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304, Part II. The aforesaid distinction between an act amounting to murder and an act not amounting to murder has been brought out in the numerous decisions of this Court. *Jagriti Devi* v. *State of Himachal Pradesh*, AIR 2009 SC 2869 (2872) : 2009 (3) Crimes 289 (SC) : 2009 (1) SCR 167 : JT 2009 (8) SC 648.

[11645] ● *Culpable homicide—Degrees.*—For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. *Laxminath* v. *State of Chhattisgarh*, AIR 2009 SC 1383 (1384) : (2009) 3 SCC 519 : JT 2009 (1) SC 365. **TO THE SAME EFFECT** : (1) *Balkar Singh* v. *State of Uttrakhand*, 2009 (2) Crimes 73 (SC) : JT 2009 (5) SC 1 : 2009 (5) SCR 242. (2) *Santhanam* v. *State of Tamil Nadu*, (2009) 12 SCC 531 : 2009 (2) Crimes 286 (SC). (3) *Pappu* v. *State of Madhya Pradesh*, (2009) 11 SCC 472 : (2007) 15 SCC 249 : 2009 (5) SCR 230 : 2009 (2) Crimes 388.

[11646] ● *Section 299, IPC—Scope and applicability.*—Section 299 defines culpable homicide as the act of causing death; (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death or (iii) with the knowledge that such act is likely to cause death. The bare reading of the section makes it crystal clear that the first and the second clause of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e. mental attitude towards the consequences of conduct is one of the intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed. *Salesh Narayan Sawant* v. *State of Goa*, 2009 CrLJ 4655 : (2009) 4 Crimes 39 (SC) : 2009 (14) SCR 464.

[11647] ● *Culpable homicide and murder—Distinction.*—In scheme of Indian Penal Code, culpable homicide is genus and murder its specie. All murders are culpable homicide but not *vice versa*—culpable homicide sans special characteristics of murder is culpable homicide not amounting to murder. *Balkar Singh* v. *State of Uttrakhand*, (2009) 15 SCC 366 : 2009 CrLJ 2980 : 2009 (5) SCR 242 : JT 2009 (5) SC 1; *Pappu* v. *State of Madhya Pradesh*, (2009) 11 SCC 472 : 2009 (5) SCR 230 : 2009 (2) Crimes 388 (SC). **To the same effect** : (1) *Santhanam* v. *State of Tamil Nadu*, (2009) 12 SCC 531 : 2009 (6) SCR 964 : 2009 (2) Crimes 286 (SC). (2) *Laxminath* v. *State of Chattisgarh*, AIR 2009 SC 1383 : (2009) 3 SCC 519 : 2009 (1) SCR 348 : JT 2009 (1) SC 365.

[11648] ● *Culpable homicide and murder.*—Safest way of approach to interpretation and application of provisions of Section 299 and 300, IPC seems to be to keep in focus keywords used in various clauses of Sections 299 and 300, IPC. *Bakar Singh* v. *State of Uttarakhand*, 2009 CrLJ 2980 (2982) : 2009 (2) Crimes 73 (SC) : 2009 (5) SCR 242 : JT 2009 (5) SC 1. **To the same effect** : (1) *Santhanan* v. *State of Tamil Nadu*, (2009) 12 SCC 531 : JT 2009 (7) 12. (2) *Shri Kishan* v. *State of Haryana*, (2009) 12 SCC 757 : 2009 (6) SCR 1184 : JT 2009 (8) SC 305.

[11649] ● *Murder or culpable homicide.*—It was clearly established from the evidence of prosecution witness that acid was thrown over the deceased which caused blisters and rashes on her body and later led to her death. This fact found corroboration in the dying declaration given by deceased after careful reading of dying declaration what came out to the fore was that it was accused. No. 1 who had carried the vessal containing the acid and who had actually thrown its contents *i.e.* acid on the deceased. She accused both the accused persons of demanding illicit relations with her as also entering her house. No overt act, save as mentioned above, had been attributed to the appellant (accused No. 2). *Held*, keeping in mind the facts that the deceased had turned down the sexual advances made by them and that he had accompanied the accused No. 1 who was carrying a vessal containing acid in his hand at the dead of night and in an unearthly hour it can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the accused No. 1 to the house of deceased. Since the appellant was present at the scene of occurrence and simply watched the accused No. 1 throwing acid on the deceased without preventing the accused No. 1 from doing so, establishes that the appellant had intention to cause injury to and also disfigurement of decease and as such by liable be punished under Section 326, IPC and Section 304, Part II and not under Section 300, IPC. *Bengai Mandal* v. *State of Bihar*, AIR 2010 SC 686 : (2010) 2 SCC 91 : 2010 CrLJ 1420 (1423) (SC) : (2010) 1 Crimes 49.

CUSTODIA LEGIS

§ (See under CUSTODIAL LEGIS)

CUSTODIAL CRIMES

[11650] ● *Custodial crimes.*—Consequent to an alleged theft some of the suspects were brought to police station which at the relevant time was in charge of an Astt. Sub-Inspector of Police. The suspects were picked up and suffered, as part of the process of investigation, severe flagellation. One of the suspects, a victim of torture succumbed to his injuries. This triggered an investigation, Medical examination revealed the cruel cause of death as asphyxiation. One of the injuries which, according to the doctor, made the deceased unconscious was torture on both the soles of the foot of the victim. A trial for murder followed, a conviction under Section 302 was entered and eventually the High Court confirmed the conviction and sentence of life imprisonment so far as the petitioner was concerned. A false explanation of suicidal hanging was put up by the police officer-accused but this was rejected and eventually, on a study of the circumstances and the incontrovertible facts of flagellation and asphyxiation within police station premises and the testimony or eye witness about nocturnal detention within the police station and beating up of the victim, the Courts below concurrently found the guilt of the petitioner proved beyond reasonable doubt. "We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy (when) the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-ups if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order. The State, at the highest administrative and political levels, we hope, will organise special strategies to prevent and punish brutality by police methodology. Otherwise the credibility of the rule of law in our Republic *vis-a vis* the people of the country will deteriorate". *Raghuvir Singh* v. *State of Haryana*, AIR 1980 SC 1087 : (1980) 3 SCC 70 : 1980 SCC (Cri) 526 : 1980 CrLJ 801 : 1980 CrAppR (SC) 125 : 1980 CurLJ (Cri) 89 : (1980) 2 SCJ 261 : 1980 UJ (SC) 424.

[11651] ● ***Atrocities perpetrated by Police in Police Station—Law as to burden of proof to be re-examined.***—We would like to impress upon the Government the need to amend the law appropriately so that policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence. Police Officers alone, and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth. The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the police station are left without any evidence to prove who the offenders are. The law as to the burden of proof in such cases may be re-examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection. *State of Uttar Pradesh* v. *Ram Sagar Yadav*, AIR 1985 (SC) 416 : (1985) 1 SCC 552 : 1985 SCC (Cri) 552 : 1986 CrLJ 836 : 1985 CrLR (SC) 73 : 1985 (1) Crimes 344 : 1985 (1) Rec CrR 600.

[11652] ● ***Resort to third degree methods by Police Officer.***—Resort to third degree methods by police officers resulting in death of the person in police custody is an offence of a serious nature aggravated by the fact that it is committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise it will be taking a stride in the direction of police raj. It must be curbed with a heavy hand. There can be no room for leniency. *Gouri Shankar Sharma* v. *State of U.P.*, AIR 1990 SC 709 : 1990 Supp SCC 656.

[11653] ● ***Death in Police custody—Difficult to secure evidence.***—It is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third degree methods since they are incharge of police station records which they do not find difficult to manipulate. It is only in a few cases that some direct evidence is available. *Gouri Shankar Sharma* v. *State of U.P.*, AIR 1990 SC 709 : 1990 Supp SCC 656.

[11654] ● ***Custodial death.***—When once it is established that the deceased was taken into custody on September 8, 1986 second time then it is their responsibility to show as to how the deceased went out of their custody. There is not even a whisper from the side of the accused as to what happened to the deceased who was taken into custody by them. The evidence of these PWs. would show that on Sept. 9, 1986, they went to the CIA staff room early in the morning and they were not allowed to enter the office. Within half an hour they came to know that the deceased had died and his dead body was thrown under the bus. It is established beyond reasonable doubt that the deceased was taken into custody. The evidence of PWs-3, 4 and 5 also establishes that the deceased was beaten up by these accused in the Police staff room and the deceased also was found chained. Therefore, there is no question of the deceased going out of the Police Post or escaping by himself. The evidence of these witnesses, therefore, shows that these accused must have tried to create a story that the deceased met his death by the bus accident by throwing the dead body of the deceased under a running bus. The doctor also gave an opinion but he did not rule out the death being due to beating. *Dalip Singh* v. *State of Haryana*, AIR 1993 SC 2119 : 1993 SCC (Cri) 1005 (1010, 1011) : 1993 CrLJ 2092 : 1993 CrLR (SC) 335 : JT 1993 (3) SC 682 : (1993) 2 UJ (SC) 2421.

[11655] ● ***Custodial death or police torture.***—Tortures in police custody, which of late are on the increase receive encouragement by this type of unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case often results in miscarriage of justice and makes justice delivery system a suspect. In the ultimate analysis the society suffers and criminals get act encouraged. *State of M.P.* v. *Shyamsunder Trivedi,* (1995) 4 SCC 262 (725) : 1995 SCC (Cri) 715.

[11656] ● ***Police excesses and maltreatment of detainees—Court to adopt realistic rather than narrow technical approach.***—Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The Courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve otherwise the common man may lose faith in the judiciary itself, which will be a sad day. *State of Madhya Pradesh* v. *Shyamsunder Trivedi,* (1995) 4 SCC 262 : 1995 SCC (Cri) 715 (725).

[11657] ● ***Custodial crimes—Courts to have charge in their outlook.***—The Courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the Majesty of Law has prevailed. *State of Madhya Pradesh* v. *Shyamsunder Trivedi*, (1995) 4 SCC 262 : 1995 SCC (Cri) 715 (725).

[11658] ● ***Custodial death—One of worst crime.***—Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be zealously and scrupulously protected. We cannot whisk away the problem of any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. The precious right guaranteed by Art. 21 cannot be denied to convicts undertrials detenue and other prisoners except according to the procedure established by Law. *Ashok K. Johri* v. *State of H.P.*, AIR 1997 SC 610 : (1997) 1 SCC 416 : 1997 CrLJ 743 (SC).

[11659] ● ***Custodial death-cause of death—Shock and haemorrhage due to ante-mortem injuries.***—In the present case, the report of the Medical Board to which the medical record and the post-mortem report were referred to is not produced by the respondents. Instead the expert medical evidence of police officers has been produced before us. They tell us that Rishipal died of jaundice and liver failure and that the post-mortem report which lists the cause of death as shock and haemorrhage due to ante-mortem injuries is rather misleading. They state that the bandages tied to Rishipal's wrists and ankles because he was throwing his legs and hands about while in semi-conscious condition caused the injuries referred to in the post-mortem report. The injuries on Rishipal's belly mentioned in the post-mortem report according to that expert opinion can also be caused by bursting of liver inside the body. There are desperate attempts to avoid responsibility for acts committed while Rishipal was in judicial custody. There can be no doubt that the respondents have not investigated the cause of death of Rishipal as they ought to have done or that, at any rate, they have not placed all relevant material before this Court. We do not appreciate the death of persons in judicial custody.

When such deaths occur, it is not only to the public at large that those holding custody are responsible; they are responsible also to the Courts under whose orders they hold such custody. It is appropriate, therefore, that the cause of Rishipal's death should be investigated by the Central Bureau of Investigation. CBI shall register a case and conduct an investigation into the circumstances of Rishipal's death. *Ajab Singh* v. *State of U. P.*, AIR 2000 SC 3421 : (2000) 3 SCC 521 : 2000 SCC (Cri) 718 (720, 721) : 2000 CrLJ 1809 : 2000 CrLR (SC) 340.

[11660] ● ***Custodial death—Direction to pay compensation.***—In the present case the State of Uttar Pradesh is responsible in public law for the death of Rishipal and must pay compensation to the petitioners for the same. *D.K. Basu* v. *State of W.B.* (1997) 1 SCC 416 : 1997 SCC (Cri) 912. It is appropriate in the circumstances of the case to order the State of Uttar Pradesh to pay to the petitioners compensation for the death of Rishipal in the sum of rupees five lakhs within three months. *Ajab Singh* v. *State of U. P.*, AIR 2000 SC 3421 : (2000) 3 SCC 521 : 2000 SCC (Cri) 718 (720, 721) : 2000 CrLJ 1809 : 2000 CrLR (SC) 340.

[11661] ● ***Custodial death—Death during course of deceased being brought to police station and being put in lockup.***—In the present case there was allegation that the deceased who was apprehended by the police and was in their custody died during the course of his being brought to the police station and being put up in the lock-up. People of the village were agitated on the death of deceased whilst in police custody and so the record was manipulated by the Police and false story cooked up to hush up the incident. The High Court found the testimony of all the three witnesses not reliable and conflicting with each other. The direction of the High Court regarding thorough examination of the record of the police station by holding a departmental enquiry so as to bring to book such of police personnel who may be found guilty of misconduct or negligence or derelictions of duty resulting into the death of deceased whilst he was in the custody of police is valid. The judgment of the High Court acquitting all the accused is upheld. *State of U.P.* v. *Mundrika,* (2001) 9 SCC 346 : 2001 CrLJ 742 : 2001 CrLR (SC) 92 : JT 2001(1) SC 120.

[11662] ● ***Sub-Inspector allegedly beat prisoner to death.***—The appellant, a sub-inspector allegedly beat a prisoner to death. The contention that charge cannot go beyond Section 304 Part II, IPC in view of Exception 3 of Section 300 IPC is worthy to be considered. The Appellant deserves to be released on bail. *Laxman Mahadeo Sariputra* v. *State of Maharashtra,* 2001 (3) Crimes 183 : (2) (SC) (2001) 4 Supreme 483 (1).

[11663] ● ***Police atrocities/Custodial violence or deaths—Proof—Onus and standard of.***—Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues—And the present case is an apt illustration—As to how one after the other police witnesses feigned ignorance about the whole matter. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the Courts as well, because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them in the torture. The Courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "*khaki*" to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The Courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with. *Munishi Singh Gautam* v. *State of M.P.*, AIR 2005 SC 402 : (2005) 9 SCC 631 : 2005 SCC (Cri) 1269 (1275) : 2005 CrLJ 320 : 2004 (4) Crimes 294.

[11664] ● ***Govt. and Legislature to implement recommendations made in 113th report of Law Commission for amendment of Evidence Act to raise rebuttable presumptions in respect of such offences against police officers concerned.***—Disturbed by this situation the Law Commission in its 113th Report recommended amendments to the Evidence Act, 1872 so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the Court may presume that the injury was caused by the police officer having the custody of that person during that period unless the police officer proves to the contrary. The onus to prove the contrary must be discharged by the police official concerned. Keeping in view the dehumanising aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in crimes of this type, where only a few come to light and others do not, the Government and the legislature must give serious thought to the recommendation of the Law Commission and bring about appropriate changes in the law not only to curb the custodial crime but also to see that the custodial crime does not go unpunished.

The Courts are also required to have a change in their outlook, approach, appreciation and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the truth is found and the guilty should not escape so that the victim of the crime has the satisfaction, and that ultimately the majesty of law has prevailed.

But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the Courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence. The case in hand is a unique case in the sense that the complainant filed a complaint alleging custodial torture while the accused alleged false implication because of oblique motives.

It is the duty of the police, when a crime is reported, to collect evidence to be placed during trial to arrive at the truth. That certainly would not include torturing a person, be he an accused or a witness to extract information. The duty should be done within the four corners of law. Law-enforcers cannot take law into their hands in the name of collecting evidence. *Munshi Singh Gautam* v. *State of M.P.*, AIR 2005 SC 402 : (2005) 9 SCC 631 : 2005 SCC (Cri) 1269 (1275, 1276) : 2005 CrLJ 320 : 2004 (4) Crimes 294.

[11665] ● *Custodial torture—No incontrovertible evidence.*—In the instant case there was no clear or in-controvertible evidence about custodial torture nor any medical report of any injury or disability. The grievance of the petitioner and his relatives was against different officers in different police stations at different points of time. More importantly, several of the allegations are proved to be exaggerated and false. It was held to be not fit case for award of compensation. *Sube Singh* v. *State of Haryana*, AIR 2006 SC 1117 : (2006) 2 SCC 178 : 2006 CrLJ 1242 (1258).

[11666] ● *Remedial and preventive measures to prevent custodial violence.*—Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurrences. Following steps, if taken, many prove to be effective preventive measures:

(a) Police training should be re-oriented, to bring in a change in the mindset and attitude of the Police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.

(b) The functioning of lower level Police Officers should be continuously monitored and supervised by their superiors to prevent custodial violence and adherence to lawful standard methods of investigation.

(c) Compliance with the eleven requirements enumerated in *D.K. Basu* (1997 AIR SCW 233) should be ensured in all cases of arrest and detention.

(d) Simple and fool-proof procedures should be introduced for prompt registration of first information reports relating to all crimes.

(e) Computerization, video-recording, and modern methods of records maintenance should be introduced to avoid manipulations, insertions, substitutions and antedating in regard to FIRs, Mahazars, inquest proceedings, Post-mortem Reports and Statements of witnesses etc. and to bring in transparency in action.

(f) An independent investigating agency (preferably the respective Human Rights Commissioners or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against Police personnel and take stern and speedy action followed by prosecution, wherever necessary. The endeavour should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence building measures (CBMs), and at the same time, firmly deal with organized crime, terrorism, white-collared crime, deteriorating law and order situation etc. *Sube Singh* v. *State of Haryana*, AIR 2006 SC 1117 : (2006) 2 SCC 178 : 2006 CrLJ 1242 (1257, 1258).

[11667] ● *Every arrest and detention does not lead to custodial crime.*—Cases where violation of Article 21 involving custodial death or torture is established or is incontrovertible stand on a different footing when compared to cases where such violation is doubtful or not established. Where there is no independent evidence of custodial torture and where there is neither medical evidence about any injury or disability, resulting from custodial torture, nor any mark/scar, it may not be prudent to accept claims of *human right violation*, by persons having criminal records in a routine manner for awarding compensation. That may open the floodgates for false claims, either to mulct money from the State or as to prevent or thwart further investigation. Courts should, therefore, while jealously protecting the fundamental rights of those who are illegally detailed or subjected to custodial violence, should also stand guard against false, motivated and frivolous claims in the interests of the society and to enable Police to discharge their duties fearlessly and effectively. While custodial torture is not infrequent, it should be borne in mind that every arrest and detention does not lead to custodial torture.

In cases where custodial death or custodial torture or other violation of the rights guaranteed under Article 21 is established, Courts may award compensation in a proceeding under Article 32 or 226. However, before awarding compensation, the Court will have to pose to itself the following questions : (a) whether the violation of Article 21 is patent and incontrovertible, (b) whether the violation is gross and of a magnitude to shock the conscience of the Court, (c) whether the custodial torture alleged has resulted in death or whether custodial torture is supported by medical report or visible marks or scars or disability. Where there is no evidence of custodial torture of a person except his own statement, and where such allegation is not supported by any medical report or other corroboration evidence, or where there are false or exaggerated fully or in part, Courts may not award compensation as a public law remedy under Article 32 or 226, but relegate the aggrieved party to the traditional remedies by way of appropriate civil/criminal action.

We should not, however, be understood as holding that harassment and custodial violence is not serious or worthy of consideration, where there is no medical report or visible marks or independent evidence. We are conscious of the fact that harassment or custodial violence cannot always be supported by a medical report or independent evidence or proved by marks of scars. Every illegal detention irrespective of its duration, and every custodial violence, irrespective of its degree or magnitude, is outright condemnable and *per se* actionable. Remedy for such violation is available in civil law and criminal law. The public law remedy is additionally available where the conditions mentioned in the earlier para are satisfied. *Sube Singh* v. *State of Haryana*, AIR 2006 SC 1117 : (2006) 3 SCC 178 : 2006 CrLJ 1242 (1256).

[11668] ● *Cause of death unknown—No external/internal injury found—Accused acquitted of charge under Section 300, IPC.*—It was alleged that the accused SHO caused the death of the deceased by kicking on his testicles and slapping him. In post-mortem examination cause of death was unknown. No external/internal injury was found. Evidence of PW-6 was found reliable. Acquittal of the charge under Section 302, IPC was held proper. *State of Madhya Pradesh* v. *Sawa Singh*, AIR 2007 SC 2263 : (2007) 11 SCC 295 : (2008) 1 SCC (Cri) 141.

[11669] ● *Murder—Death in police custody—Police officer beating accused to death.*—In this case a police constable (DW-1) was stabbed by the deceased. The police thereafter launched a man hunt to trace culprits but were unable to do so and enraged by the turn of events the police officers picked up the family members and neighbours of the deceased and confined them in the police station where they were beaten and humiliated. It was a case of prosecution that two persons were produced in the police station and were administered a very severe beating by the accused and by some of the others present at his instance, on account of severe beating. Ram Kumar and Mahender sustained serious injuries and were taken to the hospital where Mahender died the next day. Conviction of accused under Section 304, Part II, IPC was held proper, but the sentence was reduced from 8 years to five years. Fine of Rs. 2 lacs was increased to 5 lacs. *R.P. Tyagi* v. *State (Govt. of NCT of Delhi)*, 2010 CrLJ 609 (611) : (2009) 15 SCR 1147.

[11670] ● *Custodial death and tortures on increase—Condemnable.*—There is no manner of doubt that the incidents of custodial torture and deaths are most heinous crimes committed by persons, who claim to be the protectors of the citizens. What is distressing to note is that the incidents of torture and death in the police custody take place under the shield of uniform and authority in the four walls of a police station or in the lock up, where the victims are totally helpless. *K.H. Shekarappa* v. *State of Karnataka*, 2010 (3) Scale 681 : JT 2010 (3) SC 660.

CUSTODIAL DEATH
§ (See "CUSTODIAL CRIME")

CUSTODIAL INTERROGATION

[11671] ● ***Custodial interrogation.***—Custodial interrogation exposes the suspect to the risk of abuse of his person or dignity as well as distortion or manipulation of his self-incrimination in the crime. No one should be subjected to physical violence of the person as well as to torture. Infringement thereof undermines the people's faith in the efficacy of criminal justice system. Interrogation in Police lock-up are often done under conditions of pressure and tension and the suspect could be exposed to great strain even if he is an innocent, while the culprit in custody to hide or suppress may be doubly susceptible to confusion and manipulation. A delicate balance has, therefore, to be maintained to protect the innocent from conviction and the need of the society to see the offender punished. Equally, every one has right against self-incrimination and a right to be silent under Art. 20(3) which implies his freedom from Police or anybody else. But when the Police interrogates a suspect, they abuse their authority having unbridled opportunity to exploit this moral position and authority inducing the captive to confess against his better judgment. The very fact that the person in authority puts the questions and exerts pressure on the captive to comply (sic). Silence on the part of the frightened captive seems to his ears to call for vengeance and induces a belief that confession holds out a chance to avoid torture or to get bail or a promise of lesser punishment. The resourceful investigator adopts all successful tactics to elicit confession. *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899 (1041, 1042) : 1994 CrLJ 3139.

CUSTODIAL LEGIS

[11672] ● ***Custodial legis.***—A production before the Court does not mean physical custody or possession by the Court but includes even control exercised by the Court by passing an order regarding the custody of the articles. In the instant case when once the Magistrate, after having been informed that the articles were produced before the Court, directed the Sub-Inspector to keep them with him in safe custody, to get them verified and valued by a goldsmith, the articles were undoubtedly produced before the Court and became *custodia legis*. *Basava Kom Dyamogouda Patil* v. *State of Mysore*, AIR 1977 (SC) 1749 : (1977) 4 SCC 358 : 1977 SCC (Cri) 598 : 1977 CrLJ 1141 : 1977 CrLR (SC) 257 : 1977 All CrR 337.

[11673] ● ***Property lost or destroyed during pendency of trial.***—Where the property is stolen, lost or destroyed and there is no *prima facie* defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property. We do not agree with the view of the High Court that once the articles are not available with the Court, the Court has no power to do anything in the matter and is utterly helpless. *Basava Kom Dyamogouda Patil* v. *State of Mysore*, AIR 1977 (SC) 1749 : (1977) 4 SCC 358 : 1977 SCC (Cri) 598 : 1977 CrLJ 1141 : 1977 CrLR (SC) 257 : 1977 All CrR 337.

[11674] ● ***Section 195(1)(b)(ii)—Applicability.***—Section 195(1)(b)(ii), CrPC would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court *i.e.* during the time when the document was in *custodia legis*. *Iqbal Singh Marwah* v. *Meenakshi Marwah*, AIR 2005 SC 2119 : (2005) 4 SCC 370 : 2005 CrLJ 2161 (2173) : 2005 (2) Crimes 11. **TO THE SAME EFFECT** : (1) *Sachida Nand Singh* v. *State of Bihar*, AIR 1998 SC 121 : (1996) 3 SCC 533 : 1998 CrLJ 1565. (2) *Surjit Singh* v. *Balbir Singh*, AIR 1996 SC 1592 : (1996) 3 SCC 533 : 1996 CrLJ 2304.

CUSTODIAL RAPE
§ (See also "RAPE")

[11675] ● ***Custodial rape.***—The prosecutrix was married to PW-4 and had been residing at Chandigarh wherefrom the couple had been fetched to Rajgarh in Himachal Pradesh by PW-1. On the fateful night, the prosecutrix and her husband were sleeping in the house of PW-4 where around midnight they were rudely awakened by the two appellants, one of whom was an Investigating Head Constable and the other just a Constable posted at Rajgarh Police Station. On the ostensible but false plea that a wireless message had been received from Chandigarh indicating the prosecutrix to be an abducted girl, she and PW-1 were forcibly taken by the appellants to the Police Station. There they were kept in separate rooms. In one of the rooms, one appellant, first brutally hit her, then molested her, and finally raped her. The prosecutrix is not only a reliable witness but her word directed against the appellants bears a ring of truth for no explanation whatsoever as to why the appellants have been accused of the offence has been rendered. Her word is corroborated by the evidence of not only her husband PW-4 but her brother-in-law PW-1. Besides this evidence we have the evidence of local people who had seen the prosecutrix being led to the Police Station and that PW-6 who was approached by PW-1 to seek help because of the illegal confinement of the prosecutrix and her husband. *Ram Kumar* v. *State of Himachal Pradesh*, AIR 1995 SC 1965 (1965, 1966) : 1995 Supp 4 SCC 67 : 1996 SCC (Cri) 100 : 1995 CrLJ 3621.

[11676] ● *Custodial rape by co-accused forcibly.*—The shrieks of the prosecutrix were heard in the room where her husband PW-4 was confined. Guarding him kept sitting Ram Kumar appellant. He did not react to it. His conduct right from the act of his forcibly taking separately the prosecutrix by arm to the Police Station, her separate confinement in a room, Nain Singh misusing his position and having forcibly raped her and Ram Kumar-appellant not doing anything about it while keeping a watch over the husband, reflected a mind of consistency in aiding and abetting the commission of crime of rape.

The conduct and consistency of Ram Singh were towards facilitating that crime as otherwise he would have reacted on the hearing of the shrieks of the hapless prosecutrix who was a young girl aged about 19 years at that time. His turning deaf ears to her cries was the finale on his conduct and he must be assumed to have had this end in mind when he dragged the prosecutrix forcibly to the Police Station. Having to this view, we unhesitatingly uphold the judgment and order of the High Court. *Ram Kumar* v. *State of Himachal Pradesh*, AIR 1995 SC 1965 (1965, 1966) : 1995 Supp (4) SCC 67 : 1996 SCC (Cri) 100 : 1995 CrLJ 3621.

[11677] ● *Violation of fundamental rights—Contention that matter should not have been considered in petition under Article 226, Constitution not accepted.*—The contention that Smt. Hanuffa Khatton (victim of gang rape in Railways Yatri Niwas should have approached the Civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.

It is not a mere matter of violation of an ordinary right of a person but the violation of fundamental rights which is involved. Smt. Hanuffa Khatoon was a victim of rape. "Rape" is an offence which is violative of the fundamental right of a person guaranteed under Article 21 of the Constitution. *Chairman Railway Board* v. *Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465 : 2000 CrLJ 1473.

CUSTODY

[11678] ● *Custody.*—In a writ of *habeas corpus* for recovery of illegitimate female infant of an unmarried Sunni Muslim mother it may be noted that under the Mohammedan Law the mother of an illegitimate female infant is entitled to its custody and the refusal to restore such a child to the custody of its mother would result in an illegal detention of the child within the meaning of Section 491, CrPC.

The dispute as to the paternity of the child is irrelevant for the purpose of the application and the Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not judicially exercised. In issuing writ of *habeas corpus* the Courts have power in the case of an infant to direct its custody to be placed with certain person. *Gohar Begum* v. *Suggar*, AIR 1960 SC 93 : 1960 CrLJ 164 : (1960) 1 SCR 597.

[11679] ● *"Custody"—Meaning of.*—"Custody" in the context of Section 439 is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions. *Niranjan Singh* v. *Prabhakar*, AIR 1980 SC 785 : (1980) 2 SCC 559 : 1980 SCC (Cri) 508 : 1980 CrLR (SC) 265 : 1980 2 SCJ 133 : 1980 SCCrR 384 : 1980 CrAppR (SC) 140 : 1980 UJ (SC) 428 : ILR (1980) HP 51 (SC) : 1980 MLJ (Cri) 573.

[11680] ● *Term "Custody"—Meaning of.*—While interpreting the expression "in custody" within the meaning of S. 439, Cr. P. Code, KRISHNA IYER, J. in *Narain Singh* v. *Prabhakar Rajaram Kharote,* AIR 1980 SC 785 : (1980) 2 SCC 559 observed that "He can be in custody not merely when the Police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions" *Narain Singh* v. *Prabhakar Rajaram Kharote*, AIR 1980 SC 785 : (1980) 2 SCC 559 : 1980 CrLJ 426.

[11681] ● *Custody of minor children—Paramount consideration—Welfare of child.*—*Guar-*

dian and Wards Act, 1890.—It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal. *Veena Kapoor* v. *Varinder Kumar Kapoor*, AIR 1982 SC 792 : (1981) 3 SCC 92 : 1981 SCC (Cri) 650 (651) : 1982 CrLJ 580 : 1982 CrLR (SC) 11(2).

[11682] ● ***Custody of minor—Relevant consideration welfare of child.***—*Guardian and Wards Act, 1890, Ss. 7, 17.*—When the atmosphere in a house, vitiated and rendered surcharged with tension as a result of bitter squabbles between husband and wife, causes misery and unhappiness to a child, who has to live in constant psychological strain in such a broken home in view of the bitter relationship between her parents for each of whom she has great affection, the healthy and normal growth of the child is bound to be seriously affected. In the interest and for the welfare of the child in such a case, the child is necessarily to be removed from such unhealthy environment of a broken home surcharged with tension. In such a case the proper and best way of serving the interest and welfare of the child will be to remove the child from such atmosphere of acrimony and tension and to put the child in a place where the embittered relationship between her parents does not easily and constantly affect her tender mind.

The facts and circumstances of the present case and bearing in mind the paramount consideration of the welfare of the child we are of the opinion that the child's interest and welfare shall be best served by keeping her in a Boarding School away from the unhealthy atmosphere of strain and tension which she had been undergoing at home, the question of custody has to be judged in this background. The mother is very anxious that the child should continue to remain in Boarding School. The girl now aged about 11 years, is reaching an age when she will need the guidance of her mother. We are, therefore, of the opinion that the custody of the girl should be given to the mother. *Thrity Hoshie Dolikuka* v. *Hoshiam Shavaksha Dolikuka*, AIR 1982 SC 1276 (1294, 1295) : (1982) 2 SCC 544 : 1982 SCC (Cri) 505 : (1983) 1 SCR 49.

[11683] ● ***Petitioners enlarged on bail but subsequently arrested.***—The petitioners were enlarged on bail in pursuance of the order passed by this Court on March 2, 1981, but they were subsequently arrested for some other offences alleged to have been committed by them para to March 2, 1981. If after the order of bail passed by us, the authorities of the State considered it fit to arrest any of the petitioners for any other offences, it was their bounden duty to apprise this Court before taking these persons in custody, especially when no disclosure was made to us when we passed the order of bail that any case or cases were under investigation against any of the petitioners. We regret that this elementary courtesy to this Court was not shown. *Uday Chand* v. *Sheikh Mohd. Abdullah, Chief Minister J. & K.*, (1983) 2 SCC 417 : 1983 SCC (Cri) 529 (530) : 1983 CrLR (SC) 573.

[11684] ● ***Custody and guardianship of child.***—*(Guardian and Wards Act, 1890, Ss. 7, 17).*— Whenever a question arises before a Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. We have twice interviewed the child in our chamber. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in the school there. In our considered opinion it will be in the best interests and welfare of child that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent Court in that country. We are also satisfied that the petitioner who is the mother is full of genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper upbringing. The child has not taken root in this country and he is still accustomed and acclimatized to the conditions and environments obtaining in the place of his origin in the United States of America. The child's presence in India is the result of an illegal act of abduction and the father who is guilty of the said act cannot claim any advantage by stating that he has already put the child in some school in Pune. The conduct of the father has not been such as to inspire confidence in us that he is a fit and suitable person to be entrusted with the custody and guardianship of the child for the present. *Elizabeth Dinshaw* v.

Arvand M. Dinshaw, AIR 1987 SC 3 (17, 18) : (1987)1 SCC 42 : 1987 SCC (Cri) 13 : 1987 CrLR (SC) 117 : JT 1986 SC 795 : (1987) 1 SCR 175 : 1987 (1) Crimes 71.

[11685] ● ***Period during which detenu on parole not find during which held in custody.***—The period during which the detenu is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, for in such a case he was not in actual custody. The order of detention prescribes the place where the detenu is to be detained. Parole brings him out of confinement from that place. *Poonam Lata* v. *M.L. Wadhawan*, AIR 1987 SC 1383 : (1987) 3 SCC 347 : 1987 SCC (Cri) 506 (516) : 1987 CrLJ 1130 : 1987 CrLR (SC) 410.

[11686] ● ***Murder—Appreciation of evidence—Probability of prosecution version.***—Where according to prosecution the four deceased and two witnesses who were inside a house the roof of which was set on fire by the accused came out of the house one by one and had run in different directions and were chased by different sets of accused and other two stayed in the house, the prosecution version could not be said to be an artificial or improbable version when four dead bodies were found lying at different places. The deceased who were inside the house would have felt afraid to come out in a body lest they became easy targets for attack by the accused. They may have thought that they would have better chances of escape if they came out of the house one by one instead of all of them coming out together. For the same reason they should also have run in different directions. Two witnesses who stayed inside might have thought that since the fire had not spread beyond the chapper portion, they could safely remain inside the house rather then go out and face an attack. The fact that four dead bodies were found lying at different places show that the house was set to fire causing death to four and two escaping witnesses were chased and attacked. The accused persons were convicted for murder. *Pattad Amerappa* v. *State of Karnataka,* AIR 1989 SC 2004 : 1989 Supp (2) SCC 389 : 1989 CrLJ 2167.

[11687] ● ***Subsisting custody of detenu not invalidate order of detention.***—Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case, preventive detention being necessary to prevent the detenue from acting in any manner prejudicial to the security of the state or to the maintenance of public order *etc.* Ordinarily it is not needed when the detenue is already in jail the detaining authority must show its awareness to the fact of subsisting custody of the detenue and the factor take into account while making the order, but even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. *Meera Rani* v. *Government of Tamil Nadu*, AIR 1989 SC 2027 : (1989) 4 SCC 418 : 1989 SCC (Cri) 732 (749) : 1989 CrLJ 2190 : 1989 CrLR (SC) 697. **To the same effect :** (1) *Rameshwar Shaw* v. *Distt. Magistrate, Burdwan*, AIR 1964 SC 334 : 1964 (1) CrLJ 257 : (1964) 4 SCR 921.

[11688] ● ***Order of detention against person in custody—Validity of.***—An order of detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenue is already in detention. and (ii) there were compelling reasons justifying such detention despite the fact that the detenue is already in detention. The expression "Compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent materials before the detaining authority on the basis of which it may be satisfied that (a) the detenue is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenue it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities. *Dharmendra Sugaanchand Chelawat* v. *Union of India*, AIR 1990 SC 1196 : (1990) 1 SCC 746 : 1990 CrLJ 1232.

[11689] ● ***Detenu already in jail—Detention order—Validity.***—No decision of this Court has gone to the extent of holding that no order of detention can validly be passed against a person in custody under any circumstances. Therefore the facts and circumstances of each case have to be taken into consideration in the context of considering the order of detention passed in the case of a detenue who is already in jail. *Sanjay Kumar Agarwal* v. *Union of India,* AIR 1990 SC 1202 (1243) : (1990) 3 SCC 309 : 1990 CrLJ 1238.

[11690] ● ***Detenu in custody at time of passing order of detention.***—Where the detenu was in custody at the time of passing an order of detention what is strictly required is whether the detaining authority was aware of the fact that the detenu was in custody and if so was there any material to show that there were compelling reasons to order detention in spite of his being in custody. These aspects assume importance because of the fact that a person who is already in custody is disabled from indulging in any prejudicial activities and as such the detention order may not normally be necessary. Therefore, the law requires that these two tests have to be satisfied in the case of such detention of a person in custody. *Abdul Sathar Ibrahim Manik* v. *Union of India*, AIR 1991 SC 2261 : (1992) 1 SCC 1 : 1991 CrLJ 3291 (3299). **TO THE SAME EFFECT :** (1) *Kamarunnissa* v. *Union of India*, AIR 1991 SC 1640 : (1991) 1 SCC 128 : 1991 CrLJ 2058.

[11691] ● ***No detention in Police Custody after expiry of period of first fifteen days.***—There cannot be any detention in the Police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under S. 167(2), proviso, and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso. If the investigation is not complete within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to S. 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the Police. Consequently the first period of fifteen days mentioned in S. 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days It should be only judicial custody. *Central Bureau of Investigation, Special Investigation Cell-1* v. *Anupam J. Kulkarni*, AIR 1992 SC 1768 : (1992) 3 SCC 141 : 1992 SCC (Cri) 554 (571) : 1992 CrLJ 2768.

[11692] ● ***Arrest and custody—Powers under CrPC.***—CrPC gives power of arrest not only to a Police Officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. In every arrest, there is custody but no *vice versa* and that both the words "custody" and "arrest" are not synonymous terms. Though "custody" may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences. *Directorate of Enforcement* v. *Deepak Mahajan*, AIR 1994 SC 1775 : (1994) 3 SCC 440 : 1994 SCC (Cri) 785 : 1994 CrLJ 2269.

[11693] ● ***Change of custody—Validity.***—That a person held in judicial custody could, if circumstances justify, be transferred to Police custody or *vice versa* within a period of 15 days referred to in S. 167(2) of the CrPC, 1973 — which by virtue of S. 20 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 is to be read as 60 days in this case—cannot be disputed. There must, of course, be sufficient grounds for such a change of custody. In the present case, having regard to the nature of offence and the stage of the investigations it cannot be said that grounds for such custody do not exist. *Kosanapur Ramreddy* v. *State of A.P.*, AIR 1994 SC 1447 (1447) : 1994 CrLJ 2121.

[11694] ● ***Custody of children—Paramount consideration welfare of children.***—In view of the facts and circumstances of the case the divorce decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. In U.S.A. the husband (respondent) is staying alongwith his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have found that appellant was not found wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time, it must be said that the son, who is elder than daughter has good feelings for his father also. Considering all the aspects relating to the welfare of the children we are of the opinion that in spite of the order passed by the Court in U.S.A. It was not proper for the High Court to have allowed the *habeas corpus* writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to U.S.A. what would be in the interest of the children requires a full and through inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such as inquiry can be held. Still there is some possibility of mother returning to U.S.A. in the interest of children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. *Sarita Sharma* v. *Sushil Sharma*, AIR 2000 SC 1019 : (2000) 3 SCC 14 : 2000 SCC (Cri) 568 (574, 575) : 2000 CrLJ 1459 : 2000 CrLR (SC) 260.

[11695] ● ***Detention of accused in police custody—Power of Magistrate.***—From the relevant part of Section 167(2), CrPC and Section 386, IPC, it is apparent that pending investigation relating to an offence punishable with imprisonment for a term "not less than 10 years", the Magistrate is empowered to authorize the detention of the accused in custody for not more than 90 days. For rest of the offences, period prescribed is 60 days. Hence, in case where offence is punishable with imprisonment for 10 years or more, accused could be detained up to a period of 90 days. In this context, the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under Section 386, punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. Further, in context also if we consider Clause (i) of proviso (a) to Section 167(2), it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under Section 386 of the IPC imprisonment can vary from minimum to maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years. *Rajeev Chaudhary* v. *State (NCT) of Delhi*, AIR 2001 SC 2369 : (2001) 5 SCC 34 : 2001 SCC (Cri) 819.

[11696] ● ***Habeas corpus petition—Seeking transfer of custody of minor children.***—From the principle laid down in cases decided by this Court it is clear that in an application seeking a writ of *habeas corpus* for custody of minor children, the principal consideration for the Court is to ascertain, whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child, the welfare of the child is of paramount consideration of the Court. The High Court has not considered whether the custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court till the family Court disposes of the petition filed by the appellant for custody of his children. *Syed Saleemuddin* v. *Rukhsana*, AIR 2001 SC 2172 : (2001) 5 SCC 247 : 2001 SCC (Cri) 841 (845, 846).

[11697] ● ***Expression "Custody"—Meaning of.***—Since the expression "custody", though used in various provisions of the Criminal Procedure Code, including Section 439, has not been defined in the Code, it has to be understood in the setting in which it is used and the provisions contained in Section 437 which relate to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterized as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which the Magistrate can entertain a bail petition of an accused. Section 437, CrPC envisages, *inter alia,* that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate. *Nirmal Jeet Kaur* v. *State of M.P.*, (2004) 7 SCC 558 : 2004 SCC (Cri) 1989 (1994-1995) : (2004) 3 Crimes 331 : JT 2004 (7) SC 161.

[11698] ● *"Custody" under Control of Court or physical hold of officer with coercive power.*—He who is under the control of the Court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. The word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in Court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.

Since the expression "custody" though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in the setting in which it is used and the provisions contained in Section 437 which relate to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterised as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which the Magistrate can entertain a bail petition of an accused. Section 437 envisages, *inter alia*, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate. Unless the applicant is in custody, his making an application only under Section 439 of the Code will not confer jurisdiction on the Court to which the application is made. The view regarding extension of time to "move" the higher Court as culled out from the decision in *K.L. Verma Case*, shall have to be treated as having been rendered *per incuriam*, as no reference was made to the prescription in Section 439 requiring the accused to be in custody. Where in a case the decision has been rendered without reference to statutory basis, the same cannot have any precedent value and shall have to be treated as having been rendered per in curium. *Sunita Devi* v. *State of Bihar*, AIR 2005 SC 498 : (2005) 1 SCC 608 : 2005 SCC (Cri) 435 (440-41).

[11699] ● *Writ of habeas corpus for custody of minor child.*—It is well settled that in an application seeking a writ of *habeas corpus* for custody of minor child the principal consideration for the Court is to ascertain whether the custody of the child can be said to be lawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child should be left in the care and custody of someone else. It is equally well settled that in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties.

It is important to note that the appellant is in the profession of law being an Advocate-on-Record in the Supreme Court. A lawyer's profession is very exacting and busy profession and requires lot of time. The appellant has submitted that his mother will come and stay with him, who will look after the child. It is admitted that currently Smt. Aruna Gupta is living with her parents. Her father Shri Ram Gopal Agarwala did his Doctorate in Econometrics from Manchester University, U.K. in the year 1966 and joined the World Bank in 1971 where he held very senior positions. He is, therefore, a well-educated and financially sound person who can look after the needs of his daughter and also the granddaughter. The mother of Smt. Aruna Gupta, namely, Smt. Bimala Agarwala, aged about 60 years, is also there to look after the child if an occasion arises. The learned Judges of the High Court before whom Smt. Aruna Gupta appeared along with Rose Mala and had also talked to her, have recorded that the child was in good and perfect condition and Smt. Aruna Gupta could be allowed to retain her custody. *Rajesh K. Gupta* v. *Ram Gopal Agarwal*, AIR 2005 SC 2426 : (2005) 5 SCC 359 : 2005 CrLJ 2581 (2582) : 2005 (3) Crimes 161. **TO THE SAME EFFECT** : *Syed Saleemuddin* v. *Rukhsana*, AIR 2001 SC 2172 : (2001) 5 SCC 247 : 2001 SCC (Cri) 841.

[11700] ● *Expression "custody" 376(2)(b), IPC.*—The expression "custody" in Section 376(2)(b), IPC implies guardianship. A Custody must be a lawful custody. The same may arise within the provisions of the statute or actual custody conferred by reason of an order of a Court of law or otherwise. *Onkar Prasad Verma* v. *State of Madhya Pradesh*, AIR 2007 SC 1381 : (2007) 4 SCC 323 : 2007 (2) SCC (Cri) 293 : 2007 CrLJ 1831 (1833) : 2007 (2) Crimes 364.

[11701] ● *Cancellation of bail on ground that police custody was necessary for recovery of dowry articles—Improper.*—In the instant case, the bail was granted on 10-10-2008. There was no allegation that the same had been misused or that any attempt was had been made after the accused-appellants were granted bail to recover the articles alleged to have been given to the appellant No. 1 at the time of marriage with the complainant. The reason given by the High Court for cancellation of the orders granting bail and directing the arrest of the appellants on the ground that disclosures had been made by the appellants and that their police custody was necessary for recovery of the same was held not sufficient for the purpose of cancellation of bail. *Devendra Kumar* v. *State of Delhi*, 2010 CrLJ 3849 (3851) (SC).

CUSTOMS ACT, 1962

SYNOPSIS

1. **General** 2402
2. **Section 14** 2405
3. **Section 25** 2405
4. **Section 104** 2406
5. **Section 105** 2406
6. **Section 106, Customs Act, 1962** 2408
7. **Section 107** 2408
8. **Section 108** 2409
9. **Section 110** 2411
10. **Section 111** 2412
11. **Section 112** 2413
12. **Section 113** 2413
13. **Section 114-A** 2414
14. **Section 123** 2414
15. **Section 125** 2416
16. **Section 129-E** 2416
17. **Section 132** 2417
18. **Section 135** 2417
19. **Section 137** 2420
20. **Section 138-A** 2420
21. **Section 151** 2421
22. **Section 155** 2421

1. GENERAL

[11702] ● ***General.***—A Magistrate has jurisdiction the moment an application for warrant under Section 172, Sea Customs Act is made before him, and proceedings on that application can be said to have started under the Criminal P.C. Section 172 of the Sea Customs Act by its second paragraph brings into operation the provisions of the Criminal P.C. land, therefore, the Magistrate's jurisdiction is both under Section 172 of the Sea Customs Act and the Criminal Procedure Code. There can be no doubt also that, unlike Section 96, Criminal P.C., the Magistrate is to be guided by the belief of the Customs authorities, though he may prevent undue harassment in cases, where it can be seen that the belief is not entertained by the Customs Officer or his action is *mala fide*. The Magistrate is entitled to satisfy himself about the belief of the Customs Officer, but is not required to make up his own mind independently of that belief. To this extent only is the mater in the control of the Magistrate, before he issues the warrant. After the warrant is issued, it is an order of the Magistrate enabling the Customs authorities to take action, for without warrant, they cannot enter any house or premises. The warrant of the Magistrate, so to speak, opens the door for entry into a house or premises, and the authority to do so is based upon the Magistrate's order. The forms prescribed under the Code require that articles seized as a result of the warrant should be brought into Court, and a Magistrate, who issues a search warrant, is entitled to see that his warrant is not abused, and has been properly executed. In a suitable case, of course, a Magistrate may amend the warrant dispensing with the production of the goods or documents before him. That, however, would be in a clear case only; but if the Magistrate so desires, he need not armed the form, and may keep the control of the goods or documents in himself. This he may find necessary to do, so that the warrant issued by him is not abused or made the instrument of harassment. A condition, therefore, in the warrant that the goods or documents should be produced before the Magistrate must be complied with, and once the goods or documents have been produced before the Magistrate, it is for him to decide, in the circumstances of each case, whether he would make them over to the Customs authorities or not. Where the Customs authorities have been somewhat indiscriminate in their seizure, the Magistrate may find it necessary to have the goods or documents scrutinised under his control, so that goods or documents not really subject to the Sea Customs Act are not retained for an unduly long period.

Where goods or documents are seized by the Customs authorities in execution of a search warrant issued in the form prescribed under Criminal P.C., by the Magistrate under Section 172, Sea Customs Act, the Customs authorities are not entitled to the custody of the records seized by them. The ultimate disposal of the books and papers must be under the Magistrate's order. *Mohammad Serajuddin* v. *R.C. Mishra*, AIR 1962 SC 759 : (1962) 1 CrLJ 692 : (1962) 1 SCJ 56 : 1963 Mad LJ (Cri) 40.

[11703] ● ***Absolute liability not to be lightly presumed.***—Unless the statute either clearly or by necessary implication rules *out mens rea* as a constituent part of a crime an accused should not be found guilty of an offence unless he has a guilty mind. Absolute liability is not to be lightly presumed, but has to be clearly established. *State* *of Maharashtra* v. *Mayer*, AIR 1965 SC 722 : (1965) 1 CrLJ 641.

[11704] ● *Contempt of Court—What amounts to.*—Where a criminal prosecution of the appellant on the basis of FIR in respect of offences in conviction with smuggling of gold under Section 120B, IPC read with Section 135, Sea Customs Act, Rule 131B, Defence of India Rules and Section 8, Foreign Exchange Regulation Act was imminent and the Collector of Customs initiated proceedings under Sections 111 and 112, Sear Customs Act against the appellant on the same facts such initiation of proceeding *bona fide* by the Custom Officer and in discharge of his statutory duty did not amount to contempt of criminal Court even though identical issues might arise in the imminent prosecution. To constitute contempt of Court, there must be involved some act done or writing published calculated to bring a Court or a judge of the Court into contempt or to lower his authority or something calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts. *Tukaram G. Gaokar* v. *R.N. Shukla*, AIR 1968 SC 1050 : 1968 CrLJ 1234 (SC) : 70 Bom LR 718.

[11705] ● *Custom officer not Police Officer.*—Although a Customs Officer has been invested with many powers which were not to be found in the provisions of the old Sea Customs Act of 1878, he cannot be regarded as a "police officer" within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Evidence Act. *Illias* v. *Collector of Custom*, AIR 1970 SC 1065 : 1970 CrLJ 998 (SC) : (1970) 1 SCJ 701 : (1970) 2 SCA 165 : (1970) 1 Mad LJ (SC) 133 : (1970) 1 Andh WR 133.

[11706] ● *Customs officer having sane power as that of officer incharge of Police station for releasing person on bail.*—As to procedure after the arrest this Act provides that where an officer of Customs has arrested any person under Section 104 (1) he for the purpose of releasing the person on bail shall have the same power as that of an officer in charge of a police station. This Sec. 107 authorises a Customs Officer to examine any person in connection with the smuggling of gold—thus Customs Officer has now been invested with many powers which heretofore were non-existent, yet a Customs Officer is not a police officer because he has no power to file charge-sheet under Sec. 173, CrPC. *Illias* v. *Collector of Customs*, AIR 1970 SC 1065 : 1970 CrLJ 998 : (1970) 1 SCJ 701 : 1970 Mad LJ (Cri) 325 : 1970 Mad LJ (SC) 133 : (1970) 1 Andh WR (SC) 133 : (1970) 2 SCA 165 : (1969) 2 SCR 613.

[11707] ● *"Otherwise"—Meaning*—As regard the procedure after arrest a significant change which has been made in the new Act is contained in sub-section (3) of Section 104. It is provided thereby that where an officer of customs has arrested any person under sub-section (1) he shall, for the purpose of releasing such person, on bail or otherwise have the same power and be subject to the same provisions as the officer-in charge of a police station has and is subject to under the Code of CrPC sub-section (4), however, makes an offence under the new Act non-cognizable notwithstanding anything contained in the Code of Criminal Procedure (the offences under the old Act were also non-cognizable). In the old Act there was no provision conferring the power of releasing a person on bail or otherwise on a Customs Officer and only a Magistrate could grant bail. It may be observed at once that the word "otherwise" clearly relates to releasing a person who has been arrested and cannot possibly be construed in the manner suggested by the learned counsel. *Illias* v. *Collector of Customs*, AIR 1970 SC 1065 : 1970 CrLJ 998 (SC) : (1970) 1 SCJ 701 : (1970) 2 SCA 165 : (1970) 1 Mad LJ (SC) 133 : (1970) 1 Andh WR 133.

[11708] ● *Power of custom officer to search on reasonable suspicion.*—Under the old Act Section 173 provided that persons reasonably suspected of offences under that Act might be arrested by any officer of Customs or other persons duly employed for the prevention of smuggling. Under the new Act according to Section 104 if an officer of customs empowered in this behalf by general or special order of the Collector of Customs has reason to believe that any person has been guilty of an offence punishable under Section 135, he may arrest such person. As regards the power to search, Chapter XVII of the old Act contained the relevant provisions. Section 169 conferred the power on a Customs Officer to search, on a reasonable suspicion. Under Section 170 when any officer of customs was about to search any person under the provisions of Section 169 such person could require that officer to take him, previous to search, before the nearest magistrate or customs collector. Section 172 conferred power on a Magistrate to issue search warrants on an application by the customs-collector. In the new Act Section 100 confers the power to search suspected persons entering or leaving India. Section 102 contains provision analogous to Section 170 of the old Act with some minor differences. Under the old Act every person arrested on the ground that he had been guilty of an offence under that Act had to be forthwith taken to the nearest Magistrate or customs-collector, (Section 174). Under the new Act Section 104(2) provides that every person arrested shall, without unnecessary delay, be taken to a Magistrate. Lastly Section 171-A of the old Act conferred power on Customs Officer to summon persons to give evidence and produce documents. Under the new Act Section 107 gives the power to Customs Officers empowered by general or special order of collector of customs to examine persons acquainted with the facts and circumstances of the case or to require any person to produce or deliver any document. Section 108 confers power on a gazetted officer of customs to summon persons for giving evidence or producing documents. The substantial difference, however, between the two enactments as relates to (1) the procedure after arrest; (2) the procedure for enquiry or investigation and (3) the procedure for search. *Illias* v. *Collector of Customs*, AIR 1970 SC 1065 : 1970 CrLJ 998 (SC) : (1970) 1 SCJ 701 : (1970) 2 SCA 165 : (1970) 1 Mad LJ (SC) 133 : (1970) 1 Andh WR 133.

[11709] ● ***Offence of possessing or keeping contraband gold.***—Smuggling, particularly of gold, into India affects the public economy and financial stability of the country. The provisions of Section 135(1) and like statutes which are designed to suppress smuggling have to be construed in accordance with the Mischief Rule first enunciated in Heydon's case. Accordingly, the words 'acquires possession or keeping' in clause (b) of Section 135(1) are not to be restricted to 'possession' or 'keeping' acquired as an owner or a purchase of the goods. Such a narrow construction which has been erroneously adopted by the High Court would defeat the object of these provisions and undermine their efficacy as instruments for suppression of the mischief which the Legislature had in view. Construed in consonance with the scheme of the statute, the purpose of these provisions and the context, the expression 'acquired possession' is of very wide amplitude and will certainly include the acquisition of possession by a person in a capacity other than as owner or purchaser. This expression takes its colour from the succeeding phrase commencing with the word 'or', which is so widely worded that even the temporary control or custody of a carrier, remover, depositor, harbourer, keeper, or dealer of any goods which he knows or has reason to believe to be smuggled goods or prohibited goods (liable to confiscation under Section 111), cannot escape the tentacles of clause (b) *State of Maharashtra* v. *Natwarlal*, AIR 1980 SC 593 : (1980) 4 SCC 669 : 1980 CrLJ 429 : 1980 CrLR (SC) 105 : 1980 CR App R (SC) 46 : 1980 UJ (SC) 171 : (1980) 2 SCR 340 : 1981 Mah LR (SC) 1.

[11710] ● ***Penalty under new Act if less than under repealed Act.***—If the penalty under the new Act is less than that under the repealed Act, penalty under the old repealed Act cannot be levied in respect of offence committed during the period the old repealed Act was in force. See *T. Barai* v. *Henry Ad Hoc*, AIR 1983 SC 150 : (1983) 1 SCC 177 : 1983 CrLJ 164 (SC).

[11711] ● ***No statutory definition when provided in respect of an item in custom or Central Excise Act.***—When no statutory definition is provided in respect of *an item* in the Customs Act or the Central Excises Act, the trade understanding meaning thereby the understanding in the opinion of those who deal with the goods in question is the safest guide. *Collector of Customs, Bombay* v. *Swastic Woolen (P.) Ltd.*, AIR 1988 SC 2176 : 1988 Supp SCC 796 : 1989 CrLR (SC) 38 : JT 1988 (3) SC 558 : (1988) 2 UJ (SC) 604. **TO THE SAME EFFECT :** (1) *Union of India* v. *Delhi Cloth & General Mills*, AIR 1963 SC 791 : 1963 Supp (1) SCR 586; (2) *South Bihar Sugar Mills Ltd.* v. *Union of India*, AIR 1968 SC 922 : (1968) 3 SCR 21; (3) *Dunlop India Ltd.* v. *Union of India*, AIR 1977 SC 597 : (1976) 2 SCC 241 : (1976) 2 SCR 98; (4) *In re Colgate Palmolive (India) Pvt. Ltd.*, 1979 ELT (J) 567; (5) *Commr. of Sales Tax, U.P.* v. *S.N. Bros., Kanpur*, AIR 1973 SC 78 : (1973) 3 SCC 496 : (1973) 2 SCR 852; (6) *The King* v. *Planters Nut and Chocolate Co. Ltd.*, 1951 CLR (Ex) 122.

[11712] ● ***Classification of entries on basis of Trade parlance.***—No specific technical definition provided in the statute or notification. Thus, in such cases it should be analysed and classified on basis of their use in trade, industry or market and understood in its popular or commonsense. *United Offset Process Pvt. Ltd.* v. *Asstt. Collector of Customs, Bombay*, AIR 1989 SC 622 : 1989 CrLJ 108 : JT 1988 (4) SC SC 198 : 1988 (38) ELT 568 : 1989 Supp (1) SCC 131.

[11713] ● ***Person arrested under Section 35 of Foreign Exchange Regulation Act and Section 104 of Customs Act assimilated with characteristics of accused person within range of Section 167(1), CrPC.***—The words 'accused' or 'accused person' is used only in a generic sense in Section 167(1) and (2) denoting the "person" whose liberty is actually restrained on his arrest by a competent authority on well-founded information or formal accusation or indictment. Therefore, the word 'accused' limited to the scope of

Section 167(1) and (2) - particularly in the light of Explanation to Section 273 of the Code includes 'any person arrested'. The inevitable consequence that follows is that 'any person is arrested' occurring in the first limb of Section 167(1) of the Code takes within its ambit 'every per son arrested'under Section 35 of FERA or Section 104 of the Customs Act also as the case may be and the 'person arrestee' can be detained by the Magistrate in exercise of his power under Section 167(2) of the Code. In other words, the 'person arrested' under FERA or Customs Act is assimilated with the characteristics of an 'accused' within the range of Section 167 91) and as such liable to be detained under Section 167(2) by a Magistrate when produced before him. A Magistrate before whom a person arrested by the competent authority under the FERA or Customs Act is produced, can authorise detention in exercise of his powers under Section 167. Otherwise the mandatory direction under the provision of Section 35(2) of F.E.R.A. or Section 104(2) of the Customs Act, to take every person arrested before the Magistrate without unnecessary delay when the arrestee was not released on bail under sub-section (3) of those special Acts, will become purposeless and meaningless and to say that the Courts even in the event of refusal of bail have no choice but to set the person arrested at liberty by folding their hands as a helpless spectator in the face of what is termed as '*legislative causes omissus*' or legal flaw or *lacuna*, it will become utterly illogical and absurd. Section 104(2) of Customs Act replace Section 167(1) and serve as a substitute thereof substantially satisfying all the required basic conditions contained therein and that consequence upon such replacement of sub-section (1) of Section 167, the arrested person under those special Acts would be an accused person to be detained by the Magistrate under sub-section (2) of Section 167. There is no expression 'police officer' deployed in Section 167(1) nor does it appear in any part of Section 167(2). The authority for detaining a person as contemplated under Section 167(2) is in aid of investigation to be carried on by any prosecuting agency who is invested with the power of investigation. *Director of Enforcement* v. *Deepal Mahajan*, AIR 1994 SC 1775 : (1994) 3 SCC 440 : 1994 CrLJ 2269 : JT 1994 (1) SC 2901 : 1995 (82) Comp Cas 103 **reversing** 1991 CrLJ 1124 (FB) : (1990) 2 Rec CrR 133.

[11714] ● ***Nature of Customs Act, 1962.***—The Statute is a complete Code by itself. It not only deals with the imposition of penalty or order of confiscation of properties under the Act but also with offences having serious consequences. *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : JT 2008 (7) SC 409.

2. SECTION 14

[11715] ● ***Section 14.***—"Landing charges" are exactly what the words mean, the expenditure incurred by an importer for bringing goods on board ship to land. Landing charges, in law, must be assessed on actuals, but, as a matter of practice, particularly to facilitate expeditious clearance, landing charges are assessed at a percentage of the value of the goods and such assessment is accepted. When so assessed landing charges cover the totality of all that an importer extends expends to bring imported goods to land.....

It is open to the Customs authorities not to assess landing charges at a percentage and to assess them at actuals. But if they do assess them on a percentage basis, they cover thereby all aspects of landing charges and it is not open to them then to seek to add any amount thereto on the basis that this or that or the other was not covered thereby. *Coromandal Fertilisers Ltd.* v. *Collector of Customs*, AIR 2000 SC 606 (607) : (2000) 1 SCC 448.

3. SECTION 25

[11716] ● ***Section 25.***—The analysis of Section 25(1), Customs Act, 1962 show *inter alia* that an exemption granted may be an absolute one or subject to such conditions, as may be specified in the notification and further that the conditions specified may relate to a stage before the clearance of the goods or to a stage subsequent to the clearance of goods. We are equally unable to agree that by virtue of the fiction contained in the exemption notification the ship-owners are being made to pay a higher duty than the statutory duty. By a fortuitous combination of circumstances, it so happens that the value of the ship when it was imported in 1968 as on ocean going vessels happens to be less then the value of the ship today when it has become junk and fit only for scrapping/breaking on account of the steep rise in the prices of steel, such an unusual situation has come about but this circumstance in no way affects the validity of the notification. The notification shifts the date of import in the case of a ship which in imported as an ocean going vessel but is subsequently broken up-from the actual date of import to the date of breaking-up by creating a legal fiction. Once it is held that it is open to the central Government to impose such a condition or to create such a fiction, as the case may be, the condition or the faction has to be given full effect to. It must be deemed that the ship is imported on the date it is broken up and its value and rate of duty should be determined with reference to such date. By doing this, the duty is chargeable by virtue of the exemption notification is not going beyond the statutory duty payable on such date. *Union of India* v. *Jalyan Udyog*, AIR 1994 SC 88 (97, 98) : (1994) 1 SCC 318.

4. SECTION 104

[11717] ● *Power to arrest a person by Customs Officer.*—Power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. *Union of India* v. *Padam Narain Aggarwal*, AIR 2009 SC 254 : (2008) 13 SCC 305 : 2008 (4) Crimes 177 : JT 2008 (11) (SC) 6.

[11718] ● *Power of Customs Officer to arrest—Safeguards against abuse of powers.*—The law thus, on the one hand, allows a Custom Officer to exercise power to arrest a person who has committed certain offences, and on the other hand, takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the authorities.

Such power of arrest can be exercised only in those cases where the Custom Officer has 'reason to believe' that a person has been guilty of an offence punishable under Sections 132, 133, 135A or 136 of the Act. Thus, the power must be exercised on objective facts of commission of an offence enumerated and the Custom Officer has reason to believe that a person sought to he arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer.

The section also obliges the Custom Officer to inform the person arrested of the grounds of arrest as soon as may be. The law requires such person to be produced before a Magistrate 'without unnecessary delay'. *Union of India* v. *Padam Narain Aggarwal*, AIR 2009 SC 254 : 2008 (4) Crimes 177 (SC) : JT 2008 (11) SC 6.

5. SECTION 105

[11719] ● *Section 105.*—A search in violation of Sec. 103, CrPC 1898 (Sec. 100, CrPC, 1973) would not vitiate the proceeding. It may only affect the weigh of the evidence in support of the search and recovery. *Sundari Singh* v. *State of U.P.*, AIR 1956 SC 411 : 1956 CrLJ 801.

[11720] ● *Article when secreted in place.*—If the information is such as leads the Customs Officer to believe that articles of search are secreted in a place he may thereby have reason to believe and issue warrant even if he then does not know the name of the person who is in possession of the articles of search. All that the Court can consider is whether there is ground *prima facie* justifying a reasonable belief. *Pukhraj* v. *D.R. Kohli*, AIR 1962 SC 1559 : 1962 Supp (3) SCR 866.

[11721] ● *Power to authorise search exercised by Magistrate.*—Under Section 172 of the Sea Customs Act power to authorise search was to be exercised by the Magistrate on the basis of belief of the Customs Officer or on the basis of the belief of the Assistant Collector of Customs. Under the old law when the goods and documents were seized by the Customs authorities in execution of search warrant by the Magistrate, the Customs authorities were not entitled to the custody of the goods or the documents seized. The ultimate disposal of the goods used to depend upon a Magisterial order. *Mohammad Serajuddin* v. *R.C. Mishra*, AIR 1962 SC 759 : (1962) 1 CrLJ 692 : (1963) 1 SCJ 56 : 1963 Mad LJ (Cri) 40.

[11722] ● *Search if illegal.*—Even if the search is illegal the seizure of the articles is not vitiated. It may be that when the provisions of Sec. 103, Customs Act and Sec. 165, CrPC 1973 are violated the search can be resisted by the person whose premises are sought to be searched. It may be that because of the illegality Court may be inclined to examine carefully the evidence regarding seizure. But beyond these two consequences no further consequence ensues. *Radha Krishnan* v. *State of U.P.*, AIR 1963 SC 822 : 1963 CrLJ 309 : 1963 Sup SCR 408.

[11723] ● *Power of search—Power of general search.*—The power of search is a power of general search. No specific description of the goods or documents expected to be recovered is necessary in the search warrant. Only condition is this that officer issuing the warrant must have reasons to believe that any documents or things which in his opinion are relevant for any proceeding under the Act are secreted in the place of search. *Durga Prasad* v. *Supdt. Central Excise*, AIR 1966 SC 1209 : (1966) 2 SCR 991.

[11724] ● *Word 'secreted' means document kept not in normal or usual place.*—The word 'secreted' in the context means 'documents which are kept not in the normal or usual place with a view to conceal them or it may even mean 'documents or things which are likely to be secreted', in other words, documents or things which a person is likely to keep out of the way or to put in a place where the officer of law cannot find it. It is not correct to say that the word "secreted" is used in Section 105 in the sense of being hidden or concealed. *Durga Prasad* v. *Supdt. Central Excise,* AIR 1966 SC 1209 : (1966) 2 SCR 991.

[11725] ● ***Object of grant of power under Section 105, Customs Act not search for particular documents.***—The object of grant of power under Section 105 is not search for a particular document but of documents or things which may be useful or necessary for proceedings either pending or contemplated under the Customs Act. At that stage it is not possible for the officer to predict or even to know in advance what documents could be found in the search and which of them may be useful or necessary for the proceedings. It is only after the search is made and documents found therein are scrutinised that their relevance or utility can be detertained. To require, therefore, a specification or description of the documents in advance is to misapprehend the purpose for which the power is granted for effecting a search under Section 105 of the Customs Act. Therefore, the power of search granted under Section 105 of the Customs Act is a power of general search. But it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied, that is, the officer concerned must have reason to believe that any documents or things, which, in his opinion, are relevant for any proceeding under the Act, are secreted in the place searched. *Durga Prasad* v. *Supdt. (Prev), Central Excise, Nagpore*, AIR 1966 SC 1209 : (1966) 2 SCR 991.

[11726] ● ***Procedure prescribed in Section 165, CrPC for search not applicable to Section 105(2) Customs Act.***—The procedure prescribed in Section 165, CrPC for search is not applicable to Section 105(2) of the Act inasmuch as the two sections are intended to meet really different situations. So recording of the reasons by the collector is not necessary. *Gopi Kissen Agarwal* v. *Assistant Collector of Customs*, AIR 1967 SC 1298 : 1967 CrLJ 1194.

[11727] ● ***Reasons to believe on which warrant for search issued if challenged.***—If the reasons to believe on which warrant for search were issued are challenged in Court, it is incumbent upon the authorities to disclose materials upon which the belief is formed, for the Court can examine the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for belief cannot be investigated by the Court. *Sheo Nath Singh* v. *Applt. Asstt. Commr. I.T.*, AIR 1971 SC 2451 : (1972) 3 SCC 234 : 82 ITR 147 : 1971 TaxLR 1747.

[11728] ● ***Discretion to Tribunal to condone obligation to deposit.***—The proviso to Section 120-E of the Customs Act gives a discretion to the tribunal in cases of undue hardship to condone the obligation to deposit or to reduce unconditionally or subject to conditions. *Navin Chandra Chhotelal* v. *Central Board of Excise and Customs, New Delhi*, AIR 1971 SC 2280 : (1971) 1 SCC 289 : (1971) 3 SCR 357.

[11729] ● ***Evidence procured by illegal means.***—Evidence procured by illegal means may be admitted in evidence of it is relevant and admissible. *Magraj Patodia* v. *R.K. Birla*, AIR 1971 SC 1295 : 1970 SCC 888 : (1971) 2 SCR 118.

[11730] ● ***Power to issue search warrant.***—The power to issue search warrant can be exercised by Asstt. Collector of Customs too. This power is not an uncanalised power, nor a power without any guideline. Enough guidance is provided in S.105, Customs Act itself. The power is not hit by Art. 14, Constitution of India—For effect of vesting of uncanalised power without guidelines. *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248 : (1978) 2 SCR 621 : (1978) 2 SCJ 312.

[11731] ● ***Independent witness when not available.***—When no independent witness available, Customs Officials may be search witnesses. *State of Maharashtra* v. *P.K. Pathak*, AIR 1980 SC 1224 : (1980) 2 SCC 259 : 1980 SCC (Cri) 428 : 1980 CrLJ 923 : 1980 UJ (SC) 320 : (1980) 3 MahLR 127 (SC) : 1980 SC CrR 300 : 1980 CrAppR (SC) 321.

[11732] ● ***Expression reason to believe not synonymous to subjective satisfaction.***—The expression 'reason to believe' is not synonymous with the subjective satisfaction of the officer. The belief must be held in good faith; it cannot be merely a presence. The subject underlying S. 105, Customs Act which confers power for issuing authorisation for search of the premises and seizure of incriminating articles was to search for goods liable to be confiscated. The search must in regard to the two categories mentioned in the section. Though under the section the officer concerned need not give reasons, if the existence of belief is questioned in any collateral proceeding he was to produce relevant evidence to sustain his belief. *Pratap Singh (Dr.)* v. *Director of Enforcement (Investigation)*, AIR 1985 SC 989 : (1985) 3 SCC 72 : 1985 SCC (Cri) 312

1985 SCC (Tax) 352 : (1986) 1 Supreme 360 : (1985) 2 Cur Civ Cas 599 : (1985) 6 ECC 103. TO THE SAME EFFECT : (1) *R.S. Seth Gopal Krishnan Agarwal* v. *R.N. Sen*, AIR 1967 SC 1298 : 1967 CrLJ 1194 : (1967) 2 SCR 340.

[11733] ● ***Search and seizure if illegal.***—If for any reason the search and seizure were illegal the consequence would not be that the documents seized must be returned. *Pratap Singh (Dr.)* v. *Director of Enforcement*, AIR 1985 SC 989 : (1985) 3 SCC 72 : 1985 SCC (Cri) 312 : 1985 SCC (Tax) 352 : (1986) 1 Supreme 360 : (1985) 2 Cur Civ Cas 599 : (1985) 6 ECC 103. TO THE SAME EFFECT : (1) *Pooranmal* v. *Director of Inspection (Investigation)*, AIR 1974 SC 348 : (1974) 1 SCC 345 : (1974) 2 SCR 704.

6. SECTION 106, CUSTOMS ACT, 1962

[11734] ● ***Section 106, Customs Act, 1962.***—To seize goods the Customs Officer concerned must have reason to believe that the said goods were improperly imported. So when a challenge is thrown it is necessary to find out if the officer concerned has in fact formed the belief and, secondly, whether there were materials relevant or germane upon which the authority concerned could have formed the belief. It there are some materials upon which such belief could have been formed, the Court is not concerned with the propriety of the belief or the sufficiency of the material. *M.A. Rasheed* v. *State of Kerala*, AIR 1974 SC 2249 : (1974) 2 SCC 687. TO THE SAME EFFECT : (1) *Barium Chemical* v. *Company Law Board*, AIR 1967 SC 295 : 1966 Supp SCR 311.

[11735] ● ***Powers of custom officer includes all consequential actions necessary.***—Powers of Customs Officer includes all consequential actions necessary to immobilise the driver or occupant of the vehicle. *Costao Farnandes* v. *State*, AIR 1996 SC 1383 : (1996) 7 SCC 516 : 1996 CrLJ 1783 : 1996 (1) Crimes 125 (SC).

[11736] ● ***Powers of Customs Officer.***—Customs Officer exercises its powers for the purpose of detection of crimes and bringing the offenders to book. *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : 2008 (10) SCR 379 : JT 2008 (7) SC 409.

7. SECTION 107

[11737] ● ***Waiver contractual.***—Waiver is contractual and may constitute cause of action, it is an agreement to release or not to assert a right. But estoppel is not a cause of action, it is a rule of evidence which comes into operation where : *(a)* a statement of acceptance of fact is made by the defendant or an authorised agent to the plaintiff or someone in this behalf; *(b)* with the intention that the plaintiff shall act upon the faith of the statement; and *(c)* the plaintiff does act upon the faith of that statement. *Baseswarnath* v. *Commr. of I.T.*, AIR 1959 SC 149 : 1959 Supp (1) SCR 528. TO THE SAME EFFECT : (1) For distinction between waiver and estoppel, *Provash Chandra Dalni* v. *Biswanath Bannerjee*, AIR 1989 SC 1834 (1840-41) : 1989 Supp (1) SCC 487.

[11738] ● ***Section 107.***—As to procedure after the arrest this Act provides that where an officer of Customs has arrested any person under Section. 104(1) he for the purpose of releasing the person on bail shall have the same power as that of an officer in charge of a police station. Section 107 authorises a Customs Officer to examine any person in connection with the smuggling of gold—thus Customs Officer has now been invested with many powers which heretofore were non-existent, yet a Customs Officer is not a police officer because he has no power to file charge-sheet under Section 173, CrPC. *Illias* v. *Collector of Customs*, AIR 1970 SC 1065 : 1970 CrLJ 998 : (1970) 1 SCJ 701 : 1970 Mad LJ (Cri) 325 : 1970 Mad LJ (SC) 133 : (1970) 1 Andh WR (SC) 133 : (1970) 2 SCA 165 : (1969) 2 SCR 613.

[11739] ● ***Confessional statements recorded under Section 107 of Customs Act.***—Confessional statements recorded under Section 107 are not hit by Section 25 of the Indian Evidence Act nor attract the prohibition against testimonial compulsion envisaged in Art. 20(3) of the Constitution of India. *Ramesh Ch. Mehta* v. *State of West Bengal*, AIR 1970 SC 940 : 1971 CrLJ 863 : 72 Bom LR 787 : (1970) 2 SCA 174 : (1969) 2 SCR 461. TO THE SAME EFFECT : (1) *Harbans Singh* v. *State of Maharashtra*, AIR 1972 SC 1224 : 1972 SCC (Cri) 843 : 1972 CrLJ 759 : 1972 UJ (SC) 746 : 1972 SCCrR 327.

[11740] ● ***Evidence if any collected by examining person arrested under Section 171-A of Sea Customs Act—Admissibility.***—A person arrested by the custom officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not, when called upon by the customs officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Art. 20(3) of the Constitution. The steps are taken by the customs officer for the purpose of holding a inquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The evidence, if any collected by examining him under Section

171-A of the Sea Customs Act is not inadmissible. *Ramesh Chandra Mehta* v. *State of West Bengal*, AIR 1970 SC 940 : 1970 CrLJ 863 : (1969) 2 SCR 461 (A case under Sea Customs Act) **To the same effect :** (1) *Maqbool Hussain* v. *State of Bombay*, AIR 1953 SC 325 : 1953 SCR 730; (2) *Thomas Dana* v. *State of Punjab*, AIR 1959 SC 375 : 1959 CrLJ 392 : 1959 Supp (1) SCR 274; (3) *Hera H. Advani* v. *State of Maharashtra*, AIR 1971 SC 44 : (1969) 2 SCC 662 : 1971 CrLJ 5 : (1970) 1 SCR 821.

[11741] ● ***Confession to Customs Officer.***—Confession to Customs Officer is not hit by Section 24 Evidence Act. *P. Rustomji* v. *State of Maharashtra*, AIR 1971 SC 1087 : (1973) 1 SCC 847 : 1971 CrLJ 933 : 1971 SCD 124 : (1973) 2 SCJ 338 : 1973 MadLJ (Cri) 497.

[11742] ● ***Collector's power quasi-judicial.***—The power of the Collector is *quasi* judicial and not administrative. *Asstt. Collector of Customs* v. *Charandas*, AIR 1972 SC 689 : (1971) 1 SCC 697.

[11743] ● ***Power of Custom Officer to examine person subsequently arraigned as accused.***—It is not proper to state that customs officer cannot examine a person subsequently arraigned as an accused. In view of Section 107(b), Customs Act any officer of Customs empowered in this behalf by general and special order of the Collector of Customs may during the course of enquiry in connection with the smuggling of any goods examine any person acquainted with the facts and circumstances of the case. *Balkrishna* v. *State of W.B.*, AIR 1974 SC 120 : (1974) 4 SCC 567 : 1974 CrLJ 280.

[11744] ● ***Statement to Custom Officer does not attract bar of Article 20(3) of constitution.***—Statement to Customs Officer does not attract the bar of Art. 20(3), Constitution of India. *Veera Ibrahim* v. *State of Maharashtra*, AIR 1976 SC 1169 : 1976 CrLJ 860.

[11745] ● ***Retracted confession before Customs Officer.***—Retracted confession before Customs Officer corroborated by independent witnesses is admissible. *State of Maharashtra* v. *P.K. Pathak*, AIR 1980 SC 1224 : (1980) 2 SCC 259 : 1980 SCC (Cri) 428 : 1980 CrLJ 923 : 1980 UJ (SC) 320 : (1980) 3 MahLR 127 (SC) : 1980 SC CrR 300 : 1980 CrAppR (SC) 321.

[11746] ● ***Person being interrogated during investigation under Customs Act—Lawyer's assistance.***—"We do not find any force in the arguments of Mr. Salve and Mr Lalit that if a person is called away from his own house and questioned in the atmosphere of the Customs office without the assistance of his lawyer or his friends his constitutional right under Article 21 is violated. The argument proceeds thus : if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering questions it amounts to mental torture. We are unable to agree. It is true that large majority of persons connected with illegal trade and evasion of taxes and duties are in a position to afford luxuries on lavish scale of which an honest ordinary citizen of this country cannot dream of and they are surrounded by persons similarly involved either directly or indirectly in such pursuits. But that cannot be a ground for holding that he has a constitutional right to claim similar luxuries and company of his choice. Mr. Salve was fair enough not to pursue his argument with reference to the comfort part, but continued to maintain that the appellant is entitled to the company of his choice during the questioning. The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be "expanded' to favour exploiters engaged in tax evasion at the cost of public exchequer. Applying the 'just, fair and reasonable test' we hold that there is no merit in the stand of appellant before us." *Poolpandi* v. *Supdt. Central Excise*, AIR 1992 SC 1795 : (1992) 3 SCC 259 : 1992 SCC (Cri) 620 : 1992 CrLJ 2761.

8. SECTION 108

[11747] ● ***Section 108.***—As held by the majority of Supreme Court, a Customs Officer is not a police officers for the purpose of Section 25 of the Evidence Act and the statements to Customs Officers were admissible in evidence at the trial of persons accused of offences, *inter alia*, under the Sea Customs Act, 1878. *State of Punjab* v. *Barkat Ram*, AIR 1962 SC 276 : (1962) 3 SCR 338.

[11748] ● ***Statement under Section 171-A(4) Customs Act containing inculpatory and excul-***

patory portions.—As to statements under Section 171-A(4), Sea Customs Act, it does not stand at par with confession so that it had to be taken as a whole or rejected as a whole. As to statements under Section 171-A(4) inculpatory portion can be accepted if the exculpatory portion is found to be inherently improbable. *H.H. Advani* v. *State of Maharashtra*, AIR 1971 SC 44 : (1969) 2 SCC 662 : 1971 CrLJ 5 (SC) : (1970) 1 SCR 821. **TO THE SAME EFFECT :** (1) *Nishi Kanta* v. *State of Bihar*, AIR 1969 SC 422 : (1969) 1 SCC 347 : 1969 CrLJ 671.

[11749] ● ***Power of customs officer to interrogate person in connection with smuggling of goods.***—At the stage envisaged by Section 171A, a Customs Officer is given the power to interrogate any person in connection with the smuggling of any goods which it is his duty to prevent. Such a person may have nothing to do with the smuggling of any goods although he may know where such goods are or who has or had them. Sub-Section (3) of Section 171A does not compel any person to make a statement but if he makes a statement he has to state the truth so as to avoid punishment under Section 193, IPC. At that stage nothing may be known as to whether an offence has been committed or who has committed it and the person interrogated at that stage is not a person accused of or charged with an offence. He is merely called upon to give evidence to facilitate the inquiry. He is not a witness giving evidence in a Court and his testimony will make him liable under Section 193, IPC only because of the express provision of law in sub-section (4) of Section 171A. *H.H. Advani* v. *State of Maharashtra*, AIR 1971 SC 44 : (1969) 2 SCC 662 : 1971 CrLJ 5 (SC) : (1970) 1 SCR 821.

[11750] ● ***Statement recorded by officer of custom—Admissibility.***—The statement recorded by an officer of Customs under the customs Act are admissible in evidence and are not hit by Section 25 of the Evidence Act or Art. 20(3) of the Constitution of India. *Harbans Singh Sardar Lena Singh* v. *State of Maharashtra*, AIR 1972 SC 1224 : (1972) 3 SCC 775 : 1972 SCC (Cri) 843 : 1972 CrLJ 759. **TO THE SAME EFFECT :** (1) *Ramesh Chandra Mehta* v. *State of West Bengal*, AIR 1970 SC 940 : 1970 CrLJ 863.

[11751] ● ***Detention under COFEPOSA.***—Despite a single incident of smuggling one may be detained under COFEPOSA if he is found to be a member of a smuggling syndicate. *Shiv Ratan Makhin* v. *Union of India*, AIR 1986 SC 610 : (1986) 1 SCC 404 : 1986 SCC (Cri) 74 : 1986 CrLJ 813 : (1986) 1 Crimes 465 (SC) : (1986) 1 Supreme 475 : 1986 Cr AppR (SC) 32.

[11752] ● ***Statement of accused before customs officer.***—Customs party following a tip off waylaid a jeep with contraband good. The driver scenting the trouble before hand stopped the jeep at a safe distance. The inmate escaped under the cover of darkness. The Customs Officials came to the abandoned vehicle and found a large number of watches of foreign make. Initially nine persons were arrayed as accused. One of the accused turned a prosecution witness. The weapons at the armoury of the prosecution was the oral evidence of the approver *i.e.* one who earlier was included as an accused and later turned to be a prosecution witness; and the statements of A-1 & A-2 under Section 108, Customs Act. The apex Court held the statements under Section 108, Customs Act cannot be corroborative piece of evidence of the statement of co-accused turned prosecution witness. *Supdt. of Customs* v. *Bhanabhai Khalpabhai*, AIR 1992 SC 1583 : 1992 CrLJ 2516 (SC) : JT 1992 (22) SC 305.

[11753] ● ***Persons called for questioning during investigation not accused.***—Persons called for questioning during investigation by authorities are not accused. The prayer to have the presence of lawyer during interrogation can be validly turned down. This refusal does not entail violation of Article 20(3) or Article 21, Constitution of India. *Phool Pandi* v. *Superintendent, Central Excise*, 1992 (3) SCC 259 : 1992 SCC (Cri) 620 : 1992 CrLJ 2761 (SC) : JT 1992 (4) SC 119 : 1992 (2) Crimes 648 : 1992 (3) SCR 247.

[11754] ● ***Statement made by appellant under Section 108 of Customs Act—Use of.***—The statement made by the appellant under Section 108 of the Customs Act, 1962 can be used against him. *Bhanabhai Khalapabhai* v. *Collector of Customs*, 1994 Supp (2) SCC 143 : 1994 SCC (Cri) 882 (884-885) : (1994) 1 Crimes 940.

[11755] ● ***Statement made before Custom Officer not statement recorded under Section 161, CrPC.***—Statement made before the customs officials is not a statement recorded Section 161, CrPC. Therefore, it is a material piece of evidence collected by the customs officials under Section 108, Customs Act. When that statement of one accused implicates the accused himself as also the co-accused, that statement can be used as substantive evidence connecting the co-accused with the contravention of a provision of the Customs Act. The conviction of co-accused only on such evidence, no matter it has received independent corroboration or not, is legal and permissible. *Naresh J. Sukhwani* v. *Union of India*, AIR 1996 SC 522 : 1996 SCC (Cri) 76 : 1995 Supp (4) SCC

663 : JT 1995 (8) SC 160 : 1995 (4) Crimes 340 (SC).

[11756] ● *Statement made before—Customs Officer—Use of.*—The statement made before Customs officials can be used as substantive evidence connecting the petitioner with contravention by exporting foreign currency out of India and therefore, no illegality in order to confiscation and imposition of penalty. *Naresh J. Sukhawani* v. *Union of India*, AIR 1996 SC 522 : 1995 Supp (4) SCC 663 : 1995 CrLR (SC) 753 : 1995 (6) Scale 386 : 1995(4) Crimes 340.

[11757] ● *Statement recorded under—Admissibility.*—The inculpatory statement made by any person under S. 108 is to non-Police personnel and, hence, it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in Police custody. Nonetheless, the caution contained in law is that such a statement should be scrutinised by the Court in the same manner as confession made by an accused person to any non-Police personnel. The Court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a Gazetted Officer must also pass the tests prescribed in S. 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in S. 24 that statement becomes useless in any criminal proceedings. We held that, a statement recorded by Customs Officers under S. 108 of the Customs Act is admissible in evidence. The Court has to test whether the inculpating portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in S. 24 of the Evidence Act. *Assistant Collector of Central Excise* v. *Duncan Agro Industries Ltd.*, AIR 2000 SC 2901 (2904) : (2000) 7 SCC 53 : 2000 SCC (Cri) 1275 : 2000 CrLJ 4035 : 2000 CrLR (SC) 640.

[11758] ● *Recovery of heroin and opium from two trucks—Driver admitting in his statement under Section 108 Customs Act that he knew about presence of said drugs in vehicle and about illegal transport.*—In this case, the appellant Tarlochan Singh was the driver of the vehicle DIL 3372. He was also in custody of vehicle PJA 8677. His statement was recorded under Section 108 of the Customs Act. From his possession the articles of opium and heroin were recovered and in his statement he admitted that he knew about the presence of these drugs in the vehicle and about the transport of the drugs illegally from Ludhiana to Bombay. It is evident from the statement made by him that he committed the offences punishable under Sections 18, 21, 22, 23, 25, 29 and 30 of the NDPS Act. That is no reason to interfere with the conviction and sentence entered against the appellant Tarlochan Singh and the criminal appeal stands dismissed. *Balwinder Singh* v. *Asstt. Commissioner, Customs and Central Excise*, AIR 2005 SC 2917 : (2005) 4 SCC 146 : 2005 SCC (Cri) 1092 (1094) : 2005 (3) Crimes 22.

[11759] ● *Enquiry under Section 108.*—The enquiry under section 108 is for the purpose of the Customs Act, 1982 and not for the purpose of convicting an accused under any other statute. *Noor Aga* v. *State of Punjab*, (2008) 16 SCC 417 : 2008 (10) SCR 379 : JT 2008 (7) SC 409.

[11760] ● *Power of Custom Officer to summon a person for evidence.*—The underlying object of Section 108 is to ensure that the officer questioning the person elicits truth concerning the incident. The person summoned to state truth is not absolved from speaking truth on the ground that such statement is admissible and can be used against him. *Union of India* v. *Padam Narain Aggarwal*, AIR 2009 SC 254 : (2008) 13 SCC 305 : 2008 (4) Crimes 177 (SC) : JT 2008 (11) SC 6.

[11761] ● *Duty of person summoned to give evidence—Nature of Statement.*—A person summoned to give evidence is bound to comply with the direction. But he cannot be said to be an accused. The statement recorded under Section 108 is distinct that recorded by Police Officers during the course of investigation under the provisions of CrPC. *Union of India* v. *Padam Narain Aggarwal*, AIR 2009 SC 254 : (2008) 13 SCC 305 : 2008 (4) Crimes 177 (SC) : JT 2008 (11) SC 6.

9. SECTION 110

[11762] ● *Section 110.*—The Court while considering this case under the prevention of Corruption Act and the nature and standard of proof required the accused under Section 105 of the Evidence Act, held that the Evidence Act does not contemplate that the accused should prove the case with same strictness and rigour. But in this case the nature of the evidence on which the reliance could not be placed was rightly rejected by the customs and the High Court held it properly that the petitioner had not discharged the on us to prove that the goods were not smuggled. *Indru Ramchand Bharwani* v. *Union of India*, 1990 CrLR (SC) 87.

[11763] ● *Seizure of goods.*—When the goods are seized under S. 110(1) of the Customs Act that amounts to seizure of the goods under the Act and one of the conditions for invoking the provisions of S. 123 are satisfied by the mere factum of seizure. The effect of non-compliance of the provisions of S. 110(2) would only be that the seized goods are returned to the person from whose possession they were seized. It would not render the initial seizure of the goods illegal. We therefore held that the seizure of the goods under S. 110(1) by itself is sufficient to comply with the requisite condition under S. 123. What happens to the goods thereafter is of no consequence. *J.K. Bardolia Mills* v. *M.L. Khunger, Dy. Collector*, (1994) 5 SCC 332 : 1994 SCC (Cri) 1497 (1500, 1501).

10. SECTION 111

[11764] ● ***Section 111.***—The appellant may, if he chooses, not appear as a witness in the proceedings under Ss. 111 and 112 of the Customs Act. The necessity to enter the witness-box for substantiating his defence is not such a compulsion as would attract the protection of Art. 20(3). Even in a criminal trial, any person accused of an offence is a competent witness for the defence under Section 342-A of the CrPC and may give evidence on oath in disproof of the charges made against him. It may be very necessary for the accused person to enter the witness-box for substantiating his defence. But this is no reason for saying that the criminal trial compels him to be a witness against himself and is in violation of Art. 20(3). Compulsion in the context of Art. 20(3) must proceed from another person or authority. The appellant is not compelled to be a witness if he voluntarily gives evidence in his defence. Different considerations may arise if he is summoned by the Customs authorities under Section 108 to give evidence in the proceedings under Ss. 111 and 112. *Tukaram G. Gaokar* v. *R.N. Shukla*, AIR 1968 SC 1050 : 1968 CrLJ 1234 (1238) : (1968) 3 SCR 422.

[11765] ● ***Ingredients in respect of offence under Section 111 read with Section 135 of Customs Act different from Section 85 of Gold Control Act.***—It is not in dispute that the respondents were tried and acquitted for the offence under the Customs Act in connection with the possession of a quantity of gold. Then trial would be barred by Section 403(1) provided they are sought to be prosecuted or "same facts" for any offence for which a different charge from the one made against them might have been made under Section 236, CrPC, for which they might have been convicted under Section 237, CrPC. The ingredients required to be established in respect of the offence under Section 111 read with Section 135 of the Customs Act are altogether different from those required to be established for offence under Section 85 of the Gold Control Act. *V.K. Agarwal* v. *Vasantraj Bhagwanji Bhatia*, AIR 1988 SC 1106 : (1988) 3 SCC 467 : 1988 SCC (Cri) 679 : 1988 CrLJ 1106 : 1988 CrLR (SC) 263.

[11766] ● ***Confiscation and penalty under Sections 111(d) and 112 Customs Act when not justified.***—A harmonised interpretation has to be given to each of the calcareous stones mentioned in the said tariff item in ITC Schedule and nothing should be left out or made redundant in giving the interpretation. The commercial nomenclature or understanding the trade which is generally given in tax statute cannot be taken recourse to in the instant case inasmuch as the statutory context in which the tariff item appears requires departure in the instant case. In the tariff item the calcareous stones used for monumental or building purposes and of a specific gravity of 2.5% or more is used in the scientific or technical sense and as such the commercial nomenclature or understanding in the trade should not be taken recourse to in interpreting the word 'marble'. The reference to the requirement of specific gravity of 2.5% or more is also a purely technical criteria or requirement which shows that the principle of trade nomenclature or commercial understanding is not applicable to that tariff item. Moreover, the said Harmonised system of Nomenclature (HSN) contains a specific note regarding serpentine rocks to the effect that the same are sometimes called marbles, but the same is excluded from Chapter Heading 25. 15. This again clearly shows that according to HSN Chapter, Heading 25. 15. has to be construed according to its technical meaning. Technically, serpentine does not fall under heading 25. 15 and the same is accordingly excluded therefrom by the HSN. If commercial meaning is to be applied then serpentine would have to be classified under item 25. 15 inasmuch as it is sometimes called marble in the trade. The HSN explanation notes, therefore, establish that Chapter Heading 25. 15 must be construed by its technical sense and not by applying a commercial nomenclature test. Considering all these aspects, there is no other alternative but to conclude that the slabs of calcareous stone imported by the appellant are not marbles as mentioned in Entry 62 of Appendix 2 of the Import and Export Police for April 1968 - March 1991 and so it is covered by Open General Licency. The imported goods cannot be confiscated by the Government under Section 111(d) of the Customs Act, 1962 nor the appellant can be given the option to clear the said goods for home consumption on payment of fine of Rs. 5,00,000/- *in lieu* of confiscation under Section 25 of the Customs Act, 1962. The appellant cannot be said to have imported calcareous stones without an import licence and as such there being no violation of the Import Control Policy the imposition of penalty of Rs. 10,00,000/- under Section 112 of the Customs Act, 1962 is also unwarranted and not sustainable. *Akbar Badruddin Giwani* v. *Collector of Customs, Bombay*, AIR 1990 SC 1597 : (1990) 2 SCC 203 : 1990 CrLJ 1304.

[11767] ● *Confiscation and penalty when not warranted.*—In the instant case, even if it is assumed for argument's sake that the stone slabs imported for home consumption are marbles still in view of the finding arrived at by the Appellate Tribunal that the said product was imported on a *bona fide* belief that it was not marble, the imposition of such a heavy fine is not at all warranted and justifiable. *Akbar Badruddin Giwani* v. *Collector of Customs, Bombay*, AIR 1990 SC 1579 : (1990) 2 SCC 203 : 1990 CrLJ 1304.

[11768] ● *Imposition of penalty and fine when justified.*—Imposition of penalty and fine justified. *Basant Export Corporation* v. *Collector of Customs*, 1995 SCC (Cri) 696.

[11769] ● *Smuggling—Detention.*—Section 2(39) of the Customs Act refers to goods brought from a place outside India shall be liable to confiscation. Unless there is proper enquiry and arrive at a conclusion in terms of Section 111 or Section 113 of the Customs Act, it cannot be concluded that smuggling had taken place. There is nothing in the order of detention which would indicate that any of the said earlier imports were effected in contravention of any of the provisions of the Customs Act, 1962, or that they could have been regarded as having been smuggled into the country within the meaning of Section 2(39) of the said Act. Except notice for reopening the order clearing eight consignments prior to Bills of Entry dated 25-4-2007, there is no adjudication and final order by the authority concerned. In other words, the reference to alleged violation of the Customs Act in respect of import of eight consignments which was only at the pre-mature stage and considering extraneous materials, which are inconclusive cannot be a valid ground for clamping detention under COFEPOSA Act. Inasmuch as, the Detaining Authority has extensively relied upon the allegations that the detenu was involved in the import of eight consignments through M/s. P.P. Dutta, reliance on those irrelevant material vitiates the detention order. This is more so as the said alleged earlier imports, apparently constitute the main basis for the opinion formed by the Detaining Authority that the detenu had the propensity and potentiality to indulge in smuggling activities in future. *Pooja Batra* v. *Union of India*, AIR 2009 SC 2256 : (2009) 5 SCC 296 : 2009 CrLJ 2797 (2803, 2804) : (2009) 2 Crimes 49.

11. SECTION 112

[11770] ● *Section 112.*—The next question which was canvassed before the High Court was that the quantification of the penalty was very high. The High Court however, noted that the liability was incurred by the petitioner in 1973 and the Collector made the order in 1975. Admittedly for about ten years even after the Collector's order imposing the penalty, the amount of penalty had not been paid by the petitioner. The value of the smuggled goods was Rs. 87,455/- even at that time, on that there is no dispute. The penalty permissible is up to five times the value of the goods. The High Court noted that the benefit derived by the petitioner by non-payment of the amount of Rs 2,00,000/- at least for ten years is sufficient indication that the penalty could not be treated as arbitrary. *Chuhar Mal* v. *Union of India*, AIR 1988 SC 1474 : (1988) 3 SCC 257 : 1988 SCC (Cri) 664 : 1988 (3) SCR 797 : 1988 CrLR (SC) 341.

[11771] ● *Proceedings for initiation of criminal trial and departmental proceeding under Section 112(b) of Customs Act parallel proceedings.*—The proceedings for initiation of Criminal Trial and departmental proceeding under Section 112(b) are parallel proceedings and mere acquittal by Criminal Court does not bind authorities under statute from proceedings under Section 112(b) of the Customs Act and passing appropriate order. *Collector of Central Excise, Madras* v. *K. Ranganathan*, (1990) 2 Crimes 570 : (1990) 1 Mad LW 61 : (1990) 1 Mad LJ 399.

12. SECTION 113

[11772] ● *Section 113.*—So far as the confiscation of goods is concerned, the order in an adjudication proceeding is an order *in rem* and the penalty is enforced against the goods whether the offender is know or unknown. *Indra Senrai* v. *Collector of Customs*, AIR 1958 SC 845 : 1958 CrLJ 1355. TO THE SAME EFFECT : (1) *Collector of Customs* v. *D. Bhurmull*, AIR 1974 SC 859 : (1974) 2 SCC 544 : 1975 CrLJ 545.

[11773] ● *Collector of Customs to act judicially.*—In a proceeding of like nature Collector of Customs acts judicially. *Leo Roy Frey* v

Supdt., District, AIR 1958 SC 119 : 1958 CrLJ 260. **To the same effect :** (1) *Sewpujanrai* v. *Collector of Customs*, AIR 1958 SC 845 : 1958 CrLJ 1355.

[11774] ● *Imposition of fine quasi-judicial act.*—The imposition of fine is a *quasi* judicial act and the test of the quantum of it is the gravity of the offence. *Ambalal* v. *Union of India*, AIR 1961 SC 264 : (1961) 1 CrLJ 326 : (1961) 1 SCR 933.

[11775] ● *Hire-purchase agreements between owner and customer.*—There are three types of hire-purchase agreements. In the first stage of its evolution a transaction of hire-purchase used to take place between the owner or the dealer and the customer, the former wanting to sell his goods and the latter was unable to pay the money necessary for paying the price in one instalment. The parties, therefore, used to enter into an agreement called hire-purchase agreement under which the customer was allowed to use the goods but the owner or dealer, continued to be the owner till the entire consideration was paid by the customer in agreed instalments and till he exercises his option to buy. But the owner or the dealer had not always enough financial solvency to wait till such time as the instalments were paid. This caused the next stage of evolution under which a financier intervened between the dealer and the customer - the financier purchasing goods from the dealer and then entering into an agreement with the customer under which agreement the financier becomes the owner and the customer hirer until such time as the customer carries out the terms of the agreement. *Sundaram Finance* v. *State of Kerala*, AIR 1966 SC 1178 : (1966) 2 SCR 828.

[11776] ● *Exclusion of jurisdiction of Civil Court—Inference of.*—Exclusion of the jurisdiction of the civil Courts cannot be readily inferred but must either be explicitly expressed or clearly implied. Even in cases of such exclusion of jurisdiction the civil Courts can examine cases where statutory provisions have not been complied with or statutory tribunals have not acted in conformity with the fundamental principles of natural justice or the fundamental principles of judicial procedure. *State of W.B.* v. *Indian Iron & Steel*, AIR1970 SC 1298 : (1970)2 SCC 39 : (1970) 2 SCWR 41 : 1970 SCD 544.

[11777] ● *Export of goods contrary to any law.*—Before invoking Section 113(d) contravention of the Act or any law for the time being in force must be proved. A citizen of Nepal contracted with a firm in Cairo for shipment of dal through Calcutta. On the point of time he was shipping dal in Calcutta port, the consignment was seized - held, Nepal has not undertaken not to re-export the goods imported from India by the treaty entered into in 1960 between Nepal and India and the confiscation is illegal as no contravention is proved. *Padam Kumar Agrwala* v. *Addl. Collector, Customs*, AIR 1972 SC 542.

[11778] ● *Seizure of property by Customs Authority—Return of.*—In respect of property seized by Customs authority, when the trial pends, Magistrate has no jurisdiction to return unless it is produced in Court. *Remo Paul Altoe* v. *Union of India*, AIR 1977 SC 2255 : (1977) 4 SCC 437 : 1977 CrLJ 1933.

13. SECTION 114-A

[11779] ● *Section 114-A—Applicability.*—Section 114-A can be invoked for imposition of equivalent amount of duty as penalty in cases where the short levy or non-levy has occurred due to misdeclaration or suppression of facts on the part of assess importer. *Commissioner of Customs* v. *M.M.K. Jewellers*, (2008) 5 SCC 617.

14. SECTION 123

[11780] ● *Section 123.*—The only prerequisite condition for application of Section 123, *i.e.* for invoking the presumption that the goods are smuggled goods is the subjectivity of the customs officer in having a reasonable belief that the goods found in possession of any person are smuggled goods. Then the burden of proving the contrary *i.e.* that the goods are not smuggled falls upon that person. *Babulal* v. *Collector of Customs*, AIR 1957 SC 877 : 1957 SCR 1110.

[11781] ● *Seizure by proper officer.*—For invocation of presumption the seizure must be proper officer. *Gian Chand* v. *State of Punjab*, AIR 1962 SC 496 : (1962) 1 CrLJ 485.

[11782] ● *Burden of proof.*—The burden of proof is shifted to accused only when the goods were "seized" in the sense that they were taken out of possession of an accused by a proper officer. *Gian Chand* v. *State of Punjab*, AIR 1962 SC 496 : (1962) 1 CrLJ 485.

[11783] ● *Waiver—Intentional relinquishment.*—Waiver is an intentional relinquishment of known right. Such intention may be inferred from circumstances, but the right in question must be a known right. *Dhiren Garai* v. *Sudhir*, AIR 1964 SC 1300 : (1964) 6 SCR 1001. **To the same effect :** (1) *Motilal Padamput* v. *State of U.P.*, AIR 1979 SC 621 : (1979) 2 SCC 469 : (1979) 2 SCR 641; (2) *Provash Chandra Dolui* v.

Bishwanath Bannerjee, AIR 1989 SC 1834 (1840) : 1989 Supp (1) SCC 487.

[11784] ● *Opportunity of being heard does not includes cross-examination.*—Section 124(c) which provides for reasonable opportunity of being heard does not include the right to cross-examine persons not summoned by Department but on whose statements reliance is placed by Department. *Kanungo & Co.* v. *Collector of Customs*, AIR 1972 SC 2136 : (1973) 2 SCC 438.

[11785] ● *Notice to owner of goods statutory requirement.*—A mandatory requirement of the statute is *giving of the notice to* the owner whose goods are being confiscated within six months from the date of the seizure. The Collector at the instance of the investigating Customs Officer after hearing the person concerned may extend the time. *Asstt. Collector of Customs* v. *Charan Das Malhotra*, AIR 1972 SC 689 : (1971) 1 SCC 697.

[11786] ● *Waiver of notice under Customs Act—Principles of.*—For principles of waiver of notice under the Customs Act. *Loke Nath Tolaram* v. *B.N. Rangwani*, AIR 1974 SC 150 : (1974) 3 SCC 575 : 1975 CrLJ 540.

[11787] ● *Discharge of burden by accused that seized liquor not smuggled.*—In the present case, Section 123 was notified to be applicable to liquor on 10.10.74. Seizure was effected on 27.9.74 and confiscation made on 25.6.75 Section 123 applies and the person is to discharge the burden that seized liquor was not smuggled. *Balumal* v. *State of Maharashtra*, AIR 1975 SC 2083 : (1975) 4 SCC 645 : 1975 CrLJ 1862.

[11788] ● *Section 123 of Customs Act to be applied when.*—Section 123 can be applied when the case comes up for trial, it being immaterial when the seizure was effected. *Balumal Jamnadas* v. *State of Maharashtra*, AIR 1975 SC 2083 : (1975) 4 SCC 645 : 1975 CrLJ 1862.

[11789] ● *Goods smuggled—Inference as to origin and recent import.*—The very appearance of the goods and the manner in which they were packed indicated that they were newly manufactured and brought into this country very recently from another country. The inscriptions on them and writing on the boxes were parts of the State in which the goods in unopened boxes were found, from which inference about their origin and recent import could arise. The appellant's conduct, including his untruthful denial of their possession, indicated consciousness of their smuggled character or *mens rea*. In any case there was some evidence to enable the Court to come to the conclusion that the goods must have been known to the appellant to be smuggled even if he was not a party to a fraudulent evasion of duty. *Balumal Jamnadas Batra* v. *State of Maharashtra*, AIR 1975 SC 2083 : (1975) 4 SCC 645 : 1975 SCC (Cri) 660 (663) : 1975 CrLJ 1862 : 1975 CrLR (SC) 533 : (1976) 1 SCR 539 : 1975 UJ (SC) 701.

[11790] ● *Seizure of goods must be by proper custom officer.*—In order to apply Section 123 of the Customs Act there must be a "seizure" of the goods by the proper Customs Officer duly authorised as provided by Section 110 of the Act. The learned counsel relied strongly on *Gian Chand* v. *State of Punjab*, AIR 1962 SC 496 : 1962 (1) CrLJ 485. Where it was held under the corresponding provisions of Sea Customs Act, 1878 that the burden of proof was shifted on to the accused only when the goods were "seized" in the sense that they were taken out of the possession of an accused by the "proper officer". That was also a case of "seizure" of allegedly smuggled gold. There the police had initially commenced proceeding under Sections 411, and 414, IPC against the accused but afterwards the case was handed over to the custom authorities. The initial "seizure" being one by the ordinary police, it was held to be not under the Act and that no presumption would arise against the accused.. Burden of proof on accused was not wrongly placed. *Labhchand Dhanpat Singh Jain* v. *State of Maharashtra*, AIR 1975 SC 182 : (1975) 3 SCC 385 : 1975 SCC (Cri) 11 (13-14) : 1975 CrLJ 246 : 1975 CrLR (SC) 105.

[11791] ● *Adjudicator when committing manifest error.*—An adjudicator committing manifest error, High Court under Art. 226, Constitution of India can interfere. *Collector of Customs* v. *Padnekar*, AIR 1976 SC 1408 : (1976) 3 SCC 790.

[11792] ● *Gold with foreign markings recovered from accused.*—Gold with foreign markings recovered from the possession of accused; the accused admitting he had no permit for importing gold under Section 106 read with presumption of Section 114, Evidence Act the accused knew that the gold in his possession was smuggled. *Shah Guman Mai* v. *State of A.P.*, AIR 1980 SC 793 : (1980) 2 SCC 262 : 1980 SCC (Cri) 432 : 1980 CrLJ 557 : 1980 MadLW (Cri) 125 : 1980 CrApR (SC) 97.

[11793] ● *Accused coating pure gold by silver.*—The fact that accused coated pure gold by silver (here a gold chain) by itself evokes the suspicion that it was made of smuggled gold

State of Gujarat v. *Mohanlal Jitmalji Porwal*, AIR 1987 SC 1321 : (1987) 2 SCC 364 : 1987 CrLJ 1061 : (1987) 2 Crimes 1 (SC).

[11794] ● ***Custom officer's belief reasonable belief.***—Appeal by State against acquittal under Section 85 of Gold (Control) Act, 1968. Non acceptance of superintendent, Custom's belief, seized article not smuggled Gold. Question about seizure, Not open to Judicial review. *Held,* Custom Official right in reasonable belief. *State of Gujarat* v. *Mohanlal Jitamalji Porwal*, AIR 1987 SC 1321 : (1987) 2 SCC 364 : 1987 SCC (Cri) 364 : 1987 CrLJ 1061 : 1987 CrLR (SC) 325 : 1987 (2) SCR 677 : 1987 (2) Scale 598 : 1987 (2) UJ 129 : 1987(1) Bank CLR 226 : 1987 (2) Crimes 1 : 1987 CAR 208.

[11795] ● ***Smuggled goods—Reasonable belief of customs officer seizing foreign made watches.***—The evidence in the present case discloses that all the wrist watches are having foreign marks. The Customs Officers, taking into consideration the various impelling circumstances appearing in the case, have arrived at the conclusion on a reasonable belief that these goods are smuggled goods. As rightly pointed out by learned Addl. Solicitor General, the respondents from whom these contrabands were seized have not satisfactorily discharged the burden of proof cases upon them as required by Section 123 of the Customs Act that they are not smuggled goods. When the facts of the case are examine the light of the dictum laid down by this Court, we have no compunction. In coming to the conclusion that the prosecution has established its case. *Union of India* v. *Shyamsunder*, AIR 1994 SC 485 : (1994) 74 ELT 197.

[11796] ● ***Accused found in possession of silver ingots when.***—Where the accused is found in possession of silver ingots in notified areas the burden is on the accused to prove that either he does not know about the existence of ingots or is unconnected with the same. *Dev Chand Kalyan Jandel* v. *State of Gujarat,* AIR 1996 SC 2787 : 1996 (6) SCC 255 : 1996 SCC (Cri) 1303 : 1996 CrLJ 4147 : JT 1996 (7) SC 256 : 1996 (6) Supreme 151.

[11797] ● ***Gold-biscuits found in possession of respondent liable for confiscation.***—The Appellate Authority itself did not choose to rely upon any presumption available under S. 123 of the Customs Act but proceeded to consider and rely upon the material that was available to establish that on the date of arrest the respondent was in possession of unmarked gold biscuits; in regard to origin of which or importation of which the respondent was either ignorant or was not willing to divulge and remained evasive. The authorities also have taken note of other materials on record to which we have made reference and which in our opinion, are sufficient in the circumstances of this case to come to the conclusion that the gold found in possession of the respondent is liable for confiscation and the respondent was liable for the penalty *de hors* the presumption contemplated under Section 123 of the Customs Act. *Union of India* v. *Rajendra Prabhu*, AIR 2001 SC 1672 : (2001) 4 SCC 472 : 2001 SCC (Cri) 745(751).

15. SECTION 125

[11798] ● ***Section 125.***—Under Section 125(1) of the Act, the Collector of Customs has discretion to give option for redemption of confiscated goods on payment of such fines as might be determined by him, having regard to the facts and circumstances of the case. It was just, fair and proper for the authority to have addressed himself to the question of giving the said option. The Matter is, therefore, remitted to the Collector of Customs for determining as to whether or not to give option to redeem the confiscated goods on payment of such fine as may be considered appropriate by him *in lieu* of confiscation. *Hargovind Das K. Joshi* v. *Collector of Customs*, AIR 1987 SC 1982 : (1987) 2 SCC 230 : 1987 SCC (Cri) 343 : 1987 CrLR (SC) 543.

[11799] ● ***Redemption fine—Imposition of.***—It is an admitted fact that the goods were released to the appellants on an application made by it and on the appellant executing a bond. Under these circumstances, of subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine. *Weston Components Ltd.* v. *Commissioner of Customs, New Delhi*, AIR 2000 SC 561 (562) : (2000) 1 SCC 565.

16. SECTION 129-E

[11800] ● ***Section 129-E.***—Section 129-E of the Customs Act, 1962 provides a conditional right of appeal in respect of an appeal against the duty demanded or penalty levied. Although the section does not expressly provide for rejection of the appeal for non-deposit of duty or penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty, pending the appeal, failing which the Appellate Tribunal is fully competent to reject the appeal. In the instant case, the only substantive right is the right of appeal as contemplated under Ss. 129-A and 129-E of the Customs Act and that right is a conditional one and the Legislature in its wisdom has imposed that condition. No question of whittling down that right by an alteration of procedure arises in this case. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and *quasi*-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right – Constitutional or statutory - without any right of appeal, as such if the statute gives a right to appeal upon certain conditions, it is upon fulfillment of these conditions that the right becomes vested and execrcisable to the appellant. The proviso to Section 129-E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit or to reduce. It is a discretion vested in an obligation to act judicially and properly. *Vijay Prakash D. Mehta and Jawahar D. Mehta* v. *Collector of Customs (Preventive) Bombay*, AIR 1988 SC 2010 (2012, 2013) : (1988) 4 SCC 402 : 1989 CrLR (SC) 75 : JT 1988 (3) SC 435 : (1988) 2 UJ (SC) 609.

17. SECTION 132

[11801] ● ***Allegations of commission of offence of false declaration and false documents committed under IPC.***—The plea raised that since the allegation in the complaint related to false declaration and false documents, the appellant could be prosecuted only under Section 132 of the Customs Act and not under the offences covered by the Indian Penal Code was unsustainable. Merely because there may be some overlapping in the two offences, it does not mean that the appellant cannot be tried under the offences covered under the Penal Code. *M. Natarajan* v. *State*, (2008) 8 SCC 413 : (2008) 3 SCC (Cri) 507 : JT 2008 (6) SC 451.

18. SECTION 135

[11802] ● ***Section 135.***—Initiation and continuances of proceedings for imposition of penalty for a person complicity in the smuggling of gold would not amount to a contempt of Court, though his trial in a criminal Court for offences under Section 135(b) of the Act and other similar offences were imminent and identical issues would arise in the proceedings before the custom authorities and the criminal Court. *Tukaram Gaokar* v. *B.N. Shukla*, AIR 1968 SC 1050 : 1968 CrLJ 1234 : (1969) 1 SCA 189 : (1968) 3 SCR 422.

[11803] ● ***Accused in conscious possession or keeping of smuggled gold.***—The High Court overlooked several tell-tale circumstances appearing in evidence which unerringly pointed to the conclusion that the gold in question was smuggled gold. These circumstances are : *(a)* The gold biscuits in question bore foreign markings which proclaimed their foreign origin; *(b)* This gold was of 24 carat purity which was not available in India at the material time. This circumstance reinforces the inference of its being smuggled gold; *(c)* These gold biscuits were found concealed and stitched in the folds of jacket specially prepared for this purpose; *(d)* The gold, was in the shape of gold biscuits and was of huge value, which at the then prevailing market rate, was Rs. 1,85,000; *(e)* After the seizure of this gold the accused absconded and continued to be a fugitive from justice till March 4, 1962. The circumstances catalogued above irresistibly lead to the conclusion that the gold in question is smuggled gold, having been recently brought into India from a foreign country without payment of duty, and further it had been brought into India in contravention of the notification dated March 25, 1947 issued by the Central Government under Section 89(1) of the Foreign Exchange Regulation Act, 1947 prohibiting the import into India of gold without the permission of the Reserve Bank. In view of the above facts and circumstances, it was for the accused-respondent to show that it had been brought into India with the permission of the Reserve Bank. The existence of this fact *viz.*, whether it had been imported with or without the necessary permission of the Reserve Bank, was a matter within the peculiar knowledge of the accused-respondent. It was, therefore, for the accused to rebut the inference which arose under Section 114, Evidence Act from the surrounding circumstances of the case, that it was contraband gold, smuggled into India. Once it is held that the accused was in conscious possession or "keeping" of this smuggled gold, it will follow as a necessary corollary therefrom that he had the *mens rea* requisite under cls. (*a*) and (*b*) of Section 135(1), Customs Act. *State of Maharashtra* v. *Natwarlal Damodardas Soni*, AIR 1980 SC 593 : (1980) 4 SCC 669 : 1980 SCC (Cri) 98 (106-107) : 1980 CrLJ 429 : 1980 CrLR (SC) 105 : (1980) 2 SCR 340 : 1980 UJ (SC) 171.

[11804] ● ***Requisite guilty knowledge or mens rea to be established by circumstantial evidence.***—The requisite guilty knowledge or *mens rea* under cls. (*a*) and (*b*) of Section 135(1). Customs Act can be established by circumstantial evidence, also. In order to substantiate the charge under cl. (*b*) against the respondent, the prosecution had to prove:

(*a*) that he had acquired possession of or was in any way concerned in keeping or concealing the gold bars;

(*b*) that he knew or had reason to believe that these gold bars were smuggled goods, and, thus liable to confiscation under Section 111 of the Customs Act. It is trite law that even in cases where Section 123(1) of the Customs Act is not attracted, the prosecution can discharge its burden by establishing circumstances from which a prudent man, acting prudently, may infer that in all probability, the goods in question were smuggled goods, and the accused had the requisite guilty knowledge in respect thereof. *State of Maharashtra* v. *Natwarlal Damodardas Soni*, AIR 1980 SC 593 : (1980) 4 SCC 669 : 1981 SCC (Cri) 98 (105) : 1980 CrLJ 429 : 1980 CrLR (SC) 105 : (1980) 2 SCR 340 : 1980 UJ (SC) 171.

[11805] ● ***Imposition of fine in lieu of confiscation—Discretion of custom authorities.***—Of course, the fine to be imposed *in lieu* of confiscation is in the discretion of the customs authorities but it would be unfair if the punishments awarded respectively to the appellants and the licensee mills were glaringly disproportionate when, as would appear from the facts summarised above both were guilty of trafficking in licence. *Jayantilal K. Katakia* v. *P. Govindan Nair*, AIR 1981 SC 1196 : (1981) 2 SCC 423 : 1981 SCC (Cri) 458 (462) : 1981 CrLR (SC) 508.

[11806] ● ***Accused mature person convicted for smuggling large quantity of gold.—Not entitled to benefit under Section 4 of probation of Offender Act.***—The respondent was convicted for an offence under clause (a) read with clause (i) of Section 135 of the Customs Act, another under clause (b) read with clause (i) of that Section and still another under Rule 126-H (a) read with Rule 126-P(ii) and (iv) of the Defence of India Rules and was sentenced to various terms of imprisonment and fine. The conviction recorded against and the sentence imposed upon the respondent were challenged by him right upto this Court which remanded the case to the High Court for a fresh decision. Before the High Court, the only prayer made was that the respondent be given the benefit of Section 4 of the probation of Offenders Act. That prayer was accepted by the High Court. However, the fact that such offence have become rampant and have already endangered the economy of the nation is part of current history and the Supreme Court cannot look upon the present state of affairs with equanimity and deal with the commission of such offences leniently. In this view of the matter, recourse to Section 4 of the Act was not at all called for. *State of Maharashtra* v. *Kapur Chand Kesarimal Jain*, AIR 1981 SC 927 : (1981) 2 SCC 458 : 1981 SCC (Cri) 491 : 1980 CrLR (SC) 506.

[11807] ● ***Export of silver without licence.***—The words "with respect to such goods" occurring at the end of cl. *(a)* of Section 135(1), Customs Act are not limited only to goods falling within the first part of Section 135(1)(a), that is goods on which duty is chargeable but it refers to any goods in respect of which prohibition is imposed under the Customs Act 1962, or any other law for the time being in force. A fishing vessel loaded with huge quantity of silver ingots on way to an Island to load the silver to a ship going to Dubai was intercepted by Customs official after hot chase. No duty was chargeable on export of silver, still the accused was answerable under Section 135(1)(a)(ii). The ingredients of Section 135(1) (a) explained. *Asstt. Collector of Customs* v. *Babu Miya Seith*, AIR 1983 SC 974 : (1983) 3 SCC 447 : 1983 SCC (Cri) 662 : 1983 CrLJ 1494 : 1983 CrLR (SC) 434 : (1983) 2 Crimes 281 : 1983 ELT 1666.

[11808] ● ***Sentence—Modified to period already undergone.***—It was brought to our notice that appellant Suraj Mal Saraf is aged about 80 years and Raj Kumar Mehra is aged about 65 years, that both of them are of indifferent health; that they have undergone the ordeal of trial and subsequent proceedings for nearly 25 years and as such the appellants may not be sent back to Jail. Accordingly we modify the sentence awarded to the appellants the period of imprisonment already undergone by them. *Suraj Mal Saraf* v. *Assistant Collector of Customs Amritsar*, AIR 1987 SC 1158 : (1987) 2 SCC 283 : 1987 SCC (Cri) 348 (349-350) : 1987 CrLJ 1057 : 1987 CrLR (SC) 193.

[11809] ● ***Sentence—Reduction of.***—In the instant case, we take into consideration his advanced age (65 years here) and the passage of time and reduce his substantive sentence from five years R. 9 to three years R. 9 and enhance the fine from Rs. 5000 to Rs. 20,000 and in default sentence to one year should be fail to pay the fine. *Mehtab Singh Gulati* v. *State of Gujarat*, AIR 1991 SC 1925 : 1991 SCC (Cri) 1044 (1045) : 1991 Supp (2) SCC 391 : 1991 CrLJ 2325.

[11810] ● *Statement before customs authorities not to be used for corroboration of co-accused.*—Statement given before the custom authorities is not to be used for the corroboration of the evidence of the co-accused turned prosecution witness. Accused cannot be convicted solely on such evidence. *Superintendent of Customs* v. *Bhanabhai Khalpabhai Patel*, AIR 1992 SC 1538 : 1992 CrLJ 2516 : JT 1991 (2) (SC) 305.

[11811] ● *Sentence—Reduction of.*—In view of the existence of mitigating circumstances—This Court reduces the sentence to period already undergone and increased the fine. *Rohit Kumar Mehra* v. *Asstt. Collector, Customs*, 1994 SCC (Cri) 154 (SC).

[11812] ● *Bar on acquiring specified goods within specified area.*—Sub-section (2) of Section 11-J, Customs Act prescribes a bar on acquiring any specified goods within the specified area unless before making such acquisition, he delivers to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored, after such acquisition. *Per se* this will amount to be prohibition in acquiring specified goods within the specified area, the value whereof exceeds fifteen thousand rupees, unless the conditions for such acquisition are fulfilled with. There is no dispute in the present case that the appellant, never before making acquisition, delivered to the proper officer any intimation in respect of acquisition, of those silver ingots and the place where such silver ingots were proposed to be kept or stored after the acquisition. In this background, there should not be any difficulty in holding that the appellant was concerned in fraudulent evasion or attempt at evasion of the aforesaid prohibition under sub-section (2) of Section 11-J in relation to specified goods. *Bhanbhai Khalphabhai* v. *Collector of Customs*, 1994 Supp (2) SCC 143 : 1994 SCC (Cri) 882 (887).

[11813] ● *Charge of carrying silver without any transport voucher within specified area.*—The fact that accused was found to be inside the vehicle from which the silver ingots were recovered; the fact that the vehicle did not stop even though customs authorities signalled for stopping; the fact that two Courts below disbelieved the plea of accused, Devanchand about the break down of his fiat car and he is taking an innocent lift by the ambassador car from the secret pocket of which the silver ingots were recovered; and that the place from where recovery was made is undoubtedly a place within the notified area under Section 11 K of the Act and further that there was no transport voucher as required under Section 11 K of the Act, unhesitatingly pointing towards the complicity of the accused in the commission of the offence under Section 135(1) and the presumption. Under Section 138-A having been rightly attracted. The burden lay on the accused appellant to establish that either he did not know about the fact of silver ingots being transported in the vehicle or that he was in no way connected with the same. But the accused utterly failed to discharge the said burden. The conviction must be held to be well founded and the sentence passed thereunder is wholly justified. *Devchand Kalyan Tandel* v. *State of Gujarat*, AIR 1996 SC 2787 : (1996) 6 SCC 255 : 1996 SCC (Cri) 1303 : 1996 CrLJ 4147.

[11814] ● *Presumption as to culpable mental state under Section 138-A of Custom Act—Raising of.*—It is, no doubt true that in a charge for violation of the provisions of Section 135-(1)(a) it is required for the prosecution to establish that the accused have fraudulently evaded or attempted to evade any duty chargeable on the goods or that violated the prohibition imposed under the Act in respect of the goods. But if the prosecution establishes the aforesaid facts then there is no necessity of attracting the statutory presumption under Section 135(1)(a). But the Legislature having found it difficult to establish the necessary ingredient of such evasion of duty or prohibitions and the economic offences having grown in proportion beyond the control, came forward with the presumption available under Section 138-A of the Act. The main object of Section 138-A is to raise a presumption as to culpable oriental state or the part of the accused when he is prosecuted in a Court of law. In other words, if a recovery is made from the accused of any prohibited goods within the notified area then the statutory presumption would arise that he was knowingly concerned in the fraudulent evasion or attempted evasion of any duty chargeable on the goods in question. *Devchand Kalyan Tandel* v. *State of Gujarat*, AIR 1996 SC 2787 : (1996) 6 SCC 255 : 1996 SCC (Cri) 1303 : 1996 CrLJ 4147.

[11815] ● *Sentence reduction of—To period of imprisonment already undergone.*—The prosecution has established that the appellant was concerned in an attempt at evasion of duty under the provisions of the Act, as such committed the offence under first part of Section 135(1)(*a*) of the Act. He was also concerned in evasion of the prohibition imposed by sub-section (2) of Section 11-J of the Act, by not having delivered to the proper officer, an intimation containing the particulars of the place, where the silver ingots, in such a huge quantity were to be kept and stored.

as such he committed the offence even under the second part of Section 135(1)(*a*) of the Act. The very fact that 3274.98 kgs. of silver ingots worth more than rupees 18 lakhs had been kept buried near the well in the garden, leads to irresistible conclusion that the said silver ingots had not been kept or stored in normal course of business.

The appellant in this case had already undergone imprisonment for nearly five months. The offence is under Section 135 of the Customs Act on the allegation that he was found in possession of 48 wrist watches costing about Rs. 22000/- incident happened on 1st January, 1976. It is not necessary to confirm the sentence of one year imposed on him due to this distance of time and also due to the broad aspect involved in this case including the value of the contraband seized from him. The sentence is reduced to the period of imprisonment which appellant has already undergone. *Udai Kant Jha* v. *Union of India*, AIR 2000 SC 3641 : (2000) 9 SCC 199.

[11816] ● ***Release of petitioner on bail on executing bail bond.***—In the instant case a poor lady of foreign country who has been arrested for offences under Sections 132 and 135 is kept as undertrial for two long years. It is totally unjust to keep such persons as undertrials for years together on the allegation that the petitioner is involved in smuggling activities for which no other prosecution is pointed out to be pending. Further, to impose a condition that the petitioner shall execute a bail bond for a sum of Rs. 6 lakhs would be unjust in a circumstance of the present case, considering the aforesaid facts it is ordered that the petitioner shall be released on bail on her executing a bail bond for a sum of Rs. 10,000/- with one surety. *Olga Kozirena* v. *Department of Customs*, (2002) 10 SCC 373 : 2004 SCC (Cri) 1126 (1127).

[11817] ● ***Scope of Section 135.***—Section 135(1)(a) of the Act is in two parts. The first part relates evasion of duty, the second part relates to prohibitions. The word "or" used therein must be read disjunctively and not conjunctively. *Gurcharan Singh* v. *Directorate of Revenue Intelligence*, (2008) 17 SCC 28 : 2008 CrLJ 2238 (SC) : JT 2008 (4) SC 383 : 2008 (5) SCR 856.

[11818] ● ***Complaint for offences—Allegations disclosing prima facie case—High Court refused to quash proceedings.***—In the instant case, it was alleged that the accused including a custom officer conspired in regard to export of inferior quality of ready-made garments which had been over-invoiced. The High Court correctly refused to quash the proceedings, as the allegations made out a *prima facie* case disclosing an offence under Section 135 of the Act. *Gurcharan Singh* v. *Directorate of Revenue Intelligence*, (2008) 17 SCC 28 : 2008 CrLJ 2238 : 2008 (5) SCR 856 : JT 2008 (4) SC 383.

19. SECTION 137

[11819] ● ***Compounding of offences—Basic requirement.***—For compounding of offences under Section 137(3), the disclosure, which is the basis and requirement of compounding of offences, has to be in relation to the facts of the case. Compounding authority must be satisfied that the applicant has done all he could or need to do in the matter. If there are demonstratable contradictions or inconsistencies or incompleteness in the case of applicant, the application for compounding of offences under Sections 137(3), 135(1)(a) and 132 of the Customs Act, is liable to be rejected. *Union of India* v. *Anil Chanana*, (2008) 4 SCC 175 : 2008 (2) SCC (Cri) 761 : 2008 (2) SCR 1 : JT 2008 (2) SC 1.

[11820] ● ***Compounding of offences—Requirement.***—The applicant has to be one-time evader and has to make clean breast of his affairs. *Union of India* v. *Anil Chanana*, 2008 (2) SCC (Cri) 761 : JT 2008 (2) SC 1.

20. SECTION 138-A

[11821] ● ***Section 138-A.***—Section 138-A had come in force before the trial commenced. The provision relates only to burden and nature of proof at the trial, as such it was applicable in the present case. In view of the aforesaid section, a presumption has to be drawn, in respect of existence of the alleged mental state. An option has been given to the accused to prove by way of defence the fact, that he did not have any such mental state with respect to the act charged which is an offence. It can be said that the provision aforesaid is an exception to the general criminal jurisprudence that onus never shifts on the accused and he has only to raise a doubt in the mind of the Court, in respect of the correctness of the prosecution version. It is different from Sections 106 and 114 of the Evidence Act. In view of Section 138-A, once a presumption is raised about a culpable mental state on the part of the accused, that he had stored the silver ingots, to export them outside the country evading payment of custom duties, the accused has to prove as defence that no such mental state with respect to the act charged, did exist. No material has been produced on behalf of the appellant to discharge this burden. He had not explained as to why 3274.98 kgs. of silver ingots, worth rupees more than 18 lakhs had been concealed underground near a well in his *Wadi* without any intimation being given to the proper officer concerned, before acquisition of those silver ingots as required by sub-section (2) of Section 11-J. *Bhanabhai Khalpabhai* v. *Collector of Customs*, 1994 Supp (2) SCC 143 : 1994 SCC (Cri) 882 (887).

21. SECTION 151

[11822] ● ***Section 151.***—Section 151 of the Customs Act empowers and requires certain specified officers enumerated under clauses (a) to (e) to assist officers of the customs in the execution of the Act one of the officers enumerated under clause (c) is "officers of police". But this section does not empower Police Officers to exercise the powers conferred upon Customs Officers by and under the Act but only authorities and requires the Police Officers to assist the Customs Officers in the exercise of their powers. The "proper officer" referred to in various provisions of the Customs Act, who is to perform any function under the said Act, means the Officer of Customs who is assigned those functions by the Board or Collector of Customs as defined under cl. (34) of Section 2 of the Customs Act, but it does not include the Officers of Police or any other Officers enumerated under Section 151. Therefore, the Police Officers have no independent role to play in exercise of the powers under the Customs Act as in Ss. 45 and 46 of the Foreign Exchange Regulation Act. *Directorate of Enforcement* v. *Deepak Mahajan*, AIR 1994 SC 1775 : (1994) 3 SCC 440 : 1994 SCC (Cri) 785 : 1994 CrLJ 2269.

22. SECTION 155

[11823] ● ***Section 155.***—It is, however, necessary to indicate a note of caution in the matter of consideration of protection against criminal liability if sought for under Section 155 of the Customs Act at the threshold of the Criminal Trial. Since such immunity is claimed at the threshold, the Court should carefully scrutinise the relevant facts and materials placed before it for the purpose of finding (a) that the concerned officer was authorised to act for prevention of smuggling activity and in fact had *bona fide* acted in exercise of his duties and functions in preventing the smuggling activities being carried or about to be carried, (b) there are *prima facie* materials to indicate that such officer had honestly attempted to stop the conveyance for effecting search of the same, (c) that such an attempt to stop the vehicle was sought to be frustrated either by not stopping the vehicle or by attempting to forcibly take away the vehicle despite attempt by the concerned officer to stop the vehicle, and (d) that recourse to use of force on the driver or occupant of the vehicle was apparently necessary to immobilise the vehicles or to save himself from imminent danger of personal risk. If on consideration of the materials placed before the Court, a possible view can be objectively taken that in discharge of the duties and functions under Section 106 of the Customs Act that a competent officer had *bona fide* used force and such use of force is not just a ruse for high handed action on his part which was not at all necessary in the facts of the case but *prima facie* there is justification for the course of action pleaded by the officer, the Court would give effect to the protection under Section 155 of the Customs Act by dropping the criminal case initiated against the concerned officer. The facts already on record, some of which have been indicated in the judgment of my learned brother, indicate that the appellant was on official duty as preventive officer to look out for smuggling activities at the relevant time and in discharge of his official duties he had chased a speeding contessa car driven by the deceased in an attempt to stop the car for searching the same. As a matter of fact, he overtook the car and having disclosed his identity asked the deceased to stop the car but when the driver had attempted to flee with the car, he jumped into the same and tried to take out the ignition key in order to stop the vehicle. It has not been revealed that appellant had received various injuries including incised wounds which on the basis of medical report are likely to have been caused at the time when attempt to stop car was made. Such facts *prima facie* support the appellant's claim for the protection under Section 155 of the Customs Act. In the facts of the case, it will not be proper to disallow such protection under Section 155 of the Customs Act to the appellant but to subject him to a full fledged trial on a charge of murder by pointing out that it would be open to the appellant to plead for right to private defence in such trial, like any other accused. *Costao Fernandes* v. *State*, AIR 1996 SC 1383 : (1996) 7 SCC 516 : 1996 SCC (Cri) 489 : 1996 CrLJ 1723 (SC) : 1996 CrLR (SC) 339 : (1996) 3 Crimes 125 : (1996) 1 CCR 193.

D

DACOITY

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1. APPLICATION OF SECTION 149, IPC

[11824] ● ***Application of Section 149, IPC.***—Framing of a charge under Section 395, r/w Section 149, IPC, is a mere surplusage as an offence under Section 395 would come into existence only when an act of dacoity is committed by 5 or more persons jointly. On consideration of the evidence only three of the appellants are found guilty under minor offences. *Musakhan* v. *State of Maharashtra*, AIR 1976 SC 2566 : (1977) 1 SCC 733 : 1976 CrLJ 1987 : 1976 CrLR (SC) 466.

2. ATTEMPT TO COMMIT DACOITY (SECTION 398, IPC)

[11825] ● ***Attempt to commit dacoity.***—Different words are used in to sections, *viz.*, "used" in Section 397 and "is armed" in Section 398; the anomaly is resolved if the two terms are given identical meaning. When the offender is armed with a deadly weapon which was within the vision of the fiction so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of dacoity. *Phool Kumar* v. *Delhi Admn.*, AIR 1975 SC 905 : (1975) 1 SCC 797 : (1975) SCC (Cri) 336 : 1975 CrLJ 778 : 1975 CrLR (SC) 272 : 1975 All CrC 219.

[11826] ● ***Mere scattering of articles in house does not constitute offences of robbery or dacoity.***—When no robbery or dacoity has been committed as such, in the sense that no property was removed from the house of the complainants and nothing said to be belonging to the complainants was recovered, it would be difficult to hold that there was any attempt in regard to the commission of robbery or dacoity. Scattering of articles in the house may cause a scene as if ransacked, but that does not prove the charge, on the evidence, the conviction of the appellant under Section 398, IPC is not sustainable. *Chinnadurai* v. *State of T.N.*, AIR 1996 SC 546, at p. 547 : 1996 (1) CCR 153.

3. ESSENTIALS

[11827] ● ***Essentials.***—The essential element of the offence of dacoity under Section 395 is that five or more persons must be concerned in the commission of robbery or in the attempt to commit it. The combined effect of the definitions of robbery and dacoity in Sections 390 and 391 is that if theft is in fact committed by five or more persons conjointly, and if while the offenders are carrying away the property obtained by theft, any one of them voluntarily causes or attempts to cause death or hurt or fear of instant death or hurt, each one of the offenders is said to commit "dacoity". *Shaym Behari* v. *State of U.P.*, AIR 1957 SC 320 : 1957 CrLJ 416.

[11828] ● ***Accused running away without committing robbery.***—When a murder is committed by one of the dacoits at the time when they are chased, say by shooting at or by giving a knife blow to some one of the pursuers, and he and his companions are charged under Section 396 for the offence of dacoity with murder, the first question which the Court has to determine is whether at the time when the murder took place the dacoits were running away with looted property or were running away empty-handed. If at the time when the murder took place, the dacoits were running away with the property obtained in the loot, each one of them would be guilty under Section 396 of the offence of dacoity with murder, whatever be the distance of the spot where the murder was committed from the scene of the dacoity and whatever the gap of time between the two, because the act of dacoity continues in law as long as the looted property is being carried away. On the other hand, if the dacoity has failed and the offenders are running away empty-handed, while they are being chased, and then one of them commits the murder of someone of the persons who are chasing them, it becomes a question of fact in each case whether the others could be held guilty under Section 396. In such a case the question whether the transaction of dacoity was still continuing right up to the time when the murder took place or whether it was completed before then, will depend upon the facts and circumstances of each case, and in determining that question the Court will have to take into consideration factors such as the lapse of time, the distance of the pursuit, the break in the pursuit, *etc.*, *etc.* If after considering all the circumstances, the Court concludes that the transaction of dacoity was still continuing, the others will be guilty under Section 396, and if not, they will be guilty under Section 395 only, even though the principal offender is convicted under Sections 396 and 302. *Shyam Behari* v. *State of U.P.*, AIR 1957 SC 320 : 1957 CrLJ 416.

[11829] ● ***Accused while carrying away stolen property exploded crackers to frighten inmates of house—Conviction.***—The appellants have been rightly convicted under Section 395, IPC because while carrying away the stolen property they exploded crackers to frighten the inmates of the house who wanted to pursue them. *Kusho Mahton* v. *State of Bihar*, AIR 1980 SC 788 : 1980 Supp SCC 344 : 1981 SCC (Cri) 279 (280) : 1980 CrLJ 313.

4. ASSEMBLING FOR PURPOSE OF COMMITTING DACOITY (SECTION 402, IPC)

[11830] ● ***Assembling for purpose of committing dacoity.***—Prosecution evidence merely showed, that eight persons were found in the school premises, some of them armed with guns, some had cartridges and others ran away. The mere fact that these persons were found at 1 a.m. does not, by itself, prove that the appellants were there for the purpose of committing dacoity or for making preparations to accomplish that object. The High Court itself observed that the school was quite close to the market and hence it was difficult to believe that the appellants would assemble at such a conspicuous place with the intention of committing a dacoity and would take such a grave risk. There was no legal evidence to support the charges against the appellants. Possibility that they might have collected for the purpose of murdering somebody or committing some other offence could not be safely eliminated. Decision of the Patna High Court was reversed. *Chaturi Yadav* v. *State of Bihar,* AIR 1979 SC 1412 : (1979) 3 SCC 430 : 1979 SCC (Cri) 502 : 1979 CrLJ 1090 : 1979 CrLR (SC) 369 : 1979 BBCJ (SC) 61 : 1979 UJ (SC) 404 : 1979 BLJR 519.

5. CONVICTION OF LESS THAN FIVE PERSONS

[11831] ● ***Conviction of less than five persons.***—If some of the accused are acquitted, not because of a doubt as to their identity, but because of doubt as to their participation in the offence, and as a result the number of the accused who are left in becomes less than five, the charge under Section 395 must be held to have fallen through, and the only question which remains is whether the accused who are left in can be convicted for the offence of robbery under Section 392, or Section 392 read with Section 34. The Court must, in such a case, carefully examine the evidence against each remaining accused, in the same manner as if he had been originally charged under Section 392 or 392/34. It is only when the Court is satisfied that the evidence on record clearly establishes beyond doubt against each of the remaining accused that he was concerned in the act of robbery or participated in its commission, that he can be convicted of that offence. Every one of those accused against whom there is no such clear evidence must be given the benefit of doubt and must be acquitted. *Ram Shankar Singh* v. *State of U.P.*, AIR 1956 SC 441 : 1956 CrLJ 882.

[11832] ● ***Robbery offence of conviction converted from under Section 395 to one under Section 392.***—When the charge under Section 395 fails for the reasons stated above, each one of the remaining accused can be convicted under Section 392 only on the strength of his own individual acts, and if the prosecution fails as to any of them to prove the active or passive part he played in the commission of robbery, he must be acquitted on the charge of robbery as well. The same principles will apply equally to a case in which the Sessions Court has convicted five or more accused under Section 395, and on appeal the High Court acquits some of them, so that the question arises whether the legality of the conviction under Section 395 of the remaining accused whose number is less than five could be sustained.

In such a case, the question depends upon whether, on the facts of the case, it could be held that the offence of robbery was definitely committed by five or more persons and some of the accused who were convicted by the trial Court have been acquitted by the High Court only because of a doubt, as to their identity, or whether the prosecution case throughout was that the accused charged were the only persons concerned in the offence, and the High Court having acquitted some of them because of a doubt as to their participation in the offence, the number of the remaining convicted accused falls below five. In the former case, the conviction of even less than five accused on the charge of dacoity under Section 395 does not suffer from any illegality. But in the latter case, such conviction would be illegal, and the remaining accused can legally be convicted only under Section 392 for the offence of robbery. In such a case, the proper thing for the appellate Court to do is to convert their conviction from under Section 395 to one under Section 392. *Ram Shankar Singh* v. *State of U.P.*, AIR 1956 SC 441 : 1956 CrLJ 822.

[11833] ● ***Dacoity—Charge sustainable when presence of at least five of accused proved.***—When five or more persons are charged under Section 395, Penal Code, and the prosecution case is that the accused before the Court and they alone were concerned in the offence, that is, when the charge against the accused does not state that they committed dacoity along with some other persons who are untracked or are unknown, the charge under Section 395 can be sustained, only when at least five of the accused are proved to have been concerned in the offence. *Ram Shankar Singh* v. *State of U.P.*, AIR 1956 SC 441 : 1956 CrLJ 822.

[11834] ● ***Conviction of less than five not illegal when some acquitted.***—In a case where 5 or more were charged under Section 395, IPC but some of them are acquitted because of a doubt as to their identity, the conviction of even less than five accused under Section 395 is not illegal. *Ram Shankar Singh* v. *State of U.P.*, AIR 1956 SC 441 : 1956 CrLJ 822.

[11835] ● ***Three out of six not found guilty, conviction of remaining when.***—High Court having come to the conclusion that three out of the six accused were not guilty, should have gone into the question whether there was satisfactory evidence to show that the three remaining accused could be convicted under Section 395, Penal Code, on the charge as framed. In any event the three remaining accused could be convicted of the lessor offence of robbery under Section 392, Penal Code if there was evidence to show that they had committed acts of theft and used violence while committing the theft. *Ram Shankar Singh* v. *State of Uttar Pradesh*, AIR 1956 SC 441 : 1956 CrLJ 822.

[11836] ● ***Dacoity—Conviction of less than five can be sustained.***—Where the charge is that apart form the named 7 or 8 persons where were 5 or 6 others who had taken part in the commission of dacoity, the circumstances that all except the 3 accused have been acquitted by the High Court will not militate against the conviction of those three accused for dacoity, where the High Court held that the identity of the accused, acquitted could not be established and did not find that the group which committed robbery in the house of the complainant consisted of less than 5 persons. *Saktu* v. *State of U.P.*, AIR 1973 SC 760 : (1973) 1 SCC 202 : 1973 SCC (Cri) 307 : 1973 CrLJ 599.

[11837] ● ***Dacoity—Conviction of appellant alone—Sustainability.***—In a case of dacoity, the appellant was tried along with 8 others who alone were named in the FIR as having committed the offence. The appellant was convicted while all others were acquitted. Conviction of the appellant alone is unsustainable as assembly of 5 persons is necessary, to make out the offence under Section 395. *Ram Lakhan* v. *State of U.P.*, AIR 1983 SC 352 (1) : (1983) 2 SCC 65 : 1983 SCC (Cri) 339 : 1983 CrLJ 691 (1) : 1983 CrLR (SC) 191 : 1983 ALJ 283 : 1983 CrAppR (SC) 123 : (1983) 2 Chand LR (Cri) 1 : 1983 BBCJ (SC) 51 : (1983) 1 Crimes 734 (2) : 1983 UPCrR 147 (1).

[11838] ● ***No finding recorded by Trial Court that accused and two other unknown persons committed dacoity.***—Neither the charge nor the finding recorded by the Trial Court was that accused-Om Prakash, Munna, Amarjit Singh and two other unknown persons had committed dacoity. Specifically, the five named accused were alleged to have committed the offence. Two accused having been acquitted it ought to have been appreciated that only the remaining three accused had committed the said offence. Therefore, it was not proper to convict the remaining three accused under Section 395, IPC. Their conviction will have to be altered to one under Section 392, IPC. *Om Prakash* v. *State of Rajasthan*, AIR 1998 SC 1220 (1221) : 1998 SCC (Cri) 696 : 1998 CrLJ 1636 : 1998 CrLR (SC) 164 : JT 1998 (1) SC 395 : (1998) 1 Crimes 139.

[11839] ● ***For sustaining conviction under Section 395, IPC—Finding sine qua non that appellant committed robbery.***—For sustaining a conviction under Section 395, IPC, a finding is *sine qua non* that the appellants have committed the offence of robbery and if the number of the assailants crossed the figure of five the offence would escalate to Section 395, IPC. *Krishna Gopal Singh* v. *State of U.P.*, AIR 2000 SC 3616 : 2000 SCC (Cri) 93 (494).

[11840] ● ***Presence and participation of two out of six accused persons doubted by Court—No conviction.***—"In the instant case, earlier, there were six accused. Out of those six accused, two were acquitted by the trial Court without recording a finding that though offence of dacoity was committed by six persons, identity of two accused could not be established. They were simply acquitted by the Court. In our opinion, therefore, as per settled law, four persons could not be convicted for an offence of dacoity, being less than five which is an essential ingredient for commission of dacoity. Moreover, all of them were acquitted for an offence of criminal conspiracy punishable under Section 120-B, IPC as also for receiving stolen property in the commission of dacoity punishable under Section 412, IPC. The conviction of the appellant herein for an offence punishable under Section 396, IPC, therefore, cannot stand and must be set aside.

For the foregoing reasons, the appeal is allowed. The conviction of the appellant for an offence punishable under Section 396, IPC is set aside and he is ordered to be acquitted. Since the appellant is in jail, he is ordered to be released forthwith if his presence is not required in any other case. *Raj Kumar* v. *State of Uttaranchal*, AIR 2008 SC 3248 : 2008 (11) SCC 709 : 2008 (3) SCC (Cri) 888 : 2008 (5) SCR 1216 : JT 2008 (5) 519 : 2008 (7) Scale 1 : 2008 (3) Recent CR 604.

[11841] ● ***Non-examination of S.O. and glaring discrepancies—Effect.***—In the instant case the High Court, in view of the non-examination of the S.O. who was the architect of facts of the case, and also in view of the glaring discrepancies, set aside the order of conviction. *Held:* "...... in the facts and circumstances of the present case and on the evidence on record, the order of acquittal was reasonably possible to arrive at and that being the position, we do not find any reason to interfere with the judgment of acquittal in the exercise of our jurisdiction under Article 136 of the Constitution. At the risk of repetition, we may also reiterate that the High Court, after consideration of all the evidence and materials on record had come to a conclusion of fact that the prosecution story as made out to convict the accused/ respondents under Sections 399 and 402 of the IPC could not at all be believed and therefore, the
order of conviction of the Additional Sessio
Judge. VIth Court at Etah was needed to
interfered with. There is one further aspect of th
matter. In our view, the High Court was justifi
in drawing an adverse inference against the pros
cution as it had failed to examine the adjoinin
grove holders or land holders who were said
have been present in the grove at the time
occurrence. That apart, it was rightly pointed o
by the High Court that adverse inference ought
have been drawn against the prosecution as adm
ttedly, the persons who were caught on the sp
were caught without any resistance or strugg
from their side. From the judgment of the Hig
Court, it is also evident that the High Court ha
found discrepancies in the examination-in-chi
and the cross-examination of PW-1 as to the tim
of his departure from the Police station and als
as to the fact of his leaving the station with th
S.O., Ram Charan Singh. At this stage, we ma
further reiterate that the Additional Sessio
Judge. VIth Court at Etah, while convicting
accused/respondents had practically relied on th
evidence of PW-1, whose evidence, in fact, wa
rightly not accepted by the High Court in view
the discrepancies found in his evidence. Finall
in our view, the High Court, while reversing th
order of conviction, had also noted other contr
dictions *viz.*, vii, viii and ix, as noted herein ea
lier, which, in our view, are material contradi
tions which would lead to acquitting the accuse
respondents."

"In view of our discussions made here
above, we do not find any ground to interfere wit
the decision of the High Court, which on cons
deration of all the materials on record and th
evidence adduced by the parties had acquitted th
accused/respondents and therefore, no interf
rence is warranted in the exercise of our pow
under Article 136 of the Constitution." *State*
Uttar Pradesh v. *Punni*, AIR 2008 SC 932
(2008) 11 SCC 153 : 2008 CrLJ 1028 : 2008 (
SCR 85 : 2008 (1) Scale 43 : 2008 (1) Suprem
86 : 2008 (1) Crimes 145 (SC).

[11842] ● ***Number of accused persons require***
to establish dacoity.—To prove allegations
dacoity under Section 397, IPC against accuse
persons, the prosecution has to prove that th
accused persons were five or more then five
number. *Amin Khan* v. *State of Rajasthan*, (200
3 SCC 776 : 2009 CrLJ 2266 : JT 2009 (3) SC 4

6. DOUBLE JEOPARDY

[11843] ● ***Double jeopardy.***—The further co
tention that under the Customs Act, 1962 for th

self same contravention the penalty proceedings terminated in favour of the appellant, is of little avail to the appellant for the reason that two Acts operate in different fields, one for contravention of the Foreign Exchange Regulation Act and the second for evasion of customs duty. The mere fact that the penalty proceedings for evasion of the customs duty had ended in favour of the appellant, does not take away the jurisdiction of the enforcement authorities under the Act to impose the penalty in question. The doctrine of double jeopardy has no application. *P.V. Mohammad Barmay Sons* v. *Director of Enforcement*, AIR 1993 SC 1188 : 1993 Supp (2) SCC 724 : 1993 SCC (Cri) 777 (784) : 1993 CrLJ 197 : JT 1992 (4) SC 565.

7. EVIDENCE AND PROOF

[11844] ● ***Evidence and proof.***—The prosecution cannot be permitted to rely on such evidence without placing admissible evidence part of the information on the record. The information given by the accused may be such which if scrutinized shows only his remote connection and not the direct connection. In such a situation evidence of the bare fact of information having been given may be admissible but such evidence may cause serious prejudice. *Ram Kishan Mithanlal Sharma* v. *State of Bombay*, AIR 1955 SC 104 : 1955 CrLJ 196.

[11845] ● ***Person found in possession of stolen property not named by eye-witness or in dying declaration—Conviction.***—Where the person found in possession of stolen property was not named by the eye-witnesses or in dying declaration and no witness claimed to have identified from taking part in dacoity, it can be held that he can only be convicted under Section 411, IPC. *Sheo Nath* v. *State of U.P.*, AIR 1970 SC 535 : 1970 SCC (Cri) 15 : 1970 CrLJ 601.

[11846] ● ***Unknown dacoits committed crime—Circumstantial evidence.***—The theory of some unknown dacoits having committed the crime cannot be believed when a number of villagers came running to the spot and stood outside the main gate of the house in which the dacoity was committed, some of them had torches and it was also a moonlit night, and the accused would have been falsely involved and implicated if they never came to scene of the occurrence. *Brahma Singh* v. *State of U.P.*, AIR 1972 SC 1229 : 1972 CrLJ 763.

[11847] ● ***Finding against accused inconsistent with findings upon which other accused acquitted.***—Where the High Court had found the prosecution case concocted, and the story that the three accused including the appellant had been recognised among the dacoits, doubtful, the conviction of the appellant is inconsistent with the findings upon which it had acquitted all the other accused especially when the ballistic expert was unable to express any definite opinion about one of the two cartridges said to have been fired from the gun alleged to have been recovered form the appellant, and the prosecution failed to prove that the articles were really looted during the dacoity. *Nanhey* v. *State of U.P.*, AIR 1977 SC 783 : (1977) 2 SCC 74 : 1977 SCC (Cri) 241 : 1977 CrLJ 583 : 1977 CrLR (SC) 22 : 1977 SCCrR 136 : 1977 CrAppR (SC) 111.

[11848] ● ***Conviction for having sought to fish in tank belonging to complainant by force.***—According to the prosecution as many as 400 persons variously armed with deadly weapons came to the tank, tried forcibly to take away fishes from the tank and when the witnesses protested they were threatened with dire consequences and even with the fear of death if they tried to interfere with the act of theft sought to be committed by the appellants. The appellants have not produced a single document to show that the tank belonged to the Govt. It is well settled that the question of *bona fide* claim of right arises only where the accused show to the Court's satisfaction that their belief is reasonable and is based on documents or title, however weak it may be. In the instant case, however the appellants sought to fish in the tank by sheer force of arms. For these reasons it is held that the case of dacoity has been made out. *Gedda Raminaidu* v. *State of Andhra Pradesh*, AIR 1980 SC 2127 (2127) : (1980) 1 SCC 676 : 1980 SCC (Cri) 322 : 1980 CrLJ 1477 : 1980 CrLR (SC) 239 : 1980 UJ (SC) 567.

[11849] ● ***Conviction for trying to forcibly take away fish from tank.***—Conviction was for trying to forcibly take away fish from the tank of which the complainant was the lessee. Appellants did not produce a single documents to show that the tank belonged to the Government, or any iota of evidence to support the appellants' stand that they had any *bona fide* claim to the tank. Question of *bona fide* claim of right arises only where the accused show to the Court's satisfaction that their belief is reasonable and is based on some documents of title, however weak it may be. Appeal was dismissed. *G. Raminaidu* v. *State of A.P.*, AIR 1980 SC 2127 : 1980 SCC (Cri) 322 : 1980 CrLJ 1477 : 1980 CrLR (SC) 239.

[11850] ● ***Dacoity—Appreciation of evidence.***—In a dacoity case, the judgment of the trial Court was completely wrong in its approach and the reasons given for acquitting the appellants were totally unsound and legally unsustainable. The High Court was fully justified in reversing the order of acquittal. It was not a case where any other view was possible on the evidence which could be taken by the High Court. Appreciation of evidence, would disclose that the only view possible in the case was, that the appellants had been fully proved to have participated in the dacoity. Appeal was dismissed. *Juggal Gope* v. *State of Bihar*, AIR 1981 SC 612 : (1981) 3 SCC 272 : 1979 SCC (Cri) 499 : 1981 CrLJ 4 : 1979 CrLR (SC) 571 : 1980 Bihar CrC (SC) 171 : 1980 UP CrC (SC) 171.

[11851] ● ***Many inherent improbabilities in prosecution case.***—In the instant case there are many inherent improbabilities in the prosecution case, so far as the participation of appellant is concurred. In the first place, admittedly the appellants is concerned. In the first place, admittedly the appellant was a respectable man in the sense that he was possessed of sufficient means and was a well known homoeopath doctor and also the neighbour of the complainant. In this view of the matter it is difficult to believe that he would commit dacoity in the house of his own neighbour and that too in the early hour of the evening so that he may be caught any moment and take the risk of a conviction under Section 395, IPC. Secondly the evidence of the complainant clearly shows that the dacoits had no doubt concealed their identity but they did it in such a way that their faces were visible. Indeed if the appellant had participated in the dacoity, and taken the precaution of concealing his identity, then he would have seen to it that his face was fully covered so that identification by the complainant or the witnesses would become impossible. If he was a dare-devil then would not had concealed his identity at all. Thirdly, FIR having been lodged the same evening the police visited the house of the appellant next morning and found him there. If the appellant had really participated in the dacoity, he would have at least might himself scarce. The house of the appellant was also searched and nothing incriminating was at all found. Finally there was the important circumstances that in view of a dispute between complainant and the appellant there was a clear possibility of the appellant having been falsely implicated due to enmity. *Lakshman Prasad* v. *State of Bihar*, AIR 1981 SC 1388 : 1981 Supp SCC 22 : 1981 SCC (Cri) 642 (643) : 1981 CrLJ 1010 : 1981 CrLR (SC) 478.

[11852] ● ***Totality of evidence proving commission of offence by accused.***—Where there was long-standing enmity between the accused and the victim party and the offence was committed during midnight and there was sufficient moonlight and lantern light enabling eye-witnesses to identify all the accused, the totality of evidence proved the commission of the offence by the accused. Conviction is proper. *Om Prakash* v. *State of U.P.*, AIR 1983 SC 431 : (1983) 2 SCC 358 : 1983 SCC (Cri) 475 : 1983 CrLJ 831 : 1983 (1) Crimes 804 : 1983 CrAppR (SC) 287 : 1983 (1) CrLC 588 : 1983 UPCrR 215.

[11853] ● ***Dacoity when ruled out one murder taken place inside house—Unreasonable to suspect prosecution version.***—It is on record that the dead bodies were kept inside the house during the right and were brought out in the early morning. It is certainly not suggestive of the fact that the incident might have taken place inside the house on that day. The probability suggested by the accused, on the contrary was that there was dacoity in the house of the deceased in which they must have been murdered. Apparently, this suggestion has no basis. The Investigating Officer did not notice any mark of ransaking or the traces of fire arms inside the house of Muriya Lal. The witnesses have testified to the effect that there was no dacoity in their house. When dacoity is ruled out and when there is not other suggestion that the murder could have taken place inside the house, it would be unreasonable to go on suspecting the prosecution version. *State of U.P.* v. *Ram Swarup*, AIR 1988 SC 1028 : 1988 Supp SCC 262 : 1988 SCC (Cri) 552(557) : 1988 CrLR (SC) 193 : JT 1988 (1) SC 436 : (1988) 2 UJ (SC) 65 : (1988) 1 Crimes 994(2).

[11854] ● ***No corroborative evidence showing involvement of accused in dacoity.***—Where there is no corroborative evidence showing the involvement of the accused in the dacoity and where the evidence regarding their identity is not dependable, they are entitled to the benefit of doubt. Where the name of A-1 was mentioned in the FIR and A-4 and A-7 were already known to the first informant, from whom the money was robbed, recovery of money from these three accused lent corroboration to his evidence as also the evidence of his mother who came along with him. Where the lower Courts doubted the capacity of P.Ws. 1 and 2 to possess Rs. 73,600/- and required them to prove how P.W. 2 had over a period of 10 years saved the said amount notwithstanding the find of Rs. 33,600/- from their residence after their complaint, that Rs. 40,000/- was robbed from them, the approach of the lower Courts is wrong and it resulted in an erroneous conclusion. The acquittal of A's-1, 4 and 7 is set aside and they are convicted under Section 392, IPC though they were charged under Section 395, IPC as the acquittal of the remaining four accused was confirmed. *Suryamoorthi* v. *Govindaswami*, AIR 1989 SC 1410 : (1989) 3 SCC 24 : 1989 CrLJ 1451.

[11855] ● *Persons from whom money demanded not injured though accused persons fired on them.*—Both the witnesses in the instant case deposed that the appellant and the other convicted accused came to their farm house, demanded Rs. 50,000 and when their payment was not met with, the appellant with his pistol fired. These averments in their evidence specifically made against the appellant also find corroboration from the fact, namely, recovery of the pistol alongwith the empties and the missed cartridges. Moreover, the accused were chased and were caught red-handed and the Police-Inspector who came on the spot found them in custody and had formally arrested them and proceeded with the investigation. Therefore, the evidence is sufficient to bring home the guilt to the appellant. *Sukhwinder Singh Alias Jaggi* v. *State of Punjab*, AIR 1994 SC 764(765) : 1994 Supp (3) SCC 727 : 1994 CrLJ 111.

[11856] ● *Dacoity committed by causing injuries.*—In this case the accused, particularly A-2, pleaded that they were innocent and they were going to a neighbouring place and the villagers who were running hither and thither caught hold of them and on suspicion they were implicated. The High Court convicted these two accused solely on the ground that they were caught while running. No recovery was effected from them. There is no material whatsoever that they participated in dacoity or caused injuries to inmates including the witnesses. The explanation given by the accused cannot be rejected outright. It is well-settled that the accused need not prove their plea beyond all reasonable doubt. *Latel* v. *State of Madhya Pradesh*, AIR 1994 SC 763 (764) : 1994 CrLJ 1122.

[11857] ● *Dacoity with murder—Proof of common intention or common object of all not necessary.*—If a dacoit in the progress of and in pursuance of, the commission of a dacoity commits a murder, all of his companions, who are participating in the commission of the same dacoity may be convicted under Section 396, IPC although they may have no participation in the murder beyond the fact of participation in dacoity. It is not necessary that the murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted its commission. Indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be, or had in fact been committed. But nonetheless they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the members of the gang on commission of the dacoity. It is not necessary for the prosecution in such a case to establish either any common intention envisaged in Section 34 or common object contemplated in Section 149 of the IPC. If one of the dacoits committed murder during the commission of dacoity, the tentacles of Section 396 would prance to envelop all the dacoits huddled within its penal circumference and then it would be immaterial that the other dacoits did not share the intention with that person who committed murder. *Kalika Tewari* v. *State of Bihar*, AIR 1997 SC 2186 (2188) : (1997) 4 SCC 445 : 1997 SCC (Cri) 600 : 1997 CrLJ 2531 : 1997 CrLR (SC) 375 : JT 1997 (4) SC 405.

[11858] ● *Identification of assailant by witnesses—Light from earthen lamp.*—The visibility capacity of urban people who are acclamatised to fluorescent lights of incandescent lamps is not the standard to be applied to villagers whose optical potency is attuned to country-made lamps. Their visibility is conditioned to such lights and hence it would be quite possible for them to identify men an matters in such light. A similar view was adopted by this Court in *Machhi Singh* v. *State of Punjab,* AIR 1983 SC 957. For that reason the Court not impressed by the arguments that the light from earthen lamps would not have been sufficient for those witnesses to identify the assailants. *Kalika Tiwari* v. *State of Bihar*, AIR 1997 SC 2186 : (1997) 4 SCC 445 : 1997 CrLJ 2531 : 1997 (2) Crimes 15.

[11859] ● *Extra-judicial confession—Participation of accused established in dacoity.*—Having considered the evidence of the prosecution witnesses, this Court is satisfied that A-1 was one of the dacoits who committed the dacoity at the house of PW 18 and that he had given to stick blows to PW 18 and that he was caught by the village people who had chased the dacoits. Their evidence receive support from dacoits. Their evidence receive support from *extra-judicial* confession made by A-1 himself and thus his participation in the dacoity can be said to have been established by the prosecution beyond any reasonable doubt. The High Court therefore, committed a grave error in acquitting him. As regards participation by A-3, A-4, A-5 and A-6 the counsel for the State submitted that they were identified by two or more witnesses and, therefore, their participation in the dacoity ought to have been believed. In spite of their identification by two or more witnesses the High Court did not think it fit to confirm their conviction as it appeared to it that A-4, A-5, and A-6 were probably involved because of enmity or their strained relations with Chandreshwar Thakur of village Pakaria. The High Court has also pointed out that A-4, A-5 and A-6 were not named by A-1 in his *extra-judicial* confession. They were all agriculturists and had no connection with 'K'. In these circumstances the view taken by the High Court that the prosecution cannot be said to have proved beyond reasonable doubt that A-4, A-5 and A-6 had also participated in the dacoity, is quite reasonable. As regards A-3 the High Court has pointed out that 'R' who was referred to as one of the dacoits by A-1 in his *extra-judicial* confession, was the person of village Singharia whereas A-3 is of village Pakaria. Subsequent correction made in Exh. 5/1 also creates a doubt regarding 'R' of village Pakaria having participated in the dacoity. As we find that the reasons given by the High Court for acquitting A-3, A-4, A-5 and A-6 are not unreasonable, the order of acquittal passed in their favour does not call for any interference. In the circumstances these appeals are partly allowed. The judgment and order passed by the High Court as regards A-3, A-4, A-5 and A-6 is confirmed but the order of acquittal passed in favour of A-1 is set aside and he is convicted for the offence punishable under Section 396, IPC and is sentenced to suffer imprisonment for life. A-1 is ordered to surrender to custody to serve out the remaining sentence. *State of Bihar* v. *Anirudh Thakur*, AIR 1998 SC 921 : (1998) 9 SCC 616 : 1998 CrLJ 1201 at p. 1204 (SC) : JT 1998 (1) SC 505 : 1998 (1) Scale 419 : 1998 (1) Crimes 174 (SC) : 1998 (2) SLT 542 : 1998 (1) CCR 274 (SC) : 1998 (1) Supreme 515. [G.T. NANAVATI AND S.S.M. QUADRI, JJ].

[11860] ● ***Dacoity identification.***—The condition of Dal Chand was quite good on 14.10.1977 and, therefore, he was discharged from the hospital. The High Court was, therefore, right in holding that the Investigating Officer was not telling the truth when he stated that he could not record the statement of Dal Chand on 14.10.1977 as his condition was not good. So also the explanation of the Investigating Officer regarding late recording of the statement of Darshani Devi (PW 5) has been rightly not accepted. Even if late recording of their statements is considered only as an act of negligence on the part of the Investigating Officer, the fact remains that they had not disclosed the name of Subhash till 18.10.1977 to any one. That creates a serious doubt regarding their having identified Subhash as one of the dacoits. One of the prosecution witnesses has stated that it was suspected by the village people right from morning of the next day that Subhash and his associates had committed the dacoity. It appears that because of suspicion Subhsah was involved for the first time on 18.10.1977. It is not believable that in all the rooms in which inmates of the house were sleeping and also in the courtyard 60 watts electric bulbs were kept burning. The evidence regarding discovery of bushirt, pant and ring by Subhash was rightly rejected by the High Court as it was not probable that while committing dacoity Subhash had taken away clothes also along with the golden ring and buried them in the courtyard of the house. *Shambhu Dayal* v. *Subhash Chandra*, AIR 1998 SC 1732 (1735).

[11861] ● ***Dacoity—Appreciation of evidence.***—If the witnesses were able to recognise the colour of the clothes worn by the dacoits, surely they could have recognised their faces also of those who were known to them. One electric pole was to the north -east of the house of Om Prakash and one was towards north-west. The accused had come from the north-western direction and even if it is assumed that their caps could have cast a shadow over their faces while they were passing any the north-western electric pole then light from the other pole would have fallen on their faces. Om Prakash and others had stood up to see that what was happening. Thus they were not taken by surprise. Therefore, their evidence that they stood up and noticed that there were about 20-25 persons about 30-35 steps away from the house deserves to be believed. *State of U.P.* v. *Bhoora*, AIR 1998 SC 254 (256) : 1998 CrLJ 478 : 1997 (4) CCR 90 : 1997 (4) Crimes 208.

[11862] ● ***Allegation that accused persons planning to rob petrol pump.***—To prove why the five accused had assembled at the Dharamshala of Sarup Nagar, the prosecution had mainly relied upon the evidence of PW 2 who was only eyewitness who had gone near the Dharamshala and heard conversation amongst the accused. He was accompound at that time by ASI, Bhagat Ram but the prosecution did not examine ASI, Bhagat Ram as a witness, PW 2 Head Constable Chand Singh in his examination-in-Chief did not depose anything about the conversation. He was declared hostile. In his cross-examination he stated that the conversation which he had heard and reported to ASI, was about looting a petrol pump. According to this witness he remained near the Dharamshala for about 15 minutes. His further cross-examination discloses that when he had gone near the Dharamshala, it was dark as there was no light either inside or nearby. The Dharamshala consisted of only one room and it had only one door and no window. He had stood outside that room and a little away form the door. He had not told anything more than that five persons inside the Dharamshala were planning to rob a petrol pump that night. He had not narrated what they had spoken or discussed. It is also doubtful that they were speaking so loudly that their conversation could be heard outside. It is also surprising as to how he could have reported to SI. 9 Om Prakash that two of them had pistols and the remaining three had knives. As the evidence discloses, the weapons were kept concealed on their persons and there was complete darkness inside the room. PW-2 had not even gone near the door. This would clearly indicate that PW-2 was not telling the truth when he stated that he had heard the accused talking about looting a petrol pump. It is, therefore, not possible to sustain the conviction of the appellants under Ss. 399 and 402, IPC. Their conviction under Sections 399 and 402, IPC will have to be set aside. *Suleman* v. *State of Delhi through Secretary*, AIR 1999 SC 1707 : (1999) 4 SCC 146 : 1999 SCC (Cri) 515 (516, 517) : 1999 CrLJ 2525 : 1999 CrLR (SC) 295 : (1999) 2 Crimes 334.

[11863] ● ***Veracity of the prosecution case highly doubtful.***—In the facts and circumstances of the case, veracity of the prosecution case was highly doubtful as in view of the evidence of prosecution witnesses, namely, PWs 1, 2 and 6, the possibility of dacoity in the house of Ram Singh and receiving injuries by the members of the prosecution party during the course of dacoity could not be ruled out more so when there was no evidence whatsoever to show that any of the accused persons much less the appellant assaulted the three deceased persons in view of the fact that none of the injured witnesses, namely, PWs 4, 5 and 6 stated that the accused persons assaulted any of the three deceased persons. For the foregoing reasons, the Supreme Court took view that the prosecution had failed to prove its case beyond reasonable doubt and the High Court was not justified in reversing the order of acquittal recorded by the trial Court as the same was not perverse in any manner. *Salan Singh* v. *State of Uttaranchal*, AIR 2006 SC 520 : (2005) 12 SCC 607 : 2005 (4) Crimes 265 (SC) : 2006 CrLJ 316 (318).

[11864] ● ***Doubtful evidence.***—The High Court found that the dacoity was committed during the night intervening 25th and 26th November, 1987. Admittedly, it was dark night. The evidence was not consistent as to electricity at the house of PW-1 Ramji Lal. So far as Ramsukh is concerned, temporary electric bulb was there in the chowk. But the evidence also showed that the bulb was not working. There was also inconsistency as to whether there was electricity in the village. The Court also considered the statement of PW-23 Ramswaroop Yadav, SHO. He did not mention as to at which place the electric bulb at the house of Ramsukh was on, nor was the existence of the bulb was shown in the site plan-Ex.P2. He orally mentioned that there was electric light in the village. The Court noted that there was no reason for the SHO not to mention the presence of electric bulb in the site plan if it was there as it was a very important aspect and it was the case of prosecution that the witnesses had identified the dacoits in the light of electric bulb. The Court also observed that it was not possible that the dacoits would come in such a way that they could be easily identified by village people. They would try to hide their identities. According to the High Court, the statement of all the witnesses who had stated that they had identified the dacoits in the light was 'false and unbelievable' and in the dark night, the witnesses could not have identified the miscreants.

With regard to identification of accused, at the identification parade, the High Court considered the evidence of PW-1 Ramjit Lal, PW-6 Sukkho and PW-7 Rekha who stated that they came to know about the arrest of dacoits after few days. "All this shows" observed the High Court, "that the accused persons were arrested just after 7-8 days of the incident" but their arrest was shown on December 21/22, 1987. For a number of days, the accused persons were detained at the police station. Immediately their arrest was not shown. The Court proceeded to state according to the prosecution, just after their arrest, the accused persons gave information under Section 27 of the Evidence Act and on the basis of that information, certain articles were recovered. But, according to the prosecution witnesses, they had come to know 7-8 days after the incident that the accused persons had been arrested and that stolen articles were recovered. The Court observed that it meant the arrest of the accused persons, their giving information as well as the recovery were "all false ones and they all have been manipulated later on".

The Court also found the recovery of the articles as doubtful because prior to the arrest of the accused persons and before their giving information under Section 27 of the Evidence Act, the articles were recovered by the police. Hence, the Court observed that the alleged recovery as well as the identification of the ornaments were all farce. The High Court also observed that identification parade was not conducted in a fair and proper manner and no precautionary steps had been taken by the Magistrate. The High

Court, therefore, held that the trial Court was wrong in convincing the accused and the prosecution "failed to prove beyond reasonable doubt that the appellants (accused) were the persons who had committed the dacoity as alleged by it".

Held, "We have been taken by the learned advocates for the parties to the evidence as also to the findings recorded by the trial Court as well as by the High Court. In the facts and circumstances of the case, in our opinion, it cannot be successfully contended that the High Court was wrong in granting benefit of doubt to the accused and in passing an order of acquittal. *Held*, the case was not proved beyond reasonable doubt. The acquittal of the accused persons was proper. *State of Rajasthan* v. *Netrapal*, (2007) 4 SCC 45 : 2007 (2) SCC (Cri) 187 : 2007 CrLJ 1783 (1783, 1784, 1785, 1786) : 2007 (2) Crimes 325 (SC).

[11865] ● ***Bank docoity sufficient material for conviction.***—The main stay of the Defence was that the investigation was not fair in this case inasmuch as the police had shown the accused persons to the identifying witnesses. We have already given our reasons as to why we would be prepared to accept the evidence of Ashok Kumar Dubey (PW-1). It is true that in his substantive evidence he did not speak about his identifying the accused appellant in the identification parade but we cannot forget the fact that there is a clear cut evidence of the Magistrate who conducted the Parade confirming such identification. There is practically no cross-examination of this witness. We are particularly impressed by the recovery of Rs. 40,000/- from the possession of the accused-appellant which recovery has been accepted by the Trial and the Appellate Courts. The recovery of the slips as also of the gun which was brandished against the witness is also no less significant. There is no explanation given by the accused as to how a huge sum of Rs. 40,000/- and the Dena Bank slips and the other bank documents could be recovered from him. It was feebly argued that there was delay in holding the identification parade. In the peculiar facts and circumstances of this case. The delay was of no significance, because the other accused persons are still at large and, therefore, test identification parade could not have been conducted in respect of only some of the accused. Again the question of delay was never raised by way of cross-examination and no explanation was called for from the investigating officer. The stolen property was recovered from the possession of the appellant. There is also supporting and corroborating evidence of the recovery of the other materials like the bag of S.M. Dholey (PW-6) which was recovered during the investigation. This discovery of the bag is also extremely significant because there was no reason for this bag which contained the private documents of Shri Dholey to be recovered from the accused. That also lends credence to the fairness of the investigation by the police. If will not be possible, in our jurisdiction under Article 136 of the Constitution, to re-appreciate the evidence and we will have to only see as to whether Trial Court and the Appellate Court were correct in reaching the conclusions that they have recorded. We again reiterate that the identification in the peculiar facts of this case by Ashok Kumar Dubey and other witnesses would be acceptable inspite of the so-called defects shown by the Defence in holding the identification. Considering the overall circumstances in the peculiar facts and circumstances of this case was hold the appellant guilty of commiting the offence of dacoity. There is also no explanation about the gun as well as the bullets which were examined by Irfan (PW-53). The gun was obviously an unlicenced pistol and, in our opinion, it was obviously used in contravention of Section 5 of the Arms Act. The conviction of the accused-appellant, under Sections 25 and 27 of the Arms Act was also correctly recorded by the Courts below.

In the above circumstances there is no merits in appeal and the same is accordingly dismissed. *Pravin* v. *State of Madhya Pradesh*, AIR 2008 SC 1846 : 2008 CrLJ 2980 : 2008 (5) SCR 367 : JT 2008 (4) 354 : 2008 (4) Scale 431.

[11866] ● ***Non-consideration of aspect of enmity between parties by trial Court.***—In the instant case, the trial Court. Stand of the appellant before the High Court was that accused persons were admittedly on inimical terms with Har Prasad (PW-2) and it was a specific case that accused Babu Singh had absconded and did not face trial. He was on inimical terms with the deceased and PW-2 Respondent Awadhesh happened to be brother in law of Babu Singh. The trial Court held that the accusations have been established. In appeal before the High Court it was noted that the enmity aspect was lost sight of by the Trial Court. In any event, for a long time no witness supposedly spoke about accused Awdhesh. Though the village Chowkidar. Ram Ratan (PW-3) reported the matter to the police station on the basis of which Crime case No. 30 was registered, no one was named as accused and the case was registered against unknown persons. Only when a written report was submitted by Har Prasad (PW-2) to the investigating officer, name of respondent was indicated alongwith Babu Singh and Jhallar Singh. It was pointed out that though PW-2 was shouting that three named persons were committing dacoity, in the report submitted by PW-3 the names were not given. Reference was also made to the evidence of Ram Lakhan (PW-4) who admitted that he never mentioned the names of the three persons whose names appeared in the report given by PW-2. With reference to the evidence of Smt. Sheo Sakhi, the High Court noticed that she did not know Awdesh, yet stated as if she was acquainted with him. Her statement in the cross examination was highlighted by the High Court. Similar was the position regarding Smt. Ram Rati (PW-12). The investigating officer stated that when he was going to the place of occurrence, he had met the deceased and two other persons who received injuries in the occurrence. They were Mahesh Chandra and Smt. Mahabiria. He had a talk with them and he sent them for medical examination. But till that time also the names of Awdhesh, Babu Singh and Jhallar Singh were not disclosed. Primarily, on these premises the High Court directed acquittal. The High Court also referred to the fact that while some of the alleged dacoits covered their faces to conceal the identity, the three named accused persons who were known did not try to cover their faces. In the present case, though the judgment is not happily worded and some of the reasonings are not legally supportable but the ultimate conclusion is a possible view. That being so no interference in appeal is warranted, to interfere is dismissed. The bail bond executed in the present case by the respondent shall stand discharged. *State of Uttar Pradesh* v. *Awdhesh*, (2008) 16 SCC 238 : JT 2008 (9) 591 : 2008 (12) Scale 288 : 2008 (6) Supreme 505 : 2008 (4) Crimes 30.

[11867] ● ***Long-standing enmity—Accused persons including minor and old person.***—At the time of occurrence the age of accused Vijay Jha was about 13 years, 3 months and age of Binod Jha was about 16 years, two months. They both were brothers and accused Bindishwar Jha was their another brother. It looks very unnatural that the accused would go to commit dacoity in their neighbourhood taking with them such minor and young boys as Vijay Jha and Binod Jha when they were sufficient in number and accompanied by some other persons also. Besides this, age of accused Bhai Lal Jha was estimated by Court on 31.3.1987 when he was examined under Section 313, Code of Criminal Procedure as eighty years. The defence has brought on record a voter's list showing that in this voter's list which was received in the year 1983 age of co-accused Dahaur Jha (Since dead) is recorded as seventy two year, since Dahaur Jha dead now so this document does not help the case of any now but then accused Bhai Lal Jha, admittedly at the time of the occurrence was aged about seventy-four years. So we find that the accused include an old man aged about seventy-four years as well as a boy aged about thirteen years, and as stated alone, the accused are neighbours of informant, with whom the family of informant had long-standing dispute. *Shrishi Narain Jha* v. *Bindeshwar Jha*, AIR 2010 SC 465 : (2009) 6 SCC 457 : 2010 CrLJ 467 : 2009 (7) SCR 442 : JT 2009 (13) SC 674.

[11868] ● ***Dacoity with murder—Sufficient evidence for conviction.***—On careful consideration of entire evidence on record, it was found by the Supreme Court that the following conclusions were in escapable:

1. The impugned judgment of the High Court is based on total misreading of the evidence of the injured eye-witnesses PW-3 Chandan Giri and PW-5 Smt. Longshree.
2. The High Court failed to appreciate that in this case, the test identification parade was not required since the accused were otherwise known to the witnesses. The conducting of test identification parade depends on the facts and circumstances of each case.
3. In the impugned judgment, the High Court ought to have considered the entire case in correct perspective of the small rural village background where most of the people know each other. They live in the vicinity. The test which may be relevant for metros or big cities cannot always be applied to small rural village settings.
4. The High Court in the impugned judgment has gravely erred in totally ignoring the dying declarations of Hiralal and Aidal Singh, particularly when the dying declarations were recorded by the Magistrate.
5. The High Court erred in discarding the evidence of the injured eye-witnesses whose statement is consistent and corroborated by other evidence on record.

The impugned judgment of the High Court is contrary to the well settled legal principles which have been crystallized by a series of decisions of this Court.

Ordinarily this Court would have been very reluctant to interfere with the judgment of acquittal but in this case for very substantially and compelling reasons we are constraint to set aside the impugned judgment of the High Court because the High Court totally misread the entire evidence on record. *State of Uttar Pradesh* v. *Sukhpal Singh*, AIR 2009 SC 1729 : (2009) 4 SCC 385 : 2009 CrLJ 1556 : 2009 (2) SCR 24 : 2009 (2) Scale 406.

The Court pointed out in the concluding part of judgment that the Supreme Court would have been very reluctant to interfere with the judgment of acquittal but in the instant case for very substantial and compelling reasons, the judgment of the High Court acquitting the accused had to be set aside. *State of Uttar Pradesh* v. *Sukhpal Singh*, AIR 2009 SC 1729 (1733, 1734) : (2009) 4 SCC 385 : 2009 CrLJ 1556.

[11869] ● *Infirmities in prosecution case—Manner of dacoity and participation of accused doubtful.*—In the instant case there were infirmities in prosecution version. The medical evidence showed that the death of the deceased was homicidal and the evidence of investigating officer who found blood-stains at the place of occurrence and some marks of violence on a wooden box kept at the place of occurrence may suggest the factum of dacoity in the house of informant but as far manner of dacoity and participation of accused in that dacoity is concerned, that appears quite doubtful. *Shrishi Narain Jha* v. *Bindeshwar Jha*, AIR 2010 SC 465 : (2009) 6 SCC 457 : 2010 CrlJ 467 : 2009 (7) SCR 442 : JT 2009 (13) SC 674.

[11870] ● *Section 395, IPC—Three accused on same evidence.*—In this case the counsel for the appellants contended that the evidence against the appellants A-3, A-6 and A-7 was identical and based on that evidence A-3 and A-6 were acquitted and A-7 was discharged and on the same evidence, appellants could not have been legally convicted. Insofar as A-3 is concerned, the trial Court gave him benefit of doubt as the prosecution failed to furnish any explanation as to why he could not be confined in jail or presented before a Magistrate on the day of arrest itself, *i.e.* April 30, 1980. The trial Court found that, although A-3 was arrested on April 30, 1980 at about 6.15 a.m. but he was produced before the Court on the next day despite the fact that Magistrate was available hardly 8 kilometers away. As regards A-6, the trial Court was not convinced about the date, time and place of his arrest. The trial Court held that from the evidence on record, possibility of his arrest at earlier point of time and at some other place cannot be excluded. We are afraid the grounds on which A-3 and A-6 were given benefit of doubt do not, in any manner, affect the credibility of the evidence of PW-2, PW-3 and PW-9 in the Court or the test identification parade insofar as A-2, A-4 and A-5 are concerned. These witnesses have identified the appellants not only in test identification parade but also in the Court. The identification of the appellants. *Ram Babu* v. *State of U.P.*, AIR 2010 SC 2143 : (2010) 5 SCC 63 : 2010 CrLJ 2856 (2859) (SC) : (2010) 2 Crimes 389.

[11871] ● *Section 396, IPC—Dacoity—Appreciation of evidence.*—"The prosecution witnesses have claimed that they identified the appellants in the light of lantern but the investigating officer, during investigation, did not find any lantern or sign of lighting the lantern which usually appear in the surrounding areas. Accused-Bharat Lal Jha was not identified by PWs-1 and 2, accused Binod Jha by PW-2 and accused Umesh Jha by PW-6. Besides this, PWs 4 and 6 have added names of Ashok Jha, Somendra Jha and Ram Ballabh Jha who are not among the accused persons. The medical evidence showing that the death of deceased was homicidal and the evidence of Investigating Officer who found blood-stains at the place of occurrence and some marks of violence on a wooden box kept at the place of occurrence may suggest the factum of dacoity in the house of informant but so far manner of dacoity and participation of accused in that dacoity is concerned, that appears quite doubtful. The evidence of prosecution witnesses is that besides accused, there were some other dacoits also with them who could not be identified. The possibility of false implication of appellants in this case on account of long standing enmity utilizing the incident of dacoity cannot be ruled out.

At the time of occurrence the age of accused Vijay Jha was about thirteen years, three months and age of appellant Binod Jha was about sixteen years, two months. They both are brothers and accused Bindeshwar Jha is their another brother. It looks very unnatural that the accused would go to commit dacoity in their neighbourhood taking with them such minor and young boys as Vijay Jha and Binod Jha when they were sufficient in number and accompanied by some other persons also. Besides this, age of accused Bhai Lal Jha was estimated by Court on 31.3.1987 when he was examined under Section 313, Code of Criminal Procedure as eighty years. The defence has brought on record a Voters' List (Exhibit-A) showing that in this Voters' List which was received in the year, 1983, age of co-accused Dahaur Jha (since dead) is recorded as seventy two years, since Dahaur Jha dead now so this document does not help the case of any now but then accused Bhai Lal Jha, admittedly at the time of occurrence was aged about seventy four years. So, we find that the accused include an old man aged about seventy four years as well as a boy aged about thirteen years and, as stated above, the accused are neighbours of informant with whom the family of informant had long standing dispute. The judgment of the High Court does not suffer from any infirmity. The appeals fail and are dismissed. *Sherishti Narain Jha* v. *Bindeshwar Jha*, AIR 2010 SC 465 : (2009) 6 SCC 457 : 2010 CrLJ 467 (SC).

8. FIRST INFORMATION REPORT

[11872] ● ***First information report.***—Where the fact relating to looting of property was mentioned in the FIR but was not mentioned in the charge, and the substantial evidence refined to extorting of Rs. 300/- the accused could be convicted under Section 384 and not under Sections 395/149. *Vishun Shiv Ram Bhovi* v. *State of Maharashtra*, AIR 1979 SC 1943 : (1979) 3 SCC 365 : 1979 SCC (Cri) 642 : 1979 CrLJ 1305 : 1979 CrLR (SC) 723 : 1979 UJ (SC) 869.

9. IDENTIFICATION

[11873] ● ***Identification.***—Sworn testimony of witnesses in Court as to the identity of the accused who are stranger to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. There may be exception of this rule where the Court is satisfied that the evidence of a particular witness in such that it can safely rely on it without the precaution of an earlier identification proceeding. *Vaikuntam Chandrappa* v. *State of A.P.*, AIR 1960 SC 1340 : 1960 CrLJ 1681 : ILR (1962) AP 96.

[11874] ● ***Offence committed by unknown culprit—When.***—When an offence is committed by an unknown culprit for example, dacoity and a person is arrested on suspicion of his committing the crime, it is usual to hold TI Parade. The suspected accused is mixed up with under trial prisoners, generally in proportion of 9 : 1, almost similar in stature and not grossly dissimilar in status and the witness is asked to pick up the person he saw during the commission of the crime. This is called TI Parade. It belongs to investigation stage and is essentially governed by Section 162, CrPC. *Budh Sen* v. *State of U.P.*, AIR 1970 SC 1321 : AIR 1972 SC 283 : (1970) 2 SCC 128 : 1970 SCC (Cri) 343 : 1970 CrLJ 1149 : (1971) 1 SCR 564 : (1971) 2 SCWR 446.

[11875] ● ***Identification in Jail not substantive evidence.***—As a matter of fact, identification in jail is not substantive evidence. It can been used for the purpose of corroboration only. *Raj Kishore* v. *State*, AIR 1971 SC 1058 : AIR 1971 SC 1050 : 1971 CrLJ 913 : 1971 CrLJ 921 : 1971 SCD 62. **To the same effect :** (1) *Budh Sen* v. *State*, AIR 1970 SC 1321 : (1970) 2 SCC 128 : 1970 CrLJ 1149; (2) *Sadhu Bag* v. *State*, (1972) 28 Cut LT 294; (3) *Sampat* v. *State of Maharashtra*, AIR 1974 SC 791 : (1994) 4 SCC 213 : 1974 CrLJ 674 : 1974 UJ (SC) 117.

[11876] ● ***Application of accused for TI Parade if turned down.***—If the application of the accused for TI Parade is turned down and if it transpires in the evidence at the time of the trial that the witness did not know the accused persons previously, the prosecution may fail. *Jadunath Singh* v. *State of U.P.*, AIR 1971 SC 363 : (1970) 3 SCC 518 : 1971 CrLJ 305 : (1971) 2 SCJ 285 : 1971 All WR 692 : 1971 Mad LJ (Cri) 692.

[11877] ● ***Identification of TI Parade not substantive evidence.***—As to the value of TI Parade, the identification of TI Parade is never a substantive evidence. The substantive evidence is the witnesses deposition in the Court. But when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former arrest is of vital importance because he furnishes to the Investigating Agency that investigation is proceeding on right lines. *Rameshwar Singh* v. *State of J&K*, AIR 1972 SC 102 (104) : (1971) 2 SCC 715 : 1972 CrLJ 15.

[11878] ● ***Identification evidence—Value of.***—The witnesses in the present case also had not previously given any description of the appellant and had also not attributed any particular part to the appellant except to say generally that all the seven or eight dacoits were taking out the goods from the house and bringing them out. But Mewa Ram in the first information report had clearly stated that he and the witnesses named by him therein had properly seen the miscreants and would be able to identify them if shown to them. Also, there was the evidence that the witnesses had taken up their positions around the house and there was adequate light especially when one of the witnesses set fire to the heap of dry sugarcane leaves nearby. The opportunity to mark the faces and the features of the miscreants was adequate also because those miscreants were at the scene of the offence for more than half an hour. Their number was seven or eight only and there was no crowd between them and the house of the victim which could stultify that opportunity. Further, barring the allegation that the witnesses could have known the appellant because he had a contract at Pipariaghat, for which there was no evidence whatsoever, there was hardly any worthwhile challenge to the validity or reliability of the identification evidence. The result is that there is no substantial reason, as there was in Komal Gope's case, for us to reappraise the evidence a third time contrary to the practice of this Court not to do so except on exceptional grounds. *Chander Singh* v. *State of U.P.*, AIR 1973 SC 1200 : (1973) 3 SCC 55 : 1973 CrLJ 926.

[11879] ● ***Evidence of TI not substantive piece of evidence.***—The evidence of TI Parade being not a substantive piece of evidence, it can be used only to confirm the identification made in the Court. The identity of the culprit may be fixed by circumstantial evidence also. *Sampat Shindey* v. *State of Maharashtra*, AIR 1974 SC 791 : (1974) 4 SCC 213 : 1974 SCC (Cri) 382 : 1974 CrLJ 674.

[11880] ● ***Failure to hold TI Parade despite being asked by accused important factor.***—Reiterating the same view another Supreme Court case held that failure to hold TI Parade despite being asked by accused may be an important factor in favour of the accused. *Shri Ram* v. *Sate of U.P.*, AIR 1975 SC 175 : (1975) 3 SCC 495 : 1975 SCC (Cri) 87 : 1975 CrLJ 240.

[11881] ● ***Witness was saying he could see face of dacoit.***—When the witness says he could see the face of the dacoit it postulates there was light that enabled the witness to the face of the dacoit. Then, it is for the defence to show through cross-examination or otherwise that there was no light or insufficient light, if defence fails, identification can hardly be disputed. *Jugal Gope* v. *State of Bihar*, AIR 1981 SC 612 : (1979) 3 SCC 272 : 1979 SCC (Cri) 499 : 1981 CrLJ 4 (SC) : 1979 CrLR (SC) 571.

[11882] ● ***Dacoits identified by torchlight.***—Prosecution case was that the dacoits were identified by torchlights. But the witness omitted to tell about torchlight. However no question was put to witness about torchlight. It was held that the omission to tell about torchlight was inconsequential and may not affect the prosecution case. *Jugal Gope* v. *State of Bihar*, AIR 1981 SC 612 : (1979) 3 SCC 272 : 1979 SCC (Cri) 499 : 1981 CrLJ (SC) 4 : 1979 CrLR (SC) 571.

[11883] ● ***Sessions Judge acquitting accused that dacoits moving about identification not possible.***—Sessions Judge acquitted the accused on the ground that as the dacoits were moving about, identification was not possible. It was held that the Sessions Judge was wrong. *Jugal Gopel* v. *State of Bihar*, AIR 1981 SC 612 : (1979) 3 SCC 272 : 1979 SCC (Cri) 499 : 1981 CrLJ 4 (SC) : 1979 CrLR (SC) 571.

[11884] ● ***Dacoity with murder none of witnesses giving description of dacoits.***—In a case of dacoity with murder, none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity nor did they give any identification marks, *viz.*, stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In the absence any such description, it will be impossible to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded. TI parade was held about 3 and 1/2 months after the dacoity. In view of such a long lapse of time, it is not possible for any human being to remember the features of the accused, and he is very likely to commit mistakes. Unless evidence is absolutely clear, it is unsafe to convict an accused for such a serious offence on the testimony of a single witness. *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392 : 1981 Supp SCC 28 : 1981 SCC (Cri) 634 : 1981 CrLJ 1014 : 1981 CrLR (SC) 319 : 1981 BBCJ (SC) 138 : 1981 CurLJ (Cri) 131 : 1981 BLJ 462 : 1981 CrAppR (SC) 301 : 1981 Chand CrC 159 (SC).

[11885] ● ***Accused found in possession of torch and currency notes.***—The accused was found in possession of a torch and currency notes and the same were not satisfactorily proved as forming part of *corpus delicti.* The victim failed to identify the accused at either of the two identification parades. His identification in Court will not help the prosecution. Torch is a very common article and no particular mark appeared thereon. Cash was not claimed by the accused. Yet the accused was not liable under Section 397 or 395, IPC. *Bhure Khan* v. *State of M.P.*, AIR 1982 SC 948 : (1982) 2 SCC 445 : 1982 SCC (Cri) 469 : 1982 CrLJ 818 : 1982 UPCrR 184.

[11886] ● ***Victim witness when gives no description of culprit in FIR.***—Victim witness when gives no description of the culprit in FIR nor identified the accused in TI Parade, his Court identification cannot sustain conviction. *Md. Abdul Hafeez* v. *State of A.P.*, AIR 1983 SC 367 : 1983 1 SCC (Cri) 139 : 1983 CrLJ 689 : 1983 CrLR (SC) 26.

[11887] ● ***Light shed by lantern enough to identify witness—Where.***—Light shed by a lantern would be enough to enable a witness to identify the culprits where (i) the witness was accustomed to such light due to non electrification;

(ii) accused were not using mask or like to cover their faces; (iii) the accused were known to the witness. *Macchi Singh* v. *State of Punjab*, AIR 1983 SC 957 : (1983) 3 SCC 470 : 1983 CrLJ 1457.

[11888] ● *Identification by tiny kerosene Lantern.*—Identification by a tiny kerosene lantern at dead of night of a group of 14/15 persons is inherently difficult. *State of U.P.* v. *Jageswar*, AIR 1983 SC 349 : (1983) 2 SCC 305 : 1983 CrLJ 686 : 1983 All LJ 281.

[11889] ● *Villagers habituated to lantern light.*—The villagers habituated to lantern light have their eye sight conditioned of seeing things without electric light. Their power of seeing is not diminished by the circumstances that the incident was witnessed not by electric light but by lantern light. *Macchi Singh* v. *State of Punjab*, AIR 1983 SC 957 : (1983) 3 SCC 470 : 1983 CrLJ 1457 : 1983 (2) Crimes 268.

[11890] ● *Accused when caught red-handed.*—Identification assumes little importance when the accused is caught red-handed during escape. Failure to identify in Court is not fatal. *State of Rajasthan* v. *Sukhpal Singh*, AIR 1984 SC 207 : (1983) 1 SCC 393 : 1983 SCC (Cri) 213 : 1984 CrLJ 1923.

[11891] ● *Testimony in Court identifying accused corroborated by his testimony at identification parade : conviction.*—Where, though some of the PWs. were not able to identify each one of the dacoits, one of them had identified all the accused, and his testimony in Court was corroborated by his identification at the parade, the conviction of the appellant under Sections 395 & 396 was justified. *Shiv Charan* v. *State of Haryana*, AIR 1987 SC 1 : 1987 SCC (Cri) 1 : 1987 CrLJ 695 : 1986 CrLR (SC) 547 : JT (1986) SC 813 : (1987) 1 SCJ 79 : 1986 ACrC 560 : 1987 ACrR 140 : 1987 Cur CrJ (SC) 6 : 1986 CaL CrLR (SC) 196.

[11892] ● *Identifying witness not giving any particulars about feature.*—Identifying witness not giving any particulars about the features either in the FIR or in their statement to police but they identified the suspects in TI Parade and then in Court, it is held no reliance on this identification can be put, accused is to be acquitted. *Subhash* v. *State of U.P.*, AIR 1987 SC 1222 : (1987) 3 SCC 331 : 1987 CrLJ 991.

[11893] ● *Eye-witness identifying assailants whom he knew before.*—When an eye-witness actually identifies an assailant whom he knew from before and no cross-examination is made to show that light was not there, he cannot be discredited by evidence that the place of occurrence was dark. *Rakesh Kumar* v. *State of Haryana,* AIR 1987 SC 690 : (1987) 2 SCC 34 : 1987 (1) Crimes 386 (SC).

[11894] ● *Accused not to be identified by eye-witnesses due to insufficiency of light.*—When an eye-witnesses actually identifies an assailant whom he knew from before and no cross-examination is made to show that light was not there, he cannot be discredited by evidence that the place of occurrence was dark. *Rakesh Kumar alias Babli* v. *State of Haryana*, (1987) 2 SCC 165 : (1987) 1 Crimes 386 (SC).

[11895] ● *Identity of accused stranger to witness required corroboration.*—Identity of the accused which is a stranger to the witness in Court as a general rule required corroboration in the form of identification parade. *Jaimal Singh* v. *State of Haryana*, (1988) 3 Crimes 442. **TO THE SAME EFFECT :** (1) *Hasib* v. *State of Bihar*, AIR 1972 SC 283 : 1972 CrLJ 233.

[11896] ● *Identification most time unworthy.*—The one area of criminal evidence susceptible of miscarriage of criminal justice is the error in the identification of the criminal. Indeed, PROF. BORCHARD'S "Convicting the Innocent" records several criminal convictions in which the accused was subsequently proved innocent. The major source of the error is to be found in the identification of the accused by the victim of the crime. Indeed, the learned author refers to the source of mistaken identification thus: "The emotional balance of the victim or eye-witness is so disturbed by his extra-ordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused". See "Identification Parades II" Criminal Law Review, 1963, p. 546. GLANVILLE WILLIAMS in "*The Proof of Guilt*" (Hamlyn Lectures) refers to the errors of recognition breeding an invincible assurance in the witnesses, highly deceptive for those, who are not forewarned of such possibilities, and excerpts Gorphe's results of a continental investigation, thus : "There is no difference from the subjective point of view, between true and false recognition, so far as their intrinsic qualities are concerned, and there are no objective signs to distinguish one from the other. The witnesses's certainty may not be immediate, without this delay being necessarily a sign of error. Nevertheless, error is more frequent when recognition comes some time after seeing. The act of recognition is very open to suggestion in all its forms. Resemblance is a matter of relativity. For a white person, all negroes are like each other, and conversely. A person can much better distinguish those of his own age and condition than those of different ages and condition. Uniform is a cause of fallacious resemblance, above all for those who do not wear it" (emphasis). *Harinath* v. *State of U.P.*, AIR 1988 SC 345 : (1988) 1 SCC 14 : 1988 SCC (Cri) 14 : 1988 CrLJ 422 : 1987 (3) Crimes 667.

[11897] ● ***Court should be cautious to accept identification.***—One area of criminal jurisprudence susceptible to miscarriage of justice is error in identification. Court's approach to accept identification should be very cautious. *Harinath* v. *State of U.P.*, AIR 1988 SC 345 : (1988) 1 SCC 14 : 1988 CrLJ 422 : (1987) 3 Crimes 667.

[11898] ● ***Identification of culprits—With help of light from straw fire—Appreciation of evidence.***—Admittedly, the occurrence was during the dark midnight. The witnesses claimed to have identified the culprits standing at distance of 150 feet with the help of light emanating from the straw-fire in the khandar of Rajendra which was at a distance of 40 steps (80 feet) towards the north-west of the door of the scene house. The High Court on appreciation of the evidence was not inclined to accept the evidence of the witnesses claiming to have identified the culprits with the help of that light and also the torches carried by the assailants. In our opinion, the High Court was right in rejecting that evidence. *State of U.P.* v. *Hardeo*, AIR 1992 SC 1854 : 1992 CrLJ 3160 : 1993 Supp (1) SCC 473.

[11899] ● ***Dacoity participation of appellant doubtful in.***—The dacoits were strangers to the eye-witnesses. Then the question arose whether there was sufficient opportunity for these witnesses to recognise the accused. It is noted that none of their features even suggestively mentioned in the FIR not even in the case diary as noted by the High Court. It is also to be noted that none of the eye-witnesses said that they recognised the dacoits while they were inside the house and on other hand it becomes highly doubtful whether they could not have identified the stranger in the moonlight. Taking all these aspects into consideration the trial Court was not prepared to accept the evidence regarding the identification parade of the persons. We think this is a reasonable view in the matter. Therefore, the participation of the appellants in the actual dacoity becomes doubtful. *Man Singh* v. *State of Madhya Pradesh*, 1993 CrLJ 3669.

[11900] ● ***Identification of accused—Occurrence taking place at 11 p.m..***—The very fact that all the witnesses given without any margin of error had identified the suspects as culprits, creates a lurking suspicion in the mind of the Court as to whether the identifying witnesses took a clue in identifying the suspects put up in the parade with the fetters on their legs. We are not convinced about the test identification parade which was the foundation for bringing all the accused as the culprits involved in the dacoity that took place on 26th May, 1973. At any rate a great doubt is entertained with regard to fixing the identity of all the accused. We hold that the second accused is liable to be punished under Section 412 of the Indian Penal Code as the evidence relating to the recovery of the articles is acceptable. The prosecution has not satisfactorily discharged its burden in proving that it was the fifth accused who caused the death of the deceased. Therefore this charge has to fail. In the result, we set aside the convictions of all the accused and the sentences imposed therefor and acquit them of the offences of dacoity and murder, charged under Sections 396, 395 and 395 read with Section 397 and under Section 27 of the Arms Act. We on the basis of the recovery of the looted articles convict the second accused under Section 412 of the Indian Penal Code and sentenced him to the period already undergone *Tahir Mohammad, Kamad Girendra Singh, Badri Singh* v. *State*, AIR 1993 SC 931 : 1993 Supp (3) SCC 197 : 1993 CrLJ 193 (SC).

[11901] ● ***All witnesses even without any margin of error identified suspects as culprits creating suspicion in mind of Court.***—Fact that all witnesses even without any margin of error had identified accused persons, it creates suspicion and hence their conviction or the basis of such identification is liable to be set aside. *Tahir Mohammad, Kamad Ginendra Singh* v. *State of M.P.*, AIR 1993 SC 931 : 1993 CrLJ 193 (SC) : 1993 Supp (3) SCC 697.

[11902] ● ***Dacoity with murder—Evidence of identification credibility.***—In the instant case the learned counsel for the appellant has relied upon a decision of the Supreme Court in *Budh Sen* v. *State of U.P.* AIR 1970 SC 1321 to contend that the evidence of identification parade does not constitute by itself substantive evidence which is governed essentially by the provisions of Section 162 of the Code of Criminal Procedure. In that case, the Supreme Court took the view that on the facts established, the Test Identification Parade could not be considered to provide safe and trustworthy evidence on which conviction could be sustained. That case was distinguished by the Courts below and rightly, by taking into account the substantive evidence of the Magistrate, P.W. 7 supported by the remarks of the trial Court regarding demeanour of P.W. 6. There can be no dispute to the proposition that oral evidence led at the trial may by itself be substantive evidence whereas evidence of Test Identification Parade may *per se* be not. In that situation the Court would certainly be entitled to rely upon such evidence as that would be relevant under Section 9 of the Evidence Act. Here the evidence of the Magistrate, P.W. 7 too supported the prosecution evidence to say that he conducted the identification parade and before him P.W. 6 had correctly identified Ram Nath to be one of the dacoits. And the word of P.W. 7 in the context has been believed by the Courts below. *Ram Nath Matho* v. *State of Bihar*, AIR 1996 SC 2511 (2512) : (1996) 8 SCC 630 : 1996 CrLJ 3585.

[11903] ● ***Dacoity—Identification parade held much after arrest of appellant—No force—Conviction and sentence proper.***—Incident of dacoity took place in the house of complainant. The appellant was identified in test identification parade as well by witnesses in the Court. Contention that identification parade was held much after the arrest of appellant and therefore not believable has no force but which could be said to have been hold with unusual delay. Conviction & sentence proper & merit no interference. *Ramanand Ramnath* v. *State of M.P.*, (1996) 8 SCC 514 : 1996 SCC (Cri) 684 : 1996 (2) Crimes 57.

[11904] ● ***Dacoity—Appreciation of evidence.***—In the instant case, the witnesses claimed to have identified accused who were 30 paces away. The High Court has accepted the version of the witnesses that there were two poles near the house of Om Prakash and or both of them lights were burning at the time of incident. It was nobody's case that the light was so insufficient that from a distance of 30 paces a person standing near the electric pole could not be identified. The reason given by the High Court that because dacoits were wearing Khaki Uniform and wearing hats they could not have been identified appears to be more in the nature of a surmise, as it was not even suggested to any witness that because of the hats worn by the respondents there was shadow on their faces and, therefore, it was not possible to recognise them. It is difficult to appreciate the reasoning of the High Court. If the witnesses were able to recognise the colour of the clothes worn by the dacoits surely they could have recognised their faces also of those who were known to them. As noticed from the site plan and also from the evidence of the witnesses. One electric pole was to the north-east of the house of Om Prakash and one was towards north-west. The accused had come from the north-western direction and even if it is assumed that their caps could have cast a shadow over their faces while they were passing to the north-western electric pole then light from the other pole would have fallen on their faces. The evidence of Om Prakash and others that they stood up and noticed that there were about 20-25 persons about 30-35 steps away from the house deserves to be believed. *State of U.P.* v. *Bhoora*, AIR 1998 SC 254 : 1998 CrLJ 478 : 1998 CrLR (SC) 1 : (1997) 4 Crimes 208.

[11905] ● ***Sufficient light to identify dacoits.***—There was overwhelming evidence of witnesses to the effect that there was supply of electricity at the time when the occurrence took place. PW-5 stated that he was watching television when the dacoits entered his house. The High Court has rightly held on the basis of the evidence or record that there was supply of electricity at the time when the dacoity was committed and the witness, therefore, had sufficient light and opportunity to identify the dacoits. *Pramod Mandal* v. *State of Bihar,* (2004) 13 SCC 150 : 2005 SCC (Cri) 75 (80).

[11906] ● ***Dacoits having masks on their face.***— In the instant case, it was seen from the evidence of PW-5 that the dacoits had covered their face with cloth, at the time of incident. PW-1 also stated that the dacoits were covering their faces except eyes and nose, with black cloth, PW-4 did not specifically say whether or not the dacoits were having masks on their face.

Held, "Assuming that eyes and nose could be seen to some extent despite the mask, the question is whether any of the crucial witnesses could have identified the unknown masked dacoit. PW-1, the neighbour who was living in the adjacent house, came forward with the version that after hearing the noise, he put on his torch and, in that light, he saw the dacoits killing Rajendra Thakur at the courtyard of his house. PW-1 further stated that thereafter he went towards the doorway of the house of Rajendra Thakur and when one of the dacoits flashed the torch on him, he noticed Rajendra Thakur lying in an injured condition while one person was attacking him with knife. The witness then claimed in the cross-examination that he had flashed the torch 5 to 7 times at the dacoits from a distance of 20-30 feet. Therefore, his version is that he was able to identify the accused by flashing the torchlight now and then. He claimed to have remained at the place of occurrence for 2-3 minutes. It seems to us that the evidence of PW-1 is not credible. Leaving apart the probabilities and the natural course of conduct, the version of PW-1 is belied by his own version in the cross-examination. While at one point of time he said that he did not get scared, at para 24 of the deposition, he clearly stated as follows : "When I went to the place of occurrence for the first time, then I saw the assault. Accused had also run to assault me. I ran towards my house in order to save my life. I was having an Eveready torch in my hand." In the next para, he stated that after the dacoits left the place of occurrence, he and his family members when to the spot and stayed for about 10-15 minutes. It is unbelievable that he would go and remain at the place of occurrence even for a short while when the attack and dacoity by armed persons was going on and that he dared to flash the torchlight on them more than once in order to get an idea of the miscreants. On his own showing, he was concerned about his own safety. Moreover, this witness stated that there was no electricity or lantern light at the house of the deceased. On the face of it, we need not say anything more to discredit this witness on the aspect of identification of the appellant which was done after a lapse of about seven weeks. As the dacoits covered their faces, we do not think that it was reasonably possible for the witness (PW-1) to identify each of the criminals, some of whom including the appellant were unknown to him with the help of the light flashed by him intermittently, even if that version is accepted. The High Court described PW-1 as an "independent" and natural witness and believed him without testing the veracity of evidence in the light of various circumstances." *Umesh Kamat* v. *State of Bihar*, AIR 2005 SC 726 : (2005) 9 SCC 200 : 2005 SCC (Cri) 1218.

[11907] ● ***Identification of accused who covered their faces during dacoity.***—Amongst the eye-witnesses, it is the evidence of PW-4 which assumes more importance because he was the injured and he would have had the opportunity to notice the offenders from close range and there was a reasonable possibility of PW-4 having in his mind the imprint of the image of criminals who attacked him and his brother. PW-4 identified the accused in the course of evidence. However, even his evidence does not inspire confidence in ultimate analysis, contrary to what PW-1 stated, he took the stand that there was a lantern at the place (baithak) where he was sleeping. Of course, that lantern which was described as 'old' was not even seized by the police. Assuming there was a lantern, in all probability, it would have been quite dim as it is common knowledge that while going to sleep normally the lamp is kept at the minimum level in rural areas. PW-4 further stated in the chief examination that he could identify the four dacoits in the light emanating from the torch (flashed by the dacoits) and the moon-light. The High Court observed that it was not a moon-light day as per the admission of some of the witnesses. According to PW-4, the appellant herein is not the person who aimed the gun at his brother. The question is whether at that juncture when he was being subjected the blows soon after he woke up and his brother was being simultaneously attacked by the armed miscreants, he would have really observed each one of the four persons with covered faces so keenly and minutely as to identify them by the uncovered portion of the nose and eyes. The answer could only be in the negative. It is pertinent to note that PW-4 did not spell out the distinctive features of the appellant (who was admittedly a stranger to him) on the basis of which he could identify him despite the mask. *Umesh Kamat* v. *State of Bihar*, AIR 2005 SC 726 : (2005) 9 SCC 200 : 2005 CrLJ 908 (912) : (2005) 1 Crimes 215.

[11908] ● ***Dacoity with murder—Identification.***—There is any amount of doubt on the point whether PW4. In the situation in which he was placed could closely observe the identifiable features of the appellant in mask that too in the glow of dim lantern and in the light emitted by the torches flashed at him or other inmates of the house. This doubt has to be viewed in the context of two things, firstly—there was no recovery of property, nor any other corroborating evidence linking the appellant to the crime. The second aspect is that the trial Court was not inclined to believe the evidence of the identification of three other accused at the same identification parade held on 19.7.1994 and commented that they were falsely implicated. If so, the evidence of PW-4 should have been scrutinized with greater caution instead of proceeding on a premise that he was a truthful witness. One more aspect which deserves notice is that PW-4 did not have the occasion to observe the dacoits operations inside the house. He would have noticed them only initially for a short while before they entered the house. It is his case that he became unconscious a little later as a result of injury inflicted on him. These are all the various doubts which loom large over the prosecution story of identification of the appellant. Unfortunately, the High Court did not analyze the evidence of prosecution witnesses so as to test the credibility of their evidence in the light of admitted or undeniable facts apparent from the record.

The only reason given by the High Court in believing the evidence of PW-4 is that the incident must have left a deep impression in his mind, especially in view of the injuries which he and his wife received at the hands of the dacoits and such impression would not be easily fade out within a few weeks or months. This observation of the High Court was based on the hypothesis that PW-4 was in a position to clearly notice the physical features and appearance of the appellant. There was no warrant for such ready assumption. The trial Court as well as the High Court should not have taken the version of the PW-4 on its face value without testing its credibility. The relevant aspects adverted to above which give room for reasonable doubt, were not at all noticed by the trial Court or the High Court. Under these circumstances, the interference with the finding recorded by the both the Courts, is called for. *Umesh Kamat* v. *State of Bihar*, AIR 2005 SC 726 : (2009) 9 SCC 200 : 2005 CrLJ 908 (912) : (2005) 1 Crimes 215.

[11909] ● ***Delay in holding T.I. parade and in recovering /identification of stolen property.***—In cases of dacoity at midnight it takes a little more time for the prosecution to collect evidence as they have to interrogate many people during the cause of investigation to nab the real culprit. It is also not unlikely that the witnesses fear dacoits, they shirk to come out and support the prosecution case. Some delay in the identification parade or identification of property is likely in cases of dacoity at midnight and recovery of the ornaments. The delay is natural in such cases and it is not fatal so as to throw out the prosecution case outright. *Narayan Prasad* v. *State of M.P.*, AIR 2006 SC 204 : (2006) 2 SCC(Cri) 161 (164) : 2006 CrLJ 123 : JT 2005 (9) SC 433 : 2005 (4) Crimes 226.

[11910] ● ***Doubtful evidence—Animosity between parties.***—The High Court has noted as of a telephonic message was given by a stranger regarding dacoity. However, in evidence it has given that the information was given not by a stranger but by PW 1. In the information given it was stated that some stranger had committed dacoity. The accused were not strangers and were practically neighbours of the informant and his family. The High Court noted that there was no intention to falsely implicate accused persons because of enmity and there was no reason as to why dignity of two young girls would be put at stake by alleging rape. It is to be noted that in fact rape was alleged but the trial Court found that there was no material to substantiate the place of rape. The evidence is, totally in consistent and lacks evidence. The High Courts' observations were clearly based on surmises and contrary to the factual scenario the appellants are liable to be acquitted. *Abdul Gafur* v. *State of Assam*, AIR 2008 SC 607 : 2008 (3) SCC (Cri) 316 : 2008 CrLJ 800 (SC) : 2008 (4) Crimes 323 (SC).

[11911] ● ***Test Identification Parade—Validity.***—In the instant case, the case was registered against the accused and after completion of investigation, the investigating agency submitted charge-sheet against them for offence under Section 395, IPC. The basic challenge before the High Court was to the possibility of identification. The T.I. parade or 3.4.1998, the accused was arrested on 27.3.1998 and on 28.3.1998 the accused was produced by the SHO at the residence of CJM. The T.I. parade was held on 3.4.1998 and the accused was correctly identified by PW-3. PW-3 also specifically stated in his evidence that it was not correct to say that the "accused might have told to him that the accused was shown to the witness earlier". In view of the evidence which the trial Court and the High Court have analysed and the identification by PW-3 in the T.I. parade, there is no infirmity in the conclusion of guilt of the accused. The does not warrant interference. *Md. Kalam* v. *State of Rajasthan*, AIR 2008 SC 1813 : (2008) 11 SCC 352 : 2008 CrLJ 2602 (2603, 2604, 2607) : JT 2009 (4) SC 344.

[11912] ● ***Identification of accused by lantern.***—It was claimed by the prosecution witnesses that they had seen the dacoits fourteen fifteen in members, who came to informants house, at about 12 pm, were identified by lantern. But the investigation officer did not find any lantern or sign of lighting the lantern at the scene of occurrence. It was held that the order of acquittal of accused by the High Court was liable to be sustained. *Shrishi Narain Jha* v. *Bindeshwar Jha*, AIR 2010 SC 465 : (2009) 6 SCC 457 : 2010 CrLJ 467 : JT 2009 (5) SC 674.

10. MAKING PREPARATION TO COMMIT DACOITY (SECTION 399, IPC)

[11913] ● ***Making preparation to commit dacoity.***—"Preparation" in Section 399 implies discussing or arranging means essential for the purpose of the commission of the offence of dacoity in respect of which the determination to commit the offence exists. Any stage antecedent to such determination would ordinarily not amount to preparation. *Malkiat Singh* v. *State of Punjab*, AIR 1970 SC 713 : (1969) 1 SCC 157 : 1970 CrLJ 750.

[11914] ● *Accused cousin—Mere presence not sufficient to establish charge under Section 399, IPC.*—In the instant case the contention that the accused R was a cousin of and if he was staying with C, the mere fact of his presence, could not be sufficient to establish the charge under Section 399, IPC cannot be accepted. There might have been some force in the argument if the party of the dacoits had not left the *baithak* of C; that it was only after the dacoits started coming out of the house that they were arrested: that it might be assumed, although there was some dispute; that he was a cousin of C, but even assuming that the fact that he was arrested outside the house destroyed the version of R that he was at the *baithak* of C for innocent purposes; that a *phrasa* was recovered from his possession and that it was not possible to agree with the contention that in these facts the charge under Section 399 was not made out. *State of U.P.* v. *Raju*, AIR 1971 SC 708 : (1971) 3 SCC 174 : 1971 SCC (Cri) 263 : 1971 CrLJ 642.

[11915] ● *Assembly of persons for committing offence—Conviction under Section 399 or 402, IPC.*—When there was an assembly of eight persons at 1 a.m. in a school compound near a market place and a gun and cartridges were recovered from them though they may have assembled for committing an offence, their conviction under Section 399 or Section 402, IPC cannot stand. *Chaturi Yadav* v. *State of Bihar*, AIR 1979 SC 1412 : (1979) 3 SCC 430 : 1979 SCC (Cri) 502 : 1979 CrLJ 1090.

11. "OFFENDER"

[11916] ● *"Offender".*—The term 'offender' in Section 397 is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of a minimum punishment, on another offender who had not used any deadly weapon. *Phool Kumar* v. *Delhi Administration*, AIR 1975 SC 905 : (1975) 1 SCC 797 : 1975 SCC (Cri) 336 : 1975 CrLJ 778.

[11917] ● *Expression "armed with any deadly weapons".*—Section 398 uses the expression "armed with any deadly weapon" to attract the minimum punishment provided therein. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery. *Phool Kumar* v. *Delhi Admn.*, AIR 1975 SC 905 : (1975) 1 SCC 797 : 1975 SCC (Cri) 336 : 1975 CrLJ 778.

12. PRACTICE AND PROCEDURE

[11918] ● *Practice and procedure.*—When there is no mention of the fact that the accused persons had looted away the articles or movables of the victims, they cannot be convicted u/s. 395/149. However, the appellants surrounded the victims and extorted a sum of Rs. 300/- as price for sparing them and this amount was paid to the appellants offence under Section 384/149 is made out. *Vishnu Shiv Ram* v. *State of Maharashtra*, AIR 1979 SC 1943 : (1979) 3 SCC 365 : 1979 SCC (Cri) 642 : 1979 CrLJ 1305 : 1979 CrLR (SC) 723 : 1979 UJ (SC) 869.

[11919] ● *Substantive evidence if not referring to allegation that accused person looted away movables of victim.*—If the substantive evidence does not refer to the allegations that the accused person looted away movables of the victims, they cannot be convicted under Section 395/149. If his evidence and FIR show extortion of money as price for sharing them, their conviction may be altered to one under Section 384/149, IPC. *Pohalya Mathavalvi* v. *State of Maharashtra*, AIR 1979 SC 1949 : (1980) 1 SCC 530 : 1980 SCC (Cri) 261 : 1979 CrLJ 1310 : 1980 CrLR (SC) 185.

13. PUNISHMENT

[11920] ● *Punishment.*—Where only one injury has been caused, the sentence of three years' rigorous imprisonment is proper. *Shivappa* v. *State of Mysore*, AIR 1971 SC 196 : (1970) 1 SCC 487 : 1970 SCC (Cri) 415 : 1971 CrLJ 260 : 1970 SCD 384.

[11921] ● *Accused not previous convicts—Fit case for release on probation.*—Where the accused, young men and students were not previous convicts, it is a fit case for release on probation of good conduct. *Moti Lal* v. *State of U.P.*, AIR 1979 SC 1690 : (1979) 4 SCC 343 : 1979 CrLJ 800 : 1979 CrLR (SC) 94 : 1979 UJ (SC) 202.

[11922] ● *Accused while carrying away stolen property exploding cracker to frighten persons.*—While carrying away the stolen property the accused exploded cracker to frighten the inmates of the house who wanted to pursue them.

All the accused were young and they had already served a sentence of about one and half years. There was no attempt to cause any injury to any of the inmates of the house or other persons at the time of the commission of the offence or even thereafter. Taking into consideration all the circumstances the ends of justice would be served if the sentence was, reduced to imprisonment already undergone. *Kushomahton* v. *State of Bihar*, AIR 1980 SC 788 : 1981 SCC (Cri) 279 : 1980 CrLJ 313 : 1980 Supp SCC 344.

[11923] ● ***Appellant "used deadly weapon" in committing robbery.***—Technically the offence committed by the appellant was one under Section 397, IPC as he had "used a deadly weapon" in committing the robbery and the Courts had no option but to impose on him the minimum sentence of seven years' imprisonment. But there were several mitigating circumstances in the case. There was nothing on the record to show that the appellant was a person of bad antecedents. He was a primary school teacher. The amount alleged to have been robbed was a trivial amount of Rs. 385. He did not cause physical hurt to anybody. He did not make any attempt to rob the cash in the booking office where he quietly remained standing for a sufficient time. He did not resist his arrest. According to the Station Master, (PW-6), Constable Shaikh Karim had informed him that the appellant had given his name as Shankar on of Nand Lal of Damoh. Thus, the appellant made no attempt to conceal his real identity. We, therefore think that this is an appropriate case where the Executive Government may, in exercise of its power of clemency under Section 432 of the CrPC, 1973, remit or reduce the sentence of the appellant. *Ram Shankar* v. *State of Madhya Pradesh*, AIR 1981 SC 644 : 1980 Supp SCC 470 : 1981 SCC (Cri) 378 (378-379) : 1981 CrLJ 162 : 1981 CrLR (SC) 574.

[11924] ● ***Pre-planned dacoity—Murdering two persons in cruel manner.***—In this case there was a pre-planned dacoity in which a motor lorry carrying 180 chest of tea was hijacked at about midnight, taken to another place and the driver of the lorry, and a "Khalasi" and two others who were in the lorry were murdered in cold blood in a cruel manner and their bodies were buried with a view to cause evidence of the crime committed by the appellant and other co-accused to disappear. The conviction of appellant under Section 396 read with Section 34 is proper. Plea for reduction of sentence awarded by the Courts to the period already undergone is rejected. *Lalli alias Chiranjib Bhowmick* v. *State of West Bengal*, AIR 1986 SC 990 : (1986) 2 SCC 409 : 1986 SCC (CrI) 174 (176) : 1986 CrLJ 1083 : 1986 CrLR (SC) 183.

[11925] ● ***Sentence offence under Section 397, IPC simplicitor not made out.***—Coming to the question of sentence we find that ultimately neither of the two witnesses were injured nor the appellant succeeded in taking any money from them. No doubt that demand made by them is an offence in the eye of law and attract the provisions of law with which they are charged. An offence under Section 397, IPC *simpliciter* is not made out. It would be only one punishable under Section 397 read with Section 511, IPC. *Sukhwinder Singh alias Jaggi* v. *State of Punjab*, AIR 1994 SC 764 (765) : 1994 Supp (3) SCC 727 : 1994 CrLJ 1117.

[11926] ● ***Accused not to be convicted under Section 397, IPC if not used weapon for robbery.***—An accused can not be convicted under Section 397, IPC if he has not used the weapon for robbery. If weapon is used for self defence when a victim threw some object (herd a milk can) in course of robbery, accused cannot be convicted under Section 394, IPC. He can be convicted, however, under Section 392, IPC. *Ajit Singh* v. *State of Haryana*, (1996) 3 SCC 335 : (1996) 1 Crimes 146 (SC).

[11927] ● ***Weapon attributed to appellants not answered description of deadly weapon.***—Learned counsel contends that the weapon attributed to the appellants cannot answer the description of deadly weapons. We are persuaded to accept the contention particularly in view of the absence of other descriptions given to the weapons. Merely, the description of bamboo sticks or lathis is not enough to make the weapons lethal or deadly. There is no case that the accused inflicted grievous hurt or attempted to inflict grievous hurt to the inmates. Therefore, the limitation presented in Section 397, IPC cannot be applied. Considering all aspects, we think that a sentence of imprisonment for a period of 4 years will be sufficient to meet the ends of justice. *Dhavai Mahto* v. *State of Bihar*, AIR 2000 SC 3602 (3602) : 2000 AIR SCW 3966.

[11928] ● ***Serious case of dacoity with murder—Leniency in sentence not proper.***—In the instant case, the evidence of the injured witness PW-4 is of vital importance. Similar is the case of PW-2 even though PWs-1 & 3 have not been fully believed yet the credibility of the evidence of PWs-2 & 4 cannot be doubted on that score. So far as the acquittal of Dr. Shamim Ahmad Khan is concerned, the trial Court and the High Court doubted prosecution version so far as he is concerned because he was not named in the FIR. It is a serious case of dacoity, and leniency in sentence would not only be undesirable but also would be improper. The passage of time cannot wash away gravity of offence. Therefore, judged from any angle these appeals have no substance and are dismissed. *Arjun Mahto* v. *State of Bihar*, AIR 2008 SC 3270 : (2008) 15 SCC 604 : 2008 CrLJ 4313 (4315, 4316) : 2008 (9) JT 140 : 2008 (11) Scale 341 : 2008 (6) Supreme 81 : 2008 (3) Crimes 338.

[11929] ● ***Sentence—Lenient view.***—In view of the facts that the accused appellants had not caused any injury to any witness, lost in the dacoity in significant as it was only Rs. 2860/- and 28 years had already elapsed since the occurrence, the sentence of five years awarded by the High Court was reduced to 3 years. *Ram Sunder Mahto* v. *State of Bihar*, 2009 (4) Crimes 223 (SC) : JT 2009 (3) SC 337.

[11930] ● ***Section 395, IPC—Dacoity—Sentence.***—Looking to the nature of crime and the manner in which the accused looted temple properties, graver punishment was warranted. In any case, sentence of 5 years' rigorous imprisonment awarded by the trial Court and confirmed by the High Court for the offence under section 395, IPC calls for no interference. *Ram Babu* v. *State of U.P.*, AIR 2010 SC 2143 : (2010) 5 SCC 63 : 2010 CrLJ 2856 (2859, 2860) : (2010) 2 Crimes 384.

14. USING DEADLY WEAPONS OR CAUSING GRIEVOUS HURT DURING DACOITY (S. 397, IPC)

[11931] ● ***Using deadly weapons or causing grievous hurt during dacoity.***—Having interpreted the word "uses" in the context of Section 397, IPC Supreme Court held that it is not necessary that deadly weapon must be actually used by the culprit in the robbery or dacoity by way of causing hurt or brandishing the same and that it is 'used' within the meaning of Section 397, if the deadly weapon is merely held out for terrorising frightening a victim to obtain property. *Phool Kumar* v. *State (Delhi Administration)*, AIR 1975 SC 905 : (1975) 1 SCC 797 : 1975 SCC (Cri) 396 : 1975 CrLJ 778.

[11932] ● ***Accused had not used any weapon for robbery.***—In the instant case, the accused had not used any weapon for robbery but had to use in self defence when victim threw a milk can in course of robbery. Accused cannot be convicted under Section 397, IPC. *Ajit Singh* v. *State of Haryana*, (1996) 3 SCC 335 : 1996 SCC (Cri) 481 : JT 1996 (2) SC 234 : 1996 (1) Crimes 146 (SC) : (1996) 2 SCJ 324.

[11933] ● ***Word "uses" for purpose of Section 397, IPC.***—What is essential to satisfy the word "uses" for the purposes of Section 397, IPC is the robbery being committed by the offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a tenor in the victim and not that it should be further shown to have been actually used for cutting, stabbing, shorting as the case may be. *Ashfaq* v. *State*, 2004 SCC (Cri) 687 (691).

[11934] ● ***Each accused wielding deadly weapon of their own—Ingredients of Section 317, IPC fulfilled.***—The provisions of Section 397, IPC do not create any new substantive offence as such but merely serve as being complementary to Sections 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances *viz.* use of a deadly weapon or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397, IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34, IPC. Consequently, the challenge made to the conviction under Section 397 even after excluding the applicability of Section 34, IPC does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397, IPC, *dehors* any reference to Section 34, IPC. *Ashfaq* v. *State (Govt. of NCT of Delhi)*, AIR 2004 SC 1253 : (2004) 3 SCC 116 : 2004 SCC (Cri) 687 (691) : 2004 CrLJ 936.

[11935] ● ***Ingredients of offence under Section 397, IPC.***—The ingredients of the offence are as under:—

(1) The commission of robbery or dacoity as described in Sections 392 and 395 respectively;

(2) the accused:

  (a) used a deadly weapon, or

  (b) caused grievous hurt, or

  (c) attempted to cause death or grievous hurt.

(3) He did so at the time of committing robbery or dacoity. *Niranjan Singh* v.

State of Madhya Pradesh, AIR 2007 SC 2434 : 2007 CrLJ 3523 : 2007 (3) Crimes 97 (SC) : JT 2007 (9) SC 33.

[11936] ● ***Actual causing of grievous hurt not essential for attracting of grievous hurt.***—The fact of the instant case show that Section 397, IPC was rightly applied. Any hurt which endangers life is a grievous hurt. It would be seen that one of the injuries was caused just below the nipple. The term "endangerous to life". Apart from that in the provision "attempt" to cause grievous hurt attracts its application. The question whether the accused attempted to cause death or grievous hurt would depend upon the factual scenario. In the instant case knife blow was given on the chest just below the nipple. Considering the place where injury was inflicted *i.e.* on the chest the High Court was right in its view about the applicability of Section 397, IPC. *Niranjan Singh* v. *State of Madhya Pradesh*, AIR 2007 SC 2434 : 2007 CrLJ 3523 (SC) (3524) : 2007 (3) Crimes 97 (SC).

[11937] ● ***"Offender" under Section 397, IPC.***—The term "offender" under Section 397, IPC is confined to the offender who uses any deadly weapon, use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397, IPC for the imposition of minimum punishment an another offender who had not used any deadly weapon. There is a distinction between "uses" as used in Section 397, IPC and 398, IPC. Section 398, IPC, connotes something armed with deadly weapon. *Dilawar Singh* v. *State of Delhi*, AIR 2007 SC 3234 : 2007 CrLJ 4709 : 2007 (3) Crimes 388 (SC).

15. RECOVERY OF PROPERTY STOLEN IN DACOITY—PRESUMPTION

[11938] ● ***Recovery of property stolen in dacoity—Presumption.***—Recent and unexplained possession of the property stolen after robbery and murder would be presumptive evidence about robbery would similarly be evidence against him in a charge of murder. *Wasim Khan* v. *State of U.P.*, AIR 1956 SC 400 : 1956 SCR 191.

[11939] ● ***Goods stolen in dacoity when received from accused—Presumption.***—When goods stolen in dacoity were recovered from the accused three days after the occurrence, there occurs only the presumption that the accused knew the article to be stolen not that these were stolen in dacoity. *Sheo Nath* v. *State of U.P.*, AIR 1970 SC 535 : (1969) 3 SCC 116 : 1970 SCC (Cri) 15 : 1970 CrLJ 601 : (1971) 2 SCJ 369 : 1971 Mad LJ (Cri) 578 : (1970) 2 SCR 96 : 1970 AllWR 336 : 1970 LW (Cri) 144 : 1970 UJ 111.

[11940] ● ***Recovery of goods stolen in dacoity presumption drawing of.***—From the recovery of the stolen goods from the appellant, 3 days after the occurrence of the dacoity, three presumptions are possible : (1) that the appellant took part in the dacoity; (2) that he received stolen goods knowing them to be stolen in the commission of a dacoity; and (3) that the appellant received those goods knowing them to have been stolen. While clothes, ornaments, cash, *etc*., were stolen, the only articles recovered from the appellants who was a cloth merchant were a length of muslin and a length of charkhana doriya and he might well have acquired them as a receiver. It was not in evidence, that in the village in which the appellant lived it was known that a dacoity had taken place and goods had been stolen therein. Hence the only legitimate presumption to be drawn was, that the appellant knew that the goods were stolen, but he did not know that they were stolen in a dacoity and so he could only be convicted under Section 411, IPC. *Sheo Nath* v. *State of U.P.*, AIR 1970 SC 535 : (1969) 3 SCC 116 : 1970 CrLJ 601 : 1970 AWR (HC) 336 : 1970 ACrR 208 : 1970 MLW (Cri) 144.

[11941] ● ***Accused convicted on evidence of having in possession of stolen goods.***—Where the accused were convicted on the sole evidence of having in their possession stolen goods which were later identified to belong to the traders whose goods were looted in a dacoity, the presumption that they were dacoits themselves was rightly drawn. *Shivappa* v. *State of Mysore,* AIR 1971 SC 196 : (1970) 1 SCC 487 : 1970 SCC (Cri) 215 : 1971 CrLJ 260 : (1970) 2 SCJ 681.

[11942] ● ***Presumption whether accused received of stolen property or dacoity.***—If there is other evidence to connect an accused with the crime itself, however small, the finding of the stolen property with him is a piece of evidence which connects him further with the crime. There is then no question of presumption. The evidence strengthen the other evidence already against him. It is only when the accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn. In what circumstances the one presumption or the other may be drawn, it is not necessary to state categorically in this case. It all depends upon the circumstances under which the discovery of the fruits of crime are made with a particular accused. It has been stated on more than one occasion that if the gap of time is too large, the presumption that the accused was concerned with the time itself gets weakened. The presumption is stronger when the discovery of the fruits of crime if made immediately after the crime is committed. *Shivappa* v. *State of Mysore*, AIR 1971 SC 196 : (1970) 1 SCC 487 : 1970 SCC (Cri) 215 : 1971 CrLJ 260 : (1970) 2 SCJ 681. **TO THE SAME EFFECT :** (1) *Lchhman Ram* v. *State of Orissa*, AIR 1985 SC 486 : 1985 (2) SCC 533 : 1985 SCC (Cri) 263 : 1985 CrLJ 753 : 1985 CrLR (SC) 186 : 1985 (1) Crimes 611.

[11943] ● ***Dacoity—Appreciation of evidence.***—Contradictions in the evidence of the PWs. as to the weapons, possessed by the accused, cannot make the testimony unreliable. It is common experience that in the confusion of the moment, witnesses are prone to make such error especially if seized by sudden fear. Besides, those who are determined to be lawless do not always stick to their weapons. Presence of an identifying witness who claims to have been looted cannot be doubted merely because his name does not find a place in the FIR where though about 20 persons traveling by a bus including that witness, were alleged to have been looted, names of some of them only were mentioned in the FIR. *Bharat Singh* v. *State of U.P.*, AIR 1972 SC 2478 : (1973) 3 SCC 896 : 1972 CrLJ 1704 : 1972 SCD 1119.

[11944] ● ***Article subject matter of dacoity recovered—At instance of appellant.***—Where articles which were subject matter of dacoity, were recovered at the instance of the accused, is liable under Section 412, IPC by virtue of the presumption. Where none of the witnesses was able to identify the appellant at the TI parade and therefore, there was no legal evidence to connect the appellant with the actual participation in the dacoity, his conviction under Section 397, IPC, cannot be maintained. Though empty cartridges were found near the place of occurrence which were said to have been fired from the licensed gun of the appellant, that by itself was not conclusive because there had been a delay of as many as six days after the occurrence in the recovery of the cartridges. Moreover, the possibility of their having been used by someone else by borrowing the gun of the appellant could not be reasonably excluded. However, there could be no escape from the position that the articles, which were recovered at the instance of the appellant, were the subject-matter of the dacoity and had been properly identified by the owner of the articles. In these circumstances, there would be a presumption that the appellant was a receiver of the property transferred to him in the course of a dacoity. The conviction of the appellant was altered from one under Section 397 to that under Section 412, IPC. *Chhote Lal* v. *State of M.P.*, AIR 1978 SC 1390 : 1978 CrLJ 1411 : 1978 CrLR (SC) 147 (2) : 1978 SCCrR 240 : (1978) 2 SCWR 263 : 1978 CrAppR (SC) 196 : 1978 ACrR 346 : 1978 SimLC 410.

[11945] ● ***When theft property in course of dacoity proved and recovered.***—Where theft property in the course of dacoity is proved and the property is recovered soon after the dacoity taken place, the accused cannot be convicted under Section 395, IPC on the basis of presumption under Section 114, Evidence Act and conviction is altered to that under Section 412, IPC. *Amar Singh* v. *State of M.P.*, AIR 1982 SC 129 : (1982) 3 SCC 214 : 1982 SCC (Cri) 700 : 1982 CrLJ 610 : 1982 CrLR (SC) 573.

[11946] ● ***Recovery of articles stolen—Conviction.***—Recovery of articles at the instance of the accused is sufficient to bring the case not under Section 412, IPC, but under Section 395, IPC, with the aid of Section 114 of the Evidence Act because the recoveries were made very soon after the occurrence. The articles recovered were kept concealed either under a stone or under a bridge or at other places which could not be said to be accessible to any ordinary person without prior knowledge. *Lachhman Ram* v. *State of Orissa*, AIR 1985 SC 486 : (1985) 2 SCC 533 : 1985 SCC (Cri) 263 : 1985 CrLJ 753 : 1985 CrLR (SC) 186 : 1985 (1) Crimes 611 : 1985 AllCrR 165 : 1985 CurCrJ (SC) 105 : (1985) 59 CutLT 471 : 1985 East CrC 148 : 1985 CrAppR (SC) 134.

[11947] ● ***Pre-planned dacoity.***—This was a pre-planned dacoity in which a motor-lorry carrying 180 chests of tea was hijacked at about midnight, taken to another place and the driver of the lorry, and a 'Khalishi' and two others who were in the lorry were murdered in cold blood in a cruel manner and their bodies were buried with a view to cause evidence of the crime committed by the Appellant and the other co-accused to disappear. *Lalli alias Chiranjib Bhowmick* v. *State of West Bengal*, AIR 1986 SC 990 : (1986) 2 SCC 409 : 1986 SCC (Cri) 174 : 1986 CrLJ 1083 : 1986 CrLR (SC) 183.

[11948] ● ***Accused arrested after lapse of 3/4 months—Conviction.***—The recoveries are duly effected and the Sub-inspector as well as the witnesses spoke about the same. Merely because certain stolen articles were recovered from the accused they cannot be held to be dacoits by invoking the presumption unless there is a recent possession. In this case admittedly, there is a lapse of nearly three or four months. In these circumstances, we think it would be safe particularly when they were acquitted by the trial Court to convict them only for the offence of being in possession of the stolen property. *Man Singh* v. *State of Madhya Pradesh*, 1993 CrLJ 3669.

[11949] ● ***Recovery of stolen property—Nothing unnatural or improbable on part of accused in keeping their share.***—The trial Court as well as the High Court have examined the different aspects relating to the recovery of articles and have come to the conclusion that the articles removed during the dacoity had been concealed in the different parts of the residence of the appellant Barchia and were recovered pursuant to the information given by the three appellants to the Investigating Officer. The only objection taken on behalf of the appellants before this is that it looked unnatural that stolen articles would have been kept at different places by the three appellants but within the same compound, *i.e.*, the residence of the appellant Barchia. It is very difficult for Court to say as to how a set of culprits would have behaved after commission of the dacoity, in respect of disposal or concealment of the booty. According to us there is nothing unnatural or improbable on the part of the appellants in keeping their share of the stolen articles concealed in the residence of one of the appellants. *Brij Mohan* v. *State of Rajasthan*, AIR 1994 SC 739 (743-744) : (1994) 1 SCC 413 : 1994 SCC (Cri) 527 : 1994 CrLJ 922 : 1994 (1) Crimes 288.

[11950] ● ***Recovery of stolen property—Presumption.***—Where the stolen property was recovered from the possession of the accused, the Court would be justified in using the presumption, raised by Section 114 of the Evidence Act. *Pravin* v. *State of Madhya Pradesh*, AIR 2008 SC 1846 : (2008) 16 SCC 166 : 2008 CrLJ 2980 (2987) : JT 2008 (4) 354.

DAMAGES

[11951] ● ***Damages.***—The essentials are (a) detriment to one by the wrong doing of another; (b) reparation awarded to the injured through legal remedies; and (c) its quantum being determined by dual components of pecuniary compensation for the loss suffered and often, not always, a punitive addition as a deterrent-cum-denunciation by the law. For instance, exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation or other aggravations of the original wrong, or else to punish the defendant for his evil behaviours or to make a example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart money". *Organo Chemical Industries* v. *Union of India*, AIR 1979 SC 1803 : (1979) 4 SCC 573 : (1980) 1 SCR 61 at 74.

[11952] ● ***"Damages"—Meaning of.***—The traditional view of 'Damages' as meaning actual loss, does not take into account the social content of a provision like Section 14-B contained in a *socio-economic* measure like the (Employees Provident Fund) Act in question. The word 'Damages' has different shades of meaning. It must take its colour and content from its context. It very object of the Legislature would be frustrated if it was not construed in the Act to mean penal damages, which results is damnification and also serves as a deterrent. The pre-dominant object is to penalise. *Organo Chemical Industries* v. *Union of India*, AIR 1979 SC 1803 : (1979) 4 SCC 573 : (1980) 1 SCR 61 at 87.

[11953] ● ***Word "damaged" in collection of words.***—The word "damaged" in the collocation of the words "lost or damaged" appearing in the proviso to sub-section (2C) of Section 13 in relation to the part of the sample sent by the Court to the Director of the Central Food Laboratory must, in the context, mean "damaged due to any cause, including decomposition". The part of the sample sent by the Court to the Director of the Central Food Laboratory under the proviso to sub-section (2-C) of Section 13 may be either damaged due to the container not being properly sealed or fastened, or due to various other causes including breakage of the container, or because decomposition has occurred, or it may be lost in transit. The word "damaged" in the collocation of the words "lost or damaged" occurring in sub-section (2) of Section 11 and in the proviso to sub-section (2-C) of Section 13 must be construed in furtherance of the object and purpose of inserting these provisions. The whole purpose of depositing two parts of the sample with the Local (Health) Authority is that if one of the parts of the sample is lost or damaged for any reason whatever, the remaining part may still be available for analysis.

In STROUD'S *Judicial Dictionary of Words and Phrases, 3rd Edn., p. 710, para 9*, it is stated : "You 'damage' a thing if you render it imperfect or inoperative" Decomposition would render a sample useless and of no value for analysis. The word "damaged" used in sub-section (2-C) has to be given a wider meaning, it is not possible for us to subscribe to the view that the loss or damage must occur after the sample is dispatched for analysis to the Central Food Laboratory. We are inclined to think that the word "damaged" is wide enough to mean "damaged due to any cause whatever, including decomposition". To restrict the meaning of the phrase 'lost or damaged' would be to defeat the object for which the new Section 13 was inserted by Parliament by Act 34 of 1976. It is not necessary that loss should take place only after the actual dispatch of the part of the sample to the Central Food Laboratory has commenced. From the nature of things, the loss contemplated by the proviso to sub-section (2-C) of Section 13 must take place after the Court has directed one part of the sample to be dispatched to the Central Food Laboratory, but the course of such dispatch is not required to be confined to the period of actual transit. Even if that part of the sample is lost after the Court has directed it to be sent to the Director of the Central Food Laboratory and before the actual transit has commenced, that part of the sample would be "lost" within the meaning of the proviso to sub-section (2-C) of Section 13. So far as the damage to that part of the sample is concerned, if damage in the sense of decomposition were to be interpreted to mean decomposition taking place during the course of transit, it would frustrate the very object of Parliament in enacting the proviso to sub-section (2-C) of Section 13. *Charanji Lal* v. *State of Punjab*, AIR 1984 SC 80 : (1984) 1 SCC 329 : 1984 SCC (Cri) 77 : 1984 CrLJ 15.

[11954] ● ***Action for damages—Liability of state.***—An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment he damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. It is well settled now that the State is responsible for the tortuous acts of its employees. The respondent 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the SHO of Anand Parbat police station. It is deemed just and proper to direct the Delhi Administration, respondent 2 to pay compensation to Kamlesh Kumari mother of the deceased, a sum of Rs. 75, 000 within a period of four weeks from the date of this judgment. *Saheli, a Women's Resources Centre through M.S. Nalini Bhanot* v. *Commissioner of Police, Delhi*, AIR 1990 SC 513 : (1990) 1 SCC 422 : 1990 SCC (Cri) 145 (150, 151) : 1990 CrLR (SC) 152 : JT 1990 (4) SC 553.

DANGEROUS PERSON

[11955] ● ***Expressions like "habitual", desperate, dangerous etc. cannot be flung in the face of a man with laxity of semantics.***—Unless the preventive powers under Section 110, Cr.P.Code were prevented from pervasive misuse by zealous judicial vigilance and interpretative strictness, many a poor man, may be cast into prison by sticking the label of "habitual" or by using such frightening expressions as "desperate", "dangerous" and "hazardous" to the community. Law is that what the law does, even as freedom is what freedom does. Going by that test Section 110 cannot be permitted in our free Republic to pick up the homeless and the have-nots as it did when under British subjection because today to be poor is not a crime in this country. That expressions like "by habit", "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of a man with laxity of semantics. The Court must insist on specificity of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference that by confirmed habit, which is second nature, the counter-petitioner is sure to commit the offence mentioned if he is not kept captive.

To call a man dangerous is itself dangerous; to call a man desperate is to affix a desperative adjective to stigmatise a person as hazardous to the community, is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. In the instant case the Hon'ble Supreme Court expected that Government which has any regard for human rights not to use Section 110 of the Cr.P.Code, in a torture some fashion, against the weak and the poor merely because they belong to the "have-not" class and can be easily apprehended as "habitual" this or that or dangerous or desperate. *Gopalanachari* v. *State of Kerala*, AIR 1981 SC 674 : 1981 SCC (Cri) 546 : 1981 CrLJ 337.

[11956] ● ***Dangerous person.***—Under the *Explanation* under S. 2(*a*)(*iv*) of the Maharashtra Prevention and Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981, it is provided that public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely, if any of the activities of any of the persons referred to in the clause directly or indirectly, is causing or calculated to cause any harm, danger or alarm or a feeling of insecurity, among the general public or any section thereof, or grave or widespread danger to life or public health. The deeming clause in the *Explanation* widens the scope of the provision in S. 2(*a*)(*iv*). It follows that if a person found to be repeatedly engaged in such activities as mentioned in S. 2 (*b-1*) which affect adversely or are likely to affect adversely the maintenance of public order he can be detained as a dangerous person in exercise of the power under S. 3 of the Act. *Phulwari Jagadambaprasad Pathak* v. *R.H. Mendonca*, AIR 2000 SC 2527 (2531) : (2000) 6 SCC 751 : 2000 SCC (Cri) 12630 : 2000 CrLJ 3944 : 2000 CrLR (SC) 557.

DEADLY WEAPON

[11957] ● ***Deadly weapon.***—When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of robbery on the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery. *Phool Kumar* v. *Delhi Administration*, AIR 1975 SC 905 : (1975) 1 SCC 797 : 1975 SCC (Cri) 336 : 1975 CrLJ 778 : 1975 CrLR (SC) 272.

[11958] ● ***Knife—Dangerous weapon.***—Knife is indisputably a dangerous weapon. *State of Himachal Pradesh* v. *Wazir Chand*, AIR 1978 SC 315 : (1978) 1 SCC 130 : 1978 CrLJ 347.

[11959] ● ***"Rukhani" weapon for committing murder.***—It cannot be accepted that the "rukhani" used in the process of inflicting injuries on the victim cannot be called a "weapon" and that if the accused wanted to commit the murder, he could have used a regular weapon which is capable of causing more serious injuries. There is no such thing as a regular or earmarked weapon for committing murder. However, the weapon used by the accused, a carpenter by profession himself, being nothing but an implement used in carpentary, is not really such a "deadly weapon" so as to cause *per se* any serious wound or a grievous hurt or injury to the victim. *State of U.P.* v. *Indrajeet*, AIR 2000 SC 3158 : (2000) 7 SCC 249 : 2000 SCC (Cri) 1338 : 2000 CrLJ 4663 : 2000 CrLR (SC) 736.

[11960] ● ***Bamboo sticks or lathis not deadly weapon.***—Merely, the description of bamboo sticks of *lathis* is not enough to make the weapons lethal or deadly. There is no case that the accused inflicted grievous hurt or attempted to inflict grievous hurt on the inmates. Therefore, the limitation prescribed in S. 397 of the IPC cannot be applied. *Dhanai Mahto* v. *State of Bihar*, AIR 2000 SC 3602 (1) : (2001) 10 SCC 657 : 2003 SCC (Cri) 1040.

[11961] ● ***Teeth of human being not considered deadly weapon.***—The appellant stands convicted under Section 326 read with Section 34, IPC. Injuries, no doubt, are grievous, as the phalanx of the index finger has been snipped off. But the allegation is that the assailant had bitten the index finger and caused the said injury. Teeth of a human being cannot be considered as deadly weapon as per the description of deadly weapon enumerated under Section 326, IPC. Hence, the offence cannot escalate to Section 326. It can best remain only at Section 325, IPC. Therefore, the conviction is altered to Section 325, IPC read with Section 34, IPC. *Shakeel Ahmed* v. *State, Delhi*, (2004) 10 SCC 103 : 2004 SCC (Cri) 1759 (1760).

[11962] ● ***Stone whether dangerous weapon.***—It is not in every case a stone would constitute a dangerous weapon. It would depend upon the facts of the case. In some provisions e.g. Sections 324 and 326 expression "dangerous weapon" is used. In some other more serious offences the expression used is "deadly weapon" (e.g. Sections 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or deadly weapon or not. *Mathai* v. *State of Kerala*, AIR 2005 SC 710 : (2005) 3 SCC 260 : 2005 CrLJ 898 (900) : (2005) 1 Crimes 181.

DEAF WITNESS
§ (See "WITNESS")

DEALER

[11963] ● ***Dealer.***—A person, who sells goods which are unserviceable or unsuitable for his business, does not, on that account, become a dealer in those goods unless he has an intention to carry on the business of selling those goods. *State of Gujarat* v. *Raipur Mfg. Co. Ltd.*, AIR 1967 SC 1066.

[11964] ● ***Declaration as to possession or custody of ornaments in excess of exemption limit.***—*Section 16(7), Gold (Control) Act, 1968.*—On the aspect of casting unreasonable burden on the dealer or refiner it must in the first place to be observed that the burden on the dealer or refiner is the same as that which has been caste on a non-dealer (individual or family) whenever the latter comes to own, possess, hold or have under his control articles or ornaments of gold in excess of the exempted limit. Visits of guests and relations (including married daughters and sisters) on festive occasion and request proceeding from them to the house-keeper to keep their ornaments in safe custody during their stays with him, which are ordinary incidents in life, are common to licensed dealers or refiners and non-dealers and there is no reason to suppose that the requirement of making a declaration under Section 16(7) of the Gold (Control) Act, 1968 casts any additional burden on him than on a non-dealer when he has in his possession or custody articles and ornaments in excess of the exemption limit. *Manik Chand Paul* v. *Union of India*, AIR 1984 SC 1249 : (1984) 3 SCC 65 : 1984 SCC (Cri) 389 (396-397) : 1984 CrLR (SC) 475 : (1984) 3 SCR 461 : 1984 UJ (SC) 1072.

DEALING IN SMUGGLED GOODS

[11965] ● ***Dealing in smuggled goods.***—*Section 167(81), See Customs Act, 1978.*—The words "in any way concerned in any manner dealing with prohibited goods" are of very wide import. It is neither desirable nor necessary to define all manner of connection with the prohibited goods which might come within the meaning of the words "in any way concerned in any manner dealing with such goods". It will depend on the facts found in each case whether it can be said that any person was concerned in dealing with such goods. Where a person does any overt act in relation to prohibited goods which he knows to be such and the act is done in consequence of a previous arrangement or agreement, it would in our opinion be a case where the person doing the act is concerned in dealing with the prohibited goods. In other words any transaction relating to prohibited goods which is done or attempted to be done after some kind of prior arrangement or agreement would in our opinion clearly amount to the person being concerned in dealing with the prohibited goods. Both the words "concerned" and "deal" have a wide connotation. The words "concerned in" mean "interested in, involved in, mixed up with" while the words "deal" with mean "to have something to do with, to concern oneself", to treat, to make arrangement, to negotiate with respect to something". Therefore, when a person enters into some kind of transaction or attempts to enter into some kind of transaction with respect to prohibited goods and it is clear that the act is done with some kind of prior arrangement or agreement, it must be held that such a person is concerned in dealing with prohibited goods. The fact that the act stopped at an attempt to purchase as to the present case when the Police intervened does not in any way mean that Sita Ram was not concerned in dealing with the smuggled goods. The evidence shows that there must have been a previous arrangement with the Chinese accused to purchase the smuggled goods. *Sachidananda Banerjee* v. *Sitaram Agarwala*, AIR 1966 SC 955 : 1966 CrLJ 712 : (1966) 2 SCR 1.

DEATH
§ (See "CAUSE OF DEATH" also)

[11966] ● ***Death.***—As is evidence and as must be presumed, that to the healthy, death does not visit and take its toll unless something untowards happens. It is common that should it happen, the ailments of the deceased are mentioned about to the well-wishers and sympathisers who come to condole the death and often talked and repeated about. When the appellants had taken upon themselves to assert that death had occurred on account of brief illness of the deceased, their word in that regard could not be accepted unless it was supported by production of some evidence either of a Doctor or a quack who could supposedly have attended on her, or by evidence of co-villagers who would have supported the defence that the deceased was known to have died a natural death. Not only is the defence locking in this regard but the non-information of the death of the deceased to her parental family leads to the conclusion that the defence suggested was palpably false. All the circumstances could well be explained away or correspondingly established had the dead body of the deceased been not cremated surreptitiously in the absence of her family members. The totality of circumstances thus persuades us to conclude that the dead body of the deceased could have revealed commission of offence punishable at least under S. 304, Part II, IPC and for destruction of that evidence by cremation of the dead body, the appellants had attracted to themselves the third part of S. 201, IPC. *Dhura* v. *State of Rajasthan*, AIR 1995 SC 1963 : 1995 Supp (3) SCC 713 : 1995 SCC (Cri) 1154 (1155, 1156) : 1995 CrLJ 3619.

[11967] ● ***Deceased dying homicidal death in house of her in-laws.***—According to Dr. Agrawal the person may die due to suffocation as a result of inhalation of fumes and a smoke in the respiratory passages produced by burning of clothes. He further opined that the line of redness in burns caused during life may take sometime to appear and, therefore, it is possible that the line of redness may be absent if the death is immediate. There is medical evidence of third Doctor, PW-7, Dr. Radha Mohan, he was Chief Medical Officer, Lucknow and Chief Medico-Legal Expert to the State of U.P. He was Professor of Forensic Medicine in Medical Colleges at Lucknow and Meerut. He had seen the post-mortem examination report of the dead body of Smt. Krishna Kumari. The witness clearly stated that in his opinion Krishna Kumari died before and was burnt later and the death was due to asphyxia which was a result of suffocation. His further opinion was that the burns found on the dead body were post-mortem. They did not show any signs of body reaction which invariably occurs if death was due to burns. In this case the characteristic attitude of the body known as the pugilistic attitude was not present. In deaths due to burns this sort of attitude is found. This confirmed that the body was brunt after death had occurred. There were no red lines and no blisters. There was no sign of congestion in the skin. The lungs showed deep congestion but the wind pipe did not show the presence of any soot or carbon particles. In cases of death resulting from burns soot particles are found in the wind pipe because they go in with breathing. Bleeding from nostrils showed that the death had occurred from asphyxia which was of forceful nature, *i.e.,* the patient must have tried hard to breath. The protruding of the tongue showed that the deceased tried to breath hard or if something was introduced into the mouth or the mouth was closed and the patient might have tried to breath hard to overcome the obstruction and the tongue may have come out. Or if something was introduced into the mouth and if that thing was taken out after death, the tongue will come out. If an alive person is burnt there is bound to be blister formation. But there will be no blister at all if the dead body is burnt, because blister formation is sign of life. Nothing substantial could be brought out in his cross-examination. In view of this evidence, if becomes clear that deceased Krishna Kumari had died a homicidal death and the burn injuries found on her dead body were post-mortem and not ante-mortem. *Mulak Raj* v. *State of Haryana*, AIR 1996 SC 2868 : (1996) 7 SCC 308 : 1996 SCC (Cri) 398 (405, 406) : 1996 CrLJ 1358.

[11968] ● *"Death" in Section 27, Evidence Act.*—The death referred to in Section 27, Evidence Act includes suicidal death besides homicidal death. *Kans Raj* v. *State of Haryana*, AIR 2000 SC 2324 : (2000) 5 SCC 207 : 2000 SCC (Cri) 935 : 2000 CrLJ 2993.

[11969] ● *Murder by strangulation and burning.*—The High Court noticed the fact that in the post mortem report the cause of death was mentioned to be asphyxia due to throttling. While deposing in Court PW-6 supported his post mortem report. He asserted that the cause of death was asphyxia due to throttling, and the burns seen were post mortem burns. He further deposed that the throttling of the neck could have been done by using a rope or by any forceful action on the neck, like pressing. He further deposed that he found the burn injuries to be post mortem since (1) burnt blebs were present filled with air (ii) in the lumen of the trachea and bronchus carbon particles were not present and the lumen was pale. He also asserted that on account of fracture of the cornua of hyoid bone and absence of carbon particles and fumes in the trachea and bronchus, he was of the opinion that death of the deceased Veena was due to throttling.

If the evidence of the doctor (PW-6) is fairly read, it will appear that in his opinion the death was on account of asphyxia caused by throttling. This conclusion was supported by the fact that there was fracture of the cornua of the hyoid bone. It is well accepted in medical jurisprudence that hyoid bone can be fractured only if it is pressed with great force or hit by hard substance with great force. Otherwise the hyoid bone is not a bone which can be easily fractured. Moreover, the absence of carbon particles and fumes in the trachea and bronchus lead to the irresistible conclusion that the deceased must have died before she was set on fire. Some amount of carbon particles and fumes would have certainly been found in the trachea and bronchus if she were alive when set on fire. The High Court, in our view, has completely misread the evidence of the doctor. Rather than considering the reasons given by the doctor for reaching the conclusion that the deceased had died of asphyxia caused by throttling, the High Court over-emphasised that one part of a statement made by the doctor that the throttling of the neck could have been done by using a rope, or by any forceful action on the neck like pressing. *State of Karnataka* v. *K. Gopala Krishna*, AIR 2005 SC 1014 : (2005) 9 SCC 291 : 2005 CrLJ 1436 (1439, 1440) : (2005) 1 Crimes 271.

[11970] ● *Presumption of death.*—Under the law, there is a presumption that if the dead body is not found or the person concerned is not found for a period of seven years, only then the person can be presumed to be dead. *Rubabuddin Sheikh* v. *State of Gujarat*, AIR 2007 SC 1914 : (2007) 4 SCC 318 : (2007) 2 SCC (Cri) 290 : 2007 CrLJ 3206 (3209).

DEATH BY POLICE BEATING

[11971] ● *Death by police beating—Compensation.*—An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. The son of Kamlesh Kumari aged 9 years died due to beating and assault by the S.H. O. Lal Singh and as such she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortuous acts of its employees. The respondent No. 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the S.H.O. of Anand Prabat Police Station, Shri Lal Singh. It is just and proper to direct the Delhi Administration, respondent No. 2 to pay compensation to Kamlesh Kumari mother of the deceased, Naresh a sum of Rs. 75,000/- within a period of four weeks from the date of this judgment. *Saheli, a Women's Resources Centre* v. *Commissioner of Police, Delhi*, AIR 1990 SC 513 : (1990) 1 SCC 422 : 1990 SCC (Cri) 145 : JT (1989) 4 SCC 553.

DEATH BY NEGLIGENCE (S. 304A, IPC)

§ (See also "CRIMINAL NEGLIGENCE")

[11972] ● ***Death by negligence.***—Section 304-A postulate a rash and negligent act entailing death of another. A man, as stated, in Kenny, may bring about an event without having adverted to it at all; he may not have foreseen that his actions would have this consequence and it will come to him as a surprise. The event may be harmless or harmful; if harmful the question arises whether there is legal liability of it. In tort (at common law) this is decided by considering whether or not a reasonable man in the same circumstances would have realized the prospect of harm and would have stopped or changed his course so as to avoid it. If a reasonable man would not, then there is no liability and the harm must lie where it falls. But if the reasonable man would have avoided the harm then there is liability and the perpetrator of the harm is said to be guilty of negligence. The word 'negligence' denotes, and should be used only to denote, such blameworthy inadvertence; and the man who through his negligence has brought harm upon another is under a legal obligation to make reparation for it to the victim of the injury who may sue him in tort for damages. But it should now be recognized that at common law, there is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute *mens rea,* and they are intention and recklessness. The difference between recklessness and negligence is the difference between advertence and inadvertence; they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word 'negligence' with some moral epithet such as 'wicked', 'gross', or 'culpable' has been most unfortunate since it has inevitably led to great confusion of thought and of principal. It is equally misleading to speak of criminal negligence since this is merely to use an expression in order to explain. KENNY on *Out Lines of Criminal Laws* 19th Edition, Para 25 pp 38-39.

Whether negligence involves a mental element, or whether it is conduct assessed by reference to an impersonal standard is arguable. What is or is not negligent involves a consideration of that which a reasonable man would or would not have done in the circumstances; this does not invariably rule out of consideration subjective factors such as a person's knowledge, physical condition or age. A statutory provision may be so phrased as to require consideration of the defendant's intelligence or maturity in order to determine whether it was negligent for him to have acted as he did. *Halsburys Laws of England 4rth edition. Vol. II, Para 17, LC. p. 20.*

[11973] ● ***Rash and negligent act resulting in death of person.***—A Mahant went to the house of the accused who was having a drinking party. The accused was respectful to him and was over anxious to show all hospitality to him. The accused was anxious taking meals and spending the night with him. Seeing that he was going away the accused let go his gun without aiming at the Mahant in order to prevent him from leaving his place by terrifying him to some extent. The shot hit the Mahant in his chest and he died of the wound later on. It was held that this act was rash and negligent and the accused was guilty of an offence under this section. *Sadhu Singh Harnam Singh* v. *State of Pepsu*, AIR 1954 SC 271 : 1954 CrLJ 727.

[11974] ● ***Laying of trap.***—The owner fixed live naked electric wire of high voltage across passage to his latrine to dissuade trespassers. No warning that wire was live one. Trespasser getting shock and died some time thereafter. The occupier held guilty under Section 304-A, IPC. *Cherubin Gregory* v. *State of Bihar*, AIR 1964 SC 95.

[11975] ● ***Trespasser not an outlaw.***—A trespasser is not an outlaw, a *caput lupinem*. The mere fact that the person entering a land is a trespasser does not entitle the owner or occupier to inflict on him personal injury by direct violence and the same principle would govern the infliction of injury by indirectly doing something on the land the effect of which he must know was likely to cause serious injury to the trespasser.

It is, so doubt, true that the trespasser enters the property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time the occupier is not entitled to do wilfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespassers. The voltage of the current fed into the wire precludes any contention that it was merely a reasonable precaution for the protection of private property. *Cherubin Gregory* v. *State of Bihar*, AIR 1964 SC 205 : 1964 (1) CrLJ 138 : 1964 (4) SCR 199.

[11976] ● ***Homoeopath administering poisonous medicines to patient without studying effect.***—Where the accused who was registered as a Homoeopath, administered to the patient suffering from guinea worm, 24, drops of attamonium and a leaf of *dhatura* without studying its effect and the patient died of the poisoning, the accused was guilty under Section 304-A and not under Section 302, Penal Code. *Juggan Khan* v. *State of Madhya Pradesh*, AIR 1965 SC 831 : (1965) 1 CrLJ 763 : (1965) 1 SCR 14.

[11977] ● ***Death direct result of rash and negligent act.***—What Section 304-A requires is causing of death by doing any rash or negligent act, and this means that death must be the direct or proximate result of the rash or negligent act. The expert stated that if turpentine is not slowly added to bitumen and rosin before it is cooled down to a certain temperature, such fire is likely to break out. It seems, therefore, that as turpentine was being added at about closing time, Hatim was not as careful as he should have been and probably did not wait sufficiently for bitumen or rosin to cool down and added turpentine too quickly. The expert has stated that bitumen or rosinments at 300 degree F and if turpentine is added at that temperature, it will catch fire. The flash point of turpentine varies from 76 to 110 degree F. Therefore, the cooling must be brought down, according to the expert, to below 76 degree F to avoid fire. In any case even if that is not done, turpentine has to be added slowly so that there may not be too much frothing. Clearly therefore, the fire broke out because bitumen or rosin was not allowed to cool down sufficiently and turpentine was added too quickly in view of the fact that the process was performed at closing time. It is clearly the negligence of Hatim which was the direct or proximate cause of the fire breaking out, though the fact that burners were kept in the same room in which turpentine and varnish were stored was indirectly responsible for the fire breaking out and spreading so quickly. Even so in order that a person may be guilty under Section 304-A, the rash or negligent act should be the direct or proximate cause of the death. In the present case it was Hatim's act which was the direct and proximate cause of the fire breaking out with the consequence that seven persons were burnt to death; the act of the appellant in allowing turpentine and varnish being stored at a short distance was only an indirect factor in the breaking out of fire. *Kurban Hussein Mohamedalli Bangawal* v. *State of Maharashtra*, AIR 1965 SC 1616 : 1965 (2) CrLJ 550 : 1965 (2) SCR 622 : 1965 MPLJ 561 : 67 Bom LR 447 : 1965 All WR (SC) 527.

[11978] ● ***Homoeopath administering—Poisonous medicines to patient without studying its effect.***—On these facts, it appears to us that Section 299, IPC, does not apply. It cannot be held that the appellant administered the stramonium drops and the dhatura leaf with the knowledge that he was likely by such an act to cause the death of the deceased. Accordingly, we hold that the appellant must be acquitted of the charge under Section 302.

According to the evidence on the record, in no system of medicine, except perhaps in the Ayurvedic System, the dhatura leaf is given as cure for guinea worms. It seems that the appellant prescribed the medicine without thoroughly studying what would be the effect of giving 24 drops of stramonium and a leaf of dhatura. It is a rash and negligent act to prescribe poisonous medicines without studying their probable effect. It is true that care should be taken before imputing criminal negligence to a professional man acting in the course of his profession, but even taking this care we have no doubt that the appellant was guilty of a rash and negligent act. Accordingly, we hold that he is guilty under Section 304-A, IPC. *Juggan Khan* v. *State of M.P.*, AIR 1965 SC 831 : 1965 (1) CrLJ 763 : (1965) 1 SCRM.

[11979] ● ***Section 304-A—IPC-Applicability.***—The requirements of this section are that the death of any person must have been caused by the accused by doing any rash or negligent *etc*. In other words, there must be proof that the rash or negligent act of accused was the proximate cause of the death. There must be direct nexus between the death of a person and the rash or negligent act of the accused. There is no evidence to show that it was rash or the negligent act of the accused that caused the death of the deceased.

There is no presumption in law that a person who possesses only a learner's licence or possesses no licence at all does not know driving. For various reasons, not excluding sheer indifference, he might not have taken a regular licence. The prosecution evidence that appellant No. 1 had driven the jeep to various places on the day previous to the occurrence is a proof of the fact that he knew driving. There was no basis for the conclusion that it was sheer stroke of good fortune that he did not meet with any accident on that day.

To impose criminal liability under Section 304 A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of anther's negligence. It must be the *causa causans*, it is not enough that it may have been the *causa sine qua non*. *Suleman Rahiman Mulani* v. *State of Maharashtra*, AIR 1968 SC 829 : 1968 CrLJ 1013 : 1968 (2) SCR 515 : 1968 MPLJ 361 : 70 Bom LR 536 : 1968 (2) Andh LT 60.

[11980] ● ***Explosion in factory manufacturing fire works.***—Although there was no direct evidence of the immediate cause of the explosion but indisputably the explosives the possession of which was prohibited under the notifications issued under the Act were found in the shops or the premises where the appellants carried on their business and the substances which were of a highly hazardous and dangerous nature were apparently being used in the manufacture of the fire works since they were found at the scene of the explosion.

Where the explosion took place the persons who were employed were mostly women who brought their small children with them and young children below the age of 18 had been employed in the manufacture of the fire works *etc*. The factory was situate in close proximity to residential quarters. It became therefore all the more incumbent on the appellants to have completely avoided the use of highly sensitive compositions of the nature mentioned above. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. The appellants had, undoubtedly displayed a high degree of negligent by allowing or causing to be used dangerous and prohibited compositions and substances which must be held to have been the efficient cause of the explosion. *Bhalchandra* v. *State of Maharashtra*, AIR 1968 SC 1319 : 1968 CrLJ 1501 : 1968 (3) SCR 766 : 1969 Mad LJ (Cri) 36.

[11981] ● ***Mark distinction between rash act and negligent act.***—An offence under Section 304-A as committed either by committing a rash act or a negligent act. There is a marked distinction between rash act and negligent act. In the case of a rash act the criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. A culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not and sometimes with the optimism that they will not, and often with the belief that the author has taken sufficient precaution, to prevent their happening. Criminal negligence is the gross and culpable neglect or failure to exercise a reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused to have adopted. Negligence implies a omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and a reasonable man would not do. Thus culpable negligence is acting without the consciousness that the illegal or mischievous act will follow but in circumstances which saw that the actor or the author has not exercised the caution incumbent upon him and if he had he would have had the consciousness. The imputability arises from the neglect of civil duty and circumspection. *Bala Chandra Waman Pathe* v. *State of Maharashtra*, 1968 SCD 198. **TO THE SAME EFFECT :** (1) *S.N. Hussain* v. *State of Andhra Pradesh*, AIR 1972 SC 685 : 1972 (3) SCC 18 : 1972 SCC (Cri) 254 : 1972 CrLJ 496 : (1972) 1 SCWR 306 : 1972 ACJ 140 : 1972 SCD 433 : 1972 UJ (SC) 487.

[11982] ● ***Negligent act of accused in selecting pipes of less diameter.***—The accused, a bakery owner entrusted certain work of altering the chimney to an experienced mason but who was not a qualified designer. Some asbestos pipes of lesser diameter were used and the ovens were allowed to burn while the alterations were being made. There was bursting of the pipe and collapse of the chimney resulting in many deaths. It was held that the accused committed an offence under the section. Even if the mason was negligent in fixing the pipe on the brick masonry the proximate and efficient cause of the accident was the negligent acts of the accused in selecting the pipe of less diameter and allowing the oven to burn while the work was in progress. *Rustom Sheriorfrani* v. *State of Maharashtra*, 1969 ACJ 70 (SC).

[11983] ● ***Section 304A, IPC—Applicability act causing death must be causa causans.***—In a prosecution for an offence under Section 304 A, the mere fact that an accused contravenes certain rules or regulations in the doing of an act which causes death of another, does not establish that the death was the result of a rash or negligent act or that any such act was the proximate and efficient cause of the death. We have to determine whether the appellant's act in giving only one batch number to all the four lots manufactured on 12-11-62 in preparing batch no. 211105 was the cause of deaths and whether those deaths were a direct consequence of the appellants' act, that is, whether the appellant's act is the direct result of a rash and negligent act and that act was the proximate and efficient cause without the intervention of another's negligence. The act causing the deaths "must be the *causa causans*, it is not enough that it may have been the *causa sine qua non*".

In all cases under Section 304 A there is a casual chain which consists of many links, it is only that which contributes to the *cause* of all causes, namely, the *causa causans* and not *causa sine qua non* which fixes the culpability. In other words, it is submitted that it is not enough for the prosecution to show that the appellant's action was one of the causes of death. It must show that it is the direct consequence, which in this case has not been established. If the materials used in the preparation and the prepared solution had been properly tested, lead nitrate would have been detected at any rate even before the solution was prepared by the appellant. In this view, we cannot hold that the negligence of the appellant in giving one batch number to several lots was the direct cause of the deaths nor can his act be declared to be grossly rash and negligent. *Ambalal D. Bhatt* v. *State of Gujarat*, AIR 1972 SC 1150 : (1972) 3 SCC 525 : 1972 SCC (Cri) 618 : 1972 CrLJ 727.

[11984] ● ***Carrying of corrugated iron sheets on bus roof by driver of bus.***—Where the driver of a bus was prosecuted under Section 304-A and Section 279, IPC for carrying on bus-roof certain corrugated iron sheets which fell down due to jolting while bus was being driven on a Kucha road as a result of which some persons were injured and one of them died and the Investigating Officer made no mention of any attempt on his part to find the said sheets or discover them nor did the prosecution care to find out who the owner of the bus was and who had loaded them, the driver would not be liable for conviction under the above sections. *Baij Nath Singh* v. *State of Bihar*, AIR 1972 SC 1485 : (1972) 2 SCC 264 : (1486, 1487) : 1972 CrLJ 919.

[11985] ● ***Collision of bus and goods—Train at level crossing.***—In the instant case there was a collision of bus and goods train at level crossing. The gateman was negligent and so there occurred the collision resulting in death of so many innocent passengers. As the negligence of gateman intervened the driver of the bus was acquitted. *S.N. Hussain* v. *State of A.P.*, AIR 1972 SC 685 : (1972) 3 SCC 18 : 1972 SCC (Cri) 254 : 1972 SCD 433 : 1972 UJ (SC) 487.

[11986] ● ***Driver not guilty of criminal negligence because he did not stop bus when road signal situate at some distance away.***—Where a level crossing is unmanned, it may be right to insist that the driver of the vehicle should stop the vehicle, look both ways, to see if a train is approaching and thereafter only drive his vehicle after satisfying himself that there was no danger in crossing the railway track. But where a level crossing is protected by a gateman and the gateman opens out the gate inviting the vehicles to pass, it will be too much to expect of any reasonable and prudent driver to stop his vehicle and look out for any approaching train. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Where the gate is open and there is no train scheduled to pass at the time, the driver would be justified in driving his vehicle through the level crossing. Passenger trains have a time schedule and if a train is expected to come at about the time the appellant reached the level crossing, a regular driver of motor vehicles on that route may, perhaps, be found negligent in crossing the railway track, if by mischance, the gate was open. But the train in the present case was not a passenger train but a Goods train and it is not shown that the Goods train was scheduled to pass the level crossing just at about the time the bus reached the spot. The appellant may not even know that a Goods train would be coming at that moment. We do not, therefore, think that the appellant was guilty of criminal negligence merely because he did not stop when the road signal wanted him to stop. This was a clear case of unavoidable accident because of the negligence of the gateman in keeping the gate open and inviting the vehicles to pass. *S.N. Hussain* v. *State of*

Andhra Pradesh, AIR 1972 SC 685 : (1972) 3 SCC 18 : 1972 CrLJ 496.

[11987] ● ***Driver taking bus to footpath and striking against electric pole—Faulty and inefficient investigation.***—No doubt when an accident like the present takes place one naturally expects the driver concerned to explain the circumstances in which he was obliged to take the bus on to the footpath and to strike against the electric pole with such force, thereby killing one human being and injuring several others. The satisfactory nature of the explanation to absolve him of his criminal liability for the accident has, in such circumstances, to be appraised in the light of the entire evidence on the record. The onus of course remains on the prosecution and does not shift to the accused. The evidence of the bus, however, having mounted on to the footpath, which, in the normal course, does not happen, is admissible and has to be duly taken into account in understanding and evaluating the entire evidence led in the case and in appraising the value of the explanation given by the accused for his compulsion which resulted in the accident. The appellant's explanation, even though not conclusive, does, in the absence of the testimony of the bhaiya and of at least some out of the passengers, said to have been travelling in the bus, who might have been able to throw some helpful light on the relevant circumstances, seem to leave fair scope for reasonable doubt about his guilt. Whether the failure on the part of the investigating agency to contact persons who would have given useful material evidence relevant for finding the truth was due to inefficiency or was deliberate having been inspired by some other motive, is not for us to speculate on the existing record. Suffice it to say that, if it appears, as it does in this case, that material evidence has not been collected by the investigating agency for reasons which are wholly unconvincing and the evidence actually produced, leaves a serious lacuna in bringing his guilt home to the appellant, then, merely because the nature of the accident *prima facie* requires an explanation from the driver, would not be sufficient to sustain his conviction, if the truth of his explanation, which is not liable to rejection outright, could have been appropriately judged if the evidence left out by the prosecution had been produced. Parties could not control the Court's discretion to have before it further evidence if it was considered necessary for finding the truth for promoting the cause of justice. Justice would fail not only by unjust conviction of the innocent but also by acquittal of the guilty for unjustified failure to produce available evidence. On the existing record we find the evidence to be inadequate and unsafe for convicting the appellant. This, however, is entirely due to the faulty and inefficient investigation, for which no justification is forthcoming. *Nageshwar Sh. Krishan Ghobe* v. *State of Maharashtra*, AIR 1973 SC 165 : (1973) 4 SCC 23 : 1973 CrLJ 235 : 1973 CrLR (SC) 92 : 1973 (2) SCR 377.

[11988] ● ***Concurrent finding as to rash and negligent driving of accused being proximate cause of death.***—After the impact between the heavy vehicle like a truck and a very much lighter autorickshaw, the latter must in all probability, have been so pushed as to make its driver lose all control of the rickshaw. In such circumstances it could, no doubt, have been contended with a certain amount of reason that the death of the child was a remote and indirect result of the rash and negligent driving on the part of the appellant and not an immediate, direct, natural and proximate consequence. But the three Court having so held, we do not think this Court will be justified in appraising the evidence for itself on this part of the case on the peculiar facts and circumstances disclosed on the printed record. This appellant's conviction must, therefore, be upheld in agreement with the conclusions of the three Courts below. *Jagdish Chander* v. *State of Delhi*, AIR 1973 SC 2127 : (1973) 2 SCC 203 : 1973 CrLJ 1393 : 1973 CrLR (SC) 526 : 1974 (1) SCR 204.

[11989] ● ***Sentence—Mitigating circumstance.***—Penalties designed to deter crime should be gauged to so far as possible to degree of social danger that is represented by the crime and its repetition. To send the appellant back to jail to serve the sentence of six months after 8 years seems to be highly unjust for the kind of offence which has been upheld against him by the three Courts below. It is unlikely to have any reformatory effect on him. Harassment of a criminal trial for more that 8 years and the expense which he must have incurred can legitimately be taken into account when considering the question of sentence to be imposed. The appellant is stated to have served only three weeks of imprisonment but on a consideration of all The relevant circumstances it would be just and proper to reduce the sentence of imprisonment to that already undergone but to increase the sentence of fine. It is right and necessary to express of grave concern over the inordinate delay in the disposal of criminal justice is to achieve its real purpose and if it is to inspire the confidence of the people generally causes for such delay should be eliminated as early as practicable. Laws delay tend to turn justice sour. Sentence reduced and appeal allowed in part in the circumstances. *Jagdish Chander* v. *State of Delhi*, AIR 1973 SC 2127 : (1973) 2 SCC

203 : 1973 SCC (Cri) 770 : 1973 CrLJ 1393 : 1973 CrLR (SC) 526.

[11990] ● ***Death due to rash and negligent driving of bus.***—A speed of 20 miles per hour on a road like Rohtak Road which is 42 feet wide, cannot be said to be fast or excessive. But there can be no doubt that the appellant was grossly negligent in that he did not look at his right even though he was approaching a cross-road and failed to notice the deceased who was coming from his right and crossing the road. The statement of the appellant under Section 342 clearly shows that he did not see the deceased crossing the road and it was only when he heard an alarm to the effect: "stop, stop" that he stopped the bus. That is also substantially the evidence of the three defence witnesses. It is indeed difficult to imagine how the appellant could have possibly failed to notice the deceased coming from his right. It was main road 42 feet wide and if the appellant was reasonably alert and careful, he would have seen the deceased coming from his right and trying to cross the road and in that event, he could have immediately applied the brake and brought the bus to a grinding halt. But it was the case of the defence that the appellant did not notice the deceased at all and it was only when the bus struck against the cycle of the deceased and knocked him down and an alarm was raised, that the appellant applied the brake and brought the bus to a stop. This was culpable negligence on the part of the appellant. We are therefore, satisfied beyond doubt that the death of the deceased was caused on account of negligent driving of the bus. *Duli Chand* v. *Delhi Administration*, AIR 1975 SC 1960 : (1975) 4 SCC 649 : 1975 SCC (Cri) 663 : 1975 CrLJ 1732 : 1975 CrLR (SC) 499.

[11991] ● ***Rash and negligent driving—Proof.***—The main criterion for deciding whether the driving which led to the accident was rash and negligent is not only the speed but the width of the road, the density of the traffic and the attempt, as in this case, to overtake the other vehicles resulting in going to the wrong side of the road and being responsible for the accident. Even if the accident took place in the twinkling of an eye it is not difficult for an eye witness to notice a car overtaking other vehicles and going to the wrong side of the road and hitting a vehicle travelling on that side of the road. The criterion adopted by the learned Judge for adopted by the learned Judge for assessing the evidence of P.Ws. 3 and 4 and rejecting it is thoroughly unjustifiable. There may be cases where it is difficult to be clear or specific in giving details as to the cause of the accident but this is not only such case. The reference by the learned Judge about the slight damage to the electric post and the conclusion drawn therefrom that the car could not have been going at a high speed is not correct as we shall show later. His further observation that the fact that the car travelled another 45 feet and hit against the parapet wall and turned turtle showed that the car must have been travelling at an extremely high speed but there is a little blue paint on the pole and a faint gray stain on the parapet wall is self contradictory unless we are to infer that the learned Judge implied that the one or the other is not true. He does not so hold. There can be no doubt about the car having hit the electric post and the parapet wall. That and the fact of its overturning would establish the rash and negligent driving. A car driven normally and travelling behind a bus does not go to the opposite side of the road and hit an electric post an parapet wall and turn turtle. The car apparently stopped only because it turned turtle. It did not hit the electric post or the parapet wall full tilt; if it did it would have stopped at one of those points. We should remember that the collision with the scooter and pushing it back would have considerably reduced the speed of the car. Even so it travelled farther. The slight damage to the electric post and the parapet wall is because the car hit them sideways. Nobody has suggested that they were brought into existence for the purpose of this case. The car would probably not have stopped but for turning turtle and it should have been travelling quite fast before it could overturn as the learned Judge himself realises. There is only one conclusion possible on the facts of this case and that is that the accused came over to the wrong side of the road and was responsible for the accident and that is clearly a rash and negligent act in the condition of the road and the condition of the traffic. *Shakila Khader* v. *Nausher Gama*, AIR 1975 SC 1324 : (1975) 4 SCC 122 : 1975 CrLJ 1105.

[11992] ● ***Driver not wilfully driving truck on wooden cot—Case fell under Section 304-A, IPC.***—Section 304-A carve out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299, IPC or murder under Section 300, IPC. If a person wilfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Each case will, therefore, depend upon the particular facts established against the accused. Section 304-A by its own definition totally excludes the ingredients of Section 299 or Section 300, IPC. Doing an act with the intent to kill a person or knowledge that doing of an act was likely to cause a person's death are ingredients of the offence of culpable homicide.

The tangential track of the speeding truck coming in contract with the corner of the steel cot throwing it over the wooden cot and thereby throwing the deceased out of it resulting in fatal injuries, would not reveal the accused's intention or any deliberate act with the requisite knowledge for an offence of culpable homicide. The facts and circumstances disclosed in this case fit in more reasonably with the theory of loss of control by the accused of the vehicle in high speed trying to take a turn for the kutcha road.

There is, therefore, no error committed by the High Court in holding that the case falls under Section 304-A, IPC and not under Section 304, Pat II, IPC. *State of Gujarat* v. *Haiderai Kalubhali*, AIR 1976 SC 1012 : (1976) 1 SCC 889 : 1976 SCC (Cri) 211 : 1976 CrLJ 732 : 1976 CrLR (SC) 114.

[11993] ● ***Applicability of "res ipsa loquitor".***—While driving a bus at moderate speed, its driver suddenly noticed a four year child attempting to cross the road from left to right. The road was 12 feet wide with deep ditches on both sides. The driver swerved the bus to the extreme right to dodge the child but it was hit by the bus and died on the spot. He swerved the bus extreme right but to the certain limit as there was a deep ditch by the side of the road and if the bus had gone further was risk of the bus falling in the ditch. It was held that the accident was due to error of judgment and inspite of driver adopting best course according to his knowledge and belief, the principle of *res ispa laquitor* was not attracted. *Syad Akbar* v. *State of Karnataka*, AIR 1979 SC 1848 : 1980 (1) SCC 30 : 1980 SCC (Cri) 59 : 1979 CrLJ 1374 : 1979 CrLR (SC) 327.

[11994] ● ***Driver running over deceased—When deceased trying to crossroad.***—A driver of a vehicle van over the deceased without attempting to save the deceased by swerving to other side when there was sufficient space, the driver was held guilty under Section 304-A, IPC. *Baldevji* v. *State of Gujarat*, AIR 1979 SC 1327 : (1980) 1 SCC 320 : 1979 CrLJ 1136.

[11995] ● ***Accident not proved—Death of girl caused due to rash and negligent driving.***— The fact that the impact occurred in spite of the fact that persons who were making use of carriage was ahead of him could be easily seen by the accused while coming from north to south, clearly indicates that the accused had not maintained a proper look out while he was driving his lorry. Furthermore there were no tyre-marks on the road which means that the accused never made any attempt to apply brakes and the further fact that the lorry stopped 73 ft. ahead after collision is indication of speed at which he was driving the lorry. Having regard to the above aspects it was held that the incident could not be regarded as pure accident and that the accused had caused the death of girl by his rash and negligent driving. *Usman Gani Mohammad* v. *State of Maharashtra*, 1979 (3) SCC 362 : 1979 SCC (Cri) 675 : 1978 CrLR (SC) 642 : 1979 UJ (SC) 131.

[11996] ● ***Rash and negligent driving.***—Where rash and negligent driving caused death the fact that the accused driver was supporting a large family and the proprietor of the vehicle failed to compensate the family and no compensation was shown no interference from the sentence awarded by the Trial Court was called for. *Rattan Singh* v. *State of Punjab*, AIR 1980 SC 84 : 1979 (4) SCC 719 : 1980 SCC (Cri) 17 : 1980 CrLJ 11 : 1980 CrLR (SC) 44 : 1980 UJ 58.

[11997] ● ***Awarding of punishment in rash and negligent cases.***—In the case of awarding punishment in rash and negligent cases, sentence must have a policy of correction and victimisation of the family of the convict may be a reality, and welfare State must give though to this aspect. *Rattan Singh* v. *State of Punjab*, AIR 1980 SC 84 : 1979 (4) SCC 719 : 1980 SCC (Cri) 17 : 1980 CrLJ 11 : 1980 CrLR (SC) 44 : 1980 UJ 58.

[11998] ● ***Sentence—No compassion to be shown.***—Where it was contended that a sentence of 2 year's R.I. is excessive especially having regard to the fact that the petitioner has a large family to maintain and the proprietor of the truck has left his family in the cold, it was held that when a life has been lost and the circumstances of driving are harsh, no compassion can be shown. No interference can be made with the sentence, although the owner is often not morally innocent. Nevertheless, sentencing must have a policy of correction. This driver, if he had to be come a good driver, must have a better training in traffic law, and moral responsibility with special reference to the potential injury to human life and limb. Punishment in this area, must, therefore, be accompanied by these components. The State it is hoped, will attach a course for better driving together with a livelier sense of responsibility, when the punishment is for driving offences. May be the State may consider, in cases of men with poor families occasional parole and reformatory courses on appropriate application, without the rigour of the old rules which are subject to the Government discretion. The victimisation of family of the convict may well be a reality and is regrettable. Hopefully, the welfare state will bestow better thought and action to traffic justice. *Rattan Singh* v. *State of Punjab*, AIR 1980 SC 84 : 1979 (4) SCC 719 : 1980 SCC (Cri) 17 : 1980 CrLJ 11 : 1980 CrLR (SC) 44 : 1980 UJ 58.

[11999] ● ***Driver convicted for killing one person and injuring another.***—Where the driver had not only driven his bus in a reckless manner and caused the death of one person and injuries to another but he had also attempted to escape prosecution by failing to report the accident to the police authorities and the driver was guilty of offence under Section 304 A and other offences, the accused deserves a strict sentence. The Supreme Court raised the sentence to six months' R. 9 and fine of Rs. 1000/- in default to undergo R 1 for two months. *State of Karnatka* v. *Krishna alias Raju*, AIR 1987 SC 861 : (1987) 1 SCC 538 : 1987 SCC (Cri) 198 : 1987 CrLJ 776 : 1987 (1) Crimes 397.

[12000] ● ***Enhancement of sentence—Refusal by High Court—Not proper.***—Here was a case where the respondent had not only driven his bus in a reckless manner and caused the death of one person and injuries to another but he had also attempted to escape prosecution by failing to report the accident to the police authorities. Considerations of undue sympathy in such cases will not only lead to miscarriage of justice but will also undermine the confidence of the public in the efficacy of the criminal judicial system. It need be hardly pointed out that the imposition of a sentence of fine of Rs. 250/- on the driver of a Motor Vehicle for an offence under Section 304-A IPC and that too without any extenuating or mitigating circumstance is bound to shock the conscience of any one and will unmistakably leave the impression that the trial was a mockery of justice. We are, therefore, constrained to do what the High Court should have done but failed to do *viz.* enhance the sentence in the interests of justice. We, however, feel that the ends of justice would be met by enhancing the sentence for the most serious of the charges for which the respondent has been convicted *viz.* the charge under Section 304-A, IPC. Accordingly we enhance the sentence for the conviction under Section 304-A, IPC to six months RI and fine of 1000/- in default to undergo RI for two months. We leave undisturbed the other convictions and sentences. *State of Karnataka* v. *Krishna alias Raju*, AIR 1987 SC 861 : (1987) 1 SCC 538 : 1987 SCC (Cri) 198 : 1987 CrLJ 776 : 1987 CrLR (SC) 206 : 1987 CAR 129.

[12001] ● ***Indiscriminate firing—Killing two innocent bystanders.***—The section applies only to such acts which are rash or negligent and are directly the cause of death of another person. In other words, a rash act is primarily an overhasty act as opposed to a deliberate act but done without due care and caution. The accused a police constable fired two shots killing two persons an third shot went off. There was actual quarrel and fight between accused and two more constables on the one side and prosecution witness and his brother on the other side. The accused started indiscriminate firing. The occurrence took place at 9 p.m. and so due to darkness the accused could not have noticed any bystanders. The firing was not aimed at two deceased. He had fired only to scare away people. It was held that the accused acted in haste, rashly and without circumspection and due case and therefore provisions of Section 304-A were attracted. *Balwant Singh* v. *State of Punjab*, 1994 Supp (2) SCC 67 : 1994 SCC (Cri) 844 : 1994 (1) Crimes 745 (SC).

[12002] ● ***Rash and negligent driving—Causing death of boy.***—In a case of rash and negligent driving causing death of a boy having regard to the fact that the occurrence took place 15 years ago, the appellant was released on probation of good conduct. *A.P. Raju* v. *State of Orissa*, 1995 SCC (Cri) 675 : 1995 Supp (2) SCC 385.

[12003] ● ***Death of boy due to injuries caused by accident.***—Accident caused on *Kutcha* portion of right side of road in which a boy standing there was dashed and died due to injuries caused by this accident. Place of incident is itself indicative of negligent manner in which vehicle was being driven. Conviction by High Court is justified. *A.P. Raju* v. *State of Orissa*, 1995 SCC (Cri) 675 : 1995 Supp (2) SCC 385.

[12004] ● ***Bhopal gas tragedy—Defect in plant not only structural but operational.***—The employees of Union carbide running a plant with not only structural defects but also operational defects resulting in grim Bhopal tragedy were held to be negligent under Section 304-A IPC. *Keshub Mahindra* v. *State of M.P.*, (1996) 6 SCC 129 : 1996 SCC (Cri) 1124 : 1996 (3) Crimes 288 (SC).

[12005] ● ***Death caused by running over by motor vehicle.***—The appellant had gone running towards the spot where the boring work was going on. The appellant sat in the jeep which was standing there and took in it reversed up to the intersection which meets the National Highway The appellant then came in great speed with the result the deceased got frightened and ran for cover. The appellant then knocked down the deceased. The evidence of PWs 2 and 3 also support this version. Once it is believed that the appellant behaved in that manner and it is also believed that there was no other reason for the appellant to go on the wrong side of the road, it has to be held that whatever the appellant had done was done intentionally and the incident did not happen accidentally. *Vasant* v. *State of Maharashtra*, AIR 1998 SC 699 (700) : 1998 CrLJ 844 : 1998 (1) CCR 181 : 1998 (1) Crimes 120.

[12006] ● ***Delay on part of doctor to attend to patient.***—In a case, it was alleged by the second respondent that when her husband was in a serious condition, he was taken to the hospital wherein the accused doctor was working as a medical practitioner and that the accused did not attend to the patient immediately on being insisted by her, the accused became angry and there was exchange of words between them. The gravamen of the case was that the accused administered an injection to the patient and patient was taken to another hospital where he was pronounced dead. "Allegations do not disclose, *prima facie*, a case of rash or negligent act on the part of the appellant so as to attract the penal provision under Section 304-A, IPC. If there was delay on the part of the doctor to attend on the patient that may at the worst be a case of civil liability and not of culpable negligence falling under the above section. That apart, the cause of death has now been disclosed, from the report of the chemical examiner, as one of consuming poison .... Therefore, by no stretch of imagination can it be said that the death of the deceased was caused by any act done by the appellant." *Rakesh Ranjan Gupta* v. *State of U.P.*, AIR 1999 SC 2115 : (1999) 1 SCC 188 : 1999 SCC (Cri) 76 : 1999 CrLJ 3484.

[12007] ● ***Driving bus carelessly and negligently.***—The accused was alleged to have driven the vehicle carelessly and negligently with the result certain passenger had fallen down from the vehicle. The driver had really started the vehicle suddenly even before the passenger could get into the vehicle and that he moved the vehicle even before getting any signal from the rear side. The evidence in this case however was scanty to fasten the driver with criminal negligence. It was, therefore, held that conviction of driver was not sustainable and he was entitled to the acquittal. *Mohammed Ajruddin* v. *State of A.P.*, AIR 2000 SC 2511 : (2000) 7 SCC 72 : 2000 CrLJ 3508 (SC).

[12008] ● ***Accused convicted under Section 304A, IPC not given benefit of probation of good conduct.***—In the instant case the accused convicted under Section 304-A cannot be given the benefit of probation of good conduct. The accused must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of vehicle he cannot escape from jail sentence. *Dalbir Singh* v. *State of Haryana*, AIR 2000 SC 1677 : (2000) 5 SCC 82 : 2000 CrLJ 2283.

[12009] ● ***Intention to cause death.***—Section 304-A is applicable to cases where there is no intention to cause death and no knowledge that the act in all probabilities will cause death. In this case where the accused picked-up gun unlocked it, loaded it with cartridges and shot gun from very close range of about 4/5 feet aiming at chest of deceased. Section 304-A is not applicable. *Shankar Narayan Bhadolkar* v. *State of Maharashtra*, AIR 2004 SC 1966 : 2004 CrLJ 1778 : JT 2004 (3) SC 211.

[12010] ● ***Death caused by negligence.***—Section 80 protects an act done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. The primordial requirement of Section 80 is that the act which killed the other person must have been done "with proper care and caution". Where the accused shot his own colleague at close range without knowing the identity of his target, the act smacked of utter dearth of any care and caution. The amount of care and circumspection taken by an accused must be one taken by a prudent and reasonable man in the circumstances of a particular case. Where the act of the accused is itself criminal in nature the protection under Section 80 is not available. If the accused pleads exception within the meaning of Section 80 there is a presumption against him and the burden to rebut the presumption lies on him.

Here the evidence on record as substantiated by the testimony of PWs-2 and 3 shows that the accused picked up the gun, unlocked it, loaded it with cartridges and shot the gun from a close range of about 4/5 ft aimed at his chest. Certainly, in view of unimpeachable evidence of PWs-2 and 3, Section 80 has no application.

Coming to the plea of the applicability of Section 304-A, it is to be noted that the said provision relates to death caused by negligence. *Shankar Narayan Bhadalkar* v. *State of Maharashtra*, 2005 SCC (Cri) 22 (28-29).

[12011] ● ***Section 304-A, IPC—Applicability.***—Section 304-A, IPC applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. It applies to such acts that are rest and negligent and are directly the cause of death of another person. *Prabhakaran* v. *State of Kerala*, AIR 2007 SC 2376 : 2007 (3) Crimes 146 (SC) : JT 2007 (9) (SC) 346. TO THE SAME EFFECT : (1) *Naresh Giri* v. *State of Madhya Pradesh*, JT 2007 (12) SC 433. (2) *Rathnashalvan* v. *State of Karnataka*, AIR 2007 SC 1064 : (2007) 3 SCC 474 : 2007 (2) SCC (Cri) 84 : 2007 CrLJ 1451 : 2007 (2) Crimes 51 (SC). (3) *State of Rajasthan* v. *Chittarmal*, (2007) 10 SCC 792 : 2007 (3) SCC (Cri) 696 : 2007 (3) Crimes 153 (SC) : JT 2007 (9) SC 261.

[12012] ● ***Rash and negligent driving.***—Coming to the question whether there was any rash and negligence involved, evidence of the RTO (PW-10) is relevant. He has clearly stated that the accident did not occur on account on mechanical defects. The evidence of PWs 1, 2 and 6 who were eye-witnesses shows that the vehicle was being driven at a very high speed. Significantly some of the PWs. were travelling in a lorry. PW-6 had stated that the vehicle was coming at a very high speed and that the road was quite wide and there was no traffic at the time of accident. It is to be noticed that the evidence of the witnesses clearly shows that the vehicle dashed against a tree and the branches of the tree fell on it. From the evidence of PW-6 it appears that though it was rainy season but there was no rain at the relevant point of time. In view of the evidence of eye-witnesses and the factual scenario the inevitable conclusion is that the Courts below have rightly found the accused guilty. The sentence of six months' simple imprisonment and the fine imposed does not in any way appear to be irrational. *Rathnashalvan* v. *State of Karnataka*, AIR 2007 SC 1064 : (2007) 3 SCC 474 : 2007 (2) SCC (Cri) 84 : 2007 CrLJ 1451 : 2007 (2) Crimes 51 (SC).

[12013] ● ***"Negligence" and "rashness"—Difference.***—A negligent act is an act done without doing something which a reasonable man guided upon those consideration which ordinarily regulate the conduct of human affairs would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genes of which rashness is the species. It has sometimes been observed that in rashness, the action is done precipitately that the mischievous or illegal consequences may fall but with a hope that they will not. *Prabhakaran* v. *State of Kerala*, AIR 2007 SC 2374 (2377) : (2007) 14 SCC 269 : 2007 (3) Crimes 146 (SC) : 2007 (7) SCR 1141. TO THE SAME EFFECT : *Mahadev Prasad Kaushik* v. *State of Uttar Pradesh*, 2008 (4) Crimes 218 (SC) : JT 2008 (11) SC 218.

[12014] ● ***Culpable rashness or negligence—Determination.***—In criminal cases, the amount and degree of negligence are determining factors. A question whether the accuseds' conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a provident and reasonable man would consider to be sufficient considering all the circumstances of the case. *Prabhakaran* v. *State of Kerala*, AIR 2007 SC 2376 (2377) : (2007) 14 SCC 269 : 2007 (3) Crimes 146 (SC) : 2007 (7) SCR 1141. TO THE SAME EFFECT : *Rathnashalvan* v. *State of Karnataka*, AIR 2007 SC 1064 : (2007) 3 SCC 474 : 2007 (2) SCC (Cri) 84 : 2007 (2) Crimes 51 (SC).

[12015] ● ***Criminal rashness and criminal negligence—Distinction.***—"Rashness" consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. Criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted. *Prabhakaran* v. *State of Kerala*, AIR 2007 SC 2376 : (2007) 14 SCC 269 : 2007 (7) SCR 1141 : 2007 (8) Scale 191 : 2007 (3) Crimes 146.

[12016] ● ***Rash and negligent act.***—Section 304-A discloses that criminality may be that apart from any *mens rea*, there may be no motive or intention still a person may venture or practice such rashness or negligence which may cause the death of other. The death so caused is not the determining factor. *Naresh Giri* v. *State of Madhya Pradesh*, (2008) 1 SCC 791 : JT 2007 (12) SC 433 : 2007 (13) Scale 7.

[12017] ● ***Medical negligence.***—In every mishap or death during medical treatment, a medical man cannot be proceeded against in a criminal Court. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing disservice to the community at large. If the Courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. It would also lead to shaking the mutual confidence between the doctor and patient. Every failure or misfortune in the hospital or in a clinic of a doctor cannot be termed as act of negligence so as to try him of an offence punishable under Section 304-A of the Code.

A physician would not assure the patient of full recovery in each and every case. He cannot and does not guarantee that the result of his treatment would invariably be beneficial much less to the extent of 100% for the person treated by him. The only guarantee which a professional can give or can be understood to have given by necessary implication is that he is possessed of requisite skill in that branch or profession which he is practicing and while undertaking performance of the task entrusted to him, he would be exercising his skill with reasonable competence. *Mahadev Prasad Kaushik* v. *State of Uttar Pradesh*, AIR 2009 SC 125 : (2008) 14 SCC 479 : JT 2008 (11) 218 : 2008 (13) Scale 356 : 2008 (7) Supreme 292 : 2008 (4) Crimes 218.

[12018] ● ***Standard to be applied for judging negligence.***—Standard to be applied for judging whether a person charged has been negligent or not would be that of an ordinary competent person exercising ordinary skill in that profession. Mere deviation from normal professional practices is not necessarily evidence of negligence. An error of judgment of professional is also not negligence per se. Higher acuteness in emergency and higher complication, more are chances of error of judgment. *Mahadev Prasad Kaushik* v. *State of Uttar Pradesh*, AIR 2009 SC 125 : (2008) 14 SCC 479 : 2008 (13) Scale 356 : 2008 (7) Supreme 292 : 2008 (4) Crimes 218 (SC) : JT 2008 (11) 218.

[12019] ● ***Section 304-A—Scope.***—Section 304-A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder under Section 300. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When the intent or knowledge is the direct motivating force of the act. Section 304-A has to make room for the graver and more serious charge of culpable homicide. The provision of this section is not limited to rash or negligent driving. Any rash or negligent act whereby death of any person is caused becomes punishable. Two elements either of which or both of which may be proved to establish the guilt of an accused are rashness/negligence, a person may cause death by a rash or negligent act which may have nothing to do with driving at all. Negligence and rashness to be punishable in terms of Section 304-A must be attributable to a state of mind wherein the criminality arises because of no error in judgment but of a deliberation in the mind risking the crime as well as the life of the person who may lose his life as a result of the crime. Section 304-A discloses that criminality may be that apart from any *mens rea*, there may be no motive or intention still a person may venture or practice such rashness or negligence which may cause the death of the other, the death sentence so caused is not the determining factor. *Kuldeep Singh* v. *State of Himachal Pradesh*, AIR 2008 SC 3062 : 2008 CrLJ 3932 (3933, 3934) : JT 2008 (8) SC 219.

[12020] ● ***Causing death by negligence.***—Section 304-A does not create a new offence and it is directed against offences outside range of Sections 299 and 300, IPC. It covers only those cases where death is caused without intention or knowledge. *Mahadev Prasad Kaushik* v. *State of Uttar Pradesh*, AIR 2009 SC 125 : (2008) 14 SCC 479 : 2008 (4) Crimes 218 (SC) : JT 2008 (11) SC 218. TO THE SAME EFFECT : *Girish Singh* v. *State of Uttranchal*, 2008 SCR 47.

[12021] ● ***Tools required to control Road fatalities.***—"We have the tools needed to combat epidemic. In the developed nations, proven methods such as enforcement of laws regarding driving under the influence of alcohol or drugs, reducing speed limits, and requiring seat belts and restraints have shown significant reduction in traffic fatalities. Road design and road environment, vehicle design, and road safety standards are also strategies that successfully address traffic safety. For maximum impact of RTI's, a systems approach with multiple, scientifically proven prevention techniques must be employed. Education alone has been shown to be less effective, and often ineffective.

"Proven interventions for developed countries require research, modification, and testing for developing countries. For example, developing countries face poorly designed and maintained roadways, unsafe vehicles, drivers under the influence of drugs or alcohol, lack of national policies, and inadequate enforcement. Success will require significant new resources supported by sustained political commitment. *State of Karnataka* v. *Muralidhar*, AIR 2009 SC 1621 : (2009) 4 SCC 463 : 2009 (4) SCR 400.

[12022] ● ***Road accidents have a bearing on economy.***—In addition to the devastating human toll, the economic impact of road crashes is also enormous. Many of these injured or killed are wage earners, leaving families destitute and without means of support loss of wages, property damage and other factors' affected by road traffic crashes represented 4.6% of the gross national product of the United States in 1994. In developing countries, road traffic crashes represented 3.5% of the G.N.P. The estimated annual cost of road traffic crashes in developing countries exceeds $ 100 billion (U.S.). This amounts to nearly double the total combined development assistance these countries receive every year from bilateral and multilateral Government organizations. Globally the estimated annual costs of road crashes are 500 billion (U.S.). *State of Karnataka* v. *Muralidhar*, AIR 2009 SC 1621 : (2009) 4 SCC 643 : 2009 (4) SCR 400.

DEATH CERTIFICATE

[12023] ● ***Two death certificates—Reasonable doubt about cause of death.*** [Please refer to *Balai Chandra Biswas* v. *State of West Bengal*, AIR 1994 SC 914 : (1994) 1 SCC 423 : 1994 CrLJ 1035 under Topic "Disappearance of Evidence"]

DEATH IN POLICE CUSTODY
§ (See "CUSTODIAL DEATH")

[12024] ● ***Death in police custody.***—On the question of sentence, a fervent appeal was made by the counsel of accused that having regard to the passage of time and the changed circumstances the accused should not be sent to Jail and the sentence of fine should suffice. We are unable to accede to this request. This offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in Police custody must be seriously viewed for otherwise we will help take a stride in the direction of Police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency. *Gauri Shanker Sharma* v. *State of U.P.*, AIR 1990 SC 709 (716) : 1990 Supp SCC 656 : 1990 CrLR (SC) 166 : JT 1990 (1) SC 6 : (1990) 1 SCR 29.

DEATH OF COMPLAINANT

[12025] ● ***Recalling of order.***—From the material on record, it appears that both the complainant and his mother committed suicide on 5.3.2001 and his father also committed suicide two days later on 7.3.2001. The present appellant is the brother of the complainant and claims to be the legal heir-legatee of the deceased. It is true, as noticed in the impugned judgment and order, that on two earlier occasions also *i.e.* on 10.1. 2002 and 4.4.2002, none was present for the complainant. Insofar as the absence of the advocate is concerned , it is evident that on the death of his client, he had no authority to appear. The order-sheet further shows that on the aforesaid two dates, even the accused was not present. Having regard to the facts and circumstances of the cases, we are of the view that interests of justice require that the order of the Magistrate dated 7.9.2002 acquitting the accused, as affirmed by the High Court by the impugned judgment and order, deserves to be recalled so that the complaints can be tried on merits in accordance with law. We may only note that there is no hard-and-fast rule regarding recalling of such orders. *Aseem Shaliandi Merchant* v. *Brij Mehra*, (2005) 11 SCC 412 : (2006) 1 SCC (Cri) 776 (777).

DEATH SENTENCE
§ (See also "SENTENCE")

[12026] ● ***Death sentence.***—Upon conviction for murder under Section 302, Penal Code, sentence of death should ordinarily be imposed, unless there are extenuating circumstances on record by reason of which the Judge considers it proper to award the lesser penalty, in which case, the reasons for which the lesser penalty is awarded should be recorded in the judgment. *Dalip Singh* v. *State of Punjab*, AIR 1953 SC 364 : 1953 CrLJ 1465 : 1953 SCJ 532 : 1953 SCA 709 : 1953 MWN 642 : 1954 SCR 145.

[12027] ● ***Imposition of death sentence not improper.***—In the present case the accused was convicted under Section 302/34, and not under Section 302. The trial Court found that though the accused did not himself inflict any blow on the deceased, he had shared the common intention to kill him and had intentionally participated in the attack by being present on the spot armed with a lathi so as to keep guard and give support to his brother who attacked the deceased with a gandasa. The trial Judge convicted the accused under Section 302 read with Section 34 and sentenced him to death. In the eye of the law, the accused is as much guilty of the offence of murder as that co-accused who actually dealt the fatal blows, and on the facts of the case the sentence of death imposed on him cannot be held to be improper and has to be maintained. *Rishi Deo Pande* v.

State of U.P., AIR 1953 SC 331 : 1955 CrLJ 873.

[12028] ● *Death sentence—Imposition of.—* *Note:* Under the CrPC, 1973, the position is quite the opposite. As per Section 354(3) of the Code, the Court should give 'special reasons' for imposing the death sentence. Otherwise, the sentence of imprisonment for life alone should be awarded.

When the two Judges hearing a criminal appeal are divided in their opinion as to the guilt of the accused, and the conviction for murder is confirmed by relying upon the opinion of a third Judge to whom reference is made, it is a convention, though not a rule of law, that death sentence should *not* be imposed. In such a case it is not necessary to see whether there are any extenuating circumstances justifying the imposition of the lesser penalty. *Aftab Ahmed Khan* v. *State of Hyderabad*, AIR 1954 SC 436 : 1954 CrLJ 1155 : 1954 SCA 672 : 1954 SCJ 655 : 1955 SCR 588 : 1954 (2) MLJ 338 : 1954 MWN 743 : 1954 AWR (Sup) 69.

[12029] ● *Death sentence—No interference with.*—In the present case the accused was convicted under Section 302, Penal Code. It was established that the fatal blow on the head of the deceased, which was given with a sharp cutting instrument, has been intentionally given on his head with much severity after he had fallen on the ground and was helpless. The accused was sentenced to death and on appeal the sentence was confirmed. Under these circumstances there is no cause for interference with the sentence of death, even though the deceased had been attacked in the heat of the moment and without any premeditation. *Kripal* v. *State of U.P.*, AIR 1954 SC 706 : 1954 CrLJ 1757.

[12030] ● *Appellants sentenced to death on opinion of third Judge.*—The question of sentence is always a matter of discretion, but when in a confirmation proceeding there is a difference of opinion between the Judges of the High Court constituting the Bench, and the conviction of the accused has been confirmed after the matter is referred to a third Judge, the death penalty should not be imposed unless when there are compelling reasons to do so. *Pandurang, Tukia and Bhillia* v. *State of Hyderabad*, AIR 1955 SC 216 : 1955 CrLJ 572 : 1955 SCR 1083 : 1955 SCJ 106 : 1955 SCA 228 : 1955 MWN 161.

[12031] ● *Death sentence reduced to life imprisonment.*—In the present case the accused was convicted of murder for causing the death of the deceased by giving him a blow with a pen-knife in the chest. It was established that the accused who was a hot-blooded young man lost control over himself after he had been given a slap by the companion of the deceased, and had whipped out the knife thereafter in sudden anger, and had given the fatal stab without any premeditation. Under these circumstances the sentence of death is not called for, and it is reduced to one of imprisonment for life. *Narayanan Nair* v. *State of Trav.-Cochin*, AIR 1956 SC 99 : 1956 CrLJ 278 : 1956 Ker LT 92 : 1956 AWR (Sup) 28.

[12032] ● *Nature of proof nothing to do with character of punishment.*—The question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If the Court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the two sentences provided by law. In other words, the nature of the proof has nothing to do with the character of the punishment. *Vadivelu Thevar* v. *State of Madras*, AIR 1957 SC 614 : 1957 CrLJ 1000 : 1957 SCJ 527.

[12033] ● *Cold-blooded murder—Death sentence not to be reduced to one of imprisonment of life.*—When it is proved that an accused who was carrying a gun used the weapon and fired a shot deliberately at the victim at close range and killed him, he cannot be allowed to plead in mitigation of the sentence of death awarded upon conviction under Section 302 that he had used his fire-arm only when he had been ordered to do so, and that the order had been given by his own father whose orders he always obeyed and who was a person in authority over him. When the murder is a cold-blooded one without any extenuating circumstance, facts such as these cannot be taken into consideration for the purpose of reducing the sentence of death to one of imprisonment for life. *Mizaji* v. *State of U.P.*, AIR 1959 SC 572 : 1959 CrLJ 777 : 1959 SCJ 554 : 1959 ALJ 408 : 1959 BLJR 371 : 1959 ACrR 256 : (1959) MLJ (Cri) 359 : 1959 MPC 325 : 1959 AWR (HC) 305.

[12034] ● *Triple murder—Death sentence imposition of.*—If having regard to the enormity of the crime (a triple murder in the present case, which was cold-blooded and premeditated), the Court comes to the conclusion that it would not be justified in imposing the lesser sentence, it has the power to impose a sentence of death even in a case in which the conviction is not under Section

302 substantive, but is only under Section 302 read with Section 34, and there has been no finding that the accused so sentenced himself caused the fatal injuries. *Bharwad Mepa Dana* v. *State of Bombay*, AIR 1960 SC 289 : 1960 CrLJ 424 : (1960) 2 SCR 172 : 1960 MLJ (Cri) 398 : 1960 AWR (HC) 258 : 1960 ACrR 178 : 62 Bom LR 269 : 1960 SCJ 478.

[12035] ● ***Death sentence—No reason for reduction of.***—In this case, the accused is convicted on the charge of murder and is sentenced to death. It has been proved that the accused who was carrying a pistol had fired the fatal shot from a platform in which he was sitting with his father at a person who was going to his field. The accused is a young man of 25 years. It has been urged that the accused had fired the fatal shot at the instigation of his father and that the fact he was under the influence of his father be considered and the sentence of death be reduced to one of imprisonment for life. There is no doubt that the accused fired the fatal shot at the instigation of his father, but he was a mature man of 25 years, and obviously the murder must have been planned between father and son as they were apparently expecting that the deceased would pass that way as he did every day. The accused cannot be considered to be a young boy in his teens who would be completely under the influence of his father. In the circumstances, there is no reason to reduce the sentence of death. *Tori Singh* v. *State of Uttar Pradesh*, AIR 1962 SC 399 : 1962 (1) CrLJ 469 : (1962) 1 SCJ 367 : (1962) 3 SCR 580 : (1962) 1 ALT 511 : 1962 MLJ (Cri) 259 : 1962 ACrR 159 : 1962 AWR (HC) 257 : ILR (1962) 1 All 397.

[12036] ● ***Sentence of imprisonment for life appropriate.***—When considering the question whether the accused who are convicted under Section 302 on the charge of murder should be given the sentence of death, the Court has to take into account all the relevant circumstances of the case, such as, the background of the incident in which the fight between rival parties took place, the nature and extent of the threats held out by the party of the deceased, and the excitement which must have prevailed at the time of the incident. If it is shown that at the time when the fatal shots were fired there must have been considerable excitement in the minds of the accused, then, even though it be held that they had fired the fatal shots after the threat had ceased to exist and there was no apprehension of danger, and that they were guilty of murder because they had fired those shots after their right of private defence had come to an end, the continuing excitement in their minds following upon an attack upon them by the members of the opposite party, may be regarded as an extenuating circumstance. In such a case, the sentence of death would not be appropriate, and the ends of justice would be met if the sentence imposed is of imprisonment for life. *Jai Dev* v. *State of Punjab*, AIR 1963 SC 612 : 1963 (1) CrLJ 495 : 1963 SCD 66 : 1963 ACrR 170 : 1963 AWR (HC) 338.

[12037] ● ***Sentence—Background of incident to be considered.***—On the question of sentence it would be relevant to take into account the background of the incident, the nature and extent of the threat held out by the crowd of villagers, the excitement which must have been caused at the time of the incident. *Jai Dev* v. *State of Punjab*, AIR 1963 SC 612 : 1963 (1) CrLJ 495 : 1963 SCD 666 : 1964 (2) SCJ 272.

[12038] ● ***Offence brutal—Death sentence proper.***—In the instant case, it is contended that as a long time had passed the sentence of death should be substituted by imprisonment for life and reliance was placed upon *Kalawati* v. *State of H.P.*, AIR 1953 SC 131, where such action was taken. In our judgment, each case must be decided on its own facts and a sentence of imprisonment for life can only be substituted if the facts justify that the extreme penalty of the law should not be imposed. We do not consider this to be such a case.

It is then contended on the authority of *Pandurang* v. *State of Hyderabad*, AIR 1955 SC 216, that as the two learned Judges have differed, the extreme penalty of the law should not be imposed. In the cited case, the Judges had differed on the question of sentence itself and the third Judge before whom the matter was placed was in favour of the death penalty. Bose, J.; in reducing the sentence to imprisonment for life, observed : "But when appellate Judges, who agree on the question of the guilt differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons." This cannot be raised to the pedestal of a rule for that would leave the sentence to the determination of one Judge to the exclusion of the other. In the instant case, both the Judges appear to have been in favour of the death sentence because although Gyanendra Kumar, J., was in favour of acquittal he did not object to the confirmation of the death sentence when Tarku, J., had given his opinion. The offence here was brutal and normally the death penalty should follow. We, therefore, decline to reduce the sentence passed. *Babu* v. *State of Uttar Pradesh*, AIR 1965 SC 1467 : 1965 (2) CrLJ 539.

[12039] ● ***Intention to murder lacking— Sentence of imprisonment for life proper.***— Where intention to murder is lacking, lesser sentence of imprisonment for life is proper. *Hazara Singh* v. *State of Uttar Pradesh*, AIR 1969 SC 951 : (1969) 2 SCC 40 : 1969 CrLJ 1428.

[12040] ● ***Accused 22 years—Imprisonment for life proper.***—Where it was found that the offence of murder was committed by a person who was easily excited and therefore likely to be moved by irresistible impulses and the age of the accused was 22 years, lesser sentence of imprisonment for life will meet the ends of justice. *Brijkishore Pandye* v. *State of Uttar Pradesh*, (1971) 3 SCC 931 (2) : 1970 SC CrR 489 : 1970 UJ (SC) 323.

[12041] ● ***Accused given exhortation by uncle and father-latter given benefit of doubt—Sentence of imprisonment for life proper.***—Where the accused was given exhortation by his uncle and father and latter were given benefit of doubt, lesser sentence of imprisonment for life is proper. *Zila Singh* v. *State*, 1971 SCC (Cri) 534 : 1971 UJ (SC) 598.

[12042] ● ***Inordinate delay in disposal of case—Sentence for imprisonment for life justified.***—Inordinate delay in disposal of case justifies the lesser sentence of imprisonment for life. *Vivian Rodrick* v. *State of West Bengal*, AIR 1971 SC 1584 : 1971 SCC (Cri) 192 : 1971 UJ (SC) 224.

[12043] ● ***Accused not directly responsible for causing death sentence reduced to imprisonment for life.***—Where the Sessions Judge sentenced the accused who were vicariously liable but who did not give the fatal blow, to imprisonment for life, while sentencing the appellant who was believed to have given the fatal blow to death penalty and the High Court confirmed the same, this Court is of the view that as it cannot be said definitely that the appellant is directly responsible for causing the death of the deceased, applying the test applied by the Sessions Judge, the appellant also should have the benefit of that test and reduced the sentence to imprisonment for life. *Mohan Singh* v. *State of Punjab*, AIR 1971 SC 2519 : (1970) 3 SCC 496 : 1971 CrLJ 1746 : (1971) 2 SCCrR 180 : 1971 UJ (SC) 98.

[12044] ● ***No justification for enhancement of sentence.***—It is only when the sentence appears on the facts and circumstances of the case to be so manifestly inadequate as to have resulted in failure of justice that enhancement of the sentence may be justified by the appellate Court. If the reasons for awarding the lesser penalty by the trial Court in case of murder are such on which a judicial mind may appropriately do so, then the appellate Court is not expected to enhance the sentence and impose the extreme penalty of death. Merely because the appellate Court feels that left to itself it would have preferred to impose the sentence of death is by itself and without more not a sufficient ground to justify enhancement. *Ram Narain* v. *State of Uttar Pradesh*., AIR 1971 SC 757 : (1970) 3 SCC 493 : 1971 CrLJ 649 : (1971) 2 SCCrR 273 : 1971 UJ (SC) 117 : 1971 CrAppR (SC) 1 : 1971 ACrR 319 : 1971 AWR (HC) 371.

[12045] ● ***Excessive delay in disposal of case—Sufficient for imposing lessor sentence.***— Where there is extremely excessive delay in the disposal of the case, that by itself would be sufficient for imposing lesser sentence of imprisonment for life under Section 302, IPC. It is a relevant factor for the High Court to take into consideration for imposing the lesser sentence. The delay of more than 6 years under the fear of sentence of death must have caused unimaginable mental agony to the appellate and it would be inhuman to make him suffer till the Government decides the matter on a mercy petition. *V. Rodrick* v. *State of West Bengal*, AIR 1971 SC 1584 : (1971) 1 SCC 468 : 1971 CrLJ 1171 : 1971 UJ (SC) 224.

[12046] ● ***Prosecution not disclosing all true facts—Sentence of imprisonment for life proper.***—Where the prosecution did not disclose all true facts lesser sentence of imprisonment for life is proper. *Devendra Singh* v. *State of Uttar Pradesh*, AIR 1971 SC 1759 : (1972) 4 SCC 146 : 1971 CrLJ 1283 : 1971 UJ (SC) 685.

[12047] ● ***When—Shot of pistol—Not sufficient to cause death.***—Where shot of the pistol hitting clavicle was not sufficient to cause death, lesser sentence was held proper. *Sultan* v. *State of Haryana*, AIR 1972 SC 811 : (1972) 3 SCC 211 : (1972) 2 SCJ 248 : 1972 UJ (SC) 496.

[12048] ● ***Sentence—Mitigating circumstances.***—Where two accused fired shots from their guns against the deceased and where each of the shots fired by one was sufficient in the ordinary course of nature to cause death, the person whose shot hit the clavicle was not sufficient to cause death though he intended to kill and so a lesser penalty under Section 302, IPC, would meet the ends of justice even though the other person was sentenced to death. *Sultan* v. *State of Haryana*, AIR 1972 SC 811 : 1972 CrLJ 527 : (1972) 2 SCJ 248 : 1972 MLJ (Cri) 749.

[12049] ● ***Long interval just ground for-imposing imprisonment for life.***—Though the case was pre-eminently a fit case for the imposition of the sentence of death, the Supreme Court imposed the sentence of imprisonment for life for the offence under Section 302, IPC, as the High Court had acquitted the accused on a misappreciation of the evidence while the trial Court convicted him for murder with attempt to commit rape on a young woman and imposed the sentence of death for murder, taking into account that 4 years had elapsed from the date of his acquittal. *State of Maharashtra* v. *Manglya*, AIR 1972 SC 1797 : (1972) 3 SCC 46 : 1972 CrLJ 570.

[12050] ● ***Sentence—Imposition of life imprisonment.***—Where the accused suspecting the fidelity of the deceased and believing that the baby had been born to her as a result of her adulterous conduct, enquired from the deceased shortly before the occurrence regarding father of the boy and the deceased thereupon abused him lesser sentence of imprisonment for life is proper. *Nika Ram* v. *State of Himachal Pradesh*, AIR 1972 SC 2077 : (1972) 2 SCC 80 : 1972 SCC (Cri) 635 : 1972 CrLJ 1317 : 1972 UJ (SC) 932.

[12051] ● ***Death sentence or life imprisonment—Discretion of Court.***—It is a matter of judicial discretion for the Court to decide on a consideration of all the relevant circumstances of the case, which of the two permissible sentences under Section 302, IPC, should be imposed. It is no longer necessary to give reasons for imposing the lesser penalty. The determination of sentence in a given case depends on a variety of considerations, the more important being the nature of the crime, the manner of its commission, the motive which impelled it and the character and antecedents of the accused. No general rule with regard to sentence applicable to all cases of political murders can be laid down. Murder inspired by differences of political opinions and ideologies is wholly inconsistent with our system of Government where the Constitution has guaranteed freedom of thought and expression to all citizens and parties, so long as they act within the Constitution and the law. *Apren Joseph* v. *State of Kerala*, AIR 1973 SC 1 : 1973 CrLJ 185 : (1972) 2 SCWR 734 : 1972 SCD 1143.

[12052] ● ***Judicial discretion—In what cases Judge should pass death sentence.***—Any exhaustive enumeration of aggravating or mitigating circumstances is impossible. The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter of sentence is liable to be corrected by superior Courts. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguards for the accused. *Jagmohan Singh* v. *State of U.P.*, AIR 1973 SC 947 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 : 1973 CrLJ 370.

[12053] ● ***Pre-meditated brutal murder—Death sentence.***—Where the accused had inflicted 16 injuries on an unarmed and defenceless person injuring on his palms and hands indicating that he must have been desperately trying to save his life by attempting to ward off the blows with his hands, the circumstances clearly showed that the act of the accused is a cold-blooded one and the murder was brutal in nature. Sentence of death is proper. *Mohinder Singh* v. *Delhi Administration*, AIR 1973 SC 697 : (1973) 1 SCC 498 : 1973 CrLJ 610.

[12054] ● ***Murder—Reduction of death sentence to life imprisonment.***—Where the accused had some sort of mental trouble prior to the date of the occurrence which may not amount to insanity but which would affect a person's mind in a way quite different from that of a normal person and as such he was in all likelihood not in a position to weigh and analyse in a rational manner and where it was not clear from the prosecution evidence about the origin of the incident, it is not a case in which the penalty of death should have been inflicted. *Gopalan Nair* v. *State of Kerala*, AIR 1973 SC 806 : (1973) 1 SCC 469 : 1973 CrLJ 583 : 1972 SCD 181 : (1973) 1 SCWR 106 : 1973 KLT 64.

[12055] ● ***Sentence—Quantum.***—Where the altercation between the accused and the deceased would show that the accused were smarting under the feeling that their community itself was humiliated by one of his members being beaten with broom stick and that the attack was prompted by that feeling and the insolent attitude of the deceased towards their community, the extreme penalty of death was not called for. *Subbiah Thevar* v. *State of Tamil Nadu*, AIR 1973 SC 785 : (1973) 1 SCC 284 : 1973 CrLJ 563.

[12056] ● ***Murder sentence of death reduced to life-imprisonment.***—Where the evidence does not indicate that the appellant played any greater part in the act of committing the murder of the deceased than the other three accused who have been sentenced only to life imprisonment, the appellant also should be awarded the same sentence and not the death sentence. *Jose* v. *State of Kerala*, AIR 1973 SC 944 : (1973) 3 SCC 472 : 1973 CrLJ 687.

[12057] ● ***Death sentence—Intra vires.***—*Note—Death Sentence : Vires.*—The question of *vires* of capital punishment was first raised in a Supreme Court case. Under Article 21, Constitution of India no person shall be deprived of his life except according to procedure established by law. It was the contention that before the sentence of death is passed there is, in fact, no procedure established by law. It is admitted that the Criminal Procedure Code lays down a detailed procedure but that procedure, according to appellant was limited to the finding of guilt. After the accused is found guilty of the offence, there is no other procedure laid down by the law for determination whether the sentence of death or something less is appropriate in the case. Therefore, appellant contended death sentence is unconstitutional. The contention was repelled by the Supreme Court and death sentence has been held *intra vires*. *Jagmohan Singh* v. *State of U.P.*, AIR 1973 SC 947 : (1973) 1 SCC 20 : 1973 CrLJ 370.

[12058] ● ***One found guilty be punished either with death or with imprisonment for life.***—It further held that for offence under Section 302 one found guilty may be punished either with death or with imprisonment for life. True, there is no guideline in which case death is to be ordered or in which case life imprisonment is to be awarded. But this does not constitute excessive delegation by the legislature—such provision is valid constitutionally. *Jagmohan Singh* v. *State of U.P.*, AIR 1973 SC 947 : (1973) 1 SCC 20 : 1973 CrLJ 370.

[12059] ● ***Murder—Sentence principles.***—The history of relations, the background, the context and strength and nature of motive operating on mind of accused are relevant for consideration in awarding sentence. *Francies @ Ponnan* v. *State of Kerala*, AIR 1974 SC 2281 : (1975) 3 SCC 825 : 1975 SCC (Cri) 244 : 1974 CrLJ 1310 : 1974 CrLR (SC) 500.

[12060] ● ***Provocation though not sudden grave under mental distress—Imprisonment for life proper.***—Where the provocation, though not sudden, was grave under mental distress the lesser sentence of imprisonment for life is proper. *Vasant Laxman More* v. *State of Maharashtra*, AIR 1974 SC 1697 : (1974) 4 SCC 778 : 1974 CrLJ 1166 : 1974 CrLR (SC) 509.

[12061] ● ***Award of death sentence or imprisonment for life—Considerations.***—The guilt having been established, the choice between death penalty and life imprisonment has to be made in the present case under the new CrPC, the shift in the Legislative emphasis was that life-imprisonment for murder was the rule and capital sentence the exception to be resorted to for reasons to be stated : Section 354(3). The positive indicators against death sentence under the current Indian Law might be crystallized as follows :

Where the murderer was too young or too old, the clemency of penal justice helped him. Where the offender suffered from socio-economic, psychic or penal compulsion insufficient to attract a legal exception or to down grade the crime into a lesser one, judicial commutation was permissible. Other general social pressures, warranting judicial notice, with an extenuating impact might, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence had hung over the head of the culprit excruciatingly long, might persuade the Court to be compassionate. Likewise, if others involved in the crime and similarly situated had received the benefit of life-imprisonment or if the offence was only constructive, being under Section 302 read with Section 149, or again the accused had acted suddenly under another's instigation, without pre-meditation, the Court might humanly opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence.

In the present case, the criminal's social and personal factors were less harsh, her femininity and youth, her unbalanced sex and expulsion from the conjugal home and being the mother of a young boy—these individually inconclusive and cumulatively marginal facts and circumstances tended towards award of life imprisonment. *E. Anamma* v. *State of Andhra Pradesh*, AIR 1974 SC 799 : (1974) 4 SCC 443 : 1974 SCC (Cri) 479 : 1974 CrLJ 683.

[12062] ● ***Murder—Sentence—Principles.***—In deciding whether the case merits the less severe of the two penalties prescribed for murder, a history of relations between the parties concerned, the background, the context, or the factual setting of the crime, and the strength and nature of the motives operating on the mind of the offender, are relevant considerations. The state of feelings and mind produced by these, while insufficient to bring in an exception, may suffice to make the less severe sentence more appropriate. *Francis* v. *State of Kerala*, AIR 1974 SC 2281 : (1975) 3 SCC 825 : 1974 CrLJ 1310.

[12063] ● ***Murder trial—Sentence.***—Where in a murder case, there were circumstances which were though insufficient to make out a plea of private defence or to palliate the offence, could legitimately be taken into account in choosing between the sentence of life or of death and there was dread of impending execution had been brooding over the head of the condemned prisoners for an excruciatingly long period of over three years, death sentences were altered to imprisonment for life. *Bhoor Singh* v. *State of Punjab*, AIR 1974 SC 1256 : (1974) 4 SCC 754 : 1974 SCC (Cri) 664 : 1974 CrLJ 929.

[12064] ● ***Murder Possibility of some amount of provocation from deceased not ruled out—Death sentence reduced to imprisonment for life.***—Where the evidence disclosed that the deceased was a quarrelsome person and there had been a quarrel on the previous day of the occurrence as well as on the day of the occurrence between the deceased and the appellant and though the actual origin of the quarrel at the time of the assault was not known, some amount of provocation from the deceased might not be ruled out completely, the Supreme Court reduced the sentence of death to imprisonment for life while maintaining the conviction under Section 302, IPC. *K.B. Panicker* v. *State of Kerala*, AIR 1974 SC 1918 : (1974) 3 SCC 295 : 1974 CrLJ 1305.

[12065] ● ***Murder—No reason to interfere with death sentence.***—Where the accused was carrying a pistol and he fired from that pistol without any provocation from either of the deceased persons, neither of whom was armed not even with a walking stick, and all that one of them did was to ask the processionists to desist from shouting vulgar shoutings, the sentence of death on the accused cannot be interfered with. Politics may or may not be a clean game but no Court can suffer with equanimity such flagrant defiance of law by members of political parties, whatever their colour or creed. They must know that it will not pay to carry pistols in processions for being used as weapons of offence against political rivals. *Balak Ram* v. *State of Uttar Pradesh*, AIR 1974 SC 2165 : 1974 SCC (Cri) 837 : 1974 CrLJ 1486.

[12066] ● ***Common motive to murder—Sentence commuted to life imprisonment.***—Where the accused were convicted on the testimony of the approver corroborated by other evidence, mostly circumstantial, in respect of each of the accused and there was also general corroboration of the approver in regard to the motive and the occasion for committing the crime, their conviction for murder was correct. But the Court cannot be oblivious to the tendency to minimize one's own part and to shift and assign the dominant role in the commission of the offence to the accused, that is inherent in the evidence of all accomplices, the approver's testimony cannot be said to be absolutely free from such tendency in the present case. Although the corroboration of such testimony is reliable and adequate enough to make it safe for sustaining the convictions, there being a common motive for the approver and A-1 to murder the deceased, the sentence was commuted to one of life imprisonment. *Subramanian* v. *State of T.N.*, AIR 1975 SC 139 : (1975) 3 SCC 414 : 1975 SCC (Cri) 40 : 1975 CrLJ 226.

[12067] ● ***No motive to ghastly crime—Death sentence commuted to imprisonment for life.***—The accused in the instant case had no particular motive to commit the ghastly crime and the trifle murder was committed by him as a result of some mental imbalance and not a pre-planned one, death sentence is commuted to one for imprisonment for life. *Namu Ram Bora* v. *State of Assam & Nagaland*, AIR 1975 SC 762 : (1975) 1 SCC 318 : 1975 SCC (Cri) 98 : 1975 CrLJ 646.

[12068] ● ***Accused throwing hand-grenade into house of victims—Death of person.***—Where the accused threw a handgrenade into the house of the victims resulting in the death of two persons besides serious injuries to another, the crime being cruel and inhuman and the consequential deaths dastardly and pathetic, interference with the sentence of death imposed on him is not warranted. *Bishan Dass* v. *State of Punjab*, AIR 1975 SC 573 : (1975) 3 SCC 700 : 1975 SCC (Cri) 145 : 1975 CrLJ 461.

[12069] ● ***Pre-planned cold blooded murder death sentence proper.***—For pre-planned cold-blooded murder death sentence is proper. The fact that accused was sentenced one year ago is not an extenuating circumstance. *Maghar Singh* v. *State of Punjab*, AIR 1975 SC 1320 : (1975) 4 SCC 234 : 1975 SCC (Cri) 479 : 1975 CrLJ 1102.

[12070] ● ***Pre-planned cold-blooded murder death sentence proper.***—Accused murdering the victim taking advantage of the absence of the husband of the deceased with whom the accused at the relevant time was alone in the house, death being caused by several fatal blows by a *gandasa*, death sentence is proper. *Maghar Singh* v. *State of Punjab*, AIR 1975 SC 1320 : (1975) 4 SCC 234 : 1975 SCC (Cri) 479 : 1975 CrLJ 1102.

[12071] ● ***Murder of helpless woman—Death sentence proper.***—Murder of helpless woman by knife, accused chasing her and stabbing when she was running away—death sentence is proper. *Suresh* v. *State of Maharashtra*, AIR 1975 SC

783 : (1975) 3 SCC 820 : 1975 SCC (Cri) 231 : 1975 CrLJ 645.

[12072] ● ***Accused murdering victim by stabbing death sentence proper.***—Accused murdering the victim by stabbing him in the back, abdomen and in clavicle as also on both hands, the attack being premeditated one—death sentence is proper. *Perumal* v. *State of Kerala*, AIR 1975 SC 95 : 1975 CrLJ 51.

[12073] ● ***One sword injury—Death sentence commuted to life imprisonment.***—Where the appellant inflicted only one sword injury out of seven on the deceased and he did so at the instigation of one of his companions, who were either acquitted or sentenced to life imprisonment though they were ascribed other serious injuries, sentence awarding of lesser penalty prescribed for murder would be commensurate with the ends of justice. *Nattan* v. *State of T.N.*, AIR 1976 SC 2197 : (1976) 4 SCC 290 : 1976 CrLJ 1717 : 1976 CrLR (SC) 98 : 1976 SCCrR 159 : 1976 UJ (SC) 214.

[12074] ● ***Accused 18 years of age—Not appropriate to impose sentence of death.***—In view of the current sociological and juristic thinking on the subject, it would be legitimate for the Court to refuse to impose death sentence on the accused convicted of murder, if it finds that at the time of commission of offence, he was under 18 years of age. *Harnam* v. *State of U.P.*, AIR 1976 SC 2071 : (1976) 1 SCC 163 : 1975 SCC (Cri) 794 : 1976 CrLJ 1642 : 1976 CrLR (SC) 1 : (1976) 2 SCR 274 : 1976 UJ (SC) 115 : 1976 CrAppR (SC) 63.

[12075] ● ***Acquittal hardly any reason for—Imposition of lesser sentence.***—High Court was dealing with an order of acquittal is hardly any reason for imposing the lesser sentence, if the sentence of death is otherwise called for. *K. Thevar* v. *State of T.N.*, AIR 1976 SC 980 : (1976) 1 SCC 31 : 1975 SCC (Cri) 753 : 1976 CrLJ 708 : 1975 CrLR (SC) 506 : 1975 Cr AppR (SC) 294.

[12076] ● ***Death sentence—Propriety.***—Where the deceased had done no harm to the accused who was apparently a desperate character who would not stop at killing rather than be caught in an attempt to steal after breaking into a house, nothing less than death sentence was deserved by him. *Ramesh Ramdas* v. *State of Maharashtra*, AIR 1976 SC 345 : (1976) 2 SCC 201 : 1976 SCC (Cri) 256 : 1976 CrLJ 310.

[12077] ● ***Murder—Death sentence—Delay in hearing appeal not mitigating factor.***—Where the accused committed the murder in a dastardly fashion in a pre-meditated and pre-planned manner and the conduct of the accused in attempting to disrupt the matrimonial home of the deceased was highly immoral and cannot be looked upon with commiseration, particularly when after her marriage the deceased had returned to the path of rectitude and was firmly faithful to her husband, and no less than four unarmed persons were indiscriminately stabbed when most of them were lying asleep, unaware and helpless and the injury caused to the husband of the deceased was dangerous to life and, but for timely medical aid, the injury would have proved fatal, the sentence of death imposed on the appellant was confirmed by the Supreme Court. Delay in hearing the appeal is not a mitigating factor in this case. *Lajar Masih* v. *State of U.P.*, AIR 1976 SC 653 : (1976) 1 SCC 806 : 1976 SCC (Cri) 195 : 1976 CrLJ 580.

[12078] ● ***Death sentence awarded only under special reasons.***—Section 354(3) CrPC, 1973 provides that sentence other than death is the general rule only for special reasons which are required to be stated, death sentence is permissible. It is not possible to catalogue the special reasons which may justify the passing of death sentence, but just a few may be indicated, such as, the crime has been committed by a professional or hardened criminal or it has been committed in a brutal manner or on a helpless child or woman or the like. To rely on absence of extenuating circumstances to justify a sentence other than death sentence since 1st April, 1974 is not justified. *Balwant Singh* v. *State of Punjab*, AIR 1976 SC 230 : (1976) 1 SCC 425 : 1976 CrLJ 291.

[12079] ● ***Accused below 18 years of age—Death sentence—Imposition of.***—It is not in every case where the accused is below 18 years of age that the Court would necessarily and always decline to impose sentence of death in a case of Section 302, IPC, but the fact that an accused was below 18 years of age at the time of the commission of the offence is certainly an important factor which would guide the Court in determining whether or not to inflict the penalty of death. *Bachchey Lal* v. *State of U.P.*, AIR 1977 SC 2094 : (1976) 4 SCC 305 : 1976 SCC (Cri) 599 : 1977 CrLJ 1743 : 1977 CrLR (SC) 41.

[12080] ● ***Murder—Sentence—Death sentence—Legality.***—Where the appellant, more than the other accused who was sentenced to imprisonment for life, who had a strong and direct motive for committing murder of the deceased and it was he that had given the threat to kill him and it was he that almost pumped a shot into the deceased's face and head from a very close range causing extensive damage to the brain and the face resulting in his death, the sentence of death imposed on the appellant is confirmed. *Ragho Mani* v. *State of U.P.*, AIR 1977 SC 703 : (1976) 4 SCC 297 : 1976 SCC (Cri) 616 : 1977 CrLJ 345.

[12081] ● ***Accused below 18 years of age when committed offence—Sentence of death committed to life imprisonment.***—Where the accused was below 18 years of age when he committed the offence, sentence of death should not be imposed on him. The Sessions Judge and the High Court rejected the age given by the accused when examined under Section 342, CrPC (Section 313 of the new Code) as 18 years and felt that he would be not less than 24 years by his appearance and sentenced him to death. They were not right in substituting their own estimate in regard to the age of the accused rejecting his statement as to his age. The sentence of death is commuted to one of life imprisonment. *Raisul* v. *State of Uttar Pradesh*, AIR 1977 SC 1822 : (1976) 4 SCC 301 : 1976 SCC (Cri) 613 : 1977 CrLJ 1555.

[12082] ● ***Accused mature person of 60 years at time of commission of murders.***—Where the conviction of the accused under Section 302, IPC, for murdering his daughter & his son-in-law is fully justified, as the murders were not only preplanned and cold-blooded but were acts of treachery of the worst kind and the accused was a mature person of 60 years at the time of the commission of the murders, they were special reasons for imposing the extreme penalty of death. *Rau Chima* v. *State of Maharashtra*, AIR 1977 SC 2407 : (1977) 4 SCC 518 : 1977 CrLR (SC) 444 : 1977 UJ (SC) 677 : 1977 CrAppR (SC) 354.

[12083] ● ***Offence perpetrated with attendant aggravating circumstance—Death sentence proper.***—Under the new Code life sentence for murder and not death sentence is ordinary rule. For death sentence an additional ground should be assigned. If the offence has been perpetrated with attendant aggravating circumstances, if the perpetrator discloses an extremely depraved state of mind and diabolical trickery accompanied by brutal dealing with the cadaver, death sentence is proper. *Joseph* v. *State of Goa*, AIR 1977 SC 1812 : (1977) 3 SCC 280 : 1977 CrLJ 1449.

[12084] ● ***Cruel and diabolical murder—Death sentence justified.***—Where the accused committed nine murders and that too of small children by inflicting more than one injury which is sufficient in the ordinary course of nature to cause death and thus exterminated his trusted friend's whole family including his aged parents, his wife and five children for achieving his vicious object of relieving him of his cash and valuables the special reasons mandated under the law are duly recorded by both the High Court and trial Court to justify the imposition of the sentence of death for those cruel and diabolical murders. *S.P. Sharma* v. *State of Madhya Pradesh*, AIR 1977 SC 2423 : (1977) 4 SCC 322 : 1977 SCC (Cri) 596 : 1977 CrLR (SC) 440 : 1977 UJ (SC) 657 : 1977 CrAppR (SC) 334.

[12085] ● ***Aggravating circumstance—Death sentence proper.***—Where there are aggravating circumstances, death sentence must be awarded. *Tarlok Singh* v. *State of Punjab*, AIR 1977 SC 1747 : (1977) 3 SCC 218 : 1977 (Cri) 490 : 1977 CrLJ 1139 : 1977 CrLR (SC) 335 : 1977 UJ (SC) 517 : 1977 CrAppR (SC) 220 : 1977 A WC 474.

[12086] ● ***Punishment—Accused beating his wife to death.***—Where, the accused, labouring under a hallucination, however unfounded it may be, and beat his wife to death and the *corpus delicti* was not available so that the Courts might be in a position to know the nature and character of the injuries and to assess that the murder was of such a brutal or dastardly character that only a death sentence could be imposed on him and in the absence of there being anything to show the exact circumstances in which the murder took place, the Supreme Court commuted the sentence of death to imprisonment for life. *Ashok Laxman* v. *State of Maharashtra*, AIR 1977 SC 1319 : (1977) 2 SCC 103 : 1977 SCC (Cri) 243 : 1977 CrLJ 829 : 1977 CrLR (SC) 158 : 1977 UJ (SC) 442.

[12087] ● ***Murder—Not pre-meditated sentence of imprisonment for life sufficient.***—Where the murder was not pre-meditated, it is sufficient to sentence the accused to imprisonment for life. *State of Punjab* v. *Ramji Das*, AIR 1977 SC 1084 : (1977) 1 SCC 197 : 1977 SCC (Cri) 368 : 1977 CrLJ 705 : 1977 CrLR (SC) 198 : 1977 SCCrR 306 : (1977) 2 SCWR 373.

[12088] ● ***Absence of extenuating circumstances—Not enough for awarding penalty of death.***—Mere absence of extenuating circumstances in favour of the accused, is not enough for awarding the extreme penalty of death for an offence under Section 302 after the amendment of 1955 to the CrPC and under the new Code. *Asgar* v. *State of U.P.*, AIR 1977 SC 2000 : (1977) 3 SCC 283 : 1977 SCC (Cri) 489 : 1977 CrLJ

1604 : 1977 CrLR (SC) 312 : 1977 CrAppR (SC) 279 : 1977 UJ (SC) 484 : 1977 PunLJ (Cri) 274 : 79 Pun LR 716.

[12089] ● ***No evidence that assault on accused preceded by any quarrel or sudden flare up death sentence justified.***—Where the accused put an end to the life of an adversary in a pending case under Section 107, CrPC and there was no evidence that the incident was preceded with any quarrel, sudden flare-up, death sentence is justified. *Ramkishan* v. *State of Punjab*, AIR 1977 SC 820 : (1976) 4 SCC 337 : 1977 CrLJ 603 (SC).

[12090] ● ***Murder committed under grave stress of abject poverty—Sentence of death reduced to imprisonment for life.***—Where the accused committed murder of his wife under grave stress of abject poverty for which he was taunted from time to time by his wife and other relatives after having led a happy married life with the deceased for ten years and they had three small children, the sentence of death was reduced to imprisonment for life. *Thangiah* v. *State of T.N.*, AIR 1977 SC 1777 : 1977 CrLJ 1156 : 1977 CrLR (SC) 435 : 1977 UJ (SC) 604 : 1977 CrAppR (SC) 109.

[12091] ● ***Murder committed after pre-meditation—Death sentence proper.***—Where the accused were absconding and were apprehended after proceedings were taken against them under Section 82, CrPC (Section 87, of the old Code), and one of them was finally arrested on 1-8-1971, the trial Judge convicted them on 12-12-73 and the High Court confirmed the death sentence on 2-9-1974, it cannot be said that there had been any such delay as to justify the lesser sentence. On the other hand, the evidence on record established that the accused had on several occasions tried to take the law into their own hands and that led up to the murders in question which were committed after pre-meditation, with lethal weapons and in broad day light when there was really no occasion for any provocation. *Nathu* v. *State of Uttar Pradesh*, AIR 1977 SC 2096 : (1977) 4 SCC 293 : 1977 SCC (Cri) 571 : 1977 CrLJ 1578.

[12092] ● ***Death sentence commuted to life imprisonment validity.***—In the instant case the High Court did not differ from the Sessions Judge that it was a planned and cold-blooded murder which led the trial Court to impose the extreme penalty on the accused but commuted the sentence of death to imprisonment for life on the ground that though they killed an innocent person who had done no harm to them and that they did not act out of any personal motive but out of what they conceived to be a public motive, that was not a valid ground in law. The case is therefore, sent back to the High Court to consider whether there was any proper ground for interfering with the sentence awarded by the trial Court. *State of Andhra Pradesh* v. *Intha Ramana Reddy*, AIR 1977 SC 708 : (1977) 1 SCC 496 : 1977 SCC (Cri) 130 : 1977 CrLJ 349 : 1976 CrLR (SC) 522 : (1977) 1 SCWR 126 : 1976 UJ (SC) 973 : (1977) 9 Lawyer 39.

[12093] ● ***Accused committing unprovoked dastardly double murder—Not fit case for reducing sentence of death.***—Where the accused committed an unprovoked dastardly double murder not only of his wife but also his father-in-law who was his benefactor and had given a shelter to him in this house, causing as many as 22 injuries on her and 13 on her father, of whom some of them proved fatal, it was not a fit case for reducing the sentence of death. *Ramiah Asari* v. *State of T.N.*, AIR 1977 SC 2102 : 1977 SCC (Cri) 593 : 1977 CrLJ 1744 : 1977 CrLR (SC) 409 : 1977 UJ (SC) 535 : 1977 CrAppR (SC) 336.

[12094] ● ***Life convict committing murder of two jail wardens—Death sentence justified.***—Where a life convict (accused) committed murder of two jail wardens by dealing blows with handle of a hand pump and his extra-judicial confession was recorded after recovery of blood-stained handle and clothes death sentence is justified. *Pyarelal* v. *State of Madhya Pradesh*, AIR 1977 SC 1765 : (1977) 1 SCC 731 : 1977 CrLJ 1157 (SC) : 1977 CrLR (SC) 430.

[12095] ● ***Murder committed with lethal weapons—Death sentence justified.***—Where murder was committed with lethal weapons and the accused had tried to take law in their hands several times before death sentence is proper. *Nathu Singh* v. *State of U.P.*, AIR 1977 SC 2096 : (1977) 4 SCC 293 : 1977 SCC (Cri) 571 : 1977 CrLJ (SC) 1578 : 1977 CrLR (SC) 378.

[12096] ● ***Double murder—Award of extreme penalty of death proper.***—Accused committing double murder on a most brutal and dastardly fashion—betraying depravity of character—He should be awarded extreme penalty of death. *Shankaria* v. *State of Rajasthan*, AIR 1978 SC 1248 : (1978) 3 SCC 435 : 1978 CrLJ 1251. **TO THE SAME EFFECT :** (1) *Ramiah* v. *State of T.N.*, AIR 1977 SC 2102 : (1977) 4 SCC 605 (2) : 1977 CrLJ 1744; (2) *Ram Chima Chougule* v. *State of Maharashtra*, AIR 1977 SC 2407 : (1977) 4 SCC 518 : 1978 CrLJ 14.

[12097] ● ***Accused exceeding right of private defence.***—Where the circumstances showed that the accused exceeded their right of private defence, that could be taken into consideration in extenuation of the extreme penalty. *Sabal Singh* v. *State of Rajasthan*, AIR 1978 SC 1538 : (1978) 4 SCC 448 : 1978 CrLJ 1610.

[12098] ● ***Sentence—Extenuating circumstances.***—Where the accused was under spectre of sentence of death for over 3 years and 7 months and the evidence also gave indication in that he was probably instigated directly or indirectly by his father. *Sadhu Singh* v. *State of U.P.*, AIR 1978 SC 1506 : (1978) 4 SCC 428 : 1979 SCC (Cri) 49.

[12099] ● ***Death sentence proper injury where serious.***—Where the injury was serious and given with full force piercing lung and puncturing 2 ventricles death sentence was held proper. AIR 1978 SC 1420 : (1979) 1 SCC 135 : 1978 CrLJ 1413 : 1978 CrLR (SC) 150.

[12100] ● ***Brutal murder of two persons—Interference with sentence of death.***—The only ground taken by the accused on the question of sentence is that he is a poor agriculturist and a wife and five children to support, having regard to the fact that he having had caused brutal murder of two persons, it is not possible to interfere with the death sentence imposed on him. *Kuruvi Muthu* v. *State of Tamil Nadu*, AIR 1978 SC 1397 (1398) : (1979) 1 SCC 136 : 1978 SCC (Cri) 578 : 1978 CrLJ 1421 : 1978 CrLR (SC) 148.

[12101] ● ***Right to life and personal liberty—Reasonableness in procedure.***—It is apposite to recollect that meanwhile a seven-member-bench decision of Supreme Court held that procedure by which life and personal liberty can be taken away must not only be by a procedure established by law but also must be reasonable. It held that the concept of reasonableness must be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21. The principle of reasonableness which legally as well as philosophically is an essential element of equality or nonarbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be right, just and fair and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248 : (1978) 2 SCR 621.

[12102] ● ***Judge to state special reasons for awarding death sentence.***—It may be pointed out that under Section 354(3), CrPC in case of sentence of death how the judge is under the obligation to state special reason for awarding death sentence. *Bishnu Deo Shaw* v. *State of West Bengal,* AIR 1979 SC 964 : (1979) 13 SC 714 : 1979 CrLJ 841.

[12103] ● ***Counting casualties not main criterion for death sentence.***—Counting the casualties is not the main criterion for death sentence. Additional relevant factors for not imposing death sentence indicated. *Dalbir Singh* v. *State of Punjab*, AIR 1979 SC 1384 : (1979) 3 SCC 745 : 1979 SCC (Cri) 848 : 1979 CrLJ 1058.

[12104] ● ***Imposition of death penalty—Special reasons.***—The latest position now is that imposition of death penalty must be for special reasons contemplated by Section 354(3), CrPC (2 of 1974) and that the mere use of adjectives like brutal and cruel does not supply the special reasons contemplated by the above said section for imposition of death penalty. *Bishno Deo Shaw* v. *State of West Bengal*, AIR 1979 SC 964 : (1979) 3 SCC 714 : 1979 CrLJ 841.

[12105] ● ***Hired assassin committing murder for no motivation—Dogmatism in awarding sentence property exercised.***—The appellant was a hired assassin. He committed the murder for no motive except to earn a reward. No outweighing circumstance is available to interfere with the discretion concurrently exercised by the Sessions Judge and the High Court in awarding death sentence. *Ramesh* v. *State of U.P.*, AIR 1979 SC 871 : (1979) 3 SCC 394 : 1979 SCC (Cri) 686 : 1979 CrLJ 902.

[12106] ● ***Conviction for murder—Sentence compensation to widow of deceased.***—The accused was sentenced to death for causing the murder of his father and brother. Supreme Court while confirming the conviction, reduced the sentence to imprisonment for life and also imposed a fine of Rs. 10,000/- which if collected should be paid to the widow and her minor children as it is only fair that proper compensation should be provided for the dependants of the deceased by the accused who has the capacity to pay. *Guruswamy* v. *State of T.N.*, AIR 1979 SC 1177 : (1979) 3 SCC 797 : 1979 SCC (Cri) 879 : 1979 CrLJ 704 : 1979 CrLR (SC) 95 : (1979) 1 SCWR 87 : 1979 SCCrR 131 : (1979) 2 SCJ 275 : 1979 MLJ (Cri) 636 : (1980) 1 MLJ (SC) 9.

[12107] ● ***Death sentence or life R.I. Imposition of.***—Where the accused is convicted for an offence under Section 302, IPC, the Court should call upon the Public Prosecutor at the stage of

Section 235(2) to state to the Court whether the case is one where the accused as a matter of justice should be awarded the extreme penalty of law or the lesser sentence of imprisonment for life. If the Public Prosecutor informs the Court that the State as prosecutor is of the opinion that the case is not one where extreme penalty is called for and if the Sessions Judge agrees with the submission, the matter should end there. If on the other hand the Public Prosecutor states that the case calls for extreme penalty prescribed by law, the Court would be well advised to call upon the Public Prosecutor to state and establish, if necessary, by leading evidence, facts for seeking extreme penalty prescribed by law. Those reasons and the evidence in support of them would provide the special reasons according to the State which impel capital punishment. It would be open to the accused to rebut this evidence either by submissions or if need be, by leading evidence. At that stage the only consideration relevant for the purpose of determining the quantum of punishment, would be the consideration bearing on the question of sentence alone and not on the validity of the verdict of guilty. After considering the submissions and evidence it would be for the Court with its extreme judicious approach and bearing in mind the question that the extreme penalty is more an exception, to determine what would be the appropriate sentence. *Rajendra Prasad* v. *State of U.P.*, AIR 1979 SC 916 : (1979) 3 SCC 646 : 1979 CrLJ 792.

[12108] ● ***Procedure for sentencing in Section 354(3) CrPC imposing capital punishment for murder 'special reasons'.***—From a reading of Sections 354(3) and 235(2), CrPC and other related provisions of the Code of 1973, it is quite clear that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends upon the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrating index of the depraved character of the perpetrator. That is why it is not desirable to consider the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumed the proportion of extreme depravity that "special reasons" can legitimately be said to exist. There are numerous other circumstances justifying the passing of lighter sentence, as they are counter vailing circumstances of aggravation. It cannot be over-emphasized that the scope and concept of mitigating factors in the area of that penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), *viz.*, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life though law's instrumentality. That are ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. The Court should not venture to formulate rigid standards in an area in which the Legislature so warily treads. Only broad guidelines as indicated above can be laid down consistent with the policy indicated by the Legislature in Section 354(3). *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : 1980 CrLJ 636 : 1980 CrLR (SC) 388.

[12109] ● ***Mitigating circumstances to be given weight in determination of sentence.***—The following mitigating circumstances undoubtedly are relevant circumstances and must be given great weight in the determination of sentence :—

1. That the offence was committed under the influence of extreme mental or emotional disturbance.
2. The age of the accused. If the accused is young or old, he shall not be sentenced to death.
3. The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
4. The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
5. That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

6. That the accused acted under the duress or domination of another person.

7. That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : 1980 CrLJ 636.

[12110] ● ***Procedure involving imposition and execution of death sentence not ultra-vires.***—After an elaborate analysis the Supreme Court held that the procedure involving imposition and execution of death sentence is not unreasonable and is not *ultra vires*. *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898 : (1980) 2 SCC 64 : 1980 CrLJ 636.

[12111] ● ***Death sentence double murder of two children.***—It is true that the murder of the two particular children was not preplanned. But that was because the accused did not know that they would hit upon those particular children that evening. What is important is that the accused had made all the preparations for committing the murder of a person or persons whom they would apparently oblige by offering a lift. The plan which they had hatched was that they would offer a lift to some young children, try to extort ransom from their parents by kidnapping them and do the children to death in the event of any impediments arising in the execution of their plan. The murder was not committed on the spur of the moment as a result of some irresistible impulse which can be send to have overtaken the accused at the crucial moment. There was a planned motivation behind the crime though the accused had no personal motive to commit the murder of these two children. Any two children would have been good enough for them. The petitioner was an active participator in the whole episode and but for his willing co-operation, Billa could never have succeeded in his design. In fact, the petitioner was in the company of Billa right from the moment that the children entered their car until they themselves, Ranga and Billa, entered the military compartment and were arrested. In between many atrocities were committed, many falsehoods uttered, many escapades achieved and many an evidence concealed or destroyed. The petitioner's part in carrying out the nefarious plan is no less significant than that of Billa and he is no less guilty than him. There is no room for treating the one differently from the other. They were hand in glove with each other. We, therefore uphold the death sentence imposed upon him. *Kuljeet Singh alias Ranga* v. *Union of India*, AIR 1981 SC 1572 (1573, 1574) : (1981) 3 SCC 324 : 1981 SCC (Cri) 726 : 1981 CrLJ 1045 : 1981 CrLR (SC) 328 : (1981) 3 SCR 512 : 1981 UJ (SC) 584.

[12112] ● ***Sentences of death to elicit greatest concern and solicitude of Judge.***—Unfaithful husbands, unchaste wives and unruly children are not for that reason to be sentenced to death, if they commit murders unconnected with the state of their equation with their family and friends. The passing of the sentence of death must elicit the greatest concern and solicitude of the Judge, because, that is one sentence which cannot be recalled. *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*, AIR 1981 SC 765 (771) : 1981 SCC (Cri) 315 : 1981 CrLJ 325 : 1981 CrLR (SC) 616 : (1981) 2 SCR 384.

[12113] ● ***Murder of young college boy—Sentence of death—Reduction to life imprisonment.***—A young college boy was murdered because he was trying to wean away his sister from the influence of the appellant who had set his heart upon her. The appellant was smarting under the insult hurled at him by the deceased, the previous evening. When the appellant proclaimed his determination to marry her the deceased retorted, "you are a man of two paisa's worth. How can you dare to marry my sister". The dispute thus assumed the proportions of a feud over social status, the poor man fretting that the rich man's daughter would not be allowed to marry him for the mere reason that he did not belong to an equal class society. And it is evident that he believed, rightly or wrongly, that Ranjana was no unwilling to take him as a husband. The mental turmoil and the sense of being socially wronged through which the appellant was passing cannot be overlooked while deciding which is the appropriate sentence to pass, the rule being that, for the offence of murder, the normal sentence is the sentence of life imprisonment and not of death. If witnesses on whose evidence the life of an accused hangs in the balance, do not choose to reveal the whole truth, the Court, while dealing with the question of sentence, has to step in interstitially and take into account all reasonable possibilities, having regard to the normal and natural course of human affairs. Since a part of the crucial event has been screened from the Court's scrutiny and the possibility of an altercation between the appellant and the deceased cannot reasonably be excluded, it is unsafe to sentence the appellant to the extreme penalty. *Dudh Nath Pandey* v. *State of U.P.*, AIR 1981 SC 911 (917) (1981) 2 SCC 166 : 1981 SCC (Cri) 379 : 1981 CrLJ 618 : 1981 CrLR (SC) 353 : (1981) 2 SCR 771.

[12114] ● ***Murder sentence—Sole-eye witness five year old child of deceased.***—Where the conviction of accused was based on the sole eyewitness of five years of age less sentence of imprisonment for life is proper. *Suresh* v. *State of U.P.*, AIR 1981 SC 1122 : (1981) 2 SCC 569 : 1981 SCC (Cri) 559 : 1981 CrLJ 1122 : 1981 UJ 784.

[12115] ● ***Less sentence proper—Where accused 17 years of age.***—Lesser sentence is proper where the accused was of 17 when he committed the offence. *Chekarshwar Nath Jain* v. *State of U.P.*, AIR 1981 SC 2009 : 1981 SCC (Cri) 609 : 1981 CrLJ 1690 : 1981 CrLR (SC) 85 : 1981 Supp SCC 11.

[12116] ● ***Accused in jail for ten long years—Death sentence altered to one of imprisonment for life.***—Accused was just about 21 years. Sole eye-witness was a 5 years old son of the deceased, a young woman. Accused, servant of the family of the deceased, probably a sudden impulse of sex or theft made him momentarily insensible. Immediately after the crime, instead of even trying to run away which he could easily have done, he was found sitting in the chowk of the house crying bitterly. The witness was liable to a little tutoring in order to lend coherence and consistency to its disjointed thoughts which tend to stray. Extreme sentence cannot seek its main support from evidence of such kind which, even if true, is not safe enough to act upon for putting out life. Already appellant was in jail for ten long years and probably earned by now, right to be released, after taking into account remissions admissible to him, were he sentenced to life imprisonment. Hence sentence was altered from death to imprisonment for life. *Suresh* v. *State of U.P.*, AIR 1981 SC 1122 : (1981) 2 SCC 569 : 1981 SCC (Cri) 559 : 1981 CrLJ 746 : 1981 CrLR (SC) 378 : 1981 CurLJ (Cri) 149 : 1981 CrAppR (SC) 278.

[12117] ● ***Murder committed under sudden impulse in grave fit of rage—Death sentence commuted into imprisonment for life.***—In a case of murder of brother's wife and the nephew by the accused, aged about 22 years he was slapped by his brother during a quarrel. Murders were committed under a sudden impulse in a grave fit of rage. Death sentence was commuted to imprisonment for life in the ends of justice. *Umilal* v. *State of M.P.*, AIR 1981 SC 1710 : (1981) 3 SCC 574 : 1981 SCC (Cri) 760 : 1981 CrLJ 1446 : 1981 CrLR (SC) 228.

[12118] ● ***High Court in doubt as to whether fatal shot fired by accused—Sentence reduced to life imprisonment.***—Injuries found on the deceased showed that two shots were fired at him from two different guns. Evidence was not clear enough to compel the inference that whether the fatal injury was caused to the deceased by accused *N*. The High Court was in doubt about accused *N* fired the fatal shot and reduced the sentence from death to imprisonment for life. The reasoning of High Court was correct. *Nidha Singh* v. *State of Punjab*, AIR 1981 SC 376 : 1980 Supp SCC 211 : 1980 SCC (Cri) 962 : 1980 CrLJ 1421.

[12119] ● ***Murder of young boy—Accused sentenced to imprisonment for life.***—When the appellant was not a habitual criminal and he did not commit the crime for any personal gain, the sentence was reduced to life imprisonment. In a case of murder of a young boy the appellant was not a habitual criminal. The circumstances which led to the crime were not likely to recur. The appellant did not commit the crime for any personal gain. Ends of justice will be met by sentencing the appellant to suffer imprisonment for life. Even if Section 433-A is upheld by the Supreme Court, Government will not, save for weighty reason, reduce or commute sentence of the appellant to less than 14 years, since, unquestionably, he had committed a very serious crime. *Shida Gouda* v. *State of Karnataka*, AIR 1981 SC 764 : (1981) 1 SCC 164 : 1981 SCC (Cri) 163 : 1981 CrLJ 324 : 1981 CrLR (SC) 112 : 1981 CrAppR (SC) 2 : 1981 Chand CrC 33 (SC) : 1981 MLW (Cri) 35.

[12120] ● ***Double murder of two young children—Death sentence upheld.***—In a case of double murder of two young children committed in a professional manner by the two accused death sentence was upheld. *Kuljeet Singh* v. *Union of India*, AIR 1981 SC 1572 : (1981) 3 SCC 324 : 1981 SCC (Cri) 726 : 1981 CrLJ 1045 : 1981 CrLR (SC) 328 : 1981 Cr AppR (SC) 247 : 1981 UJ (SC) 584.

[12121] ● ***Death sentence—Mitigating circumstances.***—Murder of Amin, a Government servant, was committed for effecting sale of lands of the accused in a revenue sale. He performed his ministerial duty and had no personal grudge against the appellant nor had he anything to gain for himself by sale of those lands. Such crimes committed against public servants for reasons arising out of the performance by them of their public duties must be discouraged and put down with a firm hand. Death sentence was confirmed. *Gayasi* v. *State of U.P.*, AIR 1981 SC 1160 : (1981) 2 SCC 713 : 1981 SCC (Cri) 590 : 1981 CrLJ 883 : 1981 CrLR (SC) 385 : 1981 ALJ 441.

[12122] ● ***Murder—Terrific—No special reason.***—Every murder is terrific. So the fact that murder is terrific has no special reason. *Maniappan* v. *State of T.N.*, AIR 1981 SC 220 : (1981) 3 SCC 11 : 1981 SCC (Cri) 617 : 1981 CrLJ 726 : 1981 CrLR (SC) 387.

[12123] ● ***Accused 17 years of age—Death sentence set aside—Sentenced to life imprisonment.***—It is clear from the certificate issued by the jail authorities that the accused was only 17 years of age when the offence was committed. Taking into consideration the extreme young age we set aside the sentence of death and sentence him to life imprisonment. *Ujjagar Singh* v. *Union of India*, AIR 1981 SC 2009 (1) : 1981 Supp SCC 8 : 1981 SCC (Cri) 606 : 1981 CrLJ 1690 (2) : 1981 CrLR (SC) 515.

[12124] ● ***Power of president to commute sentence of death—Nature and scope.***—Undoubtedly, the President has the power in an appropriate case to commute any sentence imposed by a Court into a lesser sentence and as said by Chief Justice TAFT in *James Shewan and Sons* v. *United States*, (1914) 69 LWed 527 the executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law" and that the administration of justice by the Court is not necessarily or certainly considerate of circumstances which may properly mitigate guilt. But the question as to whether the case is appropriate for the exercise of power confirmed by Article 72 depends upon the circumstances and facts of each particular case. In this case not even the most liberal use of (President's) mercy jurisdiction could have persuaded the President to interfere with the sentence of death imposed upon the petitioners. *Kuljit Singh alias Ranga* v. *Lt. Governor of Delhi*, AIR 1982 SC 774 (774) : (1982) 1 SCC 417 : 1982 SCC (Cri) 234 : 1982 CrLJ 62 : 1982 CrLR (SC) 59.

[12125] ● ***Sentence of imprisonment must be deterrent and exemplary.***—In a peculiar case, where the Court found that the offence proved did not answer a rarest of rare case entailing death sentence, but at the same time, usual life imprisonment which in practice means not more than 14 years' incarceration in prison was found to be too inadequate and a travesty of justice. The Supreme Court observed that it was a case that lay in the murky area between the sentence of death and of the usual life imprisonment. The accused have betrayed a tendency to settle their score by violence. They have no compunctions in using inhuman methods to achieve their ends. Respect for law and life is alien to them. It will take sufficiently long time to reorient their outlook towards society and its affairs, to instill in them respect for law and life, and social discipline, and to make them repent for the reprehensible crime perpetrated by them. It is also necessary that they are made to suffer for a sufficiently long time to bring home to them and others the unpleasant consequences of their brutal behaviour. At the same time, the relations and sympathisers of the victims and above all the members of the society must feel that justice has been done, that inhuman acts are adequately punished and crimes however audacious and horrendous are not dealt with lightly. The sentence of imprisonment has therefore to be both deterrent and exemplary. It is also necessary to keep such accused away from society for a sufficiently long period so that when they rejoin it, the society does not feel insecure again by their presence amidst it. It is for this reason mere life imprisonment which does not last for more than 14 years in normal cases would not meet the ends of justice. It is necessary that the accused should remain in jail for a sufficiently long period and according to us, that period should not be less than 25 years in any case. *State of Maharashtra* v. *Manohar*, 1982 (2) CrLJ 600 (SC).

[12126] ● ***Murder—Seven years elapsed since imposition of death penalty—Reduced to sentence of life imprisonment.***—The accused was convicted on various counts of conspiracy, murder, robbery, abduction, *etc*., and sentenced to death. Though both the appellants were directly responsible for the murder of one of the victims, they were not the moving spirits of the band of criminals but were really 'junior partners', in the perpetration of the crimes. Their appearance on the scene was itself at a late stage and they were instruments in the hands of and under the domination of their fellow-accused. More than 7 years elapsed since the imposition of death penalty on them. In the circumstances, sentence of imprisonment for life was substituted for them. *Kannan* v. *State of Tamil Nadu*, AIR 1982 SC 1192 : (1962) 2 SCC 352 : 1982 SCC (Cri) 430 : 1982 CrLJ 1570.

[12127] ● ***Accused 76 years—In jail for 19 months—Sentence reduced to period already undergone.***—In a murder case the accused about 76 years old was not guilty of any overt act in strangulating the deceased. The accused was in jail for about 19 months. The sentence was reduced to period already undergone to meet the ends of justice. *Jora* v. *State of Madhya Pradesh*, AIR 1982 SC 64 : (1982) 3 SCC 229 : 1982 CrLJ 999.

[12128] ● ***Seven years elapsed since imposition of death penalty.***—Where more than seven years elapsed since the imposition of death penalty, lesser penalty for life imprisonment was awarded. *Kannan* v. *State of Tamil Nadu,* AIR 1982 SC 7192 : 1982 CrLJ 1570 : 1982 CrLR (SC) 258 : 1982 UJ (SC) 425.

[12129] ● ***Prison authorities to ascertain if death sentence commuted.***—Before execution of death sentence, the prison authorities must ascertain personally if the death sentence has been commuted. *Harbans Singh* v. *State of Uttar Pradesh*, AIR 1982 SC 849 : (1982) 2 SCC 101 : 1983 CrLJ 795 : 1982 CrLR (SC) 27.

[12130] ● ***Death sentence not to be passed except in rarest of rare cases.***—Death sentence should not be passed except in rarest of the rare cases. Applying this principle, death sentence in the instant case was commuted to one for imprisonment for life. *Earabhadrappa* v. *State of Karnataka*, AIR 1983 SC 446 : (1983) 1 SCC 330 : 1983 SCC (Cri) 447 : 1983 CrLJ 846 : 1983 CrLR (SC) 268 : 1983 (1) Crimes 784 : 1983 CrAppR (SC) 232 : (1983) 2 KantLJ 1 : 1983 (1) CrLC 550 1983 SCCCrR 251.

[12131] ● ***Pre-meditated murder of wife and daughter sentence for life imprisonment substituted.***—In a case of pre-meditated murders of wife and daughter, there was no justification for murder of daughter. The accused and his wife were frequently quarrelling and accused suspected her chastity. There was nothing to show that there was any basis for suspicion for entertaining the same. However, sexual jealousy and injured vanity often combine together to furnish powerful motive for murder particularly among rustic rural folk to which class the accused belonged. After considering all the circumstances, the Court holds that there are no sufficient grounds for departing from the rule of normal punishment and for imposing sentence of death. Sentence of imprisonment for life is substituted. *Amruta* v. *State of Maharashtra*, AIR 1983 SC 629 : (1983) 3 SCC 50 : 1983 SCC (Cri) 570 : 1983 CrLJ 1057 : 1983 CrLR (SC) 325 : 1983 MahLR (SC) 78 : 1983 UJ (SC) 570 : 1983 CrAppR (SC) 275 : (1983) 2 SCWR 222.

[12132] ● ***Death sentence—Commutation of sentence to imprisonment for life.***—The accused-petitioners and their co-conspirators got involved in six incidents during the course of which 10 murders and acts of robbery and dacoity were committed and from the record it was clear that each one of the three petitioners was involved in at least 7 murders out of the 10. In these writ petitions a fervent appeal has been made that their death sentences should be commuted to life imprisonment. Having regard to the magnitude, the gruesome nature of the offence and the manner of perpetrating them, this case in all the facts and circumstances should be regarded as falling within the rare of the rarest category and the extreme penalty of death was clearly called for. Any leniency shown in the matter of sentence would not only be misplaced but would certainly give rise to and foster a feeling of private revenge among the people leading to destabilisation of the society. The facts that for 5 years death sentence was hovering over their minds and that two of them had done translation work and wrote books could not be considered, as the petitioners were themselves responsible for the delay by indulging in successive petitions and writing and translating books required a composed mind and concentrated attention. If anything that belied that any specter of death penalty was hovering over their minds during the period they had been in jail. The writ petitions were dismissed. *Munawar Harun Shah* v. *State of Maharashtra*, AIR 1983 SC 585 : (1983) 3 SCC 354 : 1983 SCC (Cri) 625 : 1983 CrLJ 971.

[12133] ● ***Extreme penalty of death to be inflicted—When.***—The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

Before opting for the death penalty the circumstances of the 'offender' also required to be taken into consideration along with the circumstances of the 'crime';

Life imprisonment was the rule and death sentence was an exception. In other words, death sentence should be imposed only when life imprisonment appeared to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life could not be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

A balance-sheet of aggravating and mitigating circumstances had to be drawn up and in doing so the mitigating circumstances had to be accorded full weightage and a just balance had to be struck between the aggravating and the mitigating circumstances before the option was exercised.

In order to apply these guidelines, *inter alia* the following question might be asked and answered :

(a) Was there something uncommon about the crime which rendered sentence of imprisonment for life inadequate and called for a death sentence?

(b) Were the circumstances of the crime such that there was no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which spoke in favour of the offender?

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed hereinabove, the circumstances of the case were such that death sentence was warranted, the Court would proceed to do so. *Machhi Singh* v. *State of Punjab*, AIR 1983 SC 957 : (1983) 3 SCC 470 : 1983 SCC (Cri) 681 : 1983 CrLJ 1457 : 1983 CrLR (SC) 418 : (1983) 2 Crimes 268.

[12134] ● ***Multiple murder—Supreme Court declined to interfere.***—In a case of multiple murder, motive for murders was gain. As murders were perpetrated in a cruel, callous and fiendish fashion, Supreme Court declined to interfere with sentence of death, though the accused was 22 years of age and case rested upon circumstantial evidence. *Javed Ahmed Abdulhamid* v. *State of Maharashtra*, AIR 1983 SC 594 : (1983) 3 SCC 39 : 1983 SCC (Cri) 559 : 1983 CrLJ 960 : 1983 CrLR (SC) 324 : 1983 Mah LR (SC) 76 : 1983 UJ (SC) 569 : 1983 MLJ (Cri) 596.

[12135] ● ***Death sentence—Gruesome murder.***—It is true that a period of five years has elapsed since the imposition of death penalty on them. But such lapse of time is not decisive of the matter but would be a factor to be borne in mind. In this case the normal judicial process itself come to or end only on 17th November, 1980 when this Court finally dismissed the Special Leave Petition of the Petitioners against their convictions and sentences. But for the subsequent lapse of time, the petitioners or at least some of them are responsible. Each one of them preferred a review petition against the dismissal of the special leave petition and those review petitions came to be dismissed on 11th February, 1981. *Munawar Harun Shah* v. *State of Maharashtra*, AIR 1983 SC 585 (586) : (1983) 3 SCC 354 : 1983 SCC (Cri) 625 : 1983 CrLJ 971 : 1983 CrLR (SC) 312.

[12136] ● ***Accused suspecting chastity of wife—Life imprisonment substituted for sentence of death.***—While on the one hand it was clear that the murders were premeditated and there was really no justification whatsoever for the murder, on the other hand, the circumstance was that the accused and the deceased were frequently quarreling and the accused suspected the chastity of his wife. Lesser sentence for life imprisonment will meet the end of justice. *Amruta* v. *State of Maharashtra*, AIR 1983 SC 629 : (1983) 3 SCC 50 : 1983 SCC (Cri) 570 : 1983 CrLJ 1057 : 1983 UJ 570.

[12137] ● ***Execution of death sentence by hanging not ultra vires constitution.***—The provisions of execution of death sentence by hanging till death is not *ultra vires* the Constitution. *Deena* v. *Union of India*, AIR 1983 SC 1155 : (1983) 4 SCC 645 : 1983 CrLJ 1602.

[12138] ● ***Instances of bride killing—Deterrent punishment necessary.***—Instances of bride killing are alarmingly on the increase. If society should be ridden of this growing evil, it is imperative that whenever dastardly crimes of this nature were detected and the offence brought home to the accused, the Courts should deal with the offender most ruthlessly and impose deterrent punishment. *Virbhan Singh* v. *State of U.P.*, AIR 1983 SC 1002 : (1983) 4 SCC 197 : 1983 CrLJ 1635 : (1983) 2 Crimes 376.

[12139] ● ***Appellant assaulted deceased with blunt side of gandasa—Not fit case to impose extreme penalty of death.***—Although the fact that he was released on parole only a month before the present occurrence is admitted, in the facts and circumstances of this case the extreme penalty of death is not called for. To begin with the father of the appellant had executed a power of attorney which was sought to be assailed by the two brothers living separately, and this was the immediate cause of the assault. Secondly it is the admitted case of the prosecution that the appellant assaulted the deceased with the blunt side of the gandasa. Having regard to these circumstances it cannot be said that it is a fit case in which the extreme penalty of death should be given under Section 302, IPC. *Surjit Singh* v. *State of Punjab*, AIR 1983 SC 839 : (1983) 3 SCC 316 : 1983 CrLJ 1112.

[12140] ● ***Substitution of death sentence by sentence of life imprisonment cannot follow by application of two years formula.***—A convict is undoubtedly entitled to pursue all remedies lawfully open to him to get rid of the sentence of death imposed upon him and indeed, there is no one, be he blind, lame, starving or suffering from a terminal illness, who do not want to live. The Vinoba Bhave, who undertook the "Prayopaveshana" do not belong to the world of ordinary mortals. Therefore, it is understandable that a convict sentenced to death would take recourse to every remedy which is available to him under the law to ask for the commutation of his sentence, even after the death sentence was finally confirmed by the Supreme Court by dismissing his Special Leave Petition or Appeal. But, it is, at least, relevant to consider whether the delay in the execution of the death sentence is attributable to the fact that he had resorted to a series of untenable proceedings which had the effect of defeating the ends of justice. It is not uncommon that a series of review petitions and writ petitions are filed in the Supreme Court to challenge judgments and orders which had assumed finality, without any seeming justification. Stay orders obtained in those proceedings and then, at the end of it all, came the argument that there had been prolonged delay in implementing the judgment or order. The Court called upon to vacate a death sentence on the ground of delay caused in executing that sentence should find why the delay was caused and who was responsible for it. If that is not done, the law laid down by the Supreme Court would become an object of ridicule by permitting a person to defeat it by resorting to frivolous proceedings in order to delay its implementation. And then, the rule of two years would become a handy tool for defeating justice. The death sentence should not, as far as possible, be imposed. But in that rare and exceptional class of cases wherein that sentence is upheld by the Supreme Court, the judgment or order of the Supreme Court ought not to be allowed by applying any rule of thumb. Finally, and that is no less important, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence was vacated, are matters which should enter into the verdict as to whether the sentence should be vacated for the reason that its execution was delayed. The substitution of the death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula, as a matter of "*quod errat demonstrandum*". *Sher Singh* v. *State of Punjab*, AIR 1983 SC 465 : (1983) 2 SCC 344 : 1983 SCC (Cri) 461 : 1983 CrLJ 803 : 1983 CrLR (SC) 247.

[12141] ● ***Delay in execution of sentence exceeding two years not by itself entitle person under sentence of death to demand questing sentence and converting it into sentence of life imprisonment.***—An important question that arose for consideration in these two writ petitions was whether a delay exceeding two years in the execution of a sentence of death should be considered sufficient for setting aside that sentence. Reliance was placed on behalf of the petitioners upon a decision of the Supreme Court in *T.V. Vatheeswaran* v. *State of Tamil Nadu*, AIR 1983 SC 361 (2) : 1983 CrLJ 481 : 1983 (1) Scale 115, and contended that since more than two years had passed since the petitioners were sentenced to death by the Trial Court, they were entitled to demand that the said sentence should be quashed and substituted by the sentence of life imprisonment. A prisoner who had experienced living death for years on end is entitled to invoke the jurisdiction of the Supreme Court for examining the question whether, after all the agony and torment he had been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of Article 21 of the Constitution and to that extent the Supreme Court is in broad and respectful agreement with the learned brethren in *T.V. Vatheeswaran* v. *State of Tamil Nadu*, AIR 1983 SC 361, in their visualization of the meaning of that Article. The horizons of Article 21 are even widening and the final word on its conspectus should never have been said. So long as life lasts, so long shall it be the duty and the endeavour of the Supreme Court to give to the provisions of the Constitution a meaning which would prevent human suffering and degradation. Therefore, Article 21 is as much relevant at the stage of execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter what the stage, should be fair, just and reasonable. It is well-established that a prisoner cannot be tortured or subjected to unfair or inhuman treatment. It is a logical extension of the self-same principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events made its execution harsh, unjust or unfair. Article 21 stood like a sentinel over human misery, degradation and oppression. Its voice is the voice of justice and fairplay. That voice can never be challenged on the ground that the time to heed to its imperatives is long since past in the story of a trial. It reverberated through all stages—the trial, the sentence, the incarceration and finally, the execution of the sentence. *Sher Singh* v. *State of Punjab*, AIR 1983 SC 465 : (1983) 2 SCC 344 : 1983 SCC (Cri) 461 : 1983 CrLJ 803 : 1983 CrLR (SC) 247 : (1983) 1 Crimes 1017 : 1983 SCC (Cri) R 213 : (1983) 1 SCJ 318 : (1983) 2 MLJ (SC) 46 : 1983 MLJ (Cri) 545 : 1983 (2) ChandLR (Cri) 491 : 1983 CrAppR (SC) 430.

[12142] ● ***Prolonged delay in execution of death sentence.***—Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard and fast rule could be laid down as was done by the Bench in *Vatheeswaran's* case that "delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death". That period of two years purports to have been fixed in that case after making "all reasonable allowance for the time necessary for appeal and consideration of reprieve". It is impossible to agree with that part of the judgment. One had only to turn to the statistics of the disposal of cases in the High Court and the Supreme Court to appreciate that a period far exceeding two years is generally taken by those Courts together for the disposal of matters involving even the death sentence. Very often, four or five years elapsed between the imposition of death sentence by the Sessions Court and the disposal of the Special Leave Petition or an Appeal by the Supreme Court in that matter. That was apart from the time which the President or the Governor, as the case might be, took to consider petitions filed under Article 72 or Article 161 of the Constitution or the time which the Government took to dispose of application filed under Sections 432 and 433, CrPC. Therefore, the fixation of the time limit of two years does not seem to the Court to accord with the common experience of the time normally consumed by the litigative process and the proceedings before the executive. Apart from the fact that the rule of two years runs in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities, no absolute or unqualified rule could be laid down that in every case in which there was a long delay in the execution of death sentence, the sentence should be substituted by the sentence of life imprisonment. There are several other factors which should be taken into account while considering the question as to whether the death sentence should be vacated. In this case under Sections 120-B, 302 and 201, IPC, the Sessions Judge awarded sentence of death to Saxena for the offence of murder. On appeal filed by him and in the confirmation proceedings, two Judges who heard the same differed on the point of guilt. On a reference to a third Judge, the conviction of Saxena under Section 302 was upheld but death sentence was reduced to life imprisonment. A Special Leave petition was filed by the State of U.P. contending that Saxena should be sentenced to death. If the Judge who had held that Saxena was not guilty of murder had taken a more pragmatic view of the facts, he would not have persuaded himself to the view that the deceased (wife of Saxena) might have committed suicide by hanging herself. Presumably, the death sentence so justifiably imposed by the Sessions Judge on Saxena was reduced to life imprisonment for the reason that two learned Judges differed on the question as to the guilt of the accused. If the High Court were to uphold the sentence of death. This Court would not have interfered with that sentence. But it was faced with a situation in which the High Court had reduced the sentence of death to imprisonment for life. So this Court feels that it was not called upon to restore the sentence of death. *V.K. Saxena (Dr.)* v. *State of Uttar Pradesh*, AIR 1984 SC 49 : (1983) 4 SCC 519 : 1983 CrLJ 1731 : 1983 CrLR (SC) 461.

[12143] ● ***Death sentence—Prolonged delay in execution exceeding two years effect.***—Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, delay exceeding 2 years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Articles 21 and demand the quashing of the sentence of death. The appropriate relief in such a case was to vacate the sentence of death and substitute the sentence of imprisonment for life. Articles 14, 19 and 21 of the Constitution of India were not mutually exclusive. They sustained, strengthened and nourished each other. They were available to prisoners as well as free men. Prison walls did not keep out Fundamental Rights. The dehumanising factor of prolonged delay in the execution of a sentence of death had the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the constitutional guarantee that no person should be deprived of his life or personal liberty except according to procedure established by law. 'Procedure established by law' did not end with the pronouncement of sentence; it could include the carrying out of sentence.

Note: The above case was decided by two Judges of the Supreme Court, one of them being CHINNAPPA REDDY, J., who delivered the judgment. But in *Sher Singh* v. *State of Punjab*, AIR 1983 SC 465, decided by a Bench of three Judges, overruled the above case. Again another Division Bench comprising CHINNAPPA REDDY, J., and another held that there is no question of one Division Bench of the same Court unless it be a Full Bench or a Constitution Bench. *Javed Ahmed* v. *State of Maharashtra*, AIR 1985 SC 231 : (1985) 1 SCC 275 : 1984 CrLJ 1909. **TO THE SAME EFFECT :** (1) *T.V. Vatheeswaran* v *State of Tamil Nadu*, AIR 1983 SC 361 (2) (1983) 2 SCC 68 : 1983 SCC (Cri) 342 : 1983

CrLJ 481 : 1983 CrLR (SC) 199 : 1983 (1) CrLC 506 : (1983) 1 Crimes 704 : 1983 SCCrR 201 : (1983) 2 MLJ (SC) 39 : (1983) 1 SCJ 289 : 1983 MLJ (Cri) 466.

[12144] ● ***Crime committed out of poverty—Imprisonment for life awarded.***—Accused killed his ailing wife as he could not provide money for her operation and also killed his two children as they would be neglected after their mother's death. Murder of near and dear ones including two innocent kids is gruesome. He did not commit their murder actuated by any lust, sense of vengeance or for gain. Plight of an economic have-not sometimes becomes so tragic that the only escape route is crime. Accused committed the murders because in his utter helplessness he could not find few chips to help his ailing wife and he saw the escape route by putting an end to their lives. This one circumstance is of such an overwhelming character that even though the crime is detestable, capital punishment should not be imposed. *State of Uttar Pradesh* v. *M.K. Anthony*, AIR 1985 SC 48 : (1985) 1 SCC 505 : 1985 CrLJ 493 : 1985 CrLR (SC) 41 : (1985) 1 RCCrR 87 : 1985 CurCrJ (SC) 18.

[12145] ● ***Murder—Death sentence—Commutation of.***—In a murder case the accused was sentenced to death. Where there was clear evidence that the appellant and others were armed with guns and they participated in the murder of the deceased either by presence or by committing overt acts to shooting and that the appellant took a leading part in entering the house and aided and assisted others in murdering the six persons in the house, the conviction of the appellant under Sections 302 and 34, IPC, cannot be interfered with. There does not seem to be any reason why any leniency should be shown to the appellant in the question of sentence. This is most cruel, heinous and dastardly murder and there is no extenuating circumstances for reducing the sentence of death to imprisonment for life. *Lok Pal Singh* v. *State of Madhya Pradesh*, AIR 1985 SC 891 : 1985 Supp SCC 76 : 1985 SCC (Cri) 400 : 1985 CrLJ 1134 : 1985 CrLR (SC) 189 : 1985 CrAppR (SC) 129 : (1985) 2 Rec CrR 82.

[12146] ● ***Accused attempting to attract ransom even after killing boy—Death sentence confirmed.***—In the instant case, the accused was a professional child lifter who attempted to extract ransom after murdering the child inducing the father to believe that the child was alive. It was a rarest of rare case justifying death sentence. *Henry Westmuller* v. *State of Assam*, AIR 1985 SC 823 : (1985) 3 SCC 291 : 1985 CrLJ 1079.

[12147] ● ***Gruesome and cold blooded murder—Occurrence taking place over decade ago—Accused to undergo imprisonment for life.***—Where the murder was gruesome and cold-blooded, the accused were convicted under Sections 302/34 and sentenced to death by the trial Court but the High Court in appeal set aside the same and acquitted them. While affirming the conviction in special leave appeal, the Supreme Court sentenced the accused to undergo imprisonment for life since the occurrence had taken place over a decade ago. *State of Uttar Pradesh* v. *Lalloo*, AIR 1986 SC 576 : 1985 SCC (Supp) 379 : 1985 SCC (Cri) 478 : 1986 CrLJ 546 : 1985 CrLR (SC) 437 : 1985 SCCrR 370 : 1985 CrAppR (SC) 253 : (1985) 2 Crimes 708 : 1986 ALJ 275 : (1986) 1 Supreme 80.

[12148] ● ***Bride burning—Imprisonment for life.***—In this case of bride burning, the trial Court thought it fit to impose the punishment of death. But the High Court acquitted the respondents. In a suitable case of bride burning, death sentence may not be improper. But in the facts of this case and particularly on account of the acquittal by the High Court and almost two years have elapsed since then, it would not be proper to restore the death sentence as a necessary corollary to the finding of guilt. Respondents are accordingly sentenced to imprisonment for life. *State (Delhi Administration)* v. *Laxman Kumar*, AIR 1986 SC 250 : (1985) 4 SCC 476 : 1986 SCC (Cri) 2 : 1988 (1) CrLJ 155 : 1985 CrLR (SC) 501 : 1986 SCCrR 30 : (1985) 2 Crimes 758 : 1985 CrAppR (SC) 304 : (1986) 1 Supreme 1 : (1986) 1 Cr LC 149 : (1986) 1 ACrLR 111 : 1986 MLJ(Cri) 86.

[12149] ● ***Murder—Death sentence—Interference.***—Where the accused, father and son, murdered four members of a family and their neighbours who intervened merely because the daughter of that person married a harijan and the accused were sentenced to death, the Supreme Court refused to interfere with the sentence, observing that it would be a mockery of justice to permit the accused to escape the extreme penalty of law and that to give the lesser punishment would be to render the justicing system of the country suspect and the common man would lose faith in Courts. *Mahesh* v. *State of Madhya Pradesh*, AIR 1987 SC 1346 : (1987) 3 SCC 80 : 1987 CrLJ 1073 : 1987 Raj LR 213 : (1987) 1 (1) LJ Rep 574.

[12150] ● ***Bride burning maximum punishment awarded.***—In a case of bride burning for dowry which amounts to murder by the barbaric method of pouring kerosene oil and setting on fire was adopted, the maximum punishment must be awarded. *Kailash Kaur* v. *State of Punjab*, AIR 1987 SC 1368 : (1987) 2 SCC 621 : 1987 SCC (Cri) 431 : 1987 CrLJ 1127 : 1987 CrLR (SC) 393 : 1987 Rajdh LR 327 : (1987) 2 Crimes 418 : (1987) 1 Supreme 614 : (1987) 2 SCJ 516.

[12151] ● ***Death sentence—Murder committed with extreme brutality.***—The appellants in this case were real brothers and were sentenced to death under Section 302 read with Section 149, IPC, for having committed the brutal murders of their two nieces aged 14 and 20 years and under Section 307 read with Section 149 also. Their convictions were not challenged but submissions were made mainly on the question of sentence. The High Court observed that on a careful consideration of the entire material, the facts and circumstances and the applicable law, it was satisfied that this was one of the rarest of the rare cases where death penalty was the only appropriate sentence which ought to be imposed on them. The two appellants were guilty of a heinous crime out of greed and personal vengeance and deserved the extreme penalty. This case fell within the test 'rarest of the rare cases' as laid down by this Court in *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898, as elaborated in the latter case of *Machhi Singh* v. *State of Punjab,* AIR 1983 SC 957. It also observed that the punishment should fit the crime. These were cold-blooded brutal murders in that the two innocent girls lost their lives. The extreme brutality with which the appellants acted shocked the judicial conscience. Failure to impose a death sentence in such grave cases where it is a crime against the society particularly in cases of murders committed with extreme brutality would bring to naught the sentence of death provided by Section 302 of the Penal Code. It was the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellants deserved for having committed a reprehensible and gruesome murders of the two innocent girls to wreak their personal vengeance over the dispute they had with regard to their property with the girls' mother was nothing but death. As a measure of social necessity and also as a means of deterring other potential offenders, sentence of death on the two appellants was confirmed. *Asharfi Lal & Sons* v. *State of Uttar Pradesh*, AIR 1987 SC 1721 : (1987) 3 SCC 224 : 1987 SCC (Cri) 470 : 1987 CrLJ 1885 : 1987 CrLR (SC) 331 : (1987) 1 (1) IJ Rep 636 : (1987) 2 SCJ 489 : (1987) 2 UJ (SC) 152 : 1987 All CrC 342.

[12152] ● ***Death sentence conversion into life imprisonment.***—In this case the evidence does not clearly indicate exact manner in which the murder was committed. It is note-worthy that Appellant 1 had not taken with him any weapon for assaulting the deceased but used two stitchers lying in the Bank premises, indicating that the murder was not pre-planned. Looking to the nature of the weapon used, it seems to us that the accused acted under a momentary impulse. In the circumstances we direct that the death sentence should be converted into one for life imprisonment. *Laxmi Raj Shetty* v. *State of Tamil Nadu*, AIR 1988 SC 1274 : (1988) 3 SCC 319 : 1988 SCC (Cri) 633 (662) : 1988 CrLJ 1783 : 1988 CrLR (SC) 305 : JT 1988 (2) SC 180 : (1988) 2 Crimes 107.

[12153] ● ***Death sentence conversion into life imprisonment.***—Where the victim, first wife of a doctor had illicit relationship with accused, a leprosy Inspector under the doctor and doctor's daughter discovered once her mother in compromising position with the accused and threatened to disclose it to her father and since then the victim gave up the amorous relationship with accused; one day ignited by a late night movie showing murder of four women, the accused rushed to her house and murdered the victim, and grievously injured her daughter. Death sentence is converted to life imprisonment. *Moorthy* v. *State of Tamil Nadu*, AIR 1988 SC 1245 : (1988) 3 SCC 207 : 1988 CrLJ 1773.

[12154] ● ***Life imprisonment not death sentence.***—As observed in *State (Delhi Admn.)* v. *Lakshman Kumar,* AIR 1986 SC 250, though we agree that in the case of bride burning, death sentence may not be improper, the persons who perpetrate such barbaric crime, without any human consideration, must be given extreme penalty. The appellant was acquitted by the trial Court in 1977 where as the High Court reversed her acquittal and gave the extreme penalty in 1985. When there are two opinions as to the guilt of the accused, by the two Courts, ordinarily the proper sentence would be not death but imprisonment for life. Apart from that, there is no direct evidence that the appellant had sprinkled kerosene on the deceased and lighted fire on her. There must have been other persons also who conspired to murder her and committed it but they are not before the Court. It is apparent from the judgment of the High Court that the decision to award death sentence is more out of anger than on reasons. The judicial discretion should not be allowed to be swayed by emotions and indignation. Having regard to all the facts and circumstances of the case, this is not a fit case for awarding the death sentence. The same is set aside and she is sentenced to imprisonment for life. *Lichhamadevi* v. *State of Rajasthan*, AIR 1988 SC 1785 : (1988) 4 SCC 456 : 1988 CrLJ 1812 : JT 1988 (4) SC 42 : 1988 (3) Crimes 1 : (1988) 2 SCJ 637.

[12155] ● ***Brutal killing—Death sentence—Award of.***—Where the accused was keen to grab the property and in pursuit of that motive they attacked the uncle and his family and killed all the members of the family eliminating thereby every one who could claim any share in the property, the attack was brutal and gave repeated blows on a young girl, his own uncle's daughter, with determination that she might not escape, the manner in which the two persons were done to death brutally deserved the awarding of the death sentence to the accused. *Darshan Singh* v. *State of Punjab,* AIR 1988 SC 747 : (1988) 1 SCC 618 : 1988 CrLJ 909 : JT 1988 (1) SC 219.

[12156] ● ***Death sentence—Substitution by life imprisonment.***—He also invites us to consider the circumstances that the first petitioner is now aged 69 years while the second petitioner is the father of three very young children we also notice that while both the petitioners are undoubtedly guilty of the offence of murder, the record does not disclose the degree of their culpability. We have nothing to indicate what part was played by each of the petitioners in the commission of the offence. Taking an overall view of all the circumstances we think that the safer course is to set aside the sentence of death and substitute in its place the sentence of imprisonment for life on both petitioners. *Chandra Nath Banik* v. *State of West Bengal*, 1988 SCC (Cri) 105 (105, 106) : 1987 Supp SCC 468.

[12157] ● ***Award of death sentence not inappropriate.***—Where in a murder case the approver was related in equal degrees to the accused and also the deceased victim and gave a detailed version of the incident including his own participation in the commission of the crime and the Courts below accepted him as a truthful witness and found that there was no reason for the approver to implicate the accused on false charges and there was evidence about the presence of the accused along with the approver in the house of the deceased and the weapons of the crime were recovered at the instance of the accused, the said evidences, if taken together lent re-assurance by way of corroboration to the evidence of the approver. As the manner in which the entire family was eliminated indicated that the offence was deliberate, diabolical, pre-determined, cold-blooded and absolutely devilish and dastardly and the victims were innocent children done to death with lethal weapons when they were fast asleep, the sentence of death awarded cannot be said to be inappropriate. *Ranjeet Singh* v. *State of Rajasthan*, AIR 1988 SC 672 : (1988) 1 SCC 633 : 1988 CrLJ 845.

[12158] ● ***Death penalty—Just and proper.***—The person killed is no less than the Prime Minister of India who was the elected leader of the people. In our country we have adopted and accepted a system wherein change of the leader is permissible by a ballot and not by bullet. The act of the accused not only took away the life of a popular leader but also undermined our system which has been working so well for the last 40 years. There is yet another serious consideration. Beant Singh and Satwant Singh were persons posted on the security duty of the Prime Minister to protect her from any intruder or from any attack from outside and therefore if they themselves resorted to this kind of offence, there appears to be no reason or no mitigating circumstance for consideration on the question of sentence. Additionally, an unarmed lady was attacked by these two persons with a series of bullets and a number of them entered her body. The manner in which mercilessly she was attacked by these two persons on whom the confidence was reposed to give her protection repels any consideration of reduction of sentence. In this view of the matter, even the conspirator who inspired the persons who actually acted does not deserve any leniency in the matter of sentence. The sentence awarded by the trial Court and maintained by the High Court appears to be just and proper. (Per OZA, J.) *Kehar Singh* v. *State (Delhi Administration)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1989 CrLJ 1 : (1988) 3 Crimes 209.

[12159] ● ***Rarest of rare cases—Penalty of death—Proper.***—It is a gruesome murder committed by the accused who was employed as security guard to protect the Prime Minister. It is one of the rarest of rare cases in which extreme penalty of death is called for—(Per OZA, J.) *Kehar Singh* v. *State (Delhi Administration)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : 1989 CrLJ 1.

[12160] ● ***Foul and senseless assassination—Death penalty proper.***—The crime charged is not simply the murdering of a human being, but it is the crime of assassination of the duly elected Prime Minister of the country. The motive for the crime was not personal, but the consequences of the action taken by the Government in the exercise of constitutional powers and duties. In our democratic republic, if the Government becomes subversive of the purpose of its creation, the people will have the right and duty to change it by their irresistible power of ballot and have the Government of their own choice wisely administered. But no person who is duly constituted shall be eliminated by privy to conspiracies. Indian citizens are committed to the Constitution. They have faith in the ballot box. They have confidence in the democratic institutions and respect for constitutional authorities. The "Bule Star Operation" was not directed to cause damage to Akal Takht. Nor was it intended to hurt the religious feelings of Sikhs. The decision was taken by the responsible and responsive Government in the national interest. The Prime Minister was, however, made the target for the consequences of the decision. The security guards who were duty bound to protect the Prime Minister at the cost of their lives, themselves became the assassins. Incredible but true. All values and all ideals in life; all norms and obligations are thrown to the winds. It is betrayal of the worst order. It is the most foul and senseless assassination. The preparations for and the execution of this egregious crime do deserve the dread sentence of the law—(Per K. JAGANATHA SHETTY, J.) *Kehar Singh* v. *State (Delhi Administration)*, AIR 1988 SC 1883 : (1988) 3 SCC 609 : 1989 CrLJ 1.

[12161] ● ***Death sentence substituted by sentence of life imprisoners.***—The deceased was a Police Constable and was murdered while on duty. However provocative the behavior of the appellants may have been towards the members of the Naicker community, the incident had come to an end after PW 2 had floored Appellant 1 and the appellants had thereafter left the place of occurrence albeit vowing revenge on a future occasion. The whole episode was over and could have been forgotten as there was no immediate danger of retaliation by the appellants and consequently there was no need for their arrest. No report was made against the appellants for their provocative behaviour and no case was registered against them for the commission of any cognizable offence. The deceased acted over-zealously and attempted to apprehend the appellants. As the earlier incident had passed off, the appellants were perhaps unable to fathom the reasons for their attempted arrest and, therefore, tried to wriggle out from the clutches of the deceased by the use of force. Since the appellants felt that they were being unjustly treated by the deceased, they in order to free themselves attacked the deceased and caused the injuries. It cannot be said that the attack was pre-planned one. It was rather sudden and actuated by a desire to free themselves. It, therefore, follows that the murder cannot be said to belong to the rarest of rare category warranting the sentence of death. *Anguswamy* v. *State of Tamil Nadu*, (1989) 3 SCC 33 : 1989 SCC (Cri) 481 (485) : JT 1989 (2) SC 184.

[12162] ● ***Death sentence converted to life imprisonment.***—In this case of murder, the High Court confirmed the sentence of death on three of the appellants and the sentence of imprisonment for life on 16 others while acquitting 13 other accused. If the case of the rest of the appellants is not considered as "rarest of the rare" case within the parameters of the decision of this Court in *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898, the case of the three appellants sentenced to death cannot be brought under the category of "rarest of rare" case particularly having regard to the facts of the case. A charge of conspiracy was framed against all the appellants, but they have all been exonerated. Further, the evidence connecting each of the three appellants with the death of each of the deceased is at variance *inter se.* Hence the appropriate sentence to impose would be the sentence of imprisonment for life and accordingly the sentence of death on those appellants is converted into a sentence of life imprisonment. *Kannan* v. *State of T.N.*, AIR 1989 SC 396 : 1989 Supp (1) SCC 81 : 1989 CrLJ 825 : (1988) 3 Crimes 882.

[12163] ● ***Case not one of rarest of rare cases.***—On facts, this case is not one of the rarest of rare cases.

In order that the sentences may be properly graded to fit the degree of gravity of each case, it is necessary that the maximum sentence prescribed by law should, as observed in *Bachan Singh's case* (AIR 1980 SC 898), be reserved for the rarest of rare cases which are of an exceptional nature. Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a three-fold purpose : (i) punitive, (ii) deterrent and (iii) protective. That is why this Court in *Bachan Singh's case* observed that when the question of choice of sentence is under consideration the Court must not only look to the crime and the victim but also the circumstances of the criminal and the impact of the crime on the community. Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose the lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. In the subsequent decision of *Machhi Singh* v. *State of Punjab*, AIR 1983 S

957, this Court, after culling out the guidelines laid down in *Bachan Singh's case*, observed that only in those exceptional cases in which the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community, would it be permissible to award the death sentence. *Allauddin Mian* v. *State of Bihar*, AIR 1989 SC 1456 : (1989) 3 SCC 5 : 1989 CrLJ 1466.

[12164] ● *Killing not for gain—Death sentence—Converted to life imprisonment.*—In the present case, unfortunately the material for choice of sentence is scanty. The motive for the crime is obscure, the one stated, namely, the quarrel between two infants of both sides, does not seem to be correct. The killings were not for gain. The charge shows that the target was PW 6, the father, and not the two infants. The killing of the two infants was not in the contemplation of any of the accused. Both the girls were the victims of the offenders' ire resulting from frustration at the escape of their target. There is nothing so uncommon about the crime as to make the case an exceptional one. The mere fact that infants are killed, without more, is not sufficient to bring the case within the category of "the rarest of rare" cases. The extreme punishment of death on A-1 and A-2 for killing the two infants is not warranted and is converted into imprisonment for life. *Allauddin Mian* v. *State of Bihar*, AIR 1989 SC 1456 : (1989) 3 SCC 5 : 1989 CrLJ 1466.

[12165] ● *Delay in execution of death sentence.*—Delay in execution of death sentence—Violation of Article 21 of Constitution of India—Death sentence converted to life imprisonment.

This is a two-member Bench decision of Supreme Court which distinguish the 5-member Bench decision. *Madhu Mehta* v. *Union of India*, AIR 1989 SC 2299 : (1989) 4 SCC 62. **TO THE SAME EFFECT :** (1) *Triveniben* v. *State of Gujarat*, AIR 1989 SC 1335 : (1989) 1 SCC 678 : 1990 CrLJ 1810.

[12166] ● *Death sentence—Delay in execution of.*—Undue delay in execution of death sentence would no *proprio vigore* entitle the convict to acquittal or commutation of death sentence to imprisonment for life. But it will only entitle the convict to approach the Supreme Court who will examine the nature of the delay caused and the circumstances ensued after the confirmation of the death sentence. The only delay which will be material for consideration would be the delay in disposal of the mercy petition or the delays occurring at the instance of the executives. There is no fixed period (2 years rule laid down in AIR 1983 SC 361 Overruled) after which the sentence of death would inexecutable *Triveniben* v. *State of Gujarat*, AIR 1989 SC 1335 : (1989) 1 SCC 678 : 1990 CrLJ 1810.

Note : But see, *Madhu Mehta* v. *Union of India,* AIR 1989 SC 2259 : (1989) 4 SCC 578 where this decision *Triveniben* was distinguished.

[12167] ● *Court to give special reason when extreme penalty inflicted.*—In ultimate analysis of the circumstances in which the extreme penalty should be inflicted cannot be enumerated in view of complex situation in society and the possibilities in which the offence could be committed and in this context in ultimate analysis the Legislature therefore was right in leaving it to the discretion of the judicial decision as to what should be the sentence in particular circumstances of the case. But the Legislature has put a further rider that when the extreme penalty is inflicted it is necessary for the Court to give special reasons thereof. *State of Uttar Pradesh, Triveniben* v. *State of Gujarat*, AIR 1989 SC 1335 : (1989) 1 SCC 678 : 1990 CrLJ 1810.

[12168] ● *Murder—Imposition of death penalty—Permissibility.*—Section 302, IPC casts a heavy duty on the Court to choose between death and imprisonment for life. The Court must show a high degree of concern and sensitiveness in the choice of sentence. In our justice delivery system several difficult decisions are left to the presiding officers, sometimes without providing the scales or the weights for the same. In cases of murder, however, since the choice is between capital punishment and life imprisonment the legislature has provided a guideline in the form of sub-section (3) of Section 354, CrPC. This provision makes it obligatory to assign reasons in support of the sentence awarded to the convict and further ordains that in case the Judge awards the death penalty, "special reasons" for such sentence shall be stated in the judgment. When the law casts a duty on the Judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. The existence of the 'special reasons clause' in the above provision implies that the Court can in fit cases impose the extreme penalty of death which negatives the contention that there can never be a valid reason to visit an offender with the death penalty, no matter how cruel gruesome or shocking the crime may be. *Allauddin Mian* v. *State of Bihar*, AIR 1989 SC 1456 : (1989) 3 SCC 5 : 1989 CrLJ 1466 : 1989 CrLJ 1466.

[12169] ● *Death sentence—Special reasons clause in Section 354, CrPC sufficient safeguard against arbitrary imposition of.*—While rejecting the demand to the protagonist of the reformatory theory for the abolition of the death penalty, the legislature in its wisdom thought that the 'special reasons clause' should be sufficient safeguard against arbitrary imposition of the extreme penalty. Where a sentence of severity is imposed, it is imperative that the Judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the Judge would not award the death sentence. If a Judge is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentence his choice should fall on the lower sentence. In all such cases, the law casts an obligation on the Judge to make his choice after carefully examining the pros and cons of each case. It must at once be conceded that offenders of some particularly grossly brutal crimes which send tremors in the community have to be firmly dealt with to protect the community have from the perpetrators of such crimes. Where the incidence of a certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bride burning, it may be necessary for the Courts to award exemplary punishments to protect the community and to deter others from committing such crimes. Since the legislature in its wisdom, thought that in some rare cases it may still be necessary to impose the extreme punishment of death to deter others and to protect the society and in a given case the country, it left the choice of sentence to the judiciary with the rider that the Judge may visit the convict with the extreme punishment provided there exist special reasons for so doing. In the face of this statutory provision which is consistent with Article 21 of the Constitution which enjoins that the personal liberty or life of an individual shall not be taken except according to the procedure established by law, this Court is unable to countenance counsel's extreme submission of death in no case. *Allauddin Mian* v. *State of Bihar*, AIR 1989 SC 1456 : (1989) 3 SCC 5 : 1989 CrLJ 1466 : 1989 CrLJ 1466.

[12170] ● *Choice of punishment left to the discretion of Judge.*—Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the Judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. *Allauddin Mian* v. *State of Bihar*, AIR 1989 SC 1456 : (1989) 3 SCC 5 : 1989 CrLJ 1466 : 1989 CrLJ 1466.

[12171] ● *Death Sentence converted to life imprisonment.*—In this case, out of the 31 appellants convicted for murder under Section 302, read with Section 34/149, IPC, three alone were sentenced to death while the rest were sentenced to imprisonment for life. If the cases of the 28 appellants are not considered as "rarest of the rare" case within the parameters of the decision in *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898 : 1980 CrLJ 636, the case of these three appellants cannot be brought under the category of "rarest of rare" case particularly having regard to the facts of this case. A charge of conspiracy was framed against all the appellants but all of them have been exonerated of the said charge. Hence the sentence of death has been converted into one of imprisonment for life for those three appellants also. *Kannan* v. *State of T.N.*, AIR 1989 SC 396 : (1989) Supp (1) SCC 81 : 1989 CrLJ 825 : (1988) 3 Crimes 882.

[12172] ● *Death sentence—Inordinate delay in execution.*—As between funeral fire and mental worry, it is the latter which is more devastating, for, funeral burns only the dead body while the mental worry burns the living one. The mental torment may become acute when the Judicial verdict is finally set against the accused. Earlier to it there was every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the Court requesting to examine whether it is just and fair to allow the sentence of death to be executed. *Triveniben* v. *State of Gujarat*, AIR 1989 SC 1335 : (1989) 1 SCC 678 : 1989 SCC (Cri) 248 (284) : 1990 CrLJ 1810 : 1989 CrLR (SC) 267.

[12173] ● *Inordinate delay in execution of death sentence would not render execution unconstitutional.*—If the Court wants to have a look at the grievance as to delay in execution, it is needless to state that there should not be any delay either in listing or in disposal of the matter. The person who complains about the delay in the execution should not be put to further delay. The matter, therefore, must be expeditiously and on top priority basis, disposed of. The Court while examining the matter, for the reason already stated, cannot take into account the time utilized in the judicial proceedings up to the final verdict. The Court also cannot take into consideration the time taken for disposal of any petition filed by or on behalf of the accused either under Article 226 or under Article 32 of the Constitution after the final judgment affirming the conviction and sentence. The Court may only consider whether there was undue long delay in disposing of mercy petition, whether the State was guilty of dilatory conduct and whether the delay was for no reason at all. The inordinate delay may be a significant factor, but that by itself cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself. *Triveniben* v. *State of Gujarat*, AIR 1989 SC 1335 : (1989) 1 SCC 678 : 1989 SCC (Cri) 248 (284, 285) : 1990 CrLJ 1810 : 1989 CrLR (SC) 267 : JT 1989 (1) SC 314 : (1989) 1 SCR 509 : (1989) 2 Crimes 391.

[12174] ● ***Hanging by neck till death scientific.***—Hanging by neck till death is a scientific and one of least painful methods of execution of death sentence. Capital Punishment as provided by law is to be awarded in rarest of rare cases and as such procedure established by law for awarding death penalty is reasonable and it does not in any way violate the mandate of Article 21 of the Constitution. *Sashi Nayar* v. *Union of India*, AIR 1992 SC 395 : (1992) 1 SCC 96 : 1992 CrLJ 514 : (1991) 3 Crimes 767 (SC).

[12175] ● ***Convict awaiting execution of death sentence—Delay in Relief.***—In the instant case there has been an avoidable delay, which is considerable in the totality of circumstances, for which the condemned prisoner is in no way responsible. Having regard to all the circumstances of the case, we deem it fit to and accordingly substitute sentence of prisonment for life in place of death sentence. The only relief a convict awaiting execution of death sentence can get from this Court on the ground of delay is conversion of the sentence into that of life imprisonment. However, on conversion of death sentence to life imprisonment, the petitioner would now be governed and dealt with as a life convict for all purposes. *Daya Singh* v. *Union of India*, AIR 1991 SC 1548 : (1991) 3 SCC 61 : 1991 SCC (Cri) 523 : 1991 CrLJ 1903 : JT 1991 (2) SC 349.

[12176] ● ***Rarest of rare case—Award of death sentence proper.***—Where both accused persons had unmistakably unequivocally and without any reservation whatsoever admitted the fact that they were responsible for the murder of General Vaidya and they had no remorse or repentance, in fact they felt proud of having killed him in execution of their plan. The case fell within the description of the rarest of rare case to award extreme finally of death to both the accused. *State of Maharashtra* v. *Sukhdeo Singh*, AIR 1992 SC 2100 : (1992) 3 SCC 700 : 1992 SCC (Cri) 705 : 1992 CrLJ 3454 : JT 1992 (4) SC 73 : 1992 (3) Crimes 5 (SC).

[12177] ● ***Power to enhance sentence of life imprisonment to death to be sharing by exercised.***—"Of course, the High Court has power and jurisdiction to enhance of life imprisonment to death but that power has to be exercised sparingly in "rarest of rare cases" for special reasons to be recorded. The reason given by the High Court to enhance the sentence of life imprisonment to death, without taking into account all circumstances and balancing the aggravating and the mitigating circumstances are neither "special reasons" nor otherwise adequate and sufficient to impose the sentence of death on either of the three convicts. A-1 to A-3. *Anshad* v. *State of Karnataka*, (1994) 4 SCC 381 : 1994 SCC (Cri) 1204.

[12178] ● ***Conspiracy to kill two children and their mother—Death sentence commuted to life sentence.***—As far as the question of sentence to the appellants Gurbachan Singh and Raj Pal Sharma is concerned, we may state that there is convincing and conclusive evidence for their involvement and active participation in the criminal conspiracy with Suresh to do away with the three members of his family. But from the evidence on record it is clear that Gurbachan Singh had reached the house of Suresh at Ranchi in the fateful evening of 10th Oct, 1983 when Urshia was already done to death by the appellant Suresh Bahri and Raj Pal Sharma, when Raj Pal Sharma was seen wearing an underwear holding a dagger in his hand and cleaning the blood in the room with cotton. It is clear that Gurbachan Singh was not a party to the actual murder of urshia, although he was an active member of the party who hatched the conspiracy to kill her. Though Gurbachan Singh rendered assistance in sending the cot and chairs to Dhulli farm and sharpening the dagger and batalies for the murder of two children but he in fact was not present on 17/18-12-83 at Dhulli farm when the two children were done to death by the appellants Suresh and Raj Pal Sharma. In these facts and circumstances the appellant Gurbachan Singh does not deserve the extreme penalty of death but the adequate sentence for the part played would be life sentence. *Suresh Chandra Bahri* v. *State of Bihar*, AIR 1994 SC 2420 : 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60.

[12179] ● ***Sentence of death be reserved for rarest of rare cases.***—It can therefore be seen that the choice as to which one of the two punishments provided for murder is the proper one in a given case will depend upon the particular circumstances of that case and the Court has to exercise its discretion judicially and on well-recognised principles after balancing all the mitigating and aggravating circumstances of the crime. The Court also should see whether there is something uncommon about crime which renders sentence of imprisonment of life inadequate and calls for death sentence. The nature of the crime and the circumstances of the offender should be so revealing that the criminal is a menace to the society and the sentence of imprisonment of life would be inadequate. The sentence of death should be reserved for the rarest of rare cases after a due consideration of both mitigating and aggravating circumstances. *Shankar* v. *State of Tamil Nadu*, (1994) 4 SCC 478 : 1994 SCC (Cri) 1252 (1286, 1287) : 1994 CrLJ 3071 : 1994 (2) Crimes 1.

[12180] ● ***Rarest of rare cases—Warranting imposition of death sentence.***—It has been established by the evidence that A-1 was the leader of the gang which indulged in illicit arrack and brothel business which are unlawful and most harmful to the society. He was responsible for spoiling the life of many girls. He used to keep some of the girls for himself by setting up a separate residence. He used to be very cruel to them and used to burn the young girls with cigarette butts and as a result one of them committed suicide. Lalita, D-1 who could not adjust herself to live with him was brutally murdered and in order to screen the said offence he got the body buried. Having successfully committed the murder of Lalita, he planned to murder Sudalai, D-2 obviously apprehending that he may cause some trouble. He was also angry with him because he was interfering with his business. D-2 was also brutally murdered and what is more, in a diabolical manner the body was burnt in A-1's house. Thereafter the remnants of the body were taken and thrown in the Boat Yard. Then D-3 who was the supporter of D-2 was also brutally murdered since it was apprehended that he may expose them with regard to the murders of D-1 and D-2. D-3 was also brutally murdered in the same manner in which D-1 and D-2 were murdered and his body was also buried. When D-4 to D-6 threatened to his running of brothel business, A-1 obviously to prove his supremacy in the illicit business wanted to eliminate them and they were severely beaten and brutally murdered. D-6 was strangulated in a cold-blooded manner and all the three bodies were buried. Thus it can be seen that A-1 indulged in these crimes in an organized manner. His own confession, though retracted, which is found to be true and voluntary gives the details of the diabolical and cruel manner in which he participated in killing D-1 to D-3 as well as D-4 to D-6. The crime indulged was gruesome, cold-blooded, heinous, atrocious and cruel and he has proved to be an ardent criminal and thus a menace to the society. It is an exceptional case where the crime committed by him is so gruesome, diabolical and revolting which shocks the collective conscience of the community. There cannot be any doubt that his case is one of the rarest of rare cases fully warranting the imposition of death sentence. *Shankar* v. *State of Tamil Nadu*, (1994) 4 SCC 478 : 1994 SCC (Cri) 1252 (1286, 1287) : 1994 CrLJ 3071.

[12181] ● ***Murder—Retracted confession of accused corroboration—Death sentence justified.***—A-2 throughout had been actively associated with A-1. He participated in every crime. So far murders of D-1 to D-3 are concerned A-2 played an active role in a most cruel and diabolical manner as we find from his own retracted confession. As a close associate of A-1 in every unlawful business activity, A-2 went on participating with him in these organized crimes. The reasons given above in respect of A-1 for awarding the death sentence equally apply to the case of A-2 also. Apart from their own retracted confessions, the evidence of PW-1 as corroborated by the other evidence as discussed above, also independently establishes the active participation of A-1 and A-2 in the murders of D-2 to D-6. *Shankar* v. *State of Tamil Nadu*, (1994) 4 SCC 478 : 1994 SCC (Cri) 1252 (1289) : 1994 CrLJ 3071 : 1994 (2) Crimes 1.

[12182] ● ***Sentence organised criminal activity—Social status of accused acquired not relevant.***—Learned Counsel for the appellants pointed out that there is evidence to show that A-1 liberally donated to the social organizations and contended that he is not a hardened criminal and not a menace to the society and at any rate by wiping him out the crime cannot be wiped out. This submission only manifests a state of despondency which cannot gain the place of relevancy in the matter of judicial adjudication of crimes of this nature involving "organized criminal activity". In large urban areas this kind of organized crime has taken deep roots. It has become the way of life of these organized criminal groups particularly indulging in underground unlawful activities. Eventually the underground economy has entered on the vitals of the society gradually rendering it malignant. The organized crime has profit as its primary goal to be achieved at any cost. The potential for criminal violence in such crimes is inherently present in an organised crime group. The activities of crime groups indulge in may vary numerously. Prostitution is an activity bad in social sense as witnessed and is prohibited legally. Yet for many potential buyers the services of prostitutes are goods in the strict economic sense of the term "goods". The buyers are willing to pay for these goods in the market transaction. It is these monetary values, though illegal, underlying that eventually lead to growth of these organized crimes and further criminal specialization whose only common aim is attainment of wealth primarily, of course and then if possible power and influence by illegal means. It has thus become an enterprise not infrequently aiming at purchase of respectability. After all money is money and that which is illegally gained can seemingly be legally spent to achieve social status. That kind of criminally acquired social status is completely out of place and forlorn as to come anywhere near the concept of "mitigating circumstances". *Shankar* v. *State of Tamil Nadu*, (1994) 4 SCC 478 : 1994 SCC (Cri) 1252 (1290-1291) : 1994 CrLJ 3071 : 1994 (2) Crimes 1.

[12183] ● ***Occurrence taking place more than a decade ago—Death sentence not warranted.***— Keeping in view the facts and circumstances of the case, and particularly the accepted prosecution case that both Brij Mohan and Barchia, who are alleged to be armed with fire-arms did not even enter the house to commit the dacoity and remained outside the house and caused the death of two persons outside the house, it was only the other accused persons who went inside the house differently armed, the number of injuries inflicted by them on the deceased inside the house and the weapons used in causing those injuries, while committing dacoity and not keeping or using the firearms, which were otherwise available, it is not possible to say that it is the "rarest of the rare cases" which may warrant the imposition of the sentence of death for the occurrence which occurred more than a decade ago. *Brij Mohan* v. *State of Rajasthan*, AIR 1994 SC 739 (744) : (1994) 1 SCC 413 : 1994 SCC (Cri) 527 : 1994 CrLJ 922 : (1994) 1 Crimes 288.

[12184] ● ***Death sentence—Rarest of rare cases.***—The extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. In the instant case the victim had several external and internal injuries on her person including a serious injury in her private parts showing the brutality with which she was subjected to while committing rape on her. The victim of the age of 7 years could not have ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated cold blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare case attracting no punishment other than the capital punishment. *Laxman Naik* v. *State of Orissa*, AIR 1995 SC 1387 : (1994) 3 SCC 381 : 1994 SCC (Cri) 656 : 1995 CrLJ 2692 : JT 1994 (2) SC 39 : 1994 (1) UJ 645 : 1994 (1) Crimes 806.

[12185] ● ***Sentence of death converted into one for life imprisonment.***—Accused committed death of his wife and children. Some children were buried in house. It was apparent from statement of accused that it was a mental case. He committed offence not with intention to commit murder of his children but only by way of deliverance from day-to-day strain of life, he being financially crippled. If accused had not stated details of manner of occurrence in his statement under Section 313, CrPC, investigation by police would have led only to the fact that at the instance of accused three dead bodies were recovered which had been buried for six months. Extreme penalty of sentence of death should not be awarded. Sentence of death is converted into one of life imprisonment. *Janki Das* v. *State (Delhi Administration)*, AIR 1995 SC 1002 : 1994 Supp (3) SCC 143 : 1994 SCC (Cri) 1673 : 1995 CrLJ 1464 : JT 1994 (5) SC 604 : 1994 (3) Crimes 375.

[12186] ● ***Large number of deaths on one side-not ipso facto ground to bring case into category of rarest of rare cases.***—In spite of the presence of the police party, a rioting took place. The prosecution party in large numbers alongwith four gunmen from Dariyapur whose services were enlisted and also the armed police party proceeded to the village under the umbrella provided by the Labour Minister and Pradhan of Village Dariyapur to bury the dead body of the old lady. The evidence of PW-20 also shows that there was tension. The way the prosecution party went to the Village in gusto with a spirit of bravado itself indicates that there must have been some provocative acts which created the tension particularly in the back ground of the acute faction. Nothing happened for quite some time and it is also the case of the prosecution that the accused did not interfere with the burial. It is only thereafter that some incident triggered off in firing by the accused persons. Unfortunately 10 persons of the side of the prosecution died. *Held*, the large number of deaths on one side cannot *ipso facto* be a ground to bring the case into the category of "rarest of rare cases" particularly when we take into consideration the other aspects mentioned above. It is pertinent to note that none of the accused caused any injuries to any of the policemen. No doubt prosecution alleged that one Constable received a stray pellet injury which is simple. However, he was not even examined. Admittedly the police fired and caused the death of one of the accused persons. Yet there is nothing to show that the accused acted cruelly and attacked them. To that extent they manifested a sense of restraint. No doubt the accused were the aggressors. But aggression again could also be due to provocation, resulting in a disturbed and agitated state of mind. Many a time, in such a situation, heat of passion would be the mob of the man that commits a riot on his reason and does not look beyond the moment of its existence, causing disappearance of the sense of reasoning. *Shamsul Kanwar* v. *State of Uttar Pradesh*, AIR 1995 SC 1748 : (1995) 4 SCC 430 : 1995 SCC (Cri) 753 : JT 1995 (4) SC 159 : 1995 (2) UJ 660 : 1995 (2) SCJ 466 : 1995 (2) Crimes 487.

[12187] ● ***Number of victim not a yardstick—For upholding death penalty.***—True, number of victims by itself is not a yardstick to discern a case of the category described by the Constitution Bench in *Bachan Singh's case*, AIR 1980 SC 898. Nonetheless number of victims is not altogether outside the scope of consideration and should not be marginalized in appropriate cases. *Vide Sheikh Ishaque* v. *State of Bihar*, AIR 1995 SC 2001 : (1995) 3 SCC 392. **To the same effect :** (1) *Gentela Vijaya-vardhan Rao* v. *State of A.P.*, AIR 1996 SC 2791 (2794-95) : (1996) 6 SCC 241 : 1996 SCC (Cri) 1290 : 1996 CrLJ 4151 : JT 1996 (7) SC 491 : 1996 (3) Crimes 197 : 1996 (3) SCJ 247.

[12188] ● ***Death sentence—Mitigating circumstances.***—This is one of the rarest of the rare cases not merely because of the record number of innocent human beings roasted alive by the appellants but by the inhuman manner in which they have plotted the scheme and executed it. What they needed, perhaps, was only wealth by plundering others. For that motive they designed a scheme with the highest proportion of viciousness. Carrying most inflammable liquid in a can together with a match box they sneaked into a passenger bus during the dawn of the ill-fated day. None of the harmless faces of the unfortunate passengers not even those of some cute children in the bus had deterred these appellants from incinerating them into charred corpses in a spilt second. When human mind was allowed to be transformed itself into such demonic form and the planned programme was executed with extreme depravity, the Supreme Court agreed with the Courts below that this is one of the rarest of the rare cases in which alternative option is unquestionably foreclosed. *Gentela Vijayavardhan Rao* v. *State of Andhra Pradesh*, AIR 1996 SC 2791 (2795) : (1996) 6 SCC 241 : 1996 SCC (Cri) 1290 : 1996 CrLJ 4151 : JT 1996 (7) SC 491 : 1996 (3) Crimes 197 : 1996 (6) Supreme 356 : 1996 (3) SCT 247.

[12189] ● ***High Court's power in disposing of appeals from conviction or acquittal essentially same.***—It is well settled that the High Court's power in disposing of appeals from conviction or acquittal are essentially the same. It is equally well settled that where the credibility of the evidence depends upon factors other than the demeanour of witnesses, the appellate Court is free to come to its own conclusions as to the credibility. But at the same time if the view taken by the Trial Court in acquitting the accused is not palpably wrong there would no occasion for reversal of the order of acquittal. Further the High Court should also consider the reasons advanced by the Trial Court before altering the order of acquittal to order of conviction. *Betal Singh* v. *State of M.P.*, AIR 1996 SC 2770 (2771-72) : (1996) 8 SCC 205 : 1996 SCC (Cri) 571 : 1996 CrLJ 4006 : JT 1996 (3) SC 591 : 1996 (2) CCR 39 : 1996 (1) Crimes 216 : 1996 (3) Supreme 108.

[12190] ● ***Brutal murder—No justification to commute death penalty to imprisonment for life.***—The appellant has committed one of the most heinous crimes by killing his poor wife who was in advanced stage of pregnancy and three minor children for no fault on their part. The appellant had a solemn duty to protect them and to maintain them but he has betrayed the trust reposed on him in a very cruel and calculated manner without any provocation whatsoever. The appellant did not even spare his mother who very rightly tries to prevent him from committing such unpardonable crime. The appellant also attacked his mother with the axe which he had used to kill his wife and minor children and caused injuries on her person with an intention to kill her. The brutality and cruelty with which the crimes have been perpetrated cannot but shock the conscience of the society. After killing the wife and three minor children and injuring the mother he did not become remorseful and desist from committing any further crime. But like a blood thirsty demon, in a cool and calculated manner he went to one of the neighbour's house and attempted to kill the wife of the neighbour while she was asleep and as such utterly helpless to give any resistance. When in his attempt to flee away from the place of occurrence, the poor old Gulabji came on his way, the appellant did not hesitate to kill him in extremely brutal manner before the eyes of his wife. All the said heinous crimes were committed without any provocation. The appellant was not even remorseful after the said incident of successive five murders and attempt to kill two others including the appellant's mother. The appellant did not go to see the ailing mother injured by him and did not also attend the funeral of his wife and even his three innocent minor children. The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are *germane* for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal. If for such heinous crimes the most deterrent punishment for wanton and brutal murders is not given, the case of deterrent punishment will loose its relevance. There is no justification to commute the death penalty to imprisonment for life. *Ravji* v. *State of Rajasthan*, AIR 1996 SC 787 (793-94) : (1996) 2 SCC 175 : 1996 SCC (Cri) 1225 : JT 1995 (8) SC 520 : 1996 (1) SCJ 144 : 1995 (4) Crimes 695.

[12191] ● ***Death penalty—Commutation of sentence.***—From the record, particularly the confessions made by the two appellants which formed the principal basis for their conviction it was clear that the appellants did not commit the two murders on their own volition prompted by any motive or greed much less, evincing total depravity and meanness. Indeed, it was the case of the respondents themselves at the GCM the Major R.S. Budhwar along with other Officers of the Unit of the appellants instigated and compelled them to commit the above two murders by exploiting their religious feelings. The record further indicates that initially the appellants declined to take any step towards the commission of the offences but ultimately they succumbed to the "threat, command and influence" of their superiors. So far as the murders of the other two officers are concerned they became the unfortunate victims of circumstances as they happened to be present at the time of the incident. Another mitigating factor calls for commutation of the sentence is that Major Budhwar who along with another officer (since dead) masterminded the two murders were awarded life imprisonment whereas the appellants who carried out their orders have been sentenced to death. In dealing with this aspect of the matter the High Court, however, observed that the appellants committed the offences while the officers were only abettors. *Held*, in a case of the present nature which relates to a disciplined force as the Army, the offence committed by the officers who conceived the plan, was more heinous than that of the appellants who executed the plan as per their orders and directions. It is of course true that those orders being not lawful the appellants, even as disciplined soldiers, were not bound to comply with the same nor their carrying out such order minimised the offences but certainly this is factor which cannot be ignored while deciding the question of sentence. Another factor which persuades the Court to commute the sentence is the post-murder repentance of the appellants who not only surrendered before the authorities within two days but also spoke out the truth in their confessional statements. In fact, but for their confessional statements the Officers, who were the mastermind, could not have been brought to book. *R.S. Budhwar* (*Major*) v. *Union of India*, AIR 1996 SC 2000 (2004-05) : 1996 CrLJ 2862 : 1996 (2) CCR 196.

[12192] ● ***Murder committed in pre-meditated and calculated manner with extreme cruelty one brutality—Still not proper to award extreme punishment.***—The conviction of the appellants has been based on the basis of eye witness account of a boy aged about 9 years. According to this witness, at the time of incident he hid himself near a Kotna and from the place of hiding, he had witnessed the murder of the said six persons namely, his father, mother, three sisters and uncle. After keeping in mind the relevant considerations for awarding the extreme penalty of death and also on considering the fact that in the instant case, the sole eye witness did not tell the names of four of the appellants we feel that although the murders had been committed in a premeditated and calculated manner with extreme cruelty and brutality, for which normally sentence of death will be wholly justified, in the special facts of the case, it will not be proper to award extreme sentence of death on the appellants. *Raja Ram Yadav* v. *State of Bihar*, AIR 1996 SC 1613

(1614, 1616) : (1996) 9 SCC 287 : 1996 SCC (Cri) 1004 : 1996 CrLJ 2307 : JT 1996 (4) SC 140 : 1996 (1) CCR 145 : 1996 (2) Crimes 59 : 1996 (3) Supreme 482.

[12193] ● ***Rape and murder—Death sentence—No interference.***—The appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him Tiwari uncle. Obviously her closeness with the appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop and handing over a packet of biscuits apparently as a preclude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuaded the Supreme Court to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes. *Kamta Tiwari* v. *State of M.P.*, AIR 1996 SC 2800, at p. 2802-2803 : (1996) 6 SCC 250 : 1996 SCC (Cri) 1298 : 1996 CrLJ 4158 : JT 1996 (8) SC 198 : 1996 (6) Supreme 482 : 1996 (3) Crimes 241 (SC).

[12194] ● ***Attack pre-meditated—Not on account of any provocation or mental revenge—Death sentence not interfered with.***—At about 12-1 on the intervening night of 20th and 21st February, 1994, the accused started to kill his wife with the help of a sword and on hearing the shoutings the children woke up. The wife questioned the accused why he was trying to kill her and the accused without giving any answer inflicted more injuries on her head, hand and foot. By that time, the eldest daughter tried to save her mother and instead of leaving his wife from attack, he started inflicting wounds on his first daughter with the same sword. Not satisfied with that, he also inflicted injuries with the same sword to another daughter and finding that the sword he had used had been bent, he left that sword and took out another big sword, kept in a box in the room, and with the help of the second sword, he inflicted injuries to the other children. All the injured persons fell down and the wife and two children succumbed to the injuries and the other three children escaped death. On the facts established on the record, there appears to be no mitigating circumstance whatsoever, but only aggravating circumstances which justify the imposition of death sentence. The manner in which the crime was committed, the weapon used, the brutality of the crime, number of persons murdered, the helplessness of the victims, the Supreme Court cannot come to any other conclusion except the one, the Sessions Judge and the High Court arrived at to award the capital sentence to the appellant. *Umashankar Panda* v. *State of M.P.*, AIR 1996 SC 3011, at pp. 3015, 3016 : (1996) 8 SCC 110 : 1996 SCC (Cri) 543 : 1996 CrLJ 1988 : JT 1996 (2) SC 747 : 1996 (1) CCR 225 : 1996 (2) Supreme 493.

[12195] ● ***Death sentence—Imposition of.***—The trial Court had awarded the death sentence but the Supreme Court refrained from doing so for two reasons normally, (1) the present is not a case of "rarest of the rare" and (2) the respondent having enjoyed acquittal ever since High Court's judgment dated 19-11-1982, death sentence, even if it would have been merited, would not have been imposed by the Supreme Court. *State of Madhya Pradesh* v. *Dhirendra Kumar*, AIR 1997 SC 318 : (1997) 1 SCC 93 : JT 1996 (10) SC 93 : 1996 (4) Crimes 195 : 1996 (8) Supreme 272.

[12196] ● ***Aggravating and mitigating factors to be balanced for deciding just and appropriate sentence.***—For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced in a dispassionate manner. *Surja Ram* v. *State of Rajasthan*, AIR 1997 SC 18 : (1996) 6 SCC 271 : 1996 SCC (Cri) 1314 : 1997 CrLJ 51 : JT 1996 (8) SC 461 : (1996) 4 Crimes 45 : 1996 (3) SCJ 275.

[12197] ● ***Murder committed in cool and calculated manner—Rarest of rare case Death sentence justified.***—It is true that the appellant was not convicted for any other offence on any previous occasion but such fact can hardly be considered as mitigating factor in favour of the appellant that will outweigh all the aggravating factors and circumstances in which the crime of the murders had been committed. *Surja Ram* v. *State of Rajasthan*, AIR 1997 SC 18 : (1996) 6 SCC 271 : 1996 SCC (Cri) 1314 : 1997 CrLJ 51 : 1996 (7) Supreme 248 : 1996 (4) Crimes 45 : 1996 (3) SCJ 275.

[12198] ● ***Conviction upheld by Supreme Court sentence of imprisonment for life awarded.***—Present appeals were filed in 1990 and they are being disposed of in April, 1997. Having regard to the passage of time it is not proper to confirm the death sentence awarded to Abdul Ali (A-1) by the IVth Addl. Sessions Judge. We reject the reference. The Supreme Court upheld the conviction of A-1 to A-4 under Section 302/34 of the Indian Penal Code and sentenced each of the accused persons to suffer imprisonment for life. *State of Uttar Pradesh* v. *Abdul*, AIR 1997 SC 2512 : 1997 CrLJ 2997 : JT 1997 (5) SC 265 : 1997 (2) CCR 108 : 1997 (2) Crimes 78 : 1997 (4) Supreme 414.

[12199] ● ***Crime committed by accused falls in category of rarest of rare cases—Extreme penalty of death justified.***—The members of the family of the brother of the deceased were absolutely innocent and two of them were even minors. Such murders and attempt to commit murders in a cool and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons. Punishment must also respond to the society's cry for justice against the criminal. While considering the punishment to be given to the accused, the Court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with such mercy as the criminal may justly deserve, but also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the Court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused. *Held*, in the facts and circumstances of the case the crime committed by the accused falls to the category of rarest of rare cases for which extreme penalty of death is fully justified. *Suraj Ram* v. *State of Rajasthan*, AIR 1997 SC 18 : (1996) 6 SCC 271 : 1997 CrLJ 51.

[12200] ● ***Rarest of rare cases—Appellant be sentenced to death.***—The principal reason which weighted with the Courts below to hold that the extreme penalty of death was called for, was that earlier the appellant had committed a murder for which he was serving the sentence of life imprisonment at the material time and that he committed another murder while he was released on parole. Undoubtedly, felonious propensity of an offender is a factor which requires consideration while dealing with the question of imposition of the sentence of death but that cannot be made the sole basis for such sentence as all other factors relating to the commission of the crime including motives, manner and magnitude have also to be taken into consideration. Taking an overall view of the attending facts and circumstances of the instant case this is one of the rarest of the rare cases where the appellant should be sentenced to death. *Krishan* v. *State of Haryana*, AIR 1997 SC 2598 : (2000) 10 SCC 451 : 1997 CrLJ 3180 : 1997 (2) CCR 78 : 1997 (2) Crimes 59.

[12201] ● ***Mitigating circumstances would not bring case to be rarest of rare case—Death sentence not warranted.***—Appellant Pushparaj was instrumental in getting the boy from the school by telling him that his father is waiting but thereafter he had not played any role either in conceiving the idea of killing him or factually taken any part in the killing of the boy. On the other hand the evidence discloses that it is he who pleaded with Mohan not to kill the boy when Mohan divulged that boy should be killed. It is he who refused to accompany Mohan to pick up the ransom money after the death of the boy and in fact no ransom money has been paid to him nor any recovery of any incriminating material at his instance has been recovered. He had no criminal history earlier, but as he known to the father of the deceased and happened to be a neighbour of accused Mohan and Gopi he got himself involved in getting the boy kidnapped. So far as appellant No. 4 Muthu is concerned, according to the learned counsel appearing for the appellants, the only link that has been established is the alleged phone call he supposed to have made to Mohan asking him to kill the boy. He has not participated in the actual murder of the boy. On the other hand his statement under Section 313, CrPC indicates that he has helped in searching of the missing boy. He also did not receive any part of ransom money nor there has been any recovery made at his instance. The mitigating circumstances clearly do not bring their case to be the rarest of rare cases and do not bring their activities to be either diabolical or act of depraved mind warranting the extreme penalty of death sentence. *Mohan* v. *State of Tamil Nadu*, AIR 1998 SC 2238 (2241, 2242) : (1998) 5 SCC 336 : 1998 SCC (Cri) 1308 : 1998 CrLJ 3276 : JT 1998 (4) SC 116 : 1998 (2) Crimes 329.

[12202] ● ***Aggravating circumstances—Death sentence confirmed.***—*Aggravating Circumstances.*—Immediately after the boy was brought from the school by accused Pushparaj, Mohan took him in the van and kept him in confinement at a solitary place. It is he who conceived the idea of taking the life of the young boy. It is he who did not accede to the request of co-accused Muthu who persuaded him not to kill the boy and, on the other hand, Mohan threatened Muthu that unless the boy is killed he would divulge the entire episode and then not only Muthu but his parents will also be in trouble. It is Mohan's master-mind which was responsible for the ultimate act of brutal killing of the boy and it is he who directed Muthu to catch hold of the legs of the boy so that he could easily strangulate the boy with the rope. So far as appellant Gopi is concerned, he not only did participate by pulling the rope around the neck of the boy, but went to his house and brought a coir rope. After removing the rope from the neck of the boy he encircled the coir rope again around the boy's neck and pulled the said rope for about ½ a minute and the boy stopped breathing. Thereafter he took out one Keltron T.V. Box from underneath the cot and packed the boy in the box. These aggravating circumstances on the part of accused Mohan and Gopi clearly demonstrate their depraved state of mind and the brutality with which they took the life of a young boy. It further transpires that after killing the boy and disposing of the dead body of the boy, Mohan also did not lose his lust for money and got the ransom of 5 lakhs. In view of the aforesaid aggravating circumstances appearing as against appellant Mohan and appellant Gopi who happened to be the brother the Supreme Court cannot but confirm the death sentence awarded against them which has been affirmed by the High Court. *Mohan* v. *State of Tamil Nadu*, AIR 1998 SC 2238 (2242) : (1998) 5 SCC 336 : 1998 CrLJ 3276 : 1998 (2) Crimes 329.

[12203] ● ***Death sentence proper—Life imprisonment awarded.***—The dead body of Sandeep was totally charred and, therefore, doctor could not find any injury on his dead body. Is in these circumstances A-6 could not be bracketed with accused persons who have been awarded death sentence. A-6, is entitled to a differential treatment for want of conclusive evidence that he had caused fire arm injuries to Sandeep. This finding by itself would not absolve A-6 from his culpability in the present crime with the aid of Section 149, IPC as regards other murders. His presence was proved beyond every reasonable doubt at the time of occurrence. He was a member of an unlawful assembly having a common object to commit the murders in question and in prosecution thereof used his fire arm along with other accused who were armed with fire arms. In view of these proved facts the death sentence awarded to Rajendra (A-6) was not proper and instead he must fall in the group comprising of accused/appellants who used the fire arms and have been awarded life imprisonment. *Shiv Ram* v. *State of Uttar Pradesh*, AIR 1998 SC 49 (60) : (1998) 1 SCC 149 : 1998 CrLJ 76 : 1997 (4) Crimes 76.

[12204] ● ***Five murders committed—Case squarely falls within ambit of rarest of rare case.***—The accused persons first fired at Kamlesh, injured him and thereafter opened the door and searched for Ram Gulam and Sheo Pal. Kamlesh was immobilised by causing a gun shot injury. Sukhdarshan (since deceased) came out of his room. He was fired at on a non-vital part by immobilizing him and thereafter the accused persons assaulted him with Banka; A-2, A-4 and A-13 held him facilitating A-1 to severe his head. The accused did not stop there but thereafter they fired at Surendra and assaulted him by *Bankas*. A-2, A-4 and A-13 caught hold of him and A-1 severed his head. Sandeep a young boy of 10 years when came out of the room which was then set on fire was bodily lifted by a-5 and A-8 who threw him into the smouldering fire. He was roasted alive. Bhuwaneshwari who was returning from the market was fired at and was given the same cruel treatment by severing his head. This only shows that they were thirstily to severe the heads from the alive but injured bodies in order to take revenge of the murder of Chandrika. All the three heads were put together in a piece of cloth and a victory procession was taken out by accused giving slogans "Shyma Manohar Zindabad; Nandlal and Premgiri Zindabar *etc., etc.*", and then they went to the house of Chandrika. *Held,* a simple question which requires to be considered is as to whether the conscience of a society was not shocked to see such ghastly and brutal murders? The accused persons had shown scant regard for the human dignity. Upon taking overall view of the circumstances in the light of the ratio laid down by the Supreme Court and taking into account the manner of commission of crime, motive for commission of crime and criminals, magnitude of the crime and little regard for the human dignity and in particular a young boy of 10 years, the Court must draw a final balance sheet of the aggravating and mitigating circumstances after giving due consideration to the rival contentions put forth before the Court as regards six condemned prisoners. The justification clearly leans in favour of death sentence to each of the six condemned prisoners. Totality of circumstances outweighted the mitigating circumstances. Sentence of life imprisonment to these six accused persons would be totally inadequate in the facts and circumstances of this case. The proved facts of this case squarely falls within the ambit of "rarest of rare" case. Five murders were committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner which would arouse intense and extreme indignation of the community. Award of lesser punishment to these six accused persons would disintegrate the rule of law upon which the edifice of our civilized society stands. *Shiv Ram* v. *State of Uttar Pradesh*, AIR 1998 SC 49 (62) : (1998) 1 SCC 149 : 1998 CrLJ 76 : 1997 (3) CCR 70 : 1997 (4) Crimes 76.

[12205] ● ***Death sentence—When not justified.***—The death of three persons occurred not from the firing from revolvers held by Dudh Nath Ram and Victor but on account of firing from the 303 rifles held by the three Constables. It is true that the prosecution evidence established the fact that firing had taken place from a very close range but that by itself would not make out the case to be a rarest of rare cases justifying the extreme penalty of death. No aggravating circumstances have been indicated so far as accused Dudh Nath Ram and accused Victor are concerned to award the extreme penalty of death sentence. The judgment of the High Court starts with the expression that the case may be treated "as one of the most sensational trials of the recent years, so far as the State of Bihar is concerned and according to the High Court the murder is a diabolical one because three innocent persons have been killed by the police officers who were supposed to be the protectors of law abiding citizens." The High Court has not kept in view the several decisions of the Supreme Court and has not examined the circumstances proved while considering the question of sentence but on the other hand have been swayed away with the fact that trial is a sensational one, and therefore, the officials must be awarded the extreme penalty of death. *Brijlala Pd. Sinha* v. *State of Bihar*, AIR 1998 SC 2443 (2455) : (1998) 5 SCC 699 : 1998 SCC (Cri) 1382 : 1998 CrLJ 3611 : JT 1998 (4) SC 534 : 1998 (3) Crimes 4 : 1998 (5) Supreme 379 : 1998 (9) Supreme 35 : 1998 (4) Crimes 127.

[12206] ● ***Murder shocking but per se does not justify death penalty.***—Crimes such as murder are committed for gain and there is nothing exceptionally gruesome about the manner of committing this murder. A murder by its very nature is shocking. But that *per se* does not justify death penalty. *State of H.P.* v. *Manohar Singh Thakur*, AIR 1998 SC 2941 (2945) : 1998 CrLJ 3630 : 1998 (3) CCR 116 : 1998 (3) Crimes 84 (SC) : 1998 (6) Supreme 139.

[12207] ● ***Death sentence—Case falls under rarest of rare cases.***—The brutal manner in which the appellant wiped out the entire family of his uncle (except one of his sons, who, fortunately at the material time was studying in Coimbatore), obviously to grab his properties, had shocked the judicial conscience. Nonetheless the Supreme Court looked into the record to find out whether there were any extenuating or mitigating circumstances in favour of the appellant but found none. If, in spite thereof, the Supreme Court commute the death sentence to life imprisonment it will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy. *Govindasami* v. *State of Tamil Nadu*, AIR 1998 SC 2889 (2894) : (1998) 4 SCC 531 : 1998 SCC (Cri) 1092 : 1998 CrLJ 2913 : JT 1998 SC 260 : 1998 (2) Crimes 238 : 1998 (4) Supreme 147.

[12208] ● ***Distinction based on degree of complicity to be brutality to be drawn.***—A distinction based on the degree of complicity and brutality will have to be drawn which has got a vital impact in awarding the sentence. It is well settled while awarding the sentence, the Court has to bear in mind the crime and the criminal. *Shobhit Chamar* v. *State of Bihar*, AIR 1998 SC 1693 (1702) : (1998) 3 SCC 544 : 1998 CrLJ 2259 : 1998 (2) Crimes 5.

[12209] ● ***Capital punishment commuted to life imprisonment.***—Whether the case is one of the rarest of the rare case is a question which has to be determined on the facts of each case. Suffice it to mention that the choice of the death sentence has to be made only in the rarest of the rare case and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society and; where the crime is committed in an organised manner and is gruesome, cold-blooded, heinous and atrocious; where innocent and unarmed persons are attacked and murdered without any provocation, the case would present special reason for purposes of sub-section (3) of Section 354 of the Criminal Procedure code. Now in the facts of this case, the mitigating circumstances in favour of the appellants are that A-1 is a qualified Civil Engineer and a married person having a son of four years old, his parents are serving at Spiritual Life Centre, Narsapur for the last thirty-six years; A-2 is 'Thaneshri' and 'Vasaishri', titles conferred on him for his body building; his marriage is a love marriage performed against the will of his parents as well as the volition of the parents of the wife and there is nobody to look after his wife and their two daughters and two sons of whom one is 1 ½ years' old; A-3 pleaded that he is having a sick father and that he is only 27 years' old and an unmarried person. They are having no adverse antecedents in the sense of being habitual criminals. The aggravating circumstances are that A-1 is no other than the nephew (daughter's son) of the deceased Mr. Mohan Ohol. Because of the relationship, he gained access inside the house for him and for his friends; they enjoyed the hospitality of Ohols' family as it was found that there were five used plates in the sink which indicate that five had food; may be, all the three appellants and the couple or two of them. The victims were unarmed; the heinous crime was committed for gains, namely to rob the valuables of the Ohols family; to give effect to their nefarious plans the unholy alliance of the appellants not merely robbed the family of the valuables but killed all the three members of the family then in the house and above all committed sexual assault on Mrs. Ruhi Ohol. It cannot but be a dastardly act for A-1 to commit rape of Mrs. Ohol, who is none other than the wife of his maternal uncle and perhaps as old as his mother. Considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for, the whole thing was done in a pre-planned way; having regard to the nature of offences and circumstances in which they were committed, it is not possible for the Court to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. A-1 is 35 years' old. A-2 is 35 years' old and A-3 is 25 years' old. The appellants cannot be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that role of one has been more culpable in degree than that of others and *vice versa*. Where in a case like this it is not possible to say as to whose case falls within the 'rarest of the rare" case, it would serve the ends of justice if the capital punishment is commuted into life imprisonment. *Ronny alias Ronald James Alwaris,* v. *State of Maharashtra*, AIR 1998 SC 1251 (1269) : (1998) 3 SCC 625 : 1998 CrLJ 1638 : 1998 (2) Crimes 65.

[12210] ● ***Accused killed his wife and children because of unhappiness and frustration—Life imprisonment proper.***—The evidence disclosed that Ayub had some suspicion regarding the character of his wife. The facts and circumstances of the case clearly indicated that the appellant had killed his wife and also his children because of unhappiness and frustration and not because of any criminal tendency. We therefore, set aside the sentence of death and direct that for the murders committed by him, he shall suffer imprisonment for life. *Shaikh Ayub* v. *State of Maharashtra*, AIR 1998 SC 1285 (1288) : (1998) 9 SCC 521 : 1998 CrLJ 1656 : 1998 (1) CCR 371 : 1998 (1) Crimes 254.

[12211] ● ***No error committed by trial Court and High Court in awarding death sentences.***—The evidence on record proved beyond every reasonable doubt that the appellant was the principal offender/miscreants who fired from his fire-arm on all the six persons including the two innocent children. He had a deep routed revenge based upon suspicion about the murders of his brother and nephew by Haridwar Pandey which prompted him to take avenge against the family members of Haridwar and had gone to the extent of killing six persons belonging to the family of Haridwar in a most brutal, heinous and barbaric manner. Nothing was suggested to the eyewitnesses on behalf of A-2 that any of these deceased persons had played any role in committing the murders of his brother and nephew and at any rate having regard to the ages of Anil Pandey and Sunil Pandey it could not be even remotely suspected that they could be the assailants. Shobhit Chamar (A-2) wanted not only to teach a lesson to the family members of Haridwar but also to create a terror in the minds of the family members of Haridwar to satisfy his ego and muscle power. A-2 exhibited most inhuman conduct while rejoicing his victory after commission of the crime. It is in this background, it was held that the trial Court as well as the High Court has committed no error in awarding death sentence to him. *Shobhit Chamar* v. *State of Bihar*, AIR 1998 SC 1693 (1703) : (1998) 3 SCC 455 : 1998 SCC (Cri) 790 : 1998 CrLJ 2259 : JT 1998 (2) SC 259 : 1998 (2) Crimes 5 : 1998 (3) Supreme 112.

[12212] ● ***Death sentence substituted with that of life imprisonment.***—In a case special reasons given by the trial Court in awarding death sentence to the appellants and confirmed by the High Court, were that it was such a cruel act where the appellants have not even spared the innocent child and the motive being to grab the property. When the matter was carried to Supreme Court it was observed "Having regard to the guidelines stated above, it may be noticed that in the present case it was not pointed out by the prosecution that it was a cold blooded murder. There is nothing on record to show how the murder has taken place. In the absence of such evidence, we do not find that the case before us falls within the category of rarest of rare cases, deserving extreme penalty of death. Keeping in view the aforestated facts, we are of the view that the ends of justice would be met if we substitute the death sentence with that of life imprisonment under Section 302/341, IPC, while upholding the appellants' conviction, as recorded by the High Court" *Sheikh Abdul Hamid* v. *State of Madhya Pradesh*, AIR 1998 SC 942 : (1988) 3 SCC 188 : (1998) 1 Crimes 148.

[12213] ● ***Death sentence—Accused killed two old ladies by strangulation—Rarest of rare case.***—From the prosecution evidence if it is apparent that there was no premeditated plan to kill any person and the main objective was to commit robbery. In course of the incident as stated by PW-2 when the two old ladies got up and rushed towards culprits one of them strangulated them one after the other. The post-mortem report also indicated that the death of the two ladies are on account of strangulation. The Sessions Judge awarded death sentence to accused 'D' on the ground that as soon as the driver 'N' entered into the house and 'D' shot the gun which hit 'N' and he died. This itself cannot be held to be sufficient to hold that it is an act of an depraved mind. The number of persons died in the incident is not the determinative factor for deciding whether the extreme penalty of death could be awarded or not. On the evidence of PW-2 as well as the evidence of PW-5 it is difficult to hold that the death of the persons were either disbolical, ghastly or gruesome. *A. Deivendran* v. *State of Tamil Nadu*, AIR 1998 SC 2821 : (1997) 11 SCC 720 : 1998 CrLJ 814 (834) (SC).

[12214] ● ***Number of persons died in accident not determinative factor for deciding death penalty.***—The number of persons died in the incident is not the determinative factor for deciding whether the extreme penalty of death could be awarded or not. *A. Deivendran* v. *State of Tamil Nadu*, AIR 1998 SC 2821 (2840) : (1997) 11 SCC 720 : 1998 CrLJ 814 : 1998 (4) Crimes 181.

[12215] ● ***Rape and murder—Death sentence.***—The circumstances indicate that the prosecutrix probably was not unwilling initially to allow the appellant to have some liberty with her. The appellant, not being able to resist his urge for sex, went ahead in spite of her unwillingness for a sexual intercourse who offered some resistance and started raising shouts at that Stage. In order to prevent her from raising shouts, the appellant tied the Salwar around her neck which resulted in strangulation and her death we do not, therefore consider thus therefore, to be a fit case in which the extreme penalty of death deserves to be imposed upon the appellant. *Kumudi Lal* v. *State of Uttar Pradesh*, AIR 1999 SC 1699 : (1999) 4 SCC 108 : 1999 SCC (Cri) 491 (493) : 1999 CrLJ 2523 : 1999 CrLR (SC) 277 : JT 1999 (3) SC 121.

[12216] ● ***Death sentence—No straight Jacket formula for awarding of.***—It is possible in a given set a facts that the Court might think even in a case where death sentence can be awarded, the same need not be awarded because of the peculiar facts of that case like the possibility of one or more of the accused being responsible for offences less culpable than the other accused. In such circumstances in the absence of their being no material available to bifurcate the case of each accused person the Court might think it prudent not to award to extreme penalty of death. But then such a decision would rest on availability of evidence in particular case. A straight jacket formula for awarding death sentence can not be evolved which is applicable to all cases. *State of Uttar Pradesh* v. *Dharmendra Singh*, AIR 1999 SC 3789 : (1998) 8 SCC 325 : 2000 CrLJ 5.

[12217] ● ***Capital punishment imposition of in rarest of rare cases.***—Capital punishment can be imposed in the rarest of the rare cases and if there are any aggravating circumstances such as the accused having any criminal record in the past; the manner of committing the crime; delay in imposing the sentence and so on. *Kishori* v. *State of Delhi*, AIR 1999 SC 382 (386) : (1999) 1 SCC 148 : 1999 CrLJ 584.

[12218] ● ***Sentence of death modified to life imprisonment.***—In between the house of the deceased and the accused, there was some vacant land and a dispute regarding the same was going on between the accused and the deceased. An order favourable to the accused was passed by the Court but the litigation was still pending. The accused while working in the cattle shed saw the deceased tying his buffalo on the disputed land and, therefore, he went to that place and gave one blow on his back which led to his death. The evidence discloses that the act of the deceased in tying his buffalo and using that land had infuriated the appellant and thus the incident had happened all of a sudden. This case cannot be regarded as a rarest of rare case where the penalty of death would be justified. The Court modified the order of sentence by reducing it to life imprisonment. *Rajendra Rai* v. *State of Bihar*, AIR 1999 SC 996 (997, 998) : (1999) 2 SCC 423 : 1999 SCC (Cri) 1239 : 1999 CrLJ 1448 : JT 1999 (1) SC 334 : 1999 (1) Crimes 57 (SC).

[12219] ● ***Death sentence to be awarded in exceptional cases.***—Unless the nature of crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate the Court should ordinarily impose the lesser punishment and not extreme punishment of death which should be, reserved for exceptional case only. *Mahendra Nath Das @ Gobinda Das* v. *State of Assam*, AIR 1999 SC 1926 : (1999) 5 SCC 102 : 1999 CrLJ 3479 : 1999 (3) Crimes 86 (SC).

[12220] ● ***Choice of sentences—Death or life imprisonment.***—The riot in Delhi broke out as a result of the death of Smt. Gandhi and her death appears to be the symbol or web around which the violent emotions were released. The acts attributed to the mob of which the appellant was a member at the relevant time cannot be stated to be a result of any organised systematic activity leading to genocide. Perhaps, one can visualise that to the extent there was unlawful assembly and to the extent that the mob wanted to teach stern lesson to the Sikhs there was some organisation; but in that design that they did not consider that women and children should be annihilated which is a redeeming feature. When an amorphous group of persons come together it cannot be said that they indulge in any systematic or organised activity. Such group may indulge in activities and may remain cohesive only for a temporary period and thereafter would disintegrate. The acts of the mob of which the appellant was a member cannot be stated to be the result of any organisation or any group indulging in violent activities formed with any purpose or scheme so as to call an organised activity. In that sense it may be said that the acts of the mob of which the appellant was a member was only the result of a temporary frenzy. He did not play the role of a leader of the mob as noticed earlier. This not a case where Courts below should have imposed a capital punishment. *Kishori* v. *State of Delhi*, AIR 1999 SC 382 (386, 387) : (1999) 1 SCC 148 : 1999 SCC (Cri) 1 : 1999 CrLJ 584 : JT 1998 (8) SC 248 : 1999 (1) Crimes 18 (SC).

[12221] ● ***Death sentence—Rarest of rare case—Consideration of individual role played by each accused.***—The accused Dharampal had given the threat on the previous occasion that if anybody gives evidence in the rape case the whole family will be wiped off. It is he who after being convicted in the said rape case preferred an appeal and obtained a bail from the High Court and has totally misutilised that privilege of bail by killing 5 persons who were all members of family of witness whose deposition was responsible for his conviction in the rape case. It is he who has assaulted each of the 5 deceased persons by means of *Kulhari* and the nature of the injury as found by the doctor would indicate that the act is an act of a depraved mind and is of most brutal and heinous in nature. It is he who had consecrated the plan to put into action his earlier threat but he has taken the help of his brother. In the facts and circumstances narrated the act of accused Dharampal in giving brutal and merciless blows on the 5 deceased persons cannot but be held to be rarest of rare case for awarding the extreme penalty of death sentence. *Nirmal Singh* v. *State of Haryana*, AIR 1999 SC 1221 (1224) : (1999) 3 SCC 670 : 1999 SCC (Cri) 472 : 1999 CrLJ 1836 : JT 1999 (2) SC 225 : 1999 (3) Supreme 212 : 1999 (2) Crimes 25 (SC).

[12222] ● ***Death sentence—When not proper.***—Accused was all throughout feeling that he and his family members were humiliated by the other party who were rich and influential and who were intending to grab the plot/Ghar belonging to them. He was working in BSF as a disciplined member of the Armed Forces aged about 23 at the relevant time, having no criminal antecedent. Appellant-accused was feeling much more hurt because family members of the appellant including women-folk were not getting any police protection even though they were assaulted. It has been pointed out in the application that his younger brother's wife having seven months' pregnancy was assaulted and she was required to be hospitalised. It also reveals that for a period of more than three months appellant was requesting the authorities to take action so that he and his family members can live in peace. It was his allegation that the SHO of the Police Station was conniving with the other side and had demanded five thousands rupees as a ransom which their family members were unable to pay, therefore, no action was taken against the other party. Even though this is a gruesome act on the part of the appellant, yet it is a result of human mind going astray because of constant harassment of the family members of the appellant as narrated above. It could be termed as a case of retribution or act for taking revenge. No doubt, it would not be a justifiable act at all, but the accused was feeling morally justifiable on his part. Hence, it would be difficult to term it as the "rarest of the rare" cases. Further, this is not a crime committed because of lust for wealth or women, that is to say, murders are neither for money such as extortion, dacoity or robbery; nor even for lust and rape; it is not an act of anti-social element, kidnapping and trafficking in minor girls or of an anti-social element dealing in dangerous drugs which affects the entire moral fibre of the society and kills number of persons; nor is it crime committed for power or political ambitions or part of organised criminal activities. It is a crime committed by the accused who had a cause to feel aggrieved for injustice meted out to his family members at the hands of the family of the other party who according to him were strong enough physically as well as economically and having influence with the authority which was required to protect him and his family. The bitterness increased to a boiling point and because of the agony suffered by him and his family members at the hands of the other party and for not getting protection from the police officers concerned or total inaction despite repeated written prayers goaded or compelled the accused to take law in his own hands which culminated in gruesome murders, may be that his mind got derailed of the track and went astray or beyond control because of extreme mental disturbances for the constant harassment and disputes. Further considering the facts and circumstances, it cannot be said that he would be a menace to the society; there is no reason to believe that he cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. *Om Prakesh* v. *State of Haryana*, AIR 1999 SC 1332 (1338, 1339) : (1999) 3 SCC 19 : 1999 SCC (Cri) 334 : 1999 CrLJ 2044 : JT 1999 (1) SC 599.

[12223] ● *Choice of sentence—Death or life imprisonment.*—In the instant case the unmistakably show that the murder committed was extremely gruesome, heinous, cold blooded and cruel. The manner in which the murder was committed, was atrocious and shocking. After giving blows with a sword to the deceased when he fell down, the appellant amputated his hand, severed his head from the body, carried it through the road to the Police Station (majestically as the Trial Courts puts it) by holding it in one hand and the blood dripping weapon in the other hand. Does it not depict the extreme depravity of the appellant? In our view it does. *Mahendra Nath Das alias Gobinda Das* v. *State of Assam*, AIR 1999 SC 1926 : (1999) 5 SCC 102 : 1999 SCC (Cri) 664 (669) : 1999 CrLJ 2873 : 1999 CrLR (SC) 388 : JT 1999 (4) SC 35 : (1999) 3 Crimes 86.

[12224] ● *Death sentence—Rarest of rare case—Absence of mitigating factors.*—In this case the facts establish the depravity and criminality of the accused in no uncertain terms. No regard being had for precious life of the young child also. The compassionate ground of the accused being of 22 years of age cannot in the facts of the matter be termed to be at all relevant. The Learned Sessions Judge has considered the matter from all its aspects and there is no infirmity under Section 235(2) or under Section 354(3) of the code. The murder was cold blooded and brutal without any provocation. The savage nature of the crime has shocked our judicial conscience. The murder was cold blooded and brutal without any provocation. It certainly makes it rarest of the rare cases in which there are no extenuating or mitigating circumstances. *Jai Kumar* v. *State of Madhya Pradesh*, AIR 1999 SC 1860 : (1999) 5 SCC 1 : 1999 SCC (Cri) 638 : 1999 CrLJ 2569 : 1999 CrLR (SC) 409 : JT 1999 (3) SC 504 : (1999) 3 Crimes 120.

[12225] ● *Death sentence—Reasons given do not conform to guidelines.*—In *Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681. This Court held that in order to award death sentence the Court should ask itself and answer the following questions: (1) Was there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence? (2) Were the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? The reasons given by the trial Court for awarding death sentence do not conform to the guidelines laid down in *Machhi Singh's* case. *Ramji Raj* v. *State of Bihar*, AIR 1999 SC 3857 : (1999) 8 SCC 389 : 1999 SCC (Cri) 1446 (1451, 1452) : 2000 CrLJ 19 : JT 1999 (8) SC 236 : (1999) 4 Crimes 308.

[12226] ● *Sentence altered to imprisonment for life.*—"Another consideration which we find different to overlook is – She (accused) is the mother of a little female child who would not have even experienced maternal cuddling as that little one was born in captivity. Of course, the maxim "*justicia non novit patrem nee matrem*" (Justice knows no father nor mother) is a *pristine doctrine*. But it cannot be allowed to reign with its rigour in the sphere of sentence determination. As we have confirmed the death sentence passed on the father of that small child, an effort to save its mother from gallows may not militate against *jus gladii* so that an innocent child can be saved from imposed orphanhood. Thus, on an evaluation of the plus and minus, *pros* and *cons* we persuade ourselves to save A-1 (Nalini) from gallows. Hence, the sentence passed on her is altered to one of imprisonment for life. *State of Tamil Nadu* v. *Nalini*, AIR 1999 SC 2640 : (1999) 5 SCC 253 : 1999 SCC (Cri) 691 (788) : 1999 CrLJ 3124 : JT 1999 (4) SC 106.

[12227] ● *Death sentence—In rarest of rare cases.*—The acts attributed to the mob of which the appellant was a member at the relevant time cannot be stated to be a result of an organized systematic activity leading to genocide. Perhaps it can be visualized that to the extent there was unlawful assembly and to the extent that the mob wanted to teach a stern lesson to the Sikhs, there was some organisation; but in that design, that they did not consider that women and children should be annihilated which is a redeeming feature. When an amorphous group of persons come together, it cannot be said that they indulge in any systematic or organised activity. Such group may indulge in activities and may remain cohesive only for a temporary period and thereafter would disintegrate. The acts of the mob of which the appellant was a member cannot be stated to be the result of an organisation or any group indulging in violent activities formed with any purpose or scheme so as to call an organized activity. In that sense, we may say that the acts of the mob of which the appellant was a member was only the result of a temporary frenzy. He did not play the role of a leader of the mob as noticed earlier on the totality of the circumstances, this is not a case which can be called "a rarest or rare cases" which warrants imposition of maximum punishment of capital sentence. *Kishori* v. *State (NCT) of Delhi*, AIR 2000 SC 562 (567) : (2000) 2 SCC 83 : 2000 SCC (Cri) 324 : 2000 CrLJ 756.

[12228] ● ***Rape and murder of minor girl—Sentence of death altered to life imprisonment.***— It is disconcerting that a case like this in which the prosecution has presented such reliable and formidable circumstances forming into a complete chain and pointing unerringly to the irresistible conclusion that the little girl was raped and killed by none other than the respondent himself, indeed in unmerited acquittal from the High Court. Criminal justice unfortunately became a casualty in this case when the High Court side-stepped all such circumstances and exonerated the culprit of such a grotesque crime. Extreme penalty of death can be chosen for such a crime, but as the accused was once acquitted by the High Court. We refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of the "rarest of the rare cases" envisaged by the constitution Bench in *Bachan Singh* v. *State of Punjab*, 1980 SCC (Cri) 580. *State of Maharashtra* v. *Suresh*, (2000) 1 SCC 471 : 2000 SCC (Cri) 263 (271, 272) : 2000 CrLR (SC) 122.

[12229] ● ***Capital punishment to both accused proper punishment.***—The present case squarely falls in the category of one of the "rarest of rare cases". It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her undergarment and thereafter took her to the septic tank alongwith the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. In a case of this nature the capital punishment to both the accused in the only proper punishment. *Molai* v. *State of M.P.*, AIR 2000 SC 177 (184) : (1999) 9 SCC 581 : 2000 CrLJ 392 : 1999 CrLR (SC) 779.

[12230] ● ***Killing of children due to ignorance—Life imprisonment awarded.***—Looking at the horrendous acts committed by the accused, it can doubtlessly be said that this is an extremely rare case. Nonetheless a fact which loom's large in this case is that the accused genuinely believed that a hidden treasure trove could be winched to the surface by infantile sacrifice ceremonially performed. It is *germane* to note that none of the children were abducted or killed for ransom or for vengeance or for committing robbery. It was due to utter ignorance that these accused became so gullible to such superstitious thinking. Of course, such thinking was also motivated by greed for gold. Accordingly the accused should undergo imprisonment for life for the offence under Section 302 read with Section 34, IPC. *State of Maharashtra* v. *Damu Gopinath Shinde*, AIR 2000 SC 1691 : (2000) 6 SCC 269 : 2000 SCC (Cri) 1088 (1103, 1104) : 2000 CrLJ 2301 : 2000 CrLR (SC) 538.

[12231] ● ***Case fall within category of rarest of rare cases—Accused deserves death penalty.***— The appellant was charged under Sections 302 and 326, IPC for having caused the death of four persons of a family. He was also charged with having caused injuries with the sharp edged weapon to Smt. Jayanti Das, the mother of deceased 1 and Shri Rajen Hazarika, neighbour of the deceased. It was a case of pre-planned cold-blooded brutal murder of four inmates of a house. It is true that life sentence is the rule and death sentence is an exception. But present case is an exceptional case which warrants the awarding of maximum penalty under the law to the accused-appellant. The crime committed by the appellant is not only shocking but it has also jeopardised the society. The awarding of lesser sentence only on the ground of the appellant being a youth at the time of occurrence cannot be considered as a mitigating circumstance in view of our findings that the murders committed by him were most cruel, heinous and dastardly. We have no doubt that the present case is the rarest of the rare requiring the maximum penalty imposable under law. *Ramdeo Chauhan* v. *State of Assam*, AIR

2000 SC 2679 : (2000) 7 SCC 455 : 2000 SCC (Cri) 1392 (1399) : 2000 CrLJ 3954 : 2000 CrLR (SC) 616 : 2000 CrAppR (SC) 437. **TO THE SAME EFFECT :** (1) *Narayan Chetanram Chaudhary* v. *State of Maharashtra*, AIR 2000 SC 3352 : (2000) 8 SCC 457 : 2000 SCC (Cri) 1546 : 2000 CrLR (SC) 700.

[12232] ● ***Appellant killing out of confusion—Not fit case to award death sentence.***—What appears to have been overlooked by the Courts below is that the appellant and Sudipa wanted only Sudipa's mother to be removed from this world. At no point of time the appellant had planned to kill Sudipa's father and her grand parents. Sudipa was ill-treated by her mother and no other way could be seen for improving Sudipa's future. It was, therefore, out of helplessness and frustration that Sudipa and appellant had decided to remove her. There was no other reason. Till Sudipa's mother was made to eat the "kalojam" mixed with poison, there was not even the remotest desire on the part of the appellant to kill Sudipa's father or her grand parents. The subsequent events happened unexpectedly. The appellant killed them out of confusion and fright that he would be named as the murderer of Sudipa's mother. If all these circumstances would have been taken into consideration, probably the Trial Court would not have imposed the death sentence upon the appellant. And the High Court would not have confirmed the same considering the facts and circumstances of the case, it can be said that this is not a fit case in which the death sentence can be regarded as an appropriate punishment. *Randhir Basu* v. *State of West Bengal*, AIR 2000 SC 908 (924) : (2000) 3 SCC 161 : 2000 SCC (Cri) 587 : 2000 CrLJ 1417 : 2000 CrLR (SC) 364 : JT 2000 (1) SC 618.

[12233] ● ***Capital punishment substituted to imprisonment for life.***—The crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is : Whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in *Bachan Singh* 1, *Machhi Singh* 2 and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. The case is one in which a humanist approach should be taken in the matter of awarding punishment. Accordingly, the capital sentence imposed against the appellant by the Courts below is set aside. Instead the appellant shall suffer rigorous imprisonment for life. Subject to the above modification of sentence, the appeals filed by the accused are dismissed. *Mohd. Chaman* v. *State (NCT of Delhi)*, (2001) 2 SCC 28 : 2001 SCC (Cri) 278 (289) : 2001 CrLJ 725.

[12234] ● ***When two views possible about question of sentence, view favouring grant of life in comparison of death accepted.***—There is no denial of the fact that the appellant-accused convicts, who were earlier involved in the murder of Om Prakash, son of Bhagwan Ram left no stone unturned to eliminate the whole family of the said Bhagwan Ram including three eyewitnesses in that case, namely, Bhagwan Ram, Sunder Ram and Subash Chander. It is also established that the aforesaid accused persons attacked the deceased and the injured at the dead hour of night when they were sleeping, being incapable of defending themselves. The means adopted in execution of the evil designs speak of the mental condition of the accused persons whom the trial Court found to have been involved in the commission of a crime termed by it as rarest of the rare cases. The High Court, while commuting the death sentences, appears to have completely ignored various pronouncements of this Court dealing with the yardstick to be adopted while awarding the death sentence. Merely because 8 persons, convicted by the trial Court, were acquitted, by itself cannot be termed to be a justified ground for commuting the death sentence. However, as the High Court, presumably on a general conspectus and upon consideration of facts of the case, found that the accused persons should not be awarded with death sentence, we feel that for interfering with the discretion of the Court, further exceptional grounds are required to be made out. When two views are possible about the quantum of sentence, a view which favours the grant of life in comparison of death is generally accepted. *Subash Chander* v. *Krishan Lal*, AIR 2001 SC 1903 : (2001) 4 SCC 458 : 2001 SCC (Cri) 735 (742, 743) : 2001 CrLJ 1825.

[12235] ● ***Death sentence commutation of—To life imprisonment.***—In the present case from, the confessional statement made by the accused, it would appear that there was no intention on the part of the accused to commit the murder of the deceased-child. He caused injury to the deceased by giving two brick blows as she stated that she would disclose the incident at her house. There is nothing on record to indicate that the appellant was having any criminal record nor he can be said to be a grave danger to the society at large. In these circumstances, it would be difficult to hold that the case of the appellant would be rarest of rare case justifying imposition of death penalty. The conviction of the appellant under section is upheld, but the sentence of death is commuted to imprisonment of life. *Raju* v. *State of Haryana*, AIR 2001 SC 2043 (2045, 2046) : (2001) 9 SCC 50 : 2001 CrLJ 2580 : 2001 CrLR (SC) 448 : JT 2001 (5) SC 213.

[12236] ● ***Technicalities of law not to come in way of dispensing justices.***—Despite holding that neither was the petitioner juvenile nor were the provisions of the Act applicable to the case, we examined this matter from another angle *i.e.* to find out as to whether the petitioner was near or about the age of a juvenile for the purposes of ascertaining as to whether the death sentence can be substituted by imprisonment for life. We are of the considered opinion that the technicalities of law cannot come in the way of dispensing justice in a case where the accused is likely to be given the extreme penalty imposable under law. *Ram Deo Chauhan* v. *State of Assam*, 2001 SCC (Cri) 915 (934).

[12237] ● ***Imposition of death penalty—Laying down standards.***—Regarding the question of laying down standards and norms restricting the area of imposition of death penalty, if by "laying down standards", it is meant that "murder" should be categorised beforehand according to the degrees of its culpability and all the aggravating and mitigating circumstances should be exhaustively and rigidly enumerated so as to exclude all free play of discretion. The argument merits rejection. Such standardisation is well-nigh impossible. Firstly, degree of culpability cannot be measured in each case; secondly, criminal cases cannot be categorised, there being infinite, unpredictable and enforceable variations; thirdly, on such categorisation, the sentencing process will cease to be judicial; and fourthly, such standardisation or sentencing discretion is a policy-matter belonging to the legislature beyond the Court's function. *Mohd. Chaman* v. *State (NCT of Delhi)*, (2001) 2 SCC 28 : 2001 SCC (Cri) 278 (283, 284) : 2001 CrLJ 725.

[12238] ● ***Supreme Court would not venture to formulate rigid standards in area in which Legislature warily treads.***—This Court should not venture to formulate rigid standards in an area in which the legislature so warily treads. Only broad guidelines consistent with the policy indicated by the legislature in Section 354(3) can be laid down. *Mohd. Chaman* v. *State (NCT of Delhi)*, (2001) 2 SCC 28 : 2001 SCC (Cri) 278 (284) : 2001 CrLJ 725.

[12239] ● ***Death sentences commuted to life imprisonment—Appellant to serve twenty years of imprisonment including period already undergone.***—Crimes, like the one before us, cannot be looked upon with equanimity because they tend to destroy one's faith in all that is good in life. A young man was given an opportunity to learn goldsmithery. He was once sent away for an alleged act of theft. Yet again, on the day of incident, he was permitted to accompany the deceased old man and as per the evidence, he accompanied the deceased to his house. The reward of that kindness is murder of the old man and his wife along with three daughters including one whose marriage was to be held after two months. Hence, even though we reduce the death penalty, we think that punishment should be sufficient so as to have deterrent effect as well as (*sic* one that gives), no further chance to the accused for relapsing into the crime and becoming a danger to society. Of course, the nature of the crime committed by the appellant was so horrendous and exceptionally cruel and sadistic. However, we are inclined to take a lenient view having regard to the various facts and circumstances of the case. In dealing with criminal matters where death sentence is prescribed in law as the punishment for the crime, the Courts are required to answer new challenges as the object has to be not only to protect the society at large, but impose appropriate sentence lest there should be tendency to undermine the public confidence in the criminal justice delivery system. In the interest of justice, we commute the death sentence imposed upon the appellant and direct that the appellant shall undergo the sentence of imprisonment for life. We further direct that the appellant shall not be released from the prison unless he had served out at least 20 years of imprisonment including the period already undergone by the appellant. As regards offences under Sections 392 and 397, IPC, we confirm the conviction of the appellant and no separate sentence is awarded. *Shri Bhagwan* v. *State of Rajasthan*, AIR 2001 SC 2342 : (2001) 6 SCC 296 : 2001 SCC (Cri) 1095.

[12240] ● ***No previous enmity nor any acquaintance with victims—Death sentence altered to life imprisonment.***—The appellants had neither any previous enmity with the victims nor even any acquaintance with them. It is an admitted fact that they acted in a rage of fury blindfolded by communal frenzy. We are aware that in most of the communal riots the participants are by and large illiterate and indoctrinated people. When the literate leaders try to keep themselves away, without participating in the perpetration of crimes though, perhaps, some such persons would fan up the communal frenzy by their utterances in the minds of the ignorant poor people who in a deranged fury rush into the streets prowling for prey. It was an unfortunate plight of the people who are ignorant about the real sublime thoughts of religions that they threw themselves into the cauldron of communal delirium which was burning up to the boiling point. That was a time when the minds of the rioters turned demented and no sensible thoughts would enter into them. The leaders and the society have not played their part to teach them that religions are not meant for killing fellow human beings. If ignorance had promoted people to take up cudgels in the name of religion for indulging in carnage or murders they are no doubt liable to be convicted and sentenced for the offence committed by them. But we have great difficulty to treat such a case as rarest of rare cases in which the alternative sentence of life imprisonment can unquestionably be foreclosed. Thus, we alter the sentence passed on Nasim @ Naso for the offence under Section 302 read with Section 149, IPC and impose the next alternative (imprisonment for life) for the said offence. Subject to this modification of the sentence we dismiss both these appeals. *Lakeman Shah* v. *State of West Bengal*, 2001 SCC (Cri) 829.

[12241] ● ***Death sentence altered to imprisonment of life.***—In this case double murder was committed by accused in crowded market place in open daylight in morning. Serious cut injuries were found on vital parts of victims such as face, head, neck chest in addition to bullet injuries. Repeated and indiscriminate blows were inflicted by accused on vital parts with dangerous sharp cutting weapon. Hand of victim was chopped off and cut portion of hand was picked up by accused and thrown away. Plea of defence that murder committed in retaliation of some previous incident of murder, deceased and accused belonging to two different rival political party, therefore, political rivalry could not be ruled out, deceased has criminal antecedents and that A-5 was aged only 18 years when incident took place. Considering all broad aspects of the case, held, death sentence is altered to imprisonment of life. *Nemai Mandal* v. *State of West Bangal*, (2001) 9 SCC 239 : 2002 SCC (Cri) 1019.

[12242] ● ***Death sentence or life imprisonment—Factors to be considered.***—The appellant had been labouring under the strain suspecting character of his wife. This fact is mentioned by none else but by the complainant Ashaben herself in her report. She also admitted in her statement in Court that quite often there has been quarrel between the two on that count. Though denied, a suggestion has been made to PW-3 Ashaben in her cross-examination that the appellant had been telling her that their sons were not of him. It is true that does not seem to be any immediate cause before the commission of offence, yet the fact remains that rightly or wrongly such a painful belief was being entertained by the appellant since long which constantly engaged his mind as admittedly there had been quarrels on that count between the two. Obviously he would have been brooding under that idea, which perhaps he could not contain any more. It is true that two innocent children lost their lives for no fault of theirs. We also notice that Dharia is a weapon, which is ordinarily to be found in the house of any farmer or agriculturist in that area as stated by PW- 3. He seems to have used the weapon as lying in the house. The offence was obviously not committed for lust of power of otherwise or with a view to garb any property nor in pursuance of any organized criminal or anti-social activity. Chances of repetition of such criminal acts at his hands making the society further vulnerable are also not apparent. He had no previous criminal record. For the above reasons in our view it cannot be said that the case falls in the category of rarest of rare cases so as to make the appellant liable for extreme penalty of death. The crime committed is not doubt heinous and unpardonable. The act of the appellant is condemnable. In our view however the normal sentence of life imprisonment for the offence of murder would meet the ends of justice. *Dharmendrasinh* v. *State of Gujarat*, AIR 2002 SC 1937 : (2002) 4 SCC 679 : 2002 CrLJ 2631 : 2002 (3) SCR 193 : 2002 (3) SCJ 435 : 2002 (2) Crimes 294 (SC).

[12243] ● ***Death sentences—Rarest of rare cases—Circumstances constituting explained.***—In rarest or rare cases where the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:-

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; *e.g.* murder by hired assassin for money or reward; or cold-blooded murder for gains of a person *vis-a-vis* whom the murder is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a scheduled Caste or minority community *etc.*, is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person *vis-à-vis* whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the cases are such that death sentence is warranted, the Court would proceed to do so. *Lehna* v. *State of Haryana*, (2002) 3 SCC 76 : 2002 (1) SCJ 406 : (2002) 1 SCR 377.

[12244] ● *Court to state "special reasons" in case of death sentence.*—Section 354(3) of the Code, marks a significant shift in the legislative policy underlying the old Code as in force immediately before 1st April 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The Court is required to state the reasons for the sentence awarded and in case of death sentence 'special reasons' are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death sentence. It is in the light of these successive legislative changes in Code and the juridical decisions prior to the amendment made by Act 26 of 1955 and again Act 2 of 1974 have to be understood. *Lehna* v. *State of Haryana*, (2002) 3 SCC 76 : 2002 (1) SCJ 406.

[12245] ● *Death sentence—Mental conditions of accused relevant.*—It is true three lives have been lost. But at the same time, the mental condition of the accused which led to the assault cannot be lost sight of. The same may not be relevant to judge culpability. But is certainly a factor while considering question of sentence. There is no evidence of any diabolic planning to commit the crime, though cruel was the act. Deprived of his livelihood on account of the land being taken away, the accused was, as the evidence shows, exhibiting his displeasure, his resentment. Frequency of the quarrels indicate lack of any sinister planning to take away lives of the deceased. The factual scenario gives impressions of impulsive act and not planned assaults. In the peculiar background, death sentence would not be proper. A sentence of imprisonment for life will be more appropriate. The sentence is accordingly modified, while confirming the conviction for offence punishable under Section 302, IPC. *Lehna* v. *State of Haryana*, (2002) 3 SCC 76 : 2002 (1) SCR 377.

[12246] ● *Death sentence—Award of.*—While imposing death penalty, the factors to be taken into account by the Court, for illustration are : the motive of the crime, the manner of the assault, the impact of the crime on the society as a whole, the personality of the accused, circumstances and facts of the case as to whether the crime committed is for satisfying any kind of lust, greed or in pursuance of any organised anti-social activity or by way of organised crime, drug trafficking or the like or the chances of inflicting the society with a similar criminal act that is to say vulnerability of the members of the society at the hands of the accused in future or commission of murder which may be shocking to the conscience. *State of Punjab* v. *Gurmej Singh*, AIR 2002 SC 2811 : (2002) 6 SCC 663 : 2002 CrLJ 3741 : JT 2002 (6) SC 299 : 2002 (4) Crimes 11 (SC).

[12247] ● *Death sentence when not justified.*—In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise retaining death penalty, such a penalty can be inflicted. In the facts and circumstances of the present case, it is not possible to come to the conclusion that the present case would fall within the category of rarest of rare one. Therefore, we are clearly of the opinion that in the fitness of things, extreme penalty of death was not called. *Farooq* v. *State of Kerala*, AIR 2002 SC 1825 : (2002) 4 SCC 697 : 2002 CrLJ 2534 : JT 2002 (4) SC 1 : 2002 (3) Scale 361 : 2002 (2) Crimes 183 (SC).

[12248] ● ***Death penalty awarded by Court below propriety of.***—Having regard to the absence of evidence to the contrary that the appellants are a menace to the society threatening the peaceful and harmonious co-existence of the society and they are likely to be a continuous threat to the society if once they come out of incarceration, no doubt the crime was committed in a heinous and brutal manner but viewed from the facts and circumstances, as noticed above, it would be difficult to hold that the case falls within the category of "rarest of rare". At the same time, there is no reason to believe that they cannot be reformed or rehabilitated. Viewed from the aforesaid perspective, we are of the opinion that the appellants must be given a chance to repent that what they have done is neither approved by the law or by the society and be reformed or rehabilitated and become good and law abiding citizens. *Bachhitar Singh* v. *State of Punjab*, AIR 2002 SC 3473 : (2002) 8 SCC 125 : JT 2002 (7) SC 413 : 2002 (9) SRJ 511 : 2002 (7) Scale 59.

[12249] ● ***Designated Court justified in upholding conviction.***—As a result of the incident of gruesome murder of 35 persons of one community there was great commotion in the locality. There cannot be any manner of doubt that the villagers were done to death in an extremely diabolic, revolting and dastardly manner and had affected the normal tempo of life of the community in the locality. The crime in the present case is not only ghastly, but also enormous in proportion as 35 persons, all of whom belonged to one community, were massacred. Thus, after taking into consideration the balance sheet of aggravating and mitigating circumstances, in which 35 persons have been deprived of their lives by the accused persons who were thirsty of their blood. I have no doubt in holding that culpability of the accused persons assumes the proposition of extreme depravity that a special reason can legitimately be said to exist within the meaning of Section 354(3) of the Code of Criminal Procedure in the case on hand and it would be mockery of justice if extreme penalty of death is not imposed. Thus, I am clearly of the opinion that the Designated Court was quite justified in upholding convictions of the appellants and awarding the extreme penalty of death which punishment alone was called for in the facts of the present case. *Krishna Mochi* v. *State of Bihar*, AIR 2002 SC 1965 : (2002) 6 SCC 81 : 2002 CrLJ 2645 : JT 2002 (4) SC 186 : 2002 (3) SCR 1 : 2002 (3) SCJ 163 : 2002 (2) Crimes 236 (SC).

[12250] ● ***Accused to suffer imprisonment for life—Not to be released before 20 years of imprisonment.***—From the record, it is revealed that accused-Prakash Patil did not have any criminal tendency. He was working as Water Analyser (Sr. scientific Assistant). The facts and circumstances of the case reveal that he killed his brother, brother's wife and children because of frustration, as he was not partitioning the alleged joint property. No doubt, it is heinous and brutal crime but at the same time, it will be difficult to hold that it is rarest of rare case. It is also difficult to hold that appellant is a menace to the society and there is no reason to believe that he cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the Society Re : *Om Prakash* v. *State of Haryana*, (1999) 3 SCC 19. Considering the facts and circumstances, we set aside the death sentence and direct that for murders committed by him, he shall suffer imprisonment for life but he shall not be released unless he had served out at least 20 years of imprisonment including the period already undergone by him. *Prakesh Dhawai Khairnar (Patil)* v. *State of Maharashtra*, AIR 2002 SC 340 (350) : (2002) 2 SCC 35 : 2002 CrLJ 928 : (2002) 1 Crimes 18.

[12251] ● ***Death penalty—Modified to life imprisonment—Accused not entitled to commutation or premature release.***—In this case considering the heinous act of terrorism and brutal murder of two Police Constables who were on duty to guard Shailesh Haldankar, even though the we held that this would not be a fit case for imposing death sentence, we direct that accused will not be entitled to any commutation or premature release under Section 433-A of CrPC, Prisoners Act, Jail Manual or any other statute and the rules made for the purpose of commutation and remissions. *Jayawant Dattatray Suryarao* v. *State of Maharashtra*, AIR 2002 SC 143 : (2001) 10 SCC 109 : 2002 CrLJ 226.

[12252] ● ***Rape and murder—Not rarest of rare case—Death sentence not justified.***—In the instant case the accused was sentenced to death, for offence of rape and murder of 6 year's old child. The learned Counsel for the appellant submitted that in any set of circumstances, this is not the rarest of the rare case where accused is to be sentenced to death. He submitted that age of the accused on the relevant day was less than 22 years. It is his submission that even though the act is heinous, considering the fact that no injuries were found on the deceased, it is probable that death might have occurred because of gagging her mouth and nosetrix by the accused at the time of incident so that she may not raise hue and cry. The death, according to him, was accidental and unintentional one. In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor it can be said that he will be a grave danger to the Society at large. It is true that his act is a heinous one and requires to be condemned but at the same time it cannot be said that it is rarest of the rare case where accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence. *Bantu* v. *State of Madhya Pradesh*, AIR 2002 SC 70 (72) : 2002 CrLJ 211.

[12253] ● ***Murder—Mitigating circumstances—Death sentence not warranted.***—Every murder is a heinous crime. Apart from personal implications it is also a crime against the society but in every case of murder death penalty is not to be awarded. Under the present legal position imprisonment for life is the normal rule for punishing crime of murder and sentence of death, as held in different cases referred to above, would be awarded only in the rarest of rare cases. The number of factors are to be taken into account namely, the motive of the crime, the manner of the assault, the impact of the crime on the society as a whole, the personality of the accused, circumstances and facts of the case as to whether the crime committed, has been committed for satisfying and kind of lust, greed or in pursuance of anti-social activity or by way of organized crime, drug-trafficking or the like. Chances of inflicting the society with the similar criminal act that is to say vulnerability of the members of the society at the hands of the accused in future and ultimately as held in several cases mitigating and aggravating circumstances of each case has to be considered and a balance has to be struck. *Dharmendra Singh* v. *State of Gujarat*, AIR 2002 SC 1937 : (2002) 4 SCC 679 : 2002 CrLJ 2631 : JT 2002 SC 239 : 2002 (3) SCR 193 : 2002 (3) SCJ 435 : 2002 (2) Crimes 294 (SC).

[12254] ● ***Rape and murder sentence altered to life imprisonment.***—In the present case the accused was found guilty of offence of rape and murder of 3 year's old girl. Accused was convicted and sentenced to trial Court, but acquitted by High Court. Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime. However, as the accused was once acquitted by the High Court, we reform from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases" as envisaged by the constitution Bench in *Bachan Singh* v. *State of Punjab*, (1980 2 SCC 684). However, the lesser option is not unquestionably foreclosed and so alter the sentence, in regard to the offence under Section 302, IPC is altered to imprisonment for life. *State of Maharashtra* v. *Bharat Fakira Dhiwar*, AIR 2002 SC 16 (23) : (2002) 1 SCC 622 : 2002 CrLJ 218.

[12255] ● ***Death sentence—Commutation of to life imprisonment.***—Appellant, a fruit vendor, has no criminal background. His wife and daughter were not pleased with the house appellant had purchased after raising loans. They were engaging in quarrels constantly with appellant. Continuous harassment and constraint ragging could have reached a boiling point resulting in the dastardly act of murder.

The appellant though hailing from a poor family, had no criminal background and it could not be reasonably postulated that he will not get rehabilitated or that he would be a menace to the society. The boy of tender age would also once for all be deprived of the parental protection. Keeping in view all these aspects, it would not be said that the imposition of life imprisonment would not adequately meet the requirements of the case or that only an imposition of the extreme punishment alone would do real or effective justice. *Vashram Narshibai Rajpara* v. *State of Gujarat*, AIR 2002 SC 2211 : (2002) 9 SCC 168 : 2002 CrLJ 2930 : JT 2002 (4) SC 433 : (2002) 2 Crimes 306.

[12256] ● ***Appreciation of evidence—Benefit of doubt.***—In this case, incidentally the persecution involved both the father and the son—whereas the father has to wait outside, the son was completing his part of duty in a most heinous killing of four person. The Sessions Court however, in the absence of iota of evidence of even his presence outside the door acquitted the father, though convicted the son under Section 302 and the High Court converts the sentence of death penalty to that of life imprisonment but the State has also appealed against the High Court's findings and Mr. Sushil Kumar appearing for the State in no uncertain terms, submitted that the States appeal is by reason of the fact that a social evil ought not to be allowed to be in the midst of the society since accused Ravi is not only an evil but a social menace. The State's anxiety to put a man in the gallows is however not very plainly understandable, neither it is understandable as to the statute, attitude being eye for an eye and tooth for a tooth—it is true that it is the State's responsibility to maintain law and order but the State on the other hand also maintains reformatory Schools and if the State has failed to bring the accused to books in a Court of law, can the State's failure to be countenanced by the Apex Court. *Deepak Kumar* v. *Ravi Virmani*, AIR 2002 SC 1320 : (2002) 2 SCC 737 : 2002 SCC (Cri) 470 (484) : 2002 CrLJ 1781.

[12257] ● ***Nothing on record to suggest that accused menace to society—Death sentence not warranted.***—There is no evidence on record to suggest that the appellants are a menace to society as evidence by their past deeds. It is not possible to conclude that they are those who cannot be reformed or rehabilitated and that they constitute a continuing threat to the society. In fact, apart from the incident in question, there is not even an allegation about the appellants having indulged in such behaviors in the past or having resorted to violence and committed any offence whatsoever. They appear to belong to a middle class farmer family for whom land has great value. But even so, there is nothing to suggest that they may repeat such barbarism in future so that they would constitute a continuing threat to the society. Having regard to all the facts and circumstances, and also having regard to the fact that the evidence does not disclose the immediate cause of the incident, we do not find it safe to confirm the sentence of death awarded by the High Court to Lallan Singh and Babban Singh. *Ram Anup Singh* v. *State of Bihar*, AIR 2002 (SC) 3006 : (2002) 6 SCC 686 : 2002 CrLJ 3927 : JT 2002 (5) SC 621 : 2002 (3) Crimes 71 (SC).

[12258] ● ***Terrorist act—Death sentence most appropriate.***—As the factual scenario of the present case shows, at least nine persons died, several persons were injured, a number of vehicles caught fire and were destroyed on account of the perpetrated acts. The dastardly acts were diabolic in conception and cruel in execution. The "terrorists" who are sometimes described as "death merchants" have no respect for human life. Innocent persons lose their lives because of mindless killing by them. Any compassion for such persons would frustrate the purpose of enactment of TADA, and would amount to misplaced and unwarranted sympathy. Death sentence is the most appropriate sentence in the case at hand, and learned trial Judge has rightly awarded it. *Devender Pal Singh* v. *State* (*NCT*) *of Delhi*, AIR 2002 SC 1661 : (2002) 5 SCC 234 : 2002 CrLJ 2034 : JT 2002 (3) SC 264 : 2002 (2) Crimes 133 (SC).

[12259] ● ***Murder committed in most diabolical and brutal manner—Beyond reformation—Death sentence justified.***—In the instant case the crime had been cleverly pre-planned and committed in a brutal and diabolical manner. Three out of four inmates of the house in which he was employed, were eliminated. There was an attempt to kill the fourth person (PW- 1) also. The accused had inflicted injuries on the young Sarit in such a cruel manner that his neck was practically severed from his body. Multiple injuries were inflicted on the vital parts of other victims. The cruel tendency of the appellant was writ large even in the manner of attack. His antecedents also revealed a cruel and savage behaviour on his part. The evidence on record reveals that he killed a pet bird and pressed feathers inside the nose of the hen. The crime committed by the accused shocks the conscience of the society at large. He is beyond reformation though he is young. *Om Prakesh* v. *State of Uttranchal*, (2003) 1 SCC 648 : 2003 SCC (Cri) 412 (422) : 2003 CrLJ 483.

[12260] ● ***Court required to state special reasons for awarding death sentence.***—A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances here to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, *inter alia*, the following questions may be asked and answered: (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? *State of Rajasthan* v. *Kheraj Ram*, (2003) 8 SCC 224 : 2003 SCC (Cri) 1979 : AIR 2004 SC 3432.

[12261] ● ***Death sentence—Whether justified—Mitigating circumstances.***—We are primarily of the view that while deciding the question whether a case falls "rarest of rare category", the nature of the offence and into impact on the society are determinative factors. If after consideration of materials, the Court comes to the finding that it belongs to the "rarest of rare category" acquittal or sentence of life awarded by the trial or High Court should not be considered to be a mitigating factor. *Devender Pal Singh* v. *State (NCT of Delhi)*, AIR 2003 SC 886 (891) : (2003) 2 SCC 501 : 2003 CrLJ 918.

[12262] ● ***Judicial discretion of Bench hearing appeal not to be curtailed.***—The petition has been filed for issuance of a guidance as to what should be the appropriate approach in the case where one of the Judges in the Bench of Supreme Court while hearing an appeal against death sentence, acquits the accused person. We do not think that the judicial discretion of the Bench hearing the appeal can be curtailed in any manner by issuing guidelines. *V. Mohini Giri* v. *Union of India*, AIR 2003 SC 642 (642) : (2003) 9 SCC 158.

[12263] ● ***Multiple murders—Not role criterion for death penalty.***—It is time the incident in question has prematurely terminated the life of 21 people but number of deaths cannot be role criterion for awarding the maximum punishment of death. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because style is the man. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. As to the aggravating circumstances pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind; so also a murder "diabolically conceived and cruelly executed" and the test of Ediga Anamma: "The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim". *Ram Pal* v. *State of Uttar Pradesh*, AIR 2003 SC 4168 : 2003 SCC (Cri) 1595 : 2003 CrLJ 3760 (3762) : (2003) 3 Crimes 234.

[12264] ● ***Murder of wife by strangulation case not falling within ambit of rarest of rare cases.***—The facts of the case as unfolded by the prosecution are brief but horrendous, which shook human conscience. The marriage of the deceased Sujatha with accused Babu was solemnised on 2-2-1993 thereafter, the couple stayed together in the parental house of the bridegroom. The deceased seems to have elicited information from PW- 3 Lekha, wife of the elder brother of the accused, that the accused had a premarital affair with another woman. The deceased could not tolerate the information and became repulsed and adopted an unresponsive attitude towards the overtures, approach made by the accused and she succeeded in keeping him at bay on the bridal night. She adopted the same stiff attitude towards the accused on the second night also, *i.e.*, 3-2-1993, which had enraged the accused. On being unable to sustain the lust for sex, persistently prevented by the deceased, the accused decided to end the life of the deceased, strangulated her and killed her. Thereafter, the body of the deceased was lifted and taken to an unused well, situated about 17 metres away from the house of the accused and dumped. In the present case in our view though the murder is gruesome, but taking the facts and circumstances into consideration, the crime committed by the accused does not satisfy the above tests and it is difficult to say that it falls within the ambit of the "rarest of rare" cases. In our view therefore, the sentence of life imprisonment for an offence under Section 302 would be adequate. *Babu s/o Raveendran* v. *Babu s/o Bahuleyan*, (2003) 7 SCC 37 : 2003 SCC (Cri) 1569 (1571, 1576).

[12265] ● ***For awarding a punishment of death sentence special reasons are required.***—For awarding a punishment of death sentence, there must be some special reasons, the Courts should give relative weight to the aggravating and mitigating factors available on the facts of the case, the case in question should be a rarest of the rare cases. The fact that the murders in question were committed in such a deliberate and diabolic manner while the victims were sleeping, without any provocation whatsoever from the victims' side, that too having enjoyed the hospitality and kindness of the victims, indicates the cold-blooded and premeditated approach of the appellant to put to death the victims which included a child of three years' age just to gain some monetary benefit. The extenuating circumstances put forth by the learned counsel for the appellant in regard to the age of the appellant, his surviving relatives and the possibility of rehabilitation would not justify the Courts to impose a sentence of life imprisonment on the facts and circumstances of this case. Hence, the case in hand is a rarest of the rare cases involving a preplanned brutal murder without provocation, hence, there is no reason whatsoever to interfere even with the quantum of punishment awarded by the Courts below. The Supreme Court agreed with the findings of the Courts below and coming to the conclusion that the instant case was a rarest of rare case involving a preplanned brutal murder without provocation. *Dayanidhi Bisoi* v. *State of Orissa*, AIR 2003 SC 3915 : (2003) 9 SCC 310 : 2003 SCC (Cri) 1798 : 2003 CrLJ 3697 (3704) : (2003) 3 Crimes 167.

[12266] ● ***Brutal murder—Death sentence-Imprisonment for life not adequate sentence.***—The aggravating circumstances of the case, however, are that the appellants, having known that on the next day a marriage was to take place in the house of the complainant and there would be lots of relatives present in her house, came there on the evening of 21-11-1991 when a feast was going on and started firing on the innocent persons. Thirteen persons were killed on the spot and eight others were seriously injured. The appellants thereafter went to another place and killed the father and brother of PW- 15. out of the thirteen persons, one of them was a seven-year-old child, three others were at the threshold of their lives. The postmortem reports show that their ages ranged between 15 and 17 years. They had also their right to live in this world peaceably and these appellants had no grievance or enmity against any one of them. In the course of wide-ranging submissions, the counsel for the appellants laid stress on the point that the underlying principle of our sentencing jurisprudence is reformation and there is nothing in evidence to show that the appellants may be a threat or menace to the society. It is true that we cannot say that they would be a further menace to the society or not as "we live as creatures saddled with an imperfect ability to predict the future". Nevertheless, the law prescribes for future, based upon its knowledge of the past and is being forced to deal with tomorrow's problems with yesterday's tools. The entire incident is extremely revolting and shocks the collective conscience of the community. The acts of murder committed by the appellants are so gruesome, merciless and brutal that the aggravating circumstances far outweigh the mitigating circumstances. Moreover, the two accused who were earlier tried are already sentenced to death and their special leave petition was finally disposed of by this Court.

Having regard to these facts, we do not think that this is a case where imprisonment for life is an adequate sentence to meet the ends of justice. *Gurdev Singh* v. *State of Punjab*, AIR 2003 SC 4187 : (2003) 7 SCC 258 : 2003 SCC (Cri) 1616 (1627) : 2003 CrLJ 3764.

[12267] ● ***Death sentence—No rigid formula or standard to be fixed.***—The consistent view of this Court in a series of rulings is to the effect that no rigid formula or standards can be fixed and only a broad guidelines consistent with the legislative policy indicated by the legislature in Section 354(3) CrPC alone shall be considered for invoking the extreme penalty of death sentence. A survey of some of the decisions of this Court would give an idea as to how this Court viewed various circumstances, which would warrant invocation of death penalty. *Gurdev Singh* v. *State of Punjab*, AIR 2003 SC 4187 : (2003) 7 SCC 258 : 2003 SCC (Cri) 1616 (1625) : 2003 CrLJ 3764.

[12268] ● ***Court to record special reasons in case of capital punishment.***—After amendment of the Criminal Procedure Code, 1898 in 1974, there was significant change in the legislative policy with regard to the sentence of death or imprisonment for life provided for murder and certain other capital offences under the Indian Penal Code. As per the changed policy, when conviction for an offence punishable with death or in the alternative, with imprisonment for life or imprisonment for a term of years is recorded, the judgment should state reasons for the sentence awarded and in the case of sentence of death, special reasons must be given. Therefore, as per Section 354(3) CrPC, in every case where the Court finds that the capital punishment is the inevitable consequence, the Court should give special reasons. The constitutional validity of death sentence was itself challenged in *Bachan Singh* v. *State of Punjab*. One of the grounds of attack was that Section 354(3) CrPC provides for imposition of death penalty in an arbitrary and whimsical manner inasmuch as it does not lay down any rational principle or criterion for invoking the extreme penalty. The constitutional validity of the said section was upheld and the Constitution Bench stated that it is difficult to lay down a formula of universal application when facts are bound to be different from case to case and it would frustrate the very purpose of conferring a discretion on Courts. *Gurdev Singh* v. *State of Punjab*, AIR 2003 SC 4187 : (2003) 7 SCC 258 : 2003 SCC (Cri) 1616 (1624) : 2003 CrLJ 3764.

[12269] ● ***Brutality in built in every murder.***—Brutality is in built in every murder but in the case of every murder death sentence is not imposed. Life imprisonment is the rule and death sentence is the exception. The latter sentence is imposed in rarest of rare cases. Taking note of the mitigating circumstances, there is no scope for interference with the life sentence awarded. *Prem Sagar* v. *Dharambir*, AIR 2004 SC 21 : (2004) 1 SCC 113 : 2004 SCC (Cri) 22 (24) : 2004 CrLJ 17.

[12270] ● ***Death sentence—Justification for.***—Section 302, IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the Court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for "special reasons", as provided in Section 354(3). There is another provision in the Code which also uses the significant expression "special reason". It is Section 361. Section 360 of the Code re-enacts, in substance, Section 562 of the Criminal Procedure Code, 1898 (in short "the old Code"). Section 361 which is a new provision in the Code makes it mandatory for the Court to record "special reasons" for not applying the provisions of Section 360. Section 361 thus casts a duty upon the Court to apply the provisions of Section 360 wherever it is possible to do so and to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Section 361 must be such as to compel the Court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute-book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors. Criminal justice deals with complex human problems and diverse human beings. A judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed. *Sushil Murmu* v. *State of Jharkhand*, AIR 2004 SC 394 : (2002) 2 SCC 338 : 2004 SCC (Cri) 529 (533-34) : 2004 CrLJ 658.

[12271] ● ***Death penalty not warranted.***—The question that arose for consideration was whether the case fall in the category of "rarest and rare case" in which death penalty should be imposed on the appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had involved in any other criminal case previously and the appellant was a migrant labour from U.P. and was living in impecunious circumstances and it could not be said that he would be a *menace to* the society in future and no materials were produced to draw such a conclusion. The death penalty was not warranted in this case. The Supreme Court confirmed conviction of the appellant on all the counts, but the sentence of death penalty imposed on him for the offence under Section 302, IPC was commuted to life imprisonment. *Surendra Pal Shivbalakpal* v. *State of Gujarat*, AIR 2004 SC 4862 : (2005) 3 SCC 127 : 2004 CrLJ 4642 (4644) : 2004 (4) Crimes 110.

[12272] ● ***Normal punishment for in under death no longer operative.***—The former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the Court to pass either of the two sentences prescribed in this section; but whichever of the two sentences he passes, the judge must give his reasons for imposing a particular sentence. The amendment of Section 367(5) of the old Code does not affect the law regulating punishment under IPC. This amendment relates to procedure and now Courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations preferring the lesser punishment. *Sushil Murmu* v. *State of Jharkhand*, AIR 2004 SC 394 : (2004) 2 SCC 338 : 2004 SCC (Cri) 529 (534-35) : 2004 CrLJ 658.

[12273] ● ***Court to state reasons for sentence awarded.***—Section 354(3) of the Code marks a significant shift in the legislative policy underlying the old Code as in force immediately before 1.4.1974, according to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The Court is required to state the reasons for the sentence awarded and in the case of death sentence "special reasons" are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death sentence. It is in the light of these successive legislative changes in the Code that the judicial decisions prior to the amendment made by Act 26 of 1955 and again Act 2 of 1974 have to be understood. *Sushil Murmu* v. *State of Jharkhand*, AIR 2004 SC 394 : (2004) 2 SCC 338 : 2004 SCC (Cri) 529 (534-535) : 2004 CrLJ 658.

[12274] ● ***Balance to be struck between an aggravating and mitigating circumstances.***—A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, *inter alia*, the following questions may be asked and answered : (a) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence? and (b) are the circumstances of the crime such there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? *Sushil Murmu* v. *State of Jharkhand*, AIR 2004 SC 394 : (2004) 2 SCC 338 : 2004 SCC (Cri) 529 (535-36) : 2004 CrLJ 658.

[12275] ● *"Rarest of rare cases" when collective conscience of community so shocked to inflict death penalty.*—In rarest of rare cases when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances :

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness *e.g.* murder by a hired assassin for money or reward or a cold-blooded murder for gains of a person *vis-a-vis* whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course of betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community *etc.* is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "bride-burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of the murder is an innocent child, or a helpless woman or an old or infirm person or a person *vis-a-vis* whom the murderer is in a dominating position or a public figure generally loved and respected by the community. *Sushil Murmu* v. *State of Jharkand*, AIR 2004 SC 394 : (2002) 2 SCC 338 : 2004 SCC (Cri) 529 (536-37) : 2004 CrLJ 658.

[12276] ● *"Rarest of rare cases Death sentence warranted.*—"If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so. *Sushil Murmu* v. *State of Jharkhand,* AIR 2004 SC 394 : (2002) 2 SCC 338 : 2004 SCC (Cri) 529 : 2004 CrLJ 658.

[12277] ● *Award of punishment outcome of cool deliberation.*—A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the Courtroom after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man *i.e.* the judge that leads to determination of the *lis*. *Sushil Murmu* v. *State of Jharkhand*, AIR 2004 SC 394 : (2002) 2 SCC 338 : 2004 SCC (Cri) 529 (537) : 2004 CrLJ 658.

[12278] ● *Sentence—Punishment not to be disproportionate.*—The principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilt ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just deserts, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practices sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence, sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably, these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences. *Sushil Murmu* v. *State of Jharkand*, AIR 2004 SC 394 : (2002) 2 SCC 338 : 2004 SCC (Cri) 529 (537-38) : 2004 CrLJ 658.

[12279] ● ***Grant of life imprisonment rule and death penalty exception.***—True, the grant of life imprisonment is the rule and death penalty an exception in the rarest of rare cases by stating "special reasons" for awarding it but, at the same time, it is also true that the punishment awarded must be commensurate with the crime committed by the accused. It is also true that ordinarily the sentence is not enhanced by the appellate Court unless it is such a gross case that nothing but maximum sentence stipulated in law deserves to be awarded.

We are conscious of the fact that the power to enhance death sentence from life should be very rarely exercised and only for strongest-possible reasons and not only because the appellate Court is of that view. The question of enhancement of sentence to award death penalty can, however, be considered where the facts are such that to award any punishment less than the maximum would shock the conscience of the Court. *Simon* v. *State of Karnataka*, (2004) 2 SCC 694 : 2004 SCC (Cri) 646 (656).

[12280] ● ***Court to consider nature of crime as well as accused.***—The Court has to consider the nature of the crime as well as the accused. The trial Court has rightly come to a definite conclusion that the case falls in the category of the rarest of rare cases for imposing capital punishment. The reasons given by the trial Court for not awarding it have been stated above. In support of the reason stated by the trial Court that it appears that the first accused Veerappan compelled the appellants to join his gang, learned counsel for the appellants contends that if a crime is committed under duress, it would be a mitigating circumstance for not awarding death penalty. *Simon* v. *State of Karnataka*, (2004) 2 SCC 694 : 2004 SCC (Cri) 646 (657).

[12281] ● ***Court to pay due regard to crime and criminal for ascertaining existence of special reason.***—For ascertaining the existence or absence of "special reasons", the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. The Constitution Bench said that though all murders are cruel but cruelty may vary in its degree of culpability and it is only then the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist. *Simon* v. *State of Karnataka*, (2004) 2 SCC 694 : 2004 SCC (Cri) 646 (658-59).

[12282] ● ***None of Mitigating circumstances to be taken into consideration in isolation.***—None of the mitigating circumstances noticed in *Bachan Singh's case*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580 can be taken into consideration in isolation. The circumstance of duress or domination of another person is required to be taken into consideration as a relevant circumstance but that has to be considered on the facts of a particular case while considering and balancing all other aggravating and mitigating circumstances. That alone is not the determining factor. *Simon* v. *State of Karnataka*, (2004) 2 SCC 694 : 2004 SCC (Cri) 646 (659-660).

[12283] ● ***Death sentence—Mitigating factors against award of.***—The facts of the present case do not show that the appellants were compelled to fall in line with the criminal activity of Accused-1 or that they joined his group on account of any duress or compulsion. The manner in which the crime was committed clearly shows that any person can contemplate the disastrous effect of blasting of landmines. It is evident that the crime was diabolically planned. The appellants are a threat and grave danger to society at large. They must have anticipated that their activity would result in elimination of a large number of lives. As a result of criminal activities, the normal life of those living in the area has been totally shattered. It would be a mockery of justice if extreme punishment is not imposed. Thus, having given anxious consideration to all the circumstances aggravating and mitigating, in our view, there can hardly be a more appropriate case than the present one to award maximum sentence. We have to perform this onerous duty for self-preservation *i.e.* preservation of persons who are living and working in the area where the appellants and their group operate. *Simon* v. *State of Karnataka*, (2004) 2 SCC 694 : 2004 SCC (Cri) 646 (660).

[12284] ● ***Awarding of death sentence—Exception.***—Brutality in taking away the life of the victim is only one of the factors which is required to be taken into consideration for coming to the conclusion that the case at the hand is one of rarest of rare ones warranting imposition of death penalty. Imposition of punishment for life, it is the rule. Awarding of death sentence as an exception. *Sardar Khan* v. *State of Karnataka*, AIR 2004 SC 1695 : (2004) 2 SCC 4427 : 2004 SCC (Cri) 564 (569) : 2004 CrLJ 310.

[12285] ● ***Death sentence altered to life imprisonment.***—In the dead of night, the four respondents came to spot armed with lathies in their hands and assaulted the deceased where they were sleeping resulting in multiple murders. The respondents were annoyed by the declaration of deceased H that he would give away his agricultural land to PW-31. The case is not one of "rarest of rare cases" where death sentence as to be awarded. Hence death is altered to life imprisonment. *Prithvi* v. *Mam Raj*, AIR 2004 SC 2729 : (2004) 13 SCC 279 : 2005 SCC (Cri) 198 (207).

[12286] ● ***Execution of death sentence postponed.***—In the instant case, the execution of death sentence of accused was postponed and some representation also had been made to the President of India by certain Associations and citizens. The supreme, in petition before it to view the rejection of pardon, held that there was no reason to consider the matter at this stage. *Bikas Chatterjee* v. *State of W.B.*, (2004) 13 SCC 711 : (2006) 1 SCC (Cri) 531.

[12287] ● ***Death sentence—Constitutional validity.***—Death sentence has passed the test of constitutional validity. It has come to stay as part of our law of penology. At the same time, it hardly needs to be emphasised that the capital punishment ought to be imposed only in very rare and exceptionally grave cases of murder. "Scrupulous care and humane concern" should inform the approach of Court. The view held by this Court in *Sk. Ishaque* v. *State of Bihar*, (1995) 3 SCC 392 : 1995 SCC (Cri) 534, apart from other cases is that the number of persons killed, though a factor to be taken into account, should not be the sole consideration to condemn the criminal to death. A delicate balancing of various factors such as those which give an insight into the state of mind, motivation, attitude and propensities of the accused has to be done while at the same time, keeping in view the larger societal interests. The principle that in case of murder, life imprisonment is the normal rule and the death sentence should be handed down in rarest of rare cases should be course be uppermost in the mind of the judge. Though no hard-and-fast rules can be laid down, *prima facie*, a dangerous criminal who has indulged in the killing spree in an extremely brutal and horrendous manner to achieve his own selfish gains or to satisfy his physical lust or to disrupt the public order and peace, should be considered to be a menace to society and he be subjected to the extreme punishment of death. However, even in such cases, mitigating circumstances are not out of place. While death sentence ought to be imposed in the rarest of rare cases, so long as the law provides for it and such law has withstood the judicial scrutiny, the Court cannot make it a dead letter and refuse to impose death sentence where nothing short of it would be appropriate and adequate. The justification behind death sentence is to respect the collective conscience of the society in relation to crimes of extreme brutality and terrorism and to impart security to the society. The element of deterrence is of course inherent in it. Death sentence serves a threefold purpose : (*i*) punitive, (*ii*) deterrent, and (*iii*) protective. *Gyasuddin Khan* v. *State of Bihar*, 2005 SCC (Cri) 630 (637-38).

[12288] ● ***Death sentence or life imprisonment.***—The nature of the crime, the circumstances of the criminal and the impact of the crime on the community are broadly the considerations that ought to be kept in view by a Court called upon to choose between the death sentence and the life imprisonment. At the same time, the circumstances in which the death sentence can be imposed cannot be placed in pigeon holes. The enumeration of aggravating and mitigating circumstances in the case of *Bachan Singh* v. *State of Punjab*, 1980 SCC (Cri) 850 : (1980) 2 SCC

684 is not exhaustive and is not intended to fetter the judicial discretion. This Court guardedly said that they are broad indicators or guidelines and that it did not propose to formulate rigid standards *vis-à-vis* the sentencing process. Each one of the enumerated factors cannot be viewed in isolation. A holistic view has to be taken on the facts presented in each case. *Gyasuddin Khan* v. *State of Bihar*, 2005 SCC (Cri) 630 (635).

[12289] ● ***Death sentence, common life imprisonment.***—The indiscriminate killing of fellow policemen resorted to by a member of a disciplined force is no doubt an aggravating factor, but in view of the mitigating circumstances, the Supreme Court held that it would not be appropriate to award death sentence and the accused was sentence to life imprisonment with fine. *Gyasuddin Khan* v. *State of Bihar*, 2005 SCC (Cri) 630 (640).

[12290] ● ***Death sentence.***—In the present case the aggravating circumstances against the accused are : (*a*) this is a case of cold-blooded murder; (*b*) the accused was leading the gang; (*c*) the victims did not provoke or contribute to the incident; (*d*) two victims were burnt to death by locking the house from outside; (*e*) one of the victims was a young boy, aged about 6 years, who, somehow, managed to come out of the burning house, but he was mercilessly thrown back into the fire by the appellant; (*f*) the dragging of Nagarmol Bordoloi by the appellant Holiram to his house and then cutting him into pieces in broad daylight in the presence of bystanders; (*g*) the entire incident took place in broad daylight and the crime was committed in the most barbaric manner to deter others from challenging the supremacy of the appellant in the village; (*h*) the entire incident was pre-planned by the accused-appellant.

Held : "There is nothing to show that there was repentance by the accused at any point of time or an explanation for the occurrence. Even when questioned under Section 235(2), Criminal Procedure Code, the accused stated that he had nothing to say on the point of sentence. The fact that the appellant remained silent would show that he has no repentance for the ghastly act he committed. The appellant was in service and he should have been a model to the society as very few people from his community get opportunity to work in government service. But the appellant, instead of setting an example to others, organised a gang and instigated them to join his heinous activities. There was no spark of any kindness or compassion and his mind was brutal and the entire incident would have certainly shocked the collective conscience of the community. We are unable to find any mitigating circumstance to refrain from imposing the death penalty on the appellant." *Holiram Bardoloi* v. *State of Assam*, 2005 SCC (Cri) 915 (923-923).

[12291] ● ***Death sentence—Rarest of rare cases.***—In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances :

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; *e.g.* murder by hired assassin for money or reward; or cold-blooded murder for gains of a person *vis-à-vis* whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community *etc.*, is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person *vis-à-vis* whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare case, the circumstances of the case are such that death sentence is warranted, the

Court would proceed to do so." *State of U.P.* v. *Satish,* 2005 SCC (Cri) 642 (651-52)

[12292] ● ***Death penalty—Rarest of rare cases.***—In the instant case, the High Court enumerated the following circumstances in this case as indicative that it is one of the "rarest of rare cases" where imposition of death penalty is justified :

1. The accused was already convicted to life imprisonment for murder of his first wife Malakawwa. He committed the present murders while he was out on parole.
2. That the murder was the result of preplanning on his part is evident from the fact that the murder weapon is a Jambia, a hunting knife used for attack, not ordinarily available in a house.
3. Even if the accused had some reason to suspect the fidelity of his wife, which motivated him to murder her, there could have been absolutely no reason for killing the defenceless child of 1-½ years of age.
4. The murders were committed when the victims were helpless and asleep.
5. No extenuating circumstances in favour of the accused were either pleaded or proved.

The Supreme Court taking all the circumstances in consideration held that the High Court was right in coming to the conclusion that the appellants case bristled with special circumstances requisite for imposition of death penalty. *Saibanna* v. *State of Karnataka*, 2005 SCC (Cri) 1094 (1100).

[12293] ● ***Case based on circumstantial evidence.***—Where the victim of rape and murder was a six years old girl, the High Court's judgment acquitting the accused-appellant of the charges was set aside and the accused was convicted and awarded death sentence. *State of Uttar Pradesh* v. *Satish*, AIR 2005 SC 1000 : (2005) 3 SCC 114 : 2005 CrLJ 1428 (1432, 1433) : 2005 (1) Crimes 146 (SC).

[12294] ● ***Death sentence—Rarest of rare cases.***—In the instant case, there can be no doubt that the most appropriate punishment is death sentence. That is what has been awarded by the trial Court and the High Court. The present case, which has no parallel in the history of the Indian Republic, presents us in crystal-clear terms, a spectacle of the rarest of rare cases. The very idea of attacking the overpowering a sovereign democratic institution by using powerful arms and explosives and imperilling the safety of a multitude of peoples' representatives, constitutional functionaries and officials of the Government of India and engaging in a combat with the security forces is a terrorist act of the gravest severity. It is a classic example of rarest of rare cases.

The gravity of the crime conceived by the conspirators with the potential of causing enormous casualties and dislocating the functioning of the Government as well as disrupting the normal life of the people of India is something which cannot be described in words. The incident, which resulted in heavy casualties, had shaken the entire nation, and the collective conscience of the society will only be satisfied if capital punishment is awarded to the offender. The challenge to the unity, integrity and sovereignty of India by these acts of terrorists and conspirators, can only be compensated by giving maximum punishment to the person who is proved to be the conspirator in this treacherous act. The appellant, who is a surrendered militant and who was bent upon repeating the acts of treason against the nation, is a menace to the society and his life should become extinct. The death sentence is upheld. *State (NCT of Delhi)* v. *Navjot Sandhu*, 2005 SCC (Cri) 1715 (1859-1860).

[12295] ● ***Death sentence—Gruesome murder.***—*Held* : The facts of the present case shocked the judicial conscience. A greedy son-in-law with the intention of grabbing the property of his father-in-law wiped out the entire family, even the three minor innocent children were not spared. The facts of the case shocked the judicial conscience. The gruesome murder was perpetrated in cold-blooded, premeditated and well-organised manner. It calls for deterrent sentence. Such gruesome and cold-blooded murder with a view to grab the property does not only delict the law but also has a deleterious effect on civil society. At the time of granting leave, this Court did not issue notice for enhancement of punishment. However, considering the nature of the crime and the manner in which it has been perpetrated, the ends of justice would warrant that the appellant should be in jail in term of Section 57, IPC. It is directed that the appellant shall not get the benefit of any remission either granted by the State or by the Government of India on any auspicious occasion. *Reddy Sampath Kumar* v. *State of A.P.*, 2005 SCC (Cri) 1710 (1712).

[12296] ● ***Death sentence justification.***—When there was a long lapse of time the death sentence imposed upon the accused by the Sessions Court was held not justified by the Apex Court. *State of M.P.* v. *Paltan Mallah,* AIR 2005 SC 733 : (2005)

3 SCC 169 : 2005 SCC (Cri) 674 : (688-89) : 2005 CrLJ 918.

[12297] ● ***Conversion of conviction.***—"The appellant herein along with accused Subhash Krishna Savant, Mahadu Raghunath Waghmare and Ramji Balu Waghmare were tried and by judgment rendered by the Trial Court while the other three accused persons were acquitted of the charges, the appellant was convicted under Section 302 of the Penal Code and sentenced to death penalty. Apart from this conviction, the appellant was convicted for other offences also. Against the order of acquittal of the other accused persons, appeal was preferred by the State of Maharashtra before the High Court. So far as the appellant is concerned, he preferred an appeal apart from the fact that there was a reference. The High Court, upon appraisal of evidence, came to the conclusion that the order of acquittal of the other three accused persons was perverse one, as such, it reversed the same. So far as the conviction of the appellant under Section 302, IPC is concerned, the High Court was of that view that it was not a case where the appellant should have been convicted under Section 302, IPC simpliciter. Accordingly, the High Court converted the conviction of the appellant from Section 302, IPC to Section 302 read with Section 34, IPC and convicted the appellant and the other three accused persons thereunder. So far as the other three accused persons are concerned, they have been sentenced to undergo imprisonment for life and to pay fine of Rs. 500 each." *Govind Vaman Patil* v. *Sate of Maharashtra*, (2005) 12 SCC 179 : (2006) 1 SCC (Cri) 541 (542).

[12298] ● ***Delay in execution of death sentence.***—The time for consideration of delay in execution of death sentence started to run from the point of disposal of appeal and it cannot be said to be a case of delay in execution of death sentence requiring death sentence being substituted by the sentence of life imprisonment for reason of delay in execution of death sentence. *Gurmeet Singh* v. *State of U.P.*, AIR 2005 SC 3611 : (2006) 1 SCC (Cri) 138 (145) : 2005 CrLJ 4384 : JT 2005 (8) SC 628 : 2005 (4) Crimes 84.

[12299] ● ***Accused killing 13 persons for a flimsy reason.***—The appellant in this case, along with the co-accused, killed as many as 13 persons for a flimsy reason. All the victims were closely related to the appellant and they were killed in the most dastardly manner. Most of the victims were sleeping when they were attacked. The appellant did not spare even the small kids with whom he had apparently no enmity. The appellant did not have even a grain of mercy or human kindness in his heart. Considering all these aspects, this is a fit case where the death penalty is to be commuted to life imprisonment. *Gurmeet Singh* v. *State of U.P.*, AIR 2005 SC 3611 : 2006 (1) SCC (Cri) 138 (143) : 2005 CrLJ 4384 : JT 2005 (8) SC 628 : 2005 (4) Crimes 84.

[12300] ● ***Balance-sheet of aggravating and mitigating circumstances has to be drawn before awarding extreme penalty.***—While deciding the question as to whether the extreme penalty of death sentence is to be awarded, a balance-sheet of aggravating and mitigating circumstances has to be drawn up. In the instant case the matter was remitted to High Court for consideration afresh on question of sentence. *Union of India* v. *Devendra Nath Rai*, (2006) 2 SCC 243 : (2006) 1 SCC (Cri) 487 (493) : 2006 CrLJ 967 : JT 2006 (1) SC 370 : 2006 (1) Supreme 295.

[12301] ● ***Awarding of death sentence—Principles.***—The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence, sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences. *Shivu* v. *R.G. High Court of Karnataka,* (2007) 4 SCC 713 : 2007 (2) SCC (Cri) 686 : 2007 CrLJ 1806 (1812) : 2007 (2) Crimes 24 (SC).

[12302] ● ***Ordinarily death penalty not to be awarded if case is proved by circumstantial evidence.***—There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily death penalty would not be awarded. *Bishnu Prasad Sinha* v. *State of Assam*, AIR 2007 SC 848 : (2007) 11 SCC 467 : 2007 CrLJ 1145 (1155) : 2007 (1) Crimes 147.

[12303] ● ***Imposition of death sentence—Guidelines.***—In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; *e.g.* murder by hired assassin for money or reward or a cold-blooded murder for gains of a person *vis-a-vis* whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person *vis-a-vis* whom the murderer is in a dominating position or a public figure generally loved and respected by the community. *Bablu* v. *State of Rajasthan*, AIR 2007 SC 697 : 2007 (2) SCC (Cri) 590 : 2007 CrLJ 1160 : 2007 (2) Crimes 62 (SC).

[12304] ● ***What constitutes rarest of rare case.***—Death sentence can be awarded only, if in the opinion of Court, the case answers the description of "rarest of rare cases". It is the fact situation of the case that determines as to whether the case falls within the category of "rarest of rare case". *Alok Nath Dutta* v. *State of West Bengal*, (2007) 12 SCC 230 : 2007 (1) Crimes 321 (SC) : 2007 (2) Supreme 664.

[12305] ● ***Imposition of death sentence in cases based on circumstantial evidence, if permissible.***—(Per S.B. SINHA, J): It has been a fundamental point in numerous studies in the field of Death Penalty jurisprudence that cases where the sole basis of conviction is circumstantial evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as full proof incidences and the fact that the same are circumstantial evidence based must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder.

(Per MARKANDEY KATJU, J.): No principle of law that only direct evidence is strong and reliable while circumstantial evidence is weak and unreliable. Circumstantial evidence can be as strong and reliable as direct evidence, but the only requirement is that the prosecution must establish beyond reasonable doubt that there is a chain of links which connects the accused with the crime.

Swami Sharaddananda v. *State of Karnataka*, AIR 2007 SC 2531 (4548) : (2007) 12 SCC 288 : JT 2007 (7) SC 403 : 2007 (7) SCR 616 (JUSTICE S.B. SINHA).

[12306] ● ***Death penalty—If can be abolished.***—In India the death penalty cannot be abolished by a judicial verdict as death sentence is contemplated by the Constitution and the I.P.C. Thus Article 72(1)(c) of the Constitution specifically mentions that the President of India has the power to grant pardons, reprieves or suspension of any death sentence. Similarly Article 72(3) also contemplates the power in the Governor of the State to suspend, remit or commute a death sentence. Hence if we hold that the Courts have no power to impose a death sentence we will really be amending the Constitution by a judicial verdict. Again, if we hold that the Courts have no power to impose death sentence merely because the death sentence has been abolished is some foreign countries in Europe or because there is a demand in the international fora that death sentence should be abolished, we will be really amending the Constitution by a judicial verdict. In my opinion this Court has no power to amend the Constitution by a judicial verdict. The Constitution can only be amended by Parliament in the manner prescribed by Article 368 of the Constitution. This Court cannot arrogate to itself the power of Parliament under the Constitution and must maintain self-restraint. Moreover, what has happened in foreign countries cannot be automatically applied to our country where the situation is different.

No doubt Parliament can abolish the death sentence by deleting it as one of the punishments prescribed in the I.P.C. or other statutes, but this Court cannot do so. The Court cannot legislate or amend the law. There is broad separation of powers under the Constitution and this Court must not ordinarily encroach into the legislative or executive domain as held by us in *Indian Drugs & Pharmaceuticals Ltd.* v. *The workman of Indian Drugs & Pharmaceuticals Ltd.*, 2007 (1) SCC 408. *Swamy Sharaddanandea* v. *State of Karnataka*, AIR 2007 SC 2531 : (2007) 12 SCC 288 : 2007 (7) SCR 616 : JT 2007 (7) SC 403.

[12307] ● ***Long interval of time between commission of offence and final conviction.***—It is well known that now-a-days a long interval of time frequently occurs between the commission of the offence and the final conviction by this Court (because of the delays in the trial, appeals, etc.), and hence if we lay down any absolute principle of law that merely because of this long interval death penalty cannot be imposed then in all such cases merely because of lapse of time death penalty cannot be imposed even though the murder was cold blooded, diabolical and heinous. This again would be amending the Constitution by a judicial verdict. Moreover this would give encouragement to the accused and their lawyers to delay proceedings in Court (by unnecessary adjournments, interlocutory applications, etc.) to avoid the death penalty. I, therefore, cannot agree with the view that merely because a long lapse of time has occurred between the commission of the offence and the final decision of this Court the death penalty cannot be imposed. *Swamy Sharaddanandea* v. *State of Karnataka*, AIR 2007 SC 2531 : (2007) 12 SCC 288 : 2007 (7) SCR 616 : JT 2007 (7) SC 403.

[12308-09] ● ***Death sentence.***—The instant case is one wherein accused Sonia, along with accused Sanjiv [her husband] has not only put an end to the lives of her step brother and his whole family, which included three tiny tots of 45 days, 2-1/2 years and 4 years, but also her own father, mother and sister in a very diabolic manner so as to deprive her father from giving the property to her step brother and his family. The fact that murders in question were committed in such a diabolic manner while the victims were sleeping, without any provocation whatsoever from the victims' side indicates the cold-blooded and premeditated approach of the accused to cause death of the victims. The brutality of the act is amplified by the grotesque and revolting manner in which the helpless victims have been murdered which is indicative of the fact that the act was diabolic of most superlative degree in conception and cruel in execution and that both the accused persons are not possessed of the basic humanness and completely lack the psyche or mind set which can be amenable for any reformation. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so. In view of these facts we are of the view that there would be failure of justice in case death sentence is not awarded in the present case as the same undoubtedly falls within the category of rarest of rare cases and the High Court was not justified in commuting death sentence into life imprisonment. *Ram Singh* v. *Sonia*, AIR 2007 SC 1218 : 2007 (2) SCC (Cri) 1 : 2007 CrLJ 1642 (1660, 1661) : 2007 (2) Crimes 1 (SC).

[12310] ● ***Inspection of death sentence—Principles.***—When the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retai ning death penalty, the same can be awarded. It was observed:

The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; *e.g.* murder by hired assassin for money or reward; or cold-blooded murder for gains of a person *vis-s-vis* whom the murdered is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community, *etc.* is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remain for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person *vis-a-vis* whom the murderer is in a dominating position, or a public figure generally loved and respected by the community. *Shivaji v. State of Maharashtra,* AIR 2009 SC 56 ; (2008) 15 SCC 269 : JT 2008 (9) 528 : 2008 (6) Supreme 541 : 2008 (4) Crimes 102 (SC).

[12311] ● *Deep-rooted personal rivalry leading murder.*—An organised murders of innocent people call for death penalty. But where a murder was committed due to deep-rooted mutual personal rivalry, it was held that death sentence was not called for. *Shiwaji* v. *State of Maharashtra*, AIR 2009 SC 56 : (2008) 15 SCC 269 : 2008 (4) Crimes 102 (SC) : JT 2008 (9) SC 528.

[12312] ● *Death sentence in cases based on circumstantial evidence.*—The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact in most of the cases where death sentence are awarded for rape and murder and the like, there is practically no scope for having an eye-witness. They are not committed in the public view. But very nature of things in such cases, the available evidence is circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect. The plea of learned Amicus Curiae that the conviction is based on circumstantial evidence and, therefore, the death sentence should not be awarded is clearly unsustainable.

The case at hand falls in the rarest of rare category. The circumstances highlighted above, establish the depraved acts of the accused, and they call for only one sentence, that is death sentence. The circumstances if the case establish the prosecution case and call for one death-sentence. *Shivaji* v. *State of Maharashtra*, AIR 2009 SC 56 ; (2008) 15 SCC 269 : 2008 (4) Crimes 102 (SC) : JT 2008 (9) SC 528.

[12313] ● *Commission of murder due to deep-seated rivalry.*—In operating the sentencing system, the law should adopt the corrective machinery or the deterrence based or factual matrix. By deft modulation the sentencing process should be stern where it should be, and tampered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter out the area of consideration. For instance, a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organized crime or mass murders of innocent people would call for imposition of death sentence. *State of Madhya Pradesh* v. *Sheikh Shahid*, AIR 2009 SC 2951 (2953) : (2009) 12 SCC 715 : JT 2009 (8) SC 277. **TO THE SAME EFFECT** : (1) *State of Madhya Pradesh* v. *Basadi*, AIR 2009 SC 3081 : (2009) 12 SCC 318 : 2009 CrLJ 4234 : 2009 (2) Crimes 273 (SC). (2) *Ankush Maruti Shinde* v. *State of Maharashtra*, AIR 2009 SC 2609 : (2009) 6 SCC 667 : JT 2009 (6) SC 358.

[12314] ● ***Imposition of death sentence when proper.***—On the intervening night of 6th and 7th January 2001 when the inmates of the house were asleep, six members of one family lost their lives in a matter of three houses. The accused, in search of greenespastures abroad for which purpose he needed money but was refused to be paid by the members of victims family. The prosecution alleged that all these murders were cold-blooded, planned and executed with precision and there was no trace of life left in them before he left the scene of occurrence. As there was no direct evidence, the prosecution relied on circumstances. The prosecution witness saw the accused at 5.45 am. on 7.1.2001 coming out from the house of the deceased. The presence of the accused persons on spot was supported by finger-prints as also by the presence of accused heirs recovered from the scene of occurrence. The evidence of the prosecution witnesses showed that the accused was a conscientious person who need the debts. The prosecution case also found support from judicial and extra-judicial confessions. The appeal was held to be without merit and was dismissed. *M.A. Antony* v. *State of Kerala*, AIR 2009 SC 2549 : (2009) 6 SCC 220 : JT 2009 (7) SC 372.

[12315] ● ***Imposition of death sentence when permissible.***—The choice of the death sentence has to be made only in the rarest of the rare cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society and; where the crime is committed in an organized manner and is gruesome, cold-blooded, heinous and atrocious, where innocent and unarmed persons are attacked and murdered without any provocation. *State of Punjab* v. *Manjit Singh*, AIR 2009 SC 2888 : (2009) 14 SCC 31 : 2009 (9) SCR 864 : JT 2009 (8) 482 : 2009 (8) Scale 622.

[12316] ● ***Death sentence altered to life imprisonment.***—It is no doubt true that both the respondents behaved in a most cruel manner, killed four persons while they were asleep. Three, out of the four deceased persons, were murdered within the precincts of a Gurdwara. But, there are certain mitigating circumstances in the case which cannot be lost sight of. Both the respondents, as is disclosed from the records, had illicit relationship with the third accused namely Bhinder Kaur and when she narrated her woes and the harassment, both the accused persons, as it appears from the record, lost their balance and acted in a cruel manner by entering into the house of Sewa Singh-deceased in the dead night and killing Sewa Singh in the house and other three sons in the Gurdwara. Thereafter, they also gave threat to everybody outside the house by stating that they have killed those persons and, therefore, no one should dare to come near them. This behaviour on the part of the accused-respondents would show that they acted in the manner being driven more by infatuation and also being devoid of their sense on coming to know about the ill treatment meted out to Bhinder Kaur. Though the act of the accused is a gruesome one but it was a result of human mind going astray. No doubt, they acted in a ghastly manner for which, in our considered view, they have been adequately punished. The High Court has given its reasons for not awarding the death sentence and also relied upon a Supreme Court decision for the purpose.

In view of the aforesaid discussion, keeping in view entire facts and circumstances of the case, the reasons given by the High Court for altering and converting capital sentence to a sentence of life are found to be cogent and reasonable. We do not intend to interfere with the said judgment and order passed by the High Court. Therefore, the life sentence awarded to all the three accused persons by the High Court stands upheld. *State of Punjab* v. *Manjit Singh*, AIR 2009 SC 2888 : (2009) 14 SCC 31 : 2009 (9) SCR 864.

[12317] ● ***Imposition of death sentence—When proper.***—"The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have out-weighted the mitigating circumstances in the cases of accused persons 1, 2 & 4; but held that in the case of others it was to be altered to life sentence. The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenseless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged in the open field, gang raped and done to death. There can be no doubt that the case at hand falls under the rarest of rare category. There was no reason to adopt a different yardstick for A2, A3 and A5. In fact, A3 was the main person. He assaulted PW-1 and took the money from the deceased.

Above being the position, the appeal filed by the accused persons deserves dismissal, which we direct and the State's appeal deserves to be allowed. A2, A3 and A5 are also awarded death sentence. In essence all the six accused persons deserve death sentence." *Ankush Maruti Shinde* v. *State of Maharashtra*, AIR 2009 SC 2609 : (2009 6 SCC 667 : 2009 (7) SCR 182 : JT 2009 (6) 358.

[12318] ● ***Death sentence—Requirements.***— For a case to be regarded in the rarest of rare category, fact situation has to be exceptional like after committing one offence another offence is committed so as to cover up the first offence. *State of Punjab* v. *Manjit Singh*, AIR 2009 SC 2888 (2890) : (2009) 14 SCC 31 : 2009 (9) SCR 864 : JT 2009 (8) SC 482.

[12319] ● ***Death sentence, when proper.***— Murder of six members of a family including helpless women and children having been committed in a brutal, diabolic and bristly manner and the crime being one which is enormous in proportion which shocks the conscious of law, the death sentence as awarded in respect of accused Sattan and Guddu was the appropriate sentence and the High Court ought not to have altered it. *State of Uttar Pradesh* v. *Sattan*, (2009) 4 SCC 736 : 2009 (2) Crimes 121 (SC) : JT 2009 (4) SC 347.

[12320] ● ***Death sentence held not justified.***— "The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They ;have no criminal history. All were unemployed and were searching for jobs.

"Further if age of the accused was a relevant factor for the High Court for not imposing death penalty on accused Nos. 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused Nos. 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent thereto.

"It must be noted that the discretion given to the Court in such cases assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of death penalty. One of the principles which we think is clear is that the case is such where two views ordinarily could be taken, imposition of death sentence would not be appropriate, but where there is no other option and it is shown that reformation is not possible, death sentence may be imposed.

"Section 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof.

"We do not think that the reasons assigned by the Courts below disclose any special reason to uphold the death penalty. The discretion granted to the Courts must be exercised very cautiously especially because of the irrevocable character to death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality. Discussed above warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the "*rarest of rare*" category.

"For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life." *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498 : 2009 (9) SCR 90 : JT 2009 (7) 248 : 2009 (7) Scale 341.

[12321] ● ***Death sentence based on circumstantial evidence.***—"We will assume that in Swamy Shraddananda (supra), this Court did not lay down a firm law that in a case involving circumstantial evidence, imposition of death penalty not would be permissible. But, even in relation thereto the question which would arise would be whether in arriving at a conclusion some surmises, some hypothesis would be necessary in regard to the manner in which the offence was committed as contra-distinguished from a case where the manner of occurrence had no role to play. Even where sentence of death is to be imposed on the basis of the circumstantial evidence, the circumstantial evidence must be such which leads to an exceptional case. We must, however, add that in a case of this nature where the entire prosecution case revolves round the statement of an approver or dependant upon the circumstantial evidence, the prudence doctrine should be invoked. For the aforementioned purpose at the stage of sentencing evaluation of evidence would not be permissible, the Courts not only have to solely depend upon the findings arrived at for the purpose of recording a judgment of conviction, but also consider the matter keeping in view of evidences which have been brought on record on behalf of the parties and to particular the accused for imposition of a lesser punishment. A statement of approver in regard to the manner in which crime has been committed *vis-a-vis* the role played by the accused on the one hand, and that of the approver, on the other, must be tested on the touchstone of the prudence doctrine. *Santosh Kumar Satishbushan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498 : 2009 (9) SCR 90 : JT 2009 (7) 248.

[12322] ● ***Death sentence—Recording of special reasons and pre sentence hearing.***—Under Sections 235(2) and 354(3) of the Criminal Procedure Code, there is a mandate as to a full fledged bifurcated hearing and recording of "special reasons" if the Court inclines to award death penalty. In the specific backdrop of sentencing in capital punishment and that the matter attracts constitutional prescription in full force, it is incumbent on the sentencing Court to oversee comprehensive compliance to both the provisions. A scrupulous compliance of both provisions is necessary such that an informed selection of sentence could be based on the information collected and collated at this stage. *Santosh Kumar Satishbhusan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498 : 2009 (9) SCR 90 : JT 2009 (7) 248.

[12323] ● ***Doctrine of rehabilitation to be kept in mind while imposing punishment.***—Rarest of rare dictum places an extraordinary burden on the Court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the rarest of rare dictum. The background analysis leading to the conclusion that the case belongs to rarest of rare category must confirm to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception.

Whether primacy should be accorded to aggravating circumstances or mitigating circumstances, is not the question. Court is duty bound by virtue of Bachan Singh (supra) to equally consider both and then to arrive at a conclusion as to respective weights to be accorded. We are also bound by the spirit of Article 14 and Article 21 which forces us to adopt a principled approach to sentencing. This overarching policy flowing from Bachan Singh (supra) applies to heinous crimes as much as it applies to relatively less brutal murders.

Principled application of rarest of rare dictum does not come in the way of individualized sentencing. With necessary room for sentencing, consistency has to be achieved in the manner in which rarest of rare dictum has to be applied by Courts.

While imposing any sentence on the accused the Court must also keep in mind the doctrine of rehabiliation. This, considering Section 354(3) of the Code, is especially so in the cases where the Court is to determine whether the case at hand fails within the rarest of rare case. *Santosh Kumar Satishbhusan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498 : 2009 (9) SCR 90 : JT 2009 (7) 248.

[12324] ● ***Consideration for selection of penalty.***—Selection of penalty must be not require a judge to reflect on his personal perception of crime. *Santosh Kumar Satishbhusan Bariyar* v. *State of Maharashtra*, (2009) 6 SCC 498 : 2009 (9) SCR 90.

[12325] ● ***Death sentence—Relevant factors.***—For imposition of death sentence, mere number of persons killed or the nature of crime is not the only circumstance justifying the death sentence, after factors such as background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, AIR 2010 SC 361 : (2010) 1 SCC 775 : 2010 (1) Crimes 3 (SC) : JT 2009 (5) SC 1.

[12326] ● ***Proceedings for confirmation of death sentence.***—The proceeding before the High Court are in the nature of an extended trial. The conformational proceedings are always the original proceedings. Merely because no question was asked to the doctor who recorded the dying declaration, the document could not have been held back and an opportunity was bound to be given by getting the document proved, if necessary. Fairness of the trial is the basic requirement in criminal law. The Public Prosecutor ought not, to have opposed the production of the document. *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, AIR 2010 SC 361 : (2010) 1 SCC 775 : 2010 CrLJ 905 (915) : (2010) 1 Crimes 3.

[12327] ● ***Murder—Death sentence.***—There is no manner of doubt that killing six persons and wiping almost the whole family on flimsy ground of honour serving the family would fall within the rarest of rare case. However, considering the fact that the incident had roughly taken place before 20 years and the High Court had acquitted the respondents the Hon'ble Supreme Court reduced the capital sentence to rigorous imprisonment for life with fine of Rs. 25,000/-. *State of U.P.* v. *Krishna Master*, AIR 2010 SC 3071 : 2010 CrLJ 3889 (3905).

[12328] ● ***Number of persons killed—Not by itself a circumstance justifying death sentence.***—Mere number of persons killed is not by itself a circumstance justifying the death sentence. *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, AIR 2010 SC 361 : (2010) 1 SCC 775 : 2010 CrLJ 905 (915) : (2010) 1 Crimes 3.

[12329] ● ***Death sentence—Factors to be considered.***—In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, AIR 2010 SC 361 : (2010) 1 SCC 775 : 2010 CrLJ 905 (915) : (2010) 1 Crimes 3.

[12330] ● ***Multiple murders arising out of inter-caste marriage—Sentence.***—Sister of accused No. 1, Sushma, fell in love with deceased who used to live in the neighbourhood of their residential house. The deceased being a Keralite and belonging in 'Ehava Caste", the marriage was not approved by the family of Sushma, since Sushma belonged to a Brahmin family from the State of U.P. Despite extreme opposition to marriage, both married before the Registrar of marriage. Dilip accused No. 1 was a young person not having crossed his 25 years of life and not having any criminal antecedents. If he became the victim of his wrong but genuine caste considerations, it would not justify the death sentence. The murders was the outcome of social issue like a marriage with a person of so-called lower caste. No doubt, the murder was brutal. However, this was not a diabolic murder nor had the murder acted in depravity of their minds by disfiguring the bodies. True is it that the two ladies who were assaulted were helpless and so were Krishnan and Prabhu. But when we weigh all the circumstances, particularly about the mindset of accused No. 1, the cruel acts on the part of the accused would not justify the death sentence. Accused No. 2 had not assaulted Krishnan or Prabhu to begin with, who has assaulted Prabhu and Abhayraj is still not clear, as it could also be that in the assaults leading role could have been then by the unknown accused. Accused No. 3 had joined Accused No. 1 only he was residing in the same house. Accused No. 3 had played less role. In that view the accused would be liable to life imprisonment. *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, AIR 2010 SC 361 : (2010) 1 SCC 775 : 2010 CrLJ 905 (919, 920) : (2010) 1 Crimes 3.

[12331] ● ***Sentence—Death penalty substituted by life imprisonment.***—In this case, the aggravating circumstances against the accused showed that it was a cold blooded murder of five persons including one woman of the middle age, the unfortunate victims did not provoke or resist. The murders of five innocent persons were committed for ransom which was executed despite the fact that the poor villagers were unable to pay the ransom as demanded, the accused were fully aware of the inability and poverty of the victims. In this case, one of the convicts was around 65 years old. Further the convicts belonged to an extremely poor background and had committed the heinous crimes for want of money. It may not be misplaced to note that criminal who commits crimes due to his economic backwardness is most likely to reform. Taking into account all the above aggravating and mitigating circumstances the death penalty was substituted by life imprisonment. *Mulla* v. *State of U.P.*, AIR 2010 SC 942 : (2010) 3 SCC 508 : 2010 CrLJ 1440 (1456, 1457, 1459) : (2010) 1 Crimes 157.

[12332] ● ***Death sentence—Guidelines for imposition of.***—(a) The extreme penalty of death may be inflicted in gravest cases of extreme culpability; (b) While imposing death sentence the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime; (c) Death sentence be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime; and (d) Extreme penalty can be imposed after striking the balance between aggravating and mitigating circumstances found in the case.

Aggravating circumstances include : (a) If the murder has been committed after previous planning and involves extreme brutality; or (b) if the murder involves exceptional depravity.

Mitigating circumstances include : (a) That the offence was committed under the influence of extreme mental or emotional disturbance; (b) The age of the accused. If the accused is young or old, he shall not be sentenced to death; (c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society; (d) The probability that the accused can be reformed and rehabilitated. The

State shall by evidence prove that the accused does not satisfy the conditions (c) and (d) above; (e) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence; (f) That the accused acted under the duress or domination of another person; and (g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct. *Muniappan* v. *State of Tamil Nadu*, AIR 2010 SC 3718 : (2010) 7 SCC 567 : JT 2010 (9) 95 : 2010 (8) Scale 637.

[12333] ● ***Murder committed by putting house on fire—Death sentence awarded.***—In the instant case the murder was committed in a cruel, grotesque and diabolical manner. When all the members of the family were having their food, the accused poured petrol in the room and set it to fire and went to the extent of closing the door. Everybody in that room was burnt with the exception of Balwant Singh, who somehow, managed to open the door and come out. Even he was not spared and almost beheaded by the accused. It was clear that the accused had done this with pre-meditated and cold-blooded mind, as he had taken the trouble of carrying petrol to his own cousin's house. As if all this was not sufficient, he was also carrying a sword, and probably prepared himself to fire on the complainant party, as a pistol with two bullets in it was also found on the spot. The accused shown extreme depravity of mind in causing a sword blow on the neck of Balwant Singh, who himself was burnt and was trying to escape. A murder by burning, by itself, would be a very cruel act. The agony caused to the dying witnesses because of their burn injuries would be enormous. Again, when it is seen that there was no immediate provocation to the accused and all this only was on account of the enmity going on in respect of the family lands, the enormousness of the crime is increased by many folds.

Out of the five persons who lost their life, Kamla was barely 16 years old while Prem Singh was 19 years old only. Their life was nipped in bud. Both the ladies who lost their life, as also the other three persons who lost their life were without any arms and were helpless. They could not have even saved themselves and did succumb to the burn injuries. The balance sheet of the aggravating circumstances thus exceeds the mitigating circumstances. In fact, there is no mitigating circumstance in this case. Insofar as the other circumstance of the accused remaining under the shadow of death sentence right from 2004 is concerned, that circumstance, by itself, is sufficient to mitigate his horrible crime.

Considering the overall circumstances, we are of the opinion that the death sentence was rightly awarded by the Trial Court and was rightly confirmed by the High Court. We find no reasons to interfere in this appeal. The appeal is dismissed. *Sunder Singh* v. *State of Uttaranchal*, (2010) 10 SCC 611 : JT 2010 (9) 632 : 2010 (9) Scale 571 : 2010 (4) Crimes 250 (SC).

[12334] ● ***Rarest of rare cases—How to evaluate.***—While evaluating the category of rarest of the rare, must give the facts of the particular case, the predominant consideration. *Vikram Singh* v. *State of Punjab*, AIR 2010 SC 1007 : 2010 (3) SCC 56.

[12335] ● ***Accused going to extent of sprinkling petrol in bus full of girls and setting it on fire—Death sentence awarded.***—In the instant case the murders involved exceptional depravity on the part of Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A. 3) and C. Muniappan (A. 4). These were the murders of helpless, innocent, unarmed, young girl students in a totally unprovoked situation. No mitigating circumstances could be pointed to us, which would convince us to impose a lesser sentence on them. Their activities were not only barbaric but inhuman of the highest degree. Thus, the manner of the commission of the offence in the present case is extremely brutal, diabolical, grotesque and cruel. It is shocking to the collective conscience of society. We do not see any cogent reason to interfere with the punishment of death sentence awarded to Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A. 3) and C. Muniappan (A. 4) by the Courts below. *C. Muniappan* v. *State of Tamil Nadu*, AIR 2010 SC 3718 : (2010) 9 SCC 567 : JT 2010 (9) 95 : 2010 (8) Scale 637.

[12336] ● ***Relevant consideration for imposition of death sentence.***—Circumstances under which murders take place also differ from case to case and there cannot be a straitjacket formula for deciding upon circumstances under which death penalty must be awarded. In such matters, it is not only a nature of crime, but the background of criminal, his psychology, his social conditions, his mindset for committing offence and effect of imposing alternative punishment on the society are also relevant factors. *C. Muniappan* v. *State of Tamil Nadu*, AIR 2010 SC 3718 : (2010) 9 SC 567 : JT 2010 (9) SC 95.

DEATH OF COMPLAINANT

[12337] ● ***Death of Complainant—Case does not abate.***—On the death of complainant, the case did not abate. It was open to the sons of the complainant to apply for continuation of proceedings against the accused person. By granting such prayer, no illegality has been committed by the Courts. *Rashida Kamaluddin Syed* v. *Shaikh Saheblal Marden*, (2007) 3 SCC 548 : 2007 (2) SCC (Cri) 63 : 2007 CrLJ 2306 (2311) : 2007 (2) Crimes 407, (*Balasaheb K. Thackery* v. *Venkat @ Babru*, (2006) 5 SCC 530 : (2006) 3 Crimes 52 : JT 2006 (7) SC 44; *Ashwin Nanabhai Vyas* v. *State of Maharashtra*, AIR 1967 SC 983 : 1967 (1) SCR 807 **referred to**).

DECENCY

[12338] ● ***Decency.***—The dictionary meaning of "Decency" is "correct and tasteful standards of behaviour as generally accepted; conformity with current standards of behaviour or property; avoidance of obscenity; and the requirements of correct behaviour". (*See the Oxford Encyclopedia English Dictionary*); "Conformity to the prevailing standards of propriety, morality, modesty, *etc*: and the quality of being decent". *Colling English Dictionary; Ramesh Yeshwant Prabhoo* v. *Prabhaker K. Kunte*, AIR 1996 SC 1113 : (1996) 1 SCC 130 at 152.

[12339] ● ***"Decency"—Meaning of.***—The ordinary dictionary meaning of "Decency" indicates that the action must be in conformity with the current standard of behaviour or property, *etc*. In a secular polity, the requirement of correct behaviour or propriety is that the appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the house. *R.Y. Prabhoo* v. *P.K. Kunte*, AIR 1996 SC 1113 (1126) : (1996) 1 SCC 130.

DECENCY OR MORALITY

[12340] ● ***Decency or morality.***—In view of the expression in the interest of "and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words "Decency or morality" do not require a narrow or pedantic meaning to be given to these words. *Ramesh Yashwant Prabhoo* v. *Prabhaker K. Kunte,* AIR 1996 SC 1113 : (1996) 1 SCC 130 at (152).

DECIDE

[12341] ● ***"Decide" in Rule 30(8), Defence of India Rules.***—The use of the word "decide" in Rule 30(8) of the Defence of India Rules does not compel a judicial approach. The mere fact that an executive authority has to decide something does not make the decision judicial. *Prven Dutta* v. *Chief Commissioner of Tripura*, AIR 1964 SC 596 : 1965 (1) CrLJ 501.

DECISION

[12342] ● ***Decision.***—According to dictionary meaning "to decide" means settle (question, issue, dispute) by giving victory to one side; give judgment (between for, in favour of, against); bring, come to a resolution" and "decision" means "settlement of question *etc*. Conclusion, formal Judgment, making up one's mind resolve, resoluteness, decided character". *Province of Bombay* v. *Khushal'das S. Advani*, AIR 1950 SC 222 : 1950 SCR 621 (642).

[12343] ● ***Judgment not to be purely mechanical.***—A judgment should not be purely mechanical. It must show that the Court has applied its mind to all the facts and circumstances of the case from all aspects. It is not enough to make copious quotations from the evidence on record without giving reasons to show why the witness was believed or disbelieved. In other words, the judgment must first give a summary of the evidence of each material witness and then give a proper appraisal of the evidence so as to indicate the reasons why the witness was accepted or rejected. *Aftab Ahmad Khan* v. *State of Hyderabad*, AIR 1954 SC 436 : 1954 CrLJ 1155 : 1954 SCA 672 : 1954 SCJ 655 : 1955 SCR 588 : 1954 (2) MLJ 338 : 1954 MWN 743 : 1954 AWR (Supp) 69.

[12344] ● ***Decisions of English Court merely of persuasive authority.***—Decisions of the English Courts are merely of persuasive authority. Even where a later decision of an English Court is at variance with a decision of the Supreme Court, that cannot by itself justify an application to the Court to reconsider its earlier decision on a question of law. *Manipur Administration, Manipur* v. *Thokchom Bira Singh*, AIR 1965 SC 87 : 1965 (1) CrLJ 120 : 1965 SCD 8 : (1965) 1 SCJ 451 : (1964) 7 SCR 123 : 1965 ACrR 250 : 1965 MLJ (Cri) 233 : 1965 AWR (HC) 358 : (1965) 1 ALT 96.

[12345] ● ***Distinction between law and canon of construction.***—There is nothing in our Constitution which can prevent Supreme Court from departing from its previous decision if it is satisfied of its error and its baneful effect on general interests of the public. While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviations will retard its growth. Decision of the Court, based on a concession made by parties, cannot be given the same value as one given upon a careful consideration of pros and cons of the question raised. The rule of construction that the King is not bound by a statute unless he is expressly named or brought in by necessary implication, which was accepted by the Privy Council in interpreting statutes *vis-à-vis* the Crown is inconsistent with and incongruous in the present set up. We have no Crown. It is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination. There is no justification to accept the English canon of construction, for it brings about diverse results and conflicting decisions. The said canon of construction was not 'the law in force' within the meaning of Article 372 of the Constitution, and should not be applied for construing statutes in India. There is an essential distinction between a law and canon of construction. *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Corporation of Calcutta,* AIR 1967 SC 997 : 1967 CrLJ 950 : (1967) 1 SCA 508 : (1967) 2 SCR 170 : (1967) 1 SCWR 745.

[12346] ● ***Declaration of emergency.***—Article 352(1) requires only a declaration of emergency threatening the security of India by one of the causes mentioned. The words "to that effect" can have no other meaning. The power to make the declaration can no doubt be exercised only when the President is satisfied about the emergency, but we do not see that the Article requires the condition precedent for the exercise of the power, that is, the President's satisfaction to be stated in the declaration.

Article 352 by clause (2) provides that a Proclamation issued under clause (1) may be revoked by a subsequent proclamation and shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolution of both Houses of Parliament. This clause also states that the Proclamation shall be laid before each House of Parliament. It has not been stated that the Houses of Parliament did not approve to proclamation within the period of two months. It would appear, therefore, that the only way a Proclamation ceases to have effect is by one of the events mentioned in this clause. None of this has happened. Nothing contained in an address by the President to the House of the Parliament can operate to terminate the Proclamation. *P.L. Lakhanpal* v. *Union of India*, AIR 1967 SC 243 : 1967 CrLJ 282 : (1967) 2 SCJ 105.

[12347] ● ***Essence of decision is its ratio and not every observation found therein.***—What is the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. *State of Orissa* v. *Sudhansu Sekhar Misra*, AIR 1968 SC 647 : (1968) 2 SCJ 236.

[12348] ● ***Expression "decision not according to law"—Wider ambit than expression—Decision contrary to law.***—The expression "decision not according to law" is wider in ambit than the expression "decision contrary to law" the object of the latter is to see that there has been no miscarriage of justice and that the decision is according to law, and instances of it are in which the Court which made the order had no jurisdiction or in which the Court has based its decision on evidence which should not have been admitted or cases where the unsuccessful party has not been given a proper opportunity of being heard or the burden of proof has been placed on wrong shoulders. Wherever the unsuccessful party has not had a proper trial according to law, there the High Court can interfere. *Nalini Naicker* v. *Seth Manghraj*, AIR 1969 SC 1344 : (1969) 1 SCC 688 : (1969) 2 SCJ 831.

[12349] ● ***Order passed in application under Section 488, CrPC summary order.***—The order passed in an application filed under Section 488, CrPC is summary order which does not finally determine the rights and obligations of the parties thereto. It is an order made in a proceedings under a provision enacted with a view to provide a summary remedy for providing maintenance, and for preventing vagrancy. The decision of the Criminal Court that there was a marriage between Barbara and Sethurathinam and that it was a valid marriage will not operate as decisive in any civil proceeding between the parties for determining those questions. The order of the Criminal Court is not conclusive between the parties. The Civil Court in hearing the proceeding initiated by Sethurathinam will decide it on the evidence which may be produced before the Court uninfluenced by the decision of High Court, as to factum of the ceremony of marriage or as to alleged conversion of Barbara to Hinduism before the marriage or as to the validity of a marriage between a Hindu male and Christen female. *Sethurathinam Pillai, S.* v. *Barbara*, (1971) 3 SCC 923 : 1972 SCC (Cri) 171 (172) : 1970 UJ (SC) 105.

[12350] ● ***Decision of criminal Court not res judicata.***—In civil proceedings, the decision of a Criminal Court is not *res judicata*. The decision of Criminal Court would not preclude him from raising plea that he was not negligent or that the accident was due to the contributory negligence of the defendant. *Adi Pherozshah Ghandhi* v. *H.M. Serrvai, Advocate General of Maharashtra*, AIR 1971 SC 385 : (1970) 2 SCC 484 : (1971) 1 SCR 863.

[12351] ● ***Two out of six judges making observation not regarded as laying down law.****—Articles 141 & 22(5) and Misa, Section 8(1).*—Where two of the six judges made certain observations, it cannot be regarded as laying down the Law on the point when a Bench of five Judges have held otherwise. *John Martin* v. *State of West Bengal*, AIR 1975 SC 775 : (1975) 3 SCC 836 : 1975 SCC (Crl) 255 : 1975 CrLJ 637.

[12352] ● ***Obiter dictum of Supreme Court be accepted as binding.***—Declaration of law by the Supreme Court even if it be only by the way has to be respected. Even *obiter dictum* of that Court should be accepted as binding. But it does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force, as on facts no two cases could be similar and its own decisions which were essentially on questions of fact could not be relied upon as precedents for decision of other cases.

The Sessions Court made a passing reference to an *obiter* observation of the Supreme Court in *Malwa Co-operative Milk Union Ltd., Indore* v. *Biharilal*, 1968 JabLJ 213. The reading of his judgment showed that the mention of the SC ruling was meant to fortify himself and not to apply the ratio of that case. In fact, HIDAYATULLAH, J. (as he then was) was not laying down the law that minimal deficiencies in the milk components justified acquittal in food adulteration cases. In the course of his judgment, the learned Judge to drive home the point that the case itself was so marginal, referred to the microscopic difference from the said standard. To distort that passage, tear it out of context and devise a new defence out of it in respect of food adulteration cases, was to be grossly unjust to the judgment. The law of good adulteration as also the right approach to decisions of the Supreme Court were set out correctly in *State of Kerala* v. *Vasudevan Nair*, 1975 CrLJ 97 : 1975 FAC 8 (Ker), wherein such distortion of the passage in the judgment did not and could not pass muster and in fact such misuse of that ruling was repelled by the High Court. The Supreme Court dismissed the appeal as ill-advised. *Amritsar Municipality* v. *Hazara Singh*, AIR 1975 SC 1087 : (1975) 1 SCC 794 : 1975 SCC (Cri) 354 : 1975 CrLJ 928 : 1975 MLW (Cri) 76 : 1975 KLT 275.

[12353] ● ***Decision of co-ordinate Court.***—It is true that the decision is pending before this Court in appeal. That however cannot be sufficient reason for the learned Judge to ignore it and absence that it is unnecessary to keep back this matter tell the Supreme Court decides the matters. When there is a decision of a co-ordinate Court, it is open to the learned Judge to differ from it but in that case the only judicial alternative is to refer it to a larger bench and not to dispose of the appeal by taking a contrary view. Judicial discipline as well as decorum suggest that as the only course.

The pendency of the special leave petition in the Supreme Court against the first decision cannot be sufficient reason for the learned Judge to improve that and observe that it is unnecessary to keep back this matter. *Eknath Shankarrao Mukkawar* v. *State of Maharashtra*, AIR 1977 SC 1177 (1181, 1182) : (1977) 3 SCC 25 : 1977 CrLJ 964 : 1977 CrLR (SC) 352 : (1977) 3 SCR 513.

[12354] ● ***Judgment of Supreme Court proceeding on concession.***—Judgment of the Supreme Court proceeding on concession and not on any analysis or examination of the relevant provisions in no way helps as a precedent. *Lakshmi Shanker* v. *State (Delhi Administration)*, AIR 1979 SC 451 : (1979) 1 SCC 229 : 1979 SCC (Cri) 269 : 1979 CrLJ 207 : 1978 CrLR (SC) 541 : 1979 SCCrR 28 : (1979) 2 SCR 348 : 1979 UJ (SC) 63 : 1979 CrAppR (SC) 126.

[12355] ● ***When certain question neither raised nor argued.***—When a certain question is neither raised nor argued, a discussion by the Court after "pondering over the issue in depth" would not be a precedent binding on the Courts. *Sita Ram* v. *State of Uttar Pradesh,* AIR 1979 SC 745, is not an authority regarding the scope of Section 384, CrPC to summarily dismiss the appeal. *Rajpur Ruda Meha* v. *State of Gujarat*, AIR 1980 SC 1707 : (1980) 1 SCC 677 : 1980 SCC (Cri) 317 : 1980 CrLJ 1246 : 1980 CrLR (SC) 100 : (1980) 2 SCR 353 : 1980 CrAppR (SC) 57 : (1980) GujLR 411.

[12356] ● ***No warrant for High Court to reduce to husk decision of Supreme Court by its doctrine gloss.***—We need not labour the point because this Court has already interpreted Section 127(3)(b) in (*Bai Tahira* v. *Ali Hussain Fiddali Chotia* (1979) 2 SCC 316 : 1979 SCC (Cri) 473) and no Judge in India, except a larger Bench of the Supreme Court with out a departure from judicial discipline can whittle down, wish away or be unbound by the ratio thereof. The language is unmistakably the logic at play is irresistible the conclusion reached is inescapable, the application of the law as expounded there is an easy task. And yet, the Division Bench….. has by the fine art of skirting the real reasoning laid down " unlaw" in the face of the law in *Bai Tahira* which is hardly a severe and surely a mischief unintended by the Court may be, but embarrassing to the subordinate Judiciary. There is no warrant for the High Court to reduce to a husk a decision of this Court by its doctrine gloss. *Fuzleenbi* v. *K. Khader Vali*, AIR 1980 SC 1730 : (1980) 4 SCC 125 : 1980 SCC (Cri) 916 (920) : 1980 CrLJ 1249 : 1980 CrLR (SC) 524.

[12357] ● *Decision of Supreme Court declaratory of law.*—The decision of the Supreme Court are declaratory of the law. *Ganga Sugar Corporation Ltd.* v. *State of Uttar Pradesh*, AIR 1980 SC 286 : (1980) 1 SCC 223 : (1980) 1 SCR 769.

[12358] ● *Previous decision when ruled out by larger Bench.*—It is well settled that whenever a previous decision is overruled by a larger Bench, the previous decision is completely wiped out and Article 141 will have no application to the decision which has already been overruled, and the Court would have to decide the cases according to law laid down by the latest decision of this Court and not by the decision which has been expressly overruled. *Ramdas Bhikaji Chaudhari* v. *Sadanand*, AIR 1980 SC 126 : (1980) 1 SCC 550 : 1980 SCC (Cri) 268 (271) : 1980 CrLJ 111 : 1980 CrLR (SC) 41 : (1980) 1 SCR 849 : 1980 UJ (SC) 63.

[12359] ● *Earlier finding altering finality.*—An earlier finding which had attained finality is binding in the subsequent proceedings in the case. The question about the binding force of a finding at an earlier stage would depend on the question as to what the allegations were, what facts were required to be proved and what findings were arrived at. The question, thus, is not whether the ingredients of the two offences are the same but whether the facts alleged and required to be proved in the particular case to establish the offences are basically the same. *Amritlal Ratilal Mehta* v. *State of Gujarat*, AIR 1980 SC 301 : (1980) 1 SCC 121 : 1980 SCC (Cri) 81 (84) : 1980 CrLJ 214 : 1980 CrLR (SC) 48 : (1980) 2 SCR 72 : 1980 CrAppR (SC) 1 : 1980 UJ (SC) 79. TO THE SAME EFFECT : (1) *Bhagwat Ram* v. *State of Rajasthan*, (1972) 2 SCC 446; (2) *State of Rajasthan* v. *Tarachand Jain*, AIR 1973 SC 2131 : (1974) 3 SCC 72 : 1973 CrLJ 1396.

[12360] ● *Law laid down by Supreme Court binding on all.*—The law laid down by the Supreme Court is binding on all, notwithstanding the fact that it is against the State or a private party and that it is binding on even those who were not parties before the Court. A mere reading of Article 141 of the Constitution brings into sharp focus its expanse and its all pervasive nature. In cases like this where numerous petitions are disposed of by a common judgment and only one appeal is filed, the parties to the common judgment could very well have and should have intervened and could have requested the Court to hear them also. They cannot be heard to say that the decision was taken by the this Court behind their back or profess ignorance of the fact that an appeal had been filed by the State against the common judgment. We would like to observe that in the fitness of things, it would be desirable that the State Government also took out publication in such cases to alert parties bound by the Judgment, of the fact that an appeal has been preferred before this Court. *Shenoy and Co., Bangalore* v. *Commercial Tax-Officer, Circle II, Bangalore*, AIR 1985 SC 621 : (1985) 2 SCC 512.

[12361] ● *Sessions Judge over looking binding nature of Law declared by Supreme Court.*—The High Court failed to consider the matter in some detail especially when its attention was drawn to the decision of the Supreme Court instead of dismissing the revision *in limine*, since the order of the Sessions Judge referred to it. The observations of the Sessions Judge disclosed a confusion of thought about the effect of a decision rendered by the Supreme Court and a misreading of Article 141 of the Constitution of India. There was nothing like any prospective operation alone of the law laid down by the Supreme Court. The law laid down by it applied to all pending proceedings. The Sessions Judge overlooked the binding nature of the law declared by the Supreme Court, mandating under Article 141, every Court subordinate to the Supreme Court to accept it. The High Court could have, if it had examined the matter, corrected the error into which the Sessions Judge fell. The order of the High Court was set aside. *A.S. Gauraya* v. *S.N. Thakur*, AIR 1986 SC 1440 : (1986) 2 SCC 709 : 1986 SCC (Cri) 249 : 1986 CrLJ 1074.

[12362] ● *High Court to take words in Judgment in sense in which they were used.*—Under the *guise* of interpreting a Supreme Court Judgment in that case, the High Court virtually sat in appeal over the Judgment of this Court and modified it. The High Court must ought to have taken the words in that judgment in the sense in which they were and ought to have applied them to the facts before it, instead of trying to put its own words in the mouth of this Court. *G.K*

Dudani v. *S.D. Sharma*, AIR 1986 SC 1455 (1463, 1464) : 1986 (Supp) SCC 239.

[12363] ● *Law declared by Supreme Court.*—What the Judges of this Court expressly decide or what they must be considered to have decided by necessary implication by reference to the facts stated by the Judges themselves are what constitute precedents. We cannot traverse beyond the judgment ignoring what has been said in the judgment. When a question is answered "pressly or by necessary implication we cannot ignore the answer by referring to the decisions appealed against and holding that the real question was something else. *Gopal Upadhyaya* v. *Union of India*, AIR 1987 SC 413 : 1986 (Supp) 3 SCC 501 : (1987) 1 UJ (SC) 51.

[12364] ● *Bench of two judges not to disregard decision of three Judges.*—Judicial discipline requires that a Bench of two Judges should not disregard the decision of a Bench of three Judges; but if the Bench of two Judges is inclined to disagree with what has been said by the Bench of three Judges on the ground that it does not represent the correct law on the subject. The case would be referred to a larger Bench. *Ujagar Prints* v. *Union of India*, AIR 1987 SC 874 (876) : JT 1987 (2) SC 54 : 1986 (Supp) SCC 652 : (1987) 1 UJ (SC) 209.

[12365] ● *Law must be definite and certain.*—Law must be definite, and certain. If any of the features of the law can usefully be regarded as normative, it is such basic postulates as the requirement of consistency in judicial decision making. It is this requirement of consistency that gives to the law much of its rigour. At the same time, there is need for flexibility. Professor H.L.A. Hart regarded as one of the leading thinkers of our time observes in his influential book "The Concept of Law" depicting the difficult task of a Judge to strike a balance between certainty and flexibility:

"When there is obscurity in the language of a statute, it results in confusion and disorder. No doubt the Courts so frame their judgments as to give the impression that their decisions are the necessary consequence of predetermined rules. In very simple cases it may be so; but in the vast majority of cases that trouble the Courts, neither statute nor precedents in which the rules are legitimately contained allow of only one result. In most important cases there is always a choice. The Judge has to choose between alternative meanings to be given to the words of a statute or between alternative meanings to be given to the words of a statute or between rival interpretation of what a precedent amounts to. It is only the tradition that Judges "find" and do not "make" law that conceals this, and presents their decisions as if they were deductions smoothly made from clear pre-existing rules without intrusion of the Judge's choice" *Baliram Waman Hiray* (*Dr.*) v. *Mr. Justice B. Lentin*, AIR 1988 SC 2267 : (1988) 4 SCC 419 : 1988 SCC (Cri) 941 (965).

[12366] ● *Each Bench small or large exercises power vested in Court.*—Each Bench, whether small or large, exercises the powers vested in the Court and decisions rendered by the Benches irrespective of then size are considered as decisions of the Court. The practice has developed that a large Bench is entitled to overrule of a smaller Bench notwithstanding the fact that each of the decisions is that of the Court. That principle, however, would not apply in the present situation and since we are sitting as a Bench of Seven we are not entitled to reverse the decision of the Constitution Bench. Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without affecting the binding effect of the decision in the particular case." *A.R. Antulay* v. *R.S. Nayak*, AIR 1988 SC 1531 : (1988) 2 SCC 602 : 1988 SCC (Cri) 372 (438) : 1988 CrLR (SC) 366 : JT 1988 (2) SC 325.

[12367] ● *Precedent authority only.*—It is well settled that a precedent is an authority only for what it actually decides and not for what may remotely or even logically follows from it. *Goodyear India Ltd.* v. *State of Haryana*, AIR 1990 SC 781 (793, 794) : (1990) 2 SCC 71 : JT 1989 (4) SC 229.

[12368] ● *Decision on question not argued.*—A decision on a question which has not been argued cannot be created as precedent. *Goodyear India Ltd.* v. *State of Haryana*, AIR 1990 SC 781 (796) : (1990) 2 SCC 71 : JT 1989 (4) SC 229.

[12369] ● *Remission—Pardon etc.—Grant of—Framing of guidelines.*—No doubt in *Maru Ram case* (AIR 1980 SC 2147), the constitution Bench of the Supreme Court did recommend the framing of guidelines for the exercise of power under Articles 72 and 161 of the Constitution. But that was a mere recommendation and not a *ratio decidendi* having a binding effect on the Constitution Bench in *Kehar Singh's case* (AIR 1989 SC 653). Therefore, the observation made by the Constitution Bench in *Kehar Singh's case* does not upturn any ratio laid down in *Maru Ram's case*. Nor has the Bench in *Kehar Singh's case* said anything with regard to using the provisions of extant Re mission Rules as guidelines for the exercise of the clemency powers. *Ashok Kumar alias Golu* v. *Union of India*, AIR 1991 SC 1792 (1803, 1804) : (1991) 3 SCC 498 : 1991 CrLJ 2483.

[12370] ● *Decision not to mean conclusion.*— A "Decision" does not merely mean the "conclusion" it embraces within its fold the reasons which form the basis for arriving at the "conclusion". The judgment of the trial Court contains only "conclusion" and nothing more. The judgment of the trial Court cannot, therefore, be sustained. *Mukhtar Singh* v. *State of Punjab*, AIR 1995 SC 686 (690) : 1995 AIR SCW 467 : (1995) 1 SCC 760.

[12371] ● *Word decision in common parlance more or less natural expression.*—The word "decision" in common parlance is more or less a natural expression and it can be used with reference to purely executive acts as well as Judicial orders. The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test "is there any duty to decide judicially". *Mukhtar Singh* v. *State of Punjab*, AIR 1995 SC 686 (690) : 1995 AIR SCW 467 : (1995) 1 SCC 760.

DECISION OF HIGH COURT IN REVISION

[12372] ● *Decision of High Court in revision.*—The judgment of the High Court in revision is binding in the subsequent proceedings in the case. *State of Rajasthan* v. *Tarachand Jain*, AIR 1973 SC 2131 : 1973 SCC (Cri) 774 (781) : 1973 CrLJ 1396.

DECISION OF SUPREME COURT

[12373] ● *Decision of Supreme Court are binding.*—The decision of the Supreme Court laying down the position in law are laws binding on all irrespective of the fact whether one was party to that or not or any notice of those proceedings were served on him. *Star Diamond Co. India* v. *Union of India*, AIR 1987 SC 179 : (1986) 4 SCC 246 : 1986 SCC (Cri) 431.

DECOMPOSITION

[12374] ● *Medical officer finding marks of injuries—Cause of death—Decomposition.*— The very fact that Medical Officer found marks of injuries from which he could give a definite opinion about the cause of death shows that the decomposition was not so advanced as to deny identification. *Hardayal* v. *State of Uttar Pradesh*, AIR 1976 SC 2055 : (1976) 2 SCC 812 : 1976 SCC (Cri) 317 : 1976 CrLJ 1578.

[12375] ● *Decomposition.*—'Decomposition' is not something which always takes place suddenly or immediately. It is a process which, in some cases, may be slow and in some cases, quick. Decomposition cannot be noticed or ascertained by the Court when it inspects the part of the sample under sub-section (2-B) of Section 13 of the Prevention of Food Adulteration Act, 1954, to ascertain whether the mark and seal or fastening are intact and the signature or thumb-impression, as the case may be, not tampered with, before dispatching that part to the Central Food Laboratory. Even with the mark and seal intact, and the signature or thumb-impression, as the case may be, not tampered with, the sample might have already decomposed or decomposition might have already commenced. Whether a sample has decomposed or not can only be ascertained when the sealed container is opened in the Central Food Laboratory for the purpose of analysis. *Charanji Lal* v. *State of Punjab*, AIR 1984 SC 80 : (1984) 1 SCC 329 : 1984 CrLJ 15 : (1983) 2 Crimes 850.

DEEM/DEEMING PROVISION

[12376] ● *Proceeding before commission of Inquiry not judicial proceedings.*—The learned Advocate-General contends that use of the words "deemed to be " in Section 5(4) of commission of Enquiry Act, 1952 indicates that the proceedings before a commission of inquiry are not judicial proceedings, but by legal fiction they have to be regarded as judicial proceedings for the purposes of Sections 193 and 228, IPC. It is contended that the word "decreed" is however, sometimes used by the Legislature in order to remove any doubt in the matter. He drew our attention to the following observations of LORD RADCLIFFE in *St. Aubyn* v. *Attorney General*, 1952 AC 15.

[12377] ● *Deeming provision.*—"Deemed to be held" creates fiction and includes, co-sharers who may not be in actual possession have nontheless the title or a right in the property co-shared. *Kailash Rai* v. *Jai Jai Ram*, AIR 1973 SC 893 : (1973) 1 SCC 527 : (1973) 3 SCR 411.

[12378] ● *Deeming provision—Construction of.*—This Court while construing such deeming provision has adopted and applied in a number of cases the rule of construction expounded by Lord ASQUITH in *East End Dwellings Co. Ltd.* v.

Finsbury Borough Council 1952 AC 109 at p. 132 in the following words:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs". *State of Andhra Pradesh* v. *Vallabhapuram Ravi*, AIR 1985 SC 870 (875, 876) : (1984) 4 SCC 410 : 1984 SCC (Cri) 635 : 1984 CrLJ 1511 : 1984 CrLR (SC) 397 : (1984) 2 Crimes 552.

[12379] ● ***"Deemed"—Meaning of.***—LORD RADCHIFFE observed in *St. Aubyn* v. *Attorney General* 1952 AC 15: "The word "deemed" is used a great deal in modern legislation. Sometimes it is used to imposed for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense impossible". *Baliram Waman Hiray (Dr.)* v. *Mr. Justice B. Lentin*, AIR 1988 SC 2267 (2282) : (1988) 4 SCC 419 : 1988 SCC (Cri) 941 : 1988 CrLR (SC) 799 : JT 1988 (4) SC 265 : (1989) 3 Crimes 655.

[12380] ● ***Dowry Prohibition Act enacted to provide effective check to dowry deaths.***—The Dowry Prohibition Act, 1961 was enacted to provide an effective check to dowry deaths which were continuing dispute the then prevailing laws. Various amendments were brought in bringing more stringent provisions in the aforesaid 1961 Act in order to stem the onslaught on the life of a married woman. It is true as argued by the learned counsel for the appellant that in criminal jurisprudence benefit of doubt is extendable to the accused. But that benefit of doubt would arise in the context of the application of penal law, and in the facts and circumstances of a case. The concept of benefit of doubt has an important role to play but within the confines of the stringency of laws. Since the cause of death to a married woman was to occur not in normal circumstances but as a "dowry death", for which the evidence was not so easily available, as it is mostly confined to within four walls of a house, namely, husband's house, where all likely accused reside. Hence the aforesaid amendments brought in the concept of deemed "dowry death" by the husband or the relatives, as the case may be. This deeming clause has a role to play and cannot be taken lightly and ignored to shield an accused, otherwise the very purpose of the amendment will be lost. Of course, the prosecution has to prove the ultimate essential ingredients beyond all reasonable doubt after raising the initial presumption of "deemed dowry death" *Pawan Kumar* v. *State of Harayana*, AIR 1998 SC 958 (962, 963) : (1998) 3 SCC 309 : 1998 SCC (Cri) 740 : 1998 CrLJ 1144 : 1998 CrLR (SC) 216.

[12381] ● ***Category of officers while exercising powers under specific provisions become public servant—Legal fiction.***—A specific category of officers while exercising powers under specific sections have, by legal fiction, become "public servant" and it is only for the purposes of the Cooperative Societies Act. That by itself does not make those persons "public servants" under the Indian Penal Code, so as to be prosecuted for having committed the offence under the Penal Code. When a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that something, the Act of Legislature requires him to be so treated obviously for the purposes of the said Act and not otherwise. *State of Maharashtra* v. *Laljit Rajshi Shah*, AIR 2000 SC 937 : (2000) 2 SCC 699 : 2000 SCC (Cri) 533 : 2000 CrLJ 1494.

[12382] ● ***Dangerous person—Whether detenu, acted in manner prejudicial to maintenance of public interest.***—Under the explanation under Section 2(a)(iv) Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drugs Offenders Act, 1981 it is provided that public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely if any of the activities of any of the persons referred to in the clause directly or indirectly is causing or calculated to cause any harm, danger or alarm or a feeling of insecurity among the general public or any section thereof, or a grave or widespread danger to life or public health. The deeming clause in Explanation widens the scope of the provision in Section 2(a) of the aforesaid Act. It follows that if a person is found to be repeatedly engaged in such activities as mentioned in 2(b-1) which affect adversely or are likely to affect adversely the maintenance of public order, he can be detained as a dangerous person in exercise of the power under Section 3 of the Act. *Phulwari Jagdambaprasad Pathak* v. *R.H. Mendonca*, AIR 2000 SC 2527 : (2000) 6

SCC 751 : 2000 SCC (Cri) 1263 (1269) : 2000 CrLJ 3944 : 2000 CrLR (SC) 557.

[12383] ● ***Legal fiction.***—The legislative may sometimes create a claim of fictions by the same Act or by succeeding Acts. If the legislature is competent to enact a provision creating a legal fiction, there is no reason why it cannot create a chain of fictions of necessity arises. It is true that in interpreting a provision creating a legal fiction it is not open to the Court to import another fiction. *State of West Bengal* v. *Sadan K. Bormal*, AIR 2004 SC 3666 : 2004 (3) Crimes 161 : JT 2004 (2) Supp SC 367.

[12384] ● ***Deem.***—So called deemed surrender on another criminal case cannot be taken as starting point for counting 15 days police remand or 90 days or 60 days as the case may be under Section 167, CrPC. *State of West Bengal* v. *Dinesh Dalmia*, AIR 2007 SC 1801 : (2007) 5 SCC 773 : 2007 (3) SCC (Cri) 19 : 2007 CrLJ 2757 (2763).

[12385] ● ***"Deemed"—Meaning.***—"The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context. *Hindustan Co-op. Housing Building Society Ltd.* v. *Registrar, Co-operative Societies*, (2009) 14 SCC 302 : 2009 (2) SCR 331 : JT 2009 (2) 530 : 2009 (2) Scale 760.

DEFAMATION
(Ss. 499, 500, IPC)

[12386] ● ***Defamation.***—In a case an editor of a local Telegu Weekly Journal published an article describing a stationary Sub-Magistrate of the place as corrupt. When contempt of Court proceeding was drawn it was argued that since the editor is *prima facie* punishable for defamation under Section 500, IPC, the offence cannot in view of aforesaid provision then Section 2(3) Contempt of Courts Act, 1926 be taken cognizance of by the High Court. The provision aforesaid excludes the jurisdiction of High Court only in cases where the acts alleged to constitute contempt of a subordinate Court are punishable as contempt under specific provisions of the Indian Penal Code but not where these acts merely amount to offences of other descript for which punishment has been provided for in the Indian Penal Code, This would be clear from the language of the sub-section which uses the words "where such contempt is an offence and does not say "where the act alleged to constitute such contempt is an offence". It is argued that if such was the intention of the Legislature, it could have expressly said that the High Court's jurisdiction will be ousted only when the contempt is punishable as such under the Indian Penal Code. It seems that the reason for not using such language in the sub-section may be that the expression "Contempt of Court" has not been used as description of any offence in the Indian Penal Code, though certain acts which would be punishable as contempt of Court in England, are made offence under it. *Baithana Ram Krishna* v. *State of Madras*, AIR 1952 SC 149 : 1952 CrLJ 832 : 1952 SCJ 137.

[12387] ● ***Scope of—Section 195, CrPC, 1898.***—Section 195, CrPC requires that when a person gives to a public servant false information relating to an offence, or lodges with a public servant a false charge against any person as to the commission of an offence, or institutes in any Court proceedings against any person on a false charge, and thereby commits an offence under Section 182 or 211 of the Penal Code, no Court shall take cognizance of that offence except upon a complaint made by such public servant or Court. Section 195, CrPC thus prohibits the taking of cognizance, except upon the complaint made by the public servant or Court concerned, of offences arising from the making of false charges against an innocent person. It does not prohibit a Court from taking cognizance, on the complaint made by a private person, of any other offence disclosed in a false information given to the police under Section 154, CrPC or in a false complaint given to a Magistrate under Section 200, CrPC. Therefore, if a complaint lodged before a Court under Section 200, CrPC or a first information relating to an offence given to the police under Section 154, CrPC is not only false but also contains defamatory statements against any person, that person is entitled to prosecute the offender under Section 500 of the Penal Code, and Section 195, CrPC cannot be pleaded by the accused as a bar against such prosecution. *Bashir-ul-Huq* v. *State of W.B.*, AIR 1953 SC 293 : 1953 CrLJ 1232 : 1953 SCJ 405 : 1953 SCR 836 : 1953 SCA 1062 : (1953) 1 MLJ 775 : 1953 ALJ 362 : 1953 MWN 749.

[12388] ● ***Offence of defamation cognizance of—Taken on basis, of facts in complaint.***—The provisions of Section 198, CrPC are mandatory, and it means that cognizance of an offence of defamation, can be taken only on the basis of the facts stated in the complaint made by the person whose reputation has been harmed. Section 238(3), CrPC emphasizes this position by specifically stating that conviction for an offence referred to in Section 198 is not legal if no complaint has been made in respect of it. If the facts stated in the complaint are not deposed to by the complainant or his witnesses, the accused must be discharged, even though the evidence given discloses another but quite a new offence of defamation. In other words, when cognizance of an offence of defamation has been taken on a complaint setting out a particular set of facts, the charge framed must be confined to those facts only, and if those facts are not supported by evidence, the only course open to the Magistrate is to discharge the accused, leaving it to the complainant, if he so desires, to file a fresh complaint on the facts disclosed during the trial. If in such a case the Magistrate proceeds to frame a charge on the facts disclosed in evidence but as to which there was no complaint before him as required by Section 198, CrPC he acts without jurisdiction, and thereafter if he acquits the accused, even though he is of opinion that the accused had uttered the defamatory words with which he was charged, on the ground that Section 198 stood in the way of an order of conviction, his order of acquittal must be regarded as a nullity. In the present case, this was exactly what had happened. The aggrieved complainant had applied to the High Court in revision against the decision of the Magistrate, but the High Court dismissed the application. He appealed to this Court by special leave. The appeal was allowed, the order of acquittal made by the Magistrate was set aside, and the accused was discharged, leaving it to the appellant to file a fresh complaint, if he so desired, on the facts on which the charge had been framed in the trial Court. *Abdul Rehman Mahomed Yusuf* v. *Mahomed Haji Ahmad Agbotwala*, AIR 1960 SC 82 : 1960 CrLJ 1581 : 1960 SCJ 87 : (1960) 1 SCR 749 : 1960 NLJ 209 : 1960 MPLJ 513 : 1960 ACrR 76 : 26 CutLT 181 : 62 BomLR 143 : 1960 MLJ (Cri) 32.

[12389] ● ***Publication by member of question disallowed by Speaker of Legislation Assembly.***—The only question in the present appeal was whether a member of the Legislature could claim absolute privilege under Article 194 of the Constitution in respect of publication by him outside the House of Legislature of questions put by him inside the House which were disallowed by the Speaker, or whether he is liable to be prosecuted and convicted of the offence under Section 500, IPC like any other offender if such published matter is defamatory of any person. The legal position in England is that a member of the House of Commons is immune from prosecution in respect of speeches made by him in the House, but the immunity does not extend to publication of the same speech outside separately from the rest of the proceedings in the House, and if the speech contains matters which are defamatory of any person, the member is liable for defamation. The law in England in respect of the privileges and immunities of the members of the British Parliament is that there is no absolute privilege attaching to the publication of extracts from the proceedings of the House of Commons. So far as a member of the House of Commons is concerned, he has an absolute privilege in respect of what he has spoken within the four walls of the House, but there is only a qualified privilege even in respect of his own speech in the House, if he causes the same to be published in the public press. The publication of the proceedings of Parliament, which is not under the authority of the House, stands exactly on the same footing as publication of the proceedings in Courts of justice, and all the limitations placed on the one to prevent injustice to individuals necessarily attach to the other. So long as the legal position in India in this matter is not crystallised by law made by our Legislatures, the privileges, powers and immunity of the members of our Legislatures are the same as those of the members of the House of Commons as stated above, and no more. In the present case, in the exercise of his powers under Rules 28 and 29 of the Assembly Procedural Rules, the Speaker had disallowed certain questions asked by the appellant as they contained imputations of a personal character against an outsider. The appellant had got those questions published, and it was not his case that the publication was of the proceedings of the Legislature. That being so, there was no absolute privilege in his favour in respect of such publication and if the questions so published contained any defamatory imputations against the character of any person, a criminal prosecution for defamation under Section 500 of the Penal Code could lie against him in respect of such publication. *Jatish Chandra Ghosh (Dr.)* v. *Hari Sadhan Mukherjee,* AIR 1961 SC 613 : 1961 (1) CrLJ 743 : 1961 AWR (HC) 231.

[12390] ● ***Defamation—What is.***—Section 499 of the Penal Code contains a number of Exceptions which lay down what is not defamation. The Fourth Exception says that it is not defamation to publish a substantially true report of the proceedings of a Court of justice. But there is no Exception in Section 499 making a similar concession in respect of proceedings of a House of Legislature or Parliament. The question, therefore, has to be decided entirely on the basis of the privileges of the members of the Legislature as laid down in Article 194, which under clause (3) of that Article are the same as those of the members of the House of Commons in England, and no more. *Jatish Chandra Ghosh (Dr.)* v. *Hari Sadhan Mukherjee*, AIR 1961 SC 613 : 1961 (1) CrLJ 743 : 1961 AWR (HC) 231.

[12391] ● ***Section 499—Exception 8 and 9—Applicability.***—In the present case, the accused K who was a police officer and one Mst. R were neighbours. K addressed an application to the District Panchayat Officer in which he stated that R was a woman of loose character who was having illicit connection with goondas, who came at all hours of the night, and that her immoral activities reflected badly on the locality, and asked the Panchayat to take suitable action to get the house vacated by R and thus end the prostitution adda. The accused was convicted under Section 500, Penal Code, for having made a grossly defamatory statement and was sentenced to rigorous imprisonment for six months. The only question in this case is whether the case falls within Exception 8, or Exception 9 to Section 499. Exception 8 provides that it is not defamation to prefer in good faith an accusation against a person to anyone in lawful authority over that person with respect to the subject matter of the accusation. Exception 9 provides that it is not defamation to make an imputation on the character of another if it is made in good faith for the protection of the interest of the maker or for the public good. The District Panchayat Officer or the Panchayat had no such lawful authority over the woman defamed as would bring the communication within Exception 8. The Panchayats have jurisdiction only under the Punjab Gram Panchayat Act, 1952 and under Section 38 of that Act the criminal jurisdiction of the Panchayat is confined to the offences specified in Schedule I-A to the Act. Prostitution is not an offence under the Penal Code and the keeping of a disorderly or bawdy house is not an offence within Schedule 1A. Further, Section 42 of the Act provides that the Panchayat shall not take cognizance of any offence under the Penal Code in which the complainant or the accused is a public servant. So, even if the complaint be taken to be a complaint of a public nuisance, it was excluded from the jurisdiction of the Panchayat as the complainant was a public servant. Therefore, the defence based on Exception 8 must fail. The terms of Exception 9 also were not satisfied, even if good faith be taken to have been established. For the application of Exception 9 it is not enough that the accused makes the imputation in good faith to protect his own interest. It is further necessary that the person to whom the communication is made has an interest in protecting the person who makes the accusation. In other words, besides the *bona fides* of the person making the imputation, the person to whom the imputation is conveyed must have a common interest with the person making it which is served by the communication. The Exception can apply only when the accused has established such common interest in the subject-matter of the communication between himself and the person to whom the communication is made. The Panchayat or its officer had no such common interest in the communication made to it by the accused, and hence an essential condition of the application of Exception 9 was absent. That being so, Exception 9 could not be invoked by the accused. *Kanwar Lal* v. *State of Punjab*, AIR 1963 SC 1317 : 1963 (2) CrLJ 345 : 1963 SCD 350.

[12392] ● ***Section 499—Exceptions 8 and 9, IPC—Applicability.***—The point of difference between Exception 8 and Exception 9 is that under Exception 8 it has to be established by the accused that the person to whom the communication is made has lawful authority to deal with the subject-matter of the communication and take action against the person complained against, while under Exception 9 it has to be established that the person to whom the communication is made has a common interest with the accused in the subject-matter of the communication. Where the accused fails to establish either such lawful authority or such common interest his case would not fall under either Exception. *Kanwar Lal* v. *State of Punjab*, AIR 1963 SC 1317 : 1963 (2) CrLJ 345 : 1963 SCD 350.

[12393] ● ***When and proved to have made defamatory comments with ulterior motive without justification deserves deterrent punishment.***—In this case it has been urged for the appellant, that the sentence was severe and be reduced to the period of imprisonment already undergone. We do not see any justification for reducing the sentence. The Press has great power in impressing the minds of people and it is essential that persons responsible for publishing anything in newspapers should take good care before publishing anything, which tends to harm the reputation of a person Reckless comments are to be avoided. When one is proved to have made defamatory comments, with an ulterior motive and without the least justification, motivated by self interest, he deserves a deterrent sentence. *Sahib Singh* v. *State of U.P.*, AIR 1965 SC 1451 : 1965 (2) CrLJ 434 : (1965) 2 SCR 823.

[12394] ● *Sanction for prosecution in respect of defamation—Person includes collection of persons identifiable.*—Following points have been urged on behalf of the appellant:

(1) That the sanction granted was a general sanction and not with respect to the defamation of any particular Public Prosecutor or Assistant Public Prosecutor and that such sanction was not contemplated by law.

(2) That it is not proved that the appellant had any intention to harm the reputation of any particular Public Prosecutor or Assistant Public Prosecutor.

(3) That there was no evidence that the remarks were defamatory towards any particular group.

(4) That the prosecution did not lead any evidence to establish that the defamed group had any reputation which could be harmed.

(5) That the remarks were for public good.

The sanction in question is with respect to defamation of two persons (1) R. K. Sharma, Assistant Public Prosecutor, Aligarh, and (2) the other Police Prosecuting Staff of Government of Uttar Pradesh, which would be the entire prosecuting staff in the State. There is, thus, nothing wrong with the form of sanction.

The language of Explanation 2 to Section 499, IPC is general and any collection of persons would be covered by it. Of course, that collection of persons must be identifiable in the sense that one could, with certainty, say that this group of particular people had been defamed, as distinguished from the rest of the community. The prosecuting staff of Aligarh or, as a matter of fact, the prosecuting staff in the State of Uttar Pradesh, is certainly such an identifiable group or collection of persons. There is nothing indefinite about it. This group consists of all members of the prosecuting staff in the service of the Government of Uttar Pradesh. Within this general group of Public Prosecutors of U.P. there is again an identifiable group of prosecuting staff, consisting of Public Prosecutors and Assistant Public Prosecutors at Aligarh. This group of persons would be covered by Explanation 2 and could, therefore, be the subject of defamation. The impugned remarks are *per se* defamatory of the group of persons referred to. The defence in the Courts below was that they were for public good and the appellant was protected under Exceptions 3 and 9 of Section 499, IPC The tenor of the Article did not indicate, that the purpose of the appellant in publishing these remarks was 'public good'. The impugned remarks could certainly lead the readers of the Article to believe or suspect that the prosecuting staff is corrupt in the discharge of its duties as Public Prosecutors, and are thus bound to affect the reputation of the prosecuting staff adversely. Unless proved otherwise, the presumption is that every person has a good reputation. Exception 3 to Section 499, IPC comes into play when some defamatory remarks are made in good faith. Nothing has been brought on the record to establish that those defamatory remarks were made by the appellant, after due care and attention and so, in good faith. Exception 9 gives protection to imputations made in good faith for the protection of the interest of the person making it or of any other person or for public good. The appellant has not established his good faith and, as we have said above, the imputations could not have been said to have been made for the public good. We are, therefore, of the opinion that the appellant has been rightly held to have committed the offence under Section 500, IPC. *Sahib Singh Mehra* v. *State of U.P.*, AIR 1965 SC 1451 : 1965 (2) CrLJ 434 : 1965 SCD 600 : (1965) 2 SCR 823.

[12395] ● *Good faith and public good both to be satisfied.*—"Normally, we would not have examined the correctness of the finding recorded by the High Court in respect of the appellant's plea of good faith, because that is a finding made by the High Court on appreciating oral and documentary evidence, and as it happens, the said finding confirms the view taken by the trial Judge himself. Whether or not good faith has been proved by an accused person who pleads in his defence the Ninth Exception to a charge of defamation under Section 500, IPC would be a question of fact and even if it is assumed to be a mixed question of fact and law, if the Courts below make a concurrent finding on such a question, this Court generally does not re-examine the matter for itself while exercising its jurisdiction under Article 136 of the Constitution. But in the present case, we cannot accept the finding of the High Court, because it is plain that in dealing with the question of good faith the High Court has misdirected itself materially on points of law. In the present case, the ingredient of public good is satisfied, and the only question which arose for decision in the Courts below and arises before us, is whether the imputation can be said to have been made in good faith. There is no doubt that the requirements of good faith and public good have both to be satisfied, and so the failure of the appellant to prove good faith would exclude the application of the Ninth Exception in his favour even if the requirement of public good is satisfied. If it can be shown that the appellant had led evidence to show, that he acted in good faith, and by the test of probabilities that evidence proved his case, he would be entitled to claim the benefit of Exception 9. In other words, the onus on the accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the Court trying an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him. In dealing with the claim of the appellant under the Ninth Exception, it was not necessary, and indeed it was immaterial, to consider whether the appellant had strictly proved the truth of the allegations made by him. In considering the question as to whether the appellant acted in good faith in publishing his impugned statement, we have to enquire whether he acted with due care and attention. There is no doubt, that the mere plea that the accused believed that what he stated was true by itself, will not sustain his case of good faith under the Ninth Exception. Simple belief or actual belief by itself is not enough. The appellant must show that the belief in his impugned statement had a rational basis and was not just a blind simple belief. That is where the element of due care and attention plays an important role. If it appears that before making the statement the accused did not show due care and attention, that would defeat his plea of good faith. But it must be remembered that good faith does not require logical infallibility. *Harbhajan Singh* v. *State of Punjab*, AIR 1966 SC 97 : 1966 CrLJ 82 : (1966) 1 SCJ 753.

[12396] ● ***Editor means person who controls selection of matter to be published in newspaper.***—The term "editor" is defined in the Act to mean a person who controls the selection of the matter that is published in a newspaper. Where there is mentioned an editor is a person who is responsible for selection of the material Section 7 raises the presumption in respect of such a person. The name of the person has to be printed on the copy of the newspaper. Therefore not the members of the editorial board, but the persons declared as editor, publisher or printer are liable for any defamatory imputation in any newspaper news item. *State of Maharashtra* v. *Dr. R.B. Choudhari*, AIR 1968 SC 110 : 1968 CrLJ 95 : (1967) 3 SCR 708 : 1967 CAR 221.

[12397] ● ***Presumption as to selection of material for publication.***—In a case *M* admitted that the defamatory article was written by him. Three other persons were shown as members of the editorial board along with *M.* It was held the presumption under Section 7, Press and Registration of Books Act, 1867 is attracted to *M,* he having selected the material for publication and such presumption cannot be drawn against other persons. *State of Maharashtra* v. *R.B. Choudhury*, AIR 1968 SC 110 : 1968 CrLJ 95 : (1967) 3 SCR 708 : 1967 CAR 221.

[12398] ● ***Defamatory statement against character—Punishment for defamation—Conviction.***—In this appeal, the prosecution case was that one Bishan Kaur, a nurse filed a complaint against the present appellant, who was at that time President of the Municipal Committee, that he had made defamatory remarks against her character at a public meeting and that he further wrote a letter to the Civil Surgeon which contained defamatory statement against her character and further that he repeated the same before the Civil Surgeon. The appellant pleaded justification under Exceptions I, VIII and IX to Section 499, IPC. Counsel for the appellant contended that good faith of the appellant was established by two features : (1) that as President he had to act in public interest; (2) Large number of people who signed the application and passed the resolution were present at the meeting and there were allegations against the nurse. Hence, he acted not only in good faith but also for public good. The concurrent findings of fact were : (1) there was no record of the proceedings of the meeting and therefore not dependable to rely only on the oral evidence of the complainant that the appellant had defamed her at the meeting. (2) The application alleged to have been made by the residents of the place and further alleged to have been read over by the Secretary of the Municipal Committee at the meeting was a manufactured document. (3) The resolution alleged by the appellant to have been passed by the residents at the meeting was also a forged document. The main reason for rejecting both the application and the resolution from consideration by both the Courts was that none of these alleged documents was put to any of the prosecution witnesses some of whom admittedly attended the meeting. The genuineness of the document was rightly disbelieved. The evidence was that the imputation concerning the complainant was not true but was motivated by animus of the appellant. The appellant totally failed to prove both the truth and the publication of the imputation was for the public good. The appellant did not examine anybody connected with the letter relied on by him. Documents do not prove themselves. There was no proof that the appellant made any enquiry about the matters before he wrote the letter or that he acted with reasonable care. The appellant was a man of power and wealth and that was all the more, why he should have acted with restraint and decorum. He failed in both. His conviction was, therefore, correct. *Chaman Lal* v. *State of Punjab*, AIR 1970 SC 1372 : (1970) 1 SCC 590 : 1970 SCC (Cri) 253 : 1970 CrLJ 1266 : 1970 SCCrR 452.

[12399] ● ***Libel by husband through letters written to wife publication.***—Unless there is publication, there can be no offence of defamation committed. The rule that husband and wife are one in the eye of law as in England has not been adopted in its full force in our system of law and certainly not in our criminal jurisprudence. A person making libelous statement in a communication to his wife is not absolutely protected in a criminal proceeding for defamation, for under the Eighth Exception and the Illustration to Section 499 the statements are privileged only when they are made in good faith. In determining the criminality of an act under the Indian Penal Code, the Courts will not extend the scope of special Exceptions by resorting to the rule peculiar to English common law that the husband and the wife are regarded as one. The decision reported in AIR 1967 Ker 228 was reversed. Case law discussed. *M.C. Verghese* v. *T.J. Ponnan*, AIR 1970 SC 1876 : 1970 CrLJ 1651 : 1970 SCCrR 193 : (1970) 2 SCJ 353 : (1969) 2 SCR 692 : 1970 MLJ (Cri) 636 : 1968 KLT 904.

[12400] ● ***Defamation—Not necessary that complaint for defamation set out actual words used by accused.***—The proposition laid down in English decisions dealing with libel that the actual words alleged to be used must be stated in the indictment cannot be applied on all fours when dealing with the cases of defamation by spoken words under Section 499, IPC. It will be highly desirable no doubt, if the actual words stated to have been used by an accused and which are all defamatory are reproduced by the complainant. In cases where the words spoken are too many or the statements made are too long, it will be the height of the technicality to insist that the actual words and the entire statements should be reproduced verbatim. It is in the interests of the complainant to get a proper adjudication from the Court that as far as possible the words spoken or the statements actually made and which he alleges to be defamatory are before the Court. But a complaint cannot be thrown out on the mere ground that the actual words spoken or the statements made have not been stated in the complaint. From the point of view of the accused also it is necessary that the matters alleged to be defamatory in the complaint must be so stated as to enable them to know the nature of the allegations that they have to meet. *Balraj Khanna* v. *Motiram*, AIR 1971 SC 1389 : 1971 CrLJ 1110 : 1971 SCD 822 : 1971 UJ (SC) 605 : 73 PunLR (D) 271.

[12401] ● ***Exceptions to Section 499, IPC arise only after commencement of trial.***—Rejection of the complaint by the Magistrate under Section 203, CrPC, on the ground that the matter is covered by the Exceptions to Section 499, IPC, does not arise at that stage. The question of applicability of the Exceptions to Section 499, IPC, as well as other defences that may be available to the accused will have to be gone into during the trial of the complaint. *Balraj Khanna* v. *Motiram*, AIR 1971 SC 1389 : 1971 CrLJ 1110 : 1971 SCD 822 : 1971 UJ (SC) 605 : 73 PunLR (D) 271.

[12402] ● ***For attracting 9th exception to Section 499, IPC—Imputation to be made good faith.***—For attracting the 9th Exception to a case, the imputation must be made in good faith, must be for protection of the interest of the person making it or of any other person or for the public good. Good faith, protection of the interest of the person making it and public good are all questions of fact. The person alleging good faith has to establish as a fact that he made enquiry before he made the imputation and he has to give reasons and facts to indicate that he acted with due care and attention and was satisfied that the imputation was true. The proof of the truth of the statement is not an element of the 9th Exception as of the 1st Exception to Section 499, IPC In the 9th Exception, the person making the imputation has to substantiate that his enquiry was attended with due care and attention and he was thus satisfied that the imputation was true. The accent is on the enquiry, care and objective and not subjective satisfaction. In a proceeding under Section 144, CrPC, no question of title is involved. Even otherwise, that by itself will not entitle a person to make a defamatory statement and then take the plea that it was for the protection of the interest of the person making the imputation. It would not be open to a person to deny or resist possession in that proceeding by hurling defamatory invectives and then claim the benefit of protection of interests. *Sukra Mahto* v. *Basudeo Kumar*, AIR 1971 SC 1567 : 1971 CrLJ 1168 : 1971 SCD 590 : (1971) 2 SCCrR 315.

[12403] ● ***Sentence—Awarding of judicial and judicious discretion of Court.***—Awarding of sentence lies mainly on the judicial and judicious discretion of the Court. Decision on question of sentence can never be regarded as precedent. *Dalbir Singh* v. *State of Punjab*, AIR 1979 SC

1384 : (1979) 3 SCC 745 : 1979 SCC (Cri) 848 : 1979 CrLJ 1058 : 1979 CrLR (SC) 705.

[12404] ● ***Prosecution of newspaper editor for defamation—Question of good faith and public good to be decided at regular trial.***—In a prosecution of a newspaper editor for defamation, the defence was that the news item was based on a Government report. The accused applied for production of the report before he was examined, was rejected. Revision referred to the High Court was allowed and the prosecution quashed under Sections 397 & 482, CrPC, on the ground that the accused (Editor) was entitled to the protection under Section 499, Exception 9. Prayer was to quash the order of the Magistrate and for direction to him to call for the report. Report was made available to the High Court and so it quashed the prosecution. The High Court order under Section 482 amounted to prejudging the issue. It should not have used the Enquiry Report for basing its conclusions.. Questions of "good faith" and "public good", *etc*, are questions of fact to be decided at a regular trial and not to be answered even before the accused was examined. *Sewakram* v. *R.K. Karanjia*, AIR 1981 SC 1514 : (1981) 3 SCC 208 : 1981 CrLJ 894 : 1981 SCC (Cri) 798.

[12405] ● ***Defamation—Journalists do not enjoy any special privilege.***—Journalists do not enjoy any special privilege. If they make assertions of facts as opposed to comments on them, they must either justify the assertions or, in the limited cases specified in the Ninth Exception, show that the attack on the character of another was for the public good, or that it was made in good faith. *Sewakram* v. *R.K. Karanjia*, AIR 1981 SC 1514 : (1981) 3 SCC 208 : 1981 SCC (Cri) 798 : 1981 CrLJ 894.

[12406] ● ***Publication of life story or biography—Nor Govt. or its officials to impose any restraint on publication.***—Neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of Auto Shankar. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein. We must make it clear that we do not express any opinion about the right of the state or officials to prosecute the petitioners under Section 499/500, IPC. This is for the reason that even if they are entitled to do so, there is no law under which they can prevent the publication of a material on the ground that such material is likely to be defamatory of them.

It must be held that the petitioners have a right to publish, what they allege to be the life-story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication, as explained hereinabove. *R. Rajagopal alias R.R. Gopal* v. *State of Tamil Nadu*, AIR 1995 SC 264 (275, 276) : (1994) 6 SCC 632 : (1995) 2 SCJ 86.

[12407] ● ***Allegations not disclosing offence under Section 500, IPC—Magistrate not justified in issuing process.***—The complaint did not contain any of the allegations constituting the offence of defamation punishable under Section 500, IPC. The contents of the magazine were alleged to be defamatory against the Marwari community, lowering them in the estimate of the public or their reputation was lowered in the society. As, the complaint filed in the Court of the judicial Magistrate did not contain any of the allegations so as to constitute the offence of defamation defined in Section 499, IPC and punishable under Section 500 the Magistrate was not justified in issuing the process against the appellant. *Shatrughan Prasad Sinha* v. *Rajbhau Surajmal Rathi*, (1996) 6 SCC 263 : 1996 SCC (Cri) 1310 : 1997 CrLJ 212 (SC) : 1996 (4) Crimes 27.

[12408] ● ***Exception 8 to Section 499, IPC—Applicability of.***—Exception 8 to S. 499, IPC clearly indicates that it is not a defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with regard to the subject-matter of accusation. The report of the Treasury Officer clearly indicates that pursuant to the report made by the accused persons against the complainant, a departmental inquiry had been initiated that the complainant was found to be guilty. Under Such circumstances the fact that the accused persons had made a report to the superior officer of the complainant alleging that he had abused the treasury officer in a drunken state which is the gravamen of the present complaint and nothing more would be covered by Exception 8 to Section 499 of the IPC. By perusing the allegation made in the complaint petition we are also satisfied that no case of defamation has been made out. *Rajendra Kumar Sitaram Pandey* v. *Uttam*, AIR 1999 SC 1028 : (1999) 3 SCC 134 : 1999 SCC (Cri) 393 (397) : 1999 CrLJ 1620 : 1999 CrLR (SC) 130 : JT 1999 (1) SC 426.

[12409] ● *Defamation—Locus standi to file complaint.*—The collocation of the words "by some persons aggrieved" in S. 199, CrPC definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of the publication is a matter to be determined by the Court depending upon the facts of each case. If a company is described as engaging itself in nefarious activities, its impact would certainly fall on every director of the company and, hence, he can legitimately feel the pinch of it. Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it. If K.J. Hospital is a private limited company, it is too far-fetched to rule out any one of its directors, feeling aggrieved on account of pejoratives hurled at the company. Hence the appellant cannot justifiably contend that director of K.J. Hospital would not fall within the wide purview of "some person aggrieved" as envisaged in Section 199 (1) CrPC. *John Thomas* v. *K. Jagadeesan,* AIR 2001 SC 2651 : (2001) 6 SCC 30 : 2001 SCC (Cri) 974 (978) : 2001 CrLR (SC) 495 : JT 2001 (5) SC 398.

[12410] ● *Imputation prima facie defamatory.*—The only effect of an imputation being *per se* defamatory is that it would relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the right thinking members of the public. However, even if the imputation is not *per se* defamatory, that by itself would not go to the advantage of the publisher, for the complaining person can establish on evidence that the publication has in fact amounted to defamation even in spite of the apparent deficiency. So the appellant cannot contend, at this stage, that he is entitled to discharge on the ground that the imputations in the extracted publication were no *per se* defamatory. *John Thomas* v. *K. Jagdeesan,* AIR 2001 SC 2651 : (2001) 6 SCC 30 : 2001 SCC (Cri) 974 (978) : 2001 CrLR (SC) 495 : JT 2001 (5) SC 398.

[12411] ● *Defamatory attack on Judge libel.*—A defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libellor in a proper action if he so chooses. *S.K. Sundaram In re*, AIR 2001 SC 2374 : (2001) 2 SCC 171 : 2001 SCC (Cri) 304 (311).

[12412] ● *Who can make complaint for defamation.*—In this case it was submitted that the imputation were mainly against the father of the complainant, and therefore a complaint ought to have been made by the father of the complainant. Reference was made to the provisions of Section 199, CrPC. On perusal of the complaint by the Court, it was found that similar defamatory words were used against the complainant also apart from the father, and therefore, it was held that the right of the complainant to move the Court and lodge a complaint before the competent Magistrate would not be challenged. *Ram Swarup* v. *Mohd Javed Razack*, AIR 2005 SC 2005 : (2005) 10 SCC 393 : 2005 CrLJ 1725 (1726) : 2005 (1) Crimes 345.

[12413] ● *Withdrawal of proceedings.*—In the instant case, defamation was alleged to have been made by a T.V. Channel by telecasting commentary against the Chief Minister. Ministers and other public functionaries knowing fully that the said commentary would harm their reputation. The T.V. Channel stated that the it shall broadcast the clarification to show the *bona fides* within the time indicated by the Court. The parties subject to the above condition agreed to withdraw all the proceedings. *Ramaji Rao, Chairman Group of Companies* v. *State of Andhra Pradesh*, AIR 2006 SC 3334 : (2006) 8 SCC 321 : 2006 SCC (Cri) 480 : 2006 (4) Crimes 168 (SC).

[12414] ● *Prayer for quashing complaint for defamation—Scope of power of High Court.*—Allegations made in the said complaint petition in our opinion, make out a case for proceeding against the appellant under Section 500 of the Indian Penal Code as thereby imputation concerning the respondent had been made intending to harm or knowing or having reason to believe that such imputation would harm his reputation.

"At this stage, in our opinion, it would have been premature for the High Court to consider the materials placed by the appellant before it so as to arrive at a definite conclusion that there was no element of bad faith on the part of the appellant in making the said complaint before the police authorities.

Respondent was furthermore discharged by the learned Magistrate in exercise of its jurisdiction under Section 167(5) of the Code of Criminal Procedure stating that the police authorities could not complete the investigation within a period of six months ......

For the reasons aforementioned, we do not find any infirmity in the impugned judgment. Furthermore, the question, as to whether a totally false complaint has been made as against the respondent or not as he was not even in India prior to the date of occurrence, is required to be gone into by the learned Trial Judge.

Accordingly, the appeal is dismissed". *M.A. Rumugam* v. *Kittu*, AIR 2009 SC 344 : (2009) 1 SCC 101 : 2008 (15) SCR 642 : JT 2008 (11) 638 : 2008 (14) Scale 200 : 2008 (4) Crimes 344 (SC).

[12415] ● *Purpose of bringing case within purview of 8th & 9th Exception.*—For the purpose of bringing the case within the purview of the Eight and the Ninth Exception appended to Section 499 of the Penal Code, it would be necessary for the appellant to prove good faith for the protection of the interests of the person making or any other person or for the public good. *M.A. Rumugam* v. *Kittu*, AIR 2009 SC 341 (344) : (2009) 1 SCC 101 : (2008) 4 Crimes 344 : JT 2009 (11) SC 638.

[12416] ● *Section 499, IPC—Defamation—Essential ingredients.*—In the instance case, the appellants statement published in India Today is a rather general endorsement of pre-marital sex and her remarks are not directed at any individual or even at a "company or any association or collection of persons". There is no direct attack on the reputation of anyone in particular. Instead the purported remarks are in the nature of rhetorical questions wherein it was asked if people in Tamil Nadu were not aware of the incidence of sex. Nowhere it has been suggested that a woman in Tamil Nadu had engaged in pre-marital sex. The complainant was not an aggrieved person. The complaint under Section 499, IPC is liable to be quashed. *S. Khushboo* v. *Kannaimmal*, 2010 CrLJ 2828 (2837) (SC).

[12417] ● *Defamation—Requirements.*—To attract the provisions of section there must be an imputation and such imputation must have been made with the intention of harmony or knowing or having reason to believe that it will harm reputation of person about whom it is made. *Jeffrey J. Diermeier* v. *State of West Bengal*, (2010) 6 SCC 243.

[12418] ● *Good faith—Defence.*—"The question whether the accused person acted in "good faith" and for "public good" has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made; the circumstances on which it came to be made and the status of the person who makes the imputation as also the status of the person against whom imputation is allegedly made. These and a host of other considerations would be relevant and required to be considered for deciding appellants' plea of "good faith" and "public interest". Unfortunately, all these are questions of fact and matters for evidence. In this case the stage for recording of evidence had not reached and, therefore, in the absence of any evidence on record, we find it difficult to return a finding whether or not the appellants have satisfied the requirements of "good faith" and "public good" so as to fall within the ambit of the Tenth Exception to Section 499 IPC. Similarly, it will neither be possible nor appropriate for this Court to comment on the allegations levelled by respondent No. 2 and record a final opinion whether these allegations do constitute defamation. Reading the complaint as a whole, we find it difficult to hold that a case for quashing of the complaint under Section 482 of the Code has been made out. At this juncture, we say no more lest it may cause prejudice to either of the parties.

"For the afore-going reasons, we are of the opinion that the High Court was right in refusing to quash the complaint under Section 500 IPC. *Jeffrey J. Diermeier* v. *State of West Bengal*, (2010) 6 SCC 243 : JT 2010 (5) 278 : 2010 (5) Scale 695.

[12419] ● *Defamation—Degree and nature of proof which accused is required to furnish.*—The accused is not required to discharge the burden by furnishing evidence to prove the case beyond reasonable doubt. *Jeffrey J. Diermeier* v. *State of West Bengal*, (2010) 6 SCC 243.

DEFAULT

[12420] ● *Default.*—There must be a clear indication in the judgment or order of the Appellate Court that it has applied its judicial mind to the particular appeal with which it was dealing and such an indication will be available when the Appellate Court has considered the material on record, which means not only the judgment and petition of appeal, but also the other relevant materials. It is to be noted that if the appellant or his pleader is not present or if the public prosecutor is not present, it is not obligatory on the Appellate Court to postpone the hearing of the appeal. But the disposal of the appeal must be after the Appellate Court has considered the appeal on merits. *Shyam Dev* v. *State of Bihar*, AIR 1971 SC 1606 : 1971 SCC (Cri) 353 : 1971 CrLJ 1171.

Note: After the new Section 385, this case has no relevance.

[12421] ● *Sentence of imprisonment in default of fine—Powers of Magistrate.*—Section 65, IPC, only fixes a maximum period of imprisonment which can be awarded for default of payment of fine whenever any Court convicts. On the other hand, Section 30 (Section 33 of the old Code) governs specifically the powers of a First

Class Magistrate on this matter and it also contains the principle embodied in Section 65, IPC, in its application to Magistrates. Just as a First Class Magistrate trying an offence under Section 406, IPC, cannot impose the maximum amount of imprisonment prescribed therein, because his powers of awarding imprisonment are specifically limited to those conferred by Section 29 of the Code (Section 32 of the old Code), so also he cannot, by resorting to Section 65, IPC, award a period of imprisonment in default of payment of fine on the erroneous assumption that he has the power to award the maximum sentence prescribed by Section 406, IPC. *Chhajulal* v. *State of Rajasthan*, AIR 1972 SC 1809 : 1972 CrLJ 1184 : 1972 SCD 447 : (1972) 2 SCA 286.

[12422] ● ***Defective publication of cause list—Claim for hearing by absent party.***—Where the cause-list was improperly published in that it did not show either the name of the appellants or their Advocates but only the number of the case, it will be wrong to post the Advocate with notice of hearing. When an Advocate examines the cause list, he is generally not guided by the number of the case but by his name appearing against the case. Where an appeal against acquittal came for hearing nearly 2 1/2 years after the issue of notice to the accused and the cause-list of the day of hearing contained only appeal number but not the names of the accused-respondent and his Advocate resulting in conviction of the accused without hearing his counsel, it could not be said that the accused was given a reasonable opportunity of hearing. Hence, an application filed by the counsel later on to give him an opportunity for rehearing the appeal was dismissed holding that no opportunity had been denied to the appellant of being heard, it will be idle to say so. The matter was remanded for hearing the appeal afresh after issuing necessary notice to the parties. *Swarth Mahto* v. *Dharam Deo*, AIR 1972 SC 1300 : (1972) 2 SCC 273 : 1972 SCC (Cri) 676 : 1972 CrLJ 879 : (1972) 2 SCA 76.

[12423] ● ***Recall of case disposed of by judicial order not possible for any Magistrate.***—There is no provision in the CrPC empowering a Magistrate to review his own order or recall the same. The subordinate criminal Court has no inherent powers like the High Court. The Magistrate has absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent is to move the Sessions Judge or the High Court in revision. The Magistrate has become *functus officio* and has no power to review or recall that order on any ground whatsoever. The order of recall is entirely without jurisdiction. All subsequent proceedings following upon recalling the said order would fall to the ground including the order summoning the appellant which should also be treated to be a nullity and destitute of any legal effect. It is suggested by the counsel for the respondent that the application given by him for recalling the order of dismissal of the complaint would amount to a fresh complaint. This Court is unable to agree with that contention because there is no fresh complaint and that the settled position of law is that a second complaint can lie only on fresh facts or even on the previous facts only if a special case is made out. The appeal is therefore allowed setting aside the order of the High Court maintaining the order of the Magistrate and the order of the Magistrate summoning the appellant is quashed. *Bindeshwari Prasad* v. *Kali Singh*, AIR 1977 SC 2432 : (1977) 1 SCC 57 : 1977 SCC (Cri) 33 : 1978 CrLJ 187.

[12424] ● ***Hearing of appeal in absence of Appellant—Remanding of for fresh disposal.***—Appeal was pending before the Jodhpur Bench of the High Court. While pending, appeal was transferred to the Bench at Jaipur without notice to the appellant. Appeal was heard by the Jaipur Bench in the absence of the appellant. Although High Court at Jaipur had given reasons for dismissing the appeal, the fact remains that the appellant was not represented, the possibility of the appellant having persuaded the High Court to take a different view cannot be reasonably excluded. Appeal was remanded to the Jaipur Bench for disposal. *Shyam Sunder* v. *State of Rajasthan*, AIR 1982 SC 1175 : (1981) 2 SCC 672 : 1982 CrLJ 1388 : 1982 CrLR (SC) 57.

[12425] ● ***Complaint—Dismissal of for default.***—The Supreme Court had already held in the case of *Bindeshwari Prasad Singh* v. *Kali Singh,* that no criminal Court had any inherent jurisdiction not provided for in the CrPC. A second complaint was permissible in law if it could be brought within the limitations imposed by he Supreme Court in *Pramatha Nath Taluqdar* v. *Saroj Ranjan Sarkar,* (see below). Filing of a second complaint is not the same thing as reviving a dismissed complaint after recalling the earlier order of dismissal. So far as the accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the Code, a Magistrate could not exercise any inherent jurisdiction. What the Court has to see is not whether the Code contained any provision prohibiting a Magistrate from entertaining an application to restore a dismissed complaint, but the task should be to find out whether the said Code contains any provision enabling a Magistrate to exercise an inherent jurisdiction which he otherwise did not have. The order of the High Court is set aside and the original order of the Magistrate dismissing the complaint is restored. *A.S. Gauraya* v. *S.N. Thakur*, AIR 1986 SC 1440 : (1986) 2 SCC 709 : 1986 SCC (Cri) 249 : 1986 CrLJ 1074 : (1986) 3 Crimes 1.

[12426] ● ***Criminal appeal not to be dismissed for default in appearance.***—It is now well settled that no criminal appeal can be dismissed for default in appearance. The Court has to go through the record of the case even in the absence of the appellant or his counsel and decide the matter on merit. *Parasuram Patel* v. *State of Orissa*, (1994) 4 SCC 664 : 1994 SCC (Cri) 1320 : 1994 CrLJ 624.

[12427] ● ***Discretion as to whether personal attendance of complainant be dispensed with or not to be exercised judicially.***—Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice. *Associated Cement Co. Ltd.* v. *Keshvanand*, AIR 1998 SC 596 : (1998) 1 SCC 687 : 1998 SCC (Cri) 475 : 1998 CrLJ 856.

[12428] ● ***Non-appearance of counsel due to his appointment as State Counsel—Dismissal of revision.***—The Counsel who was appearing for the appellant in the criminal revision was appointed as a Counsel for the State and as such he did not appear for the appellant. There was also no material to show that the appellant after having knowledge of such appointment his counsel failed to appoint another lawyer to conduct the case before the High Court. In view of the peculiar circumstances of the case, the Supreme Court in the interest of justice to set aside the order of High Court dismissing the revision and remitted the matter to the High Court for fresh hearing. *Satin Chandra Pegu* v. *State of Assam*, AIR 2007 SC 457 : (2006) 12 SCC 446 : 2007 CrLJ 309 (310) : 2007 (1) Crimes 33 (SC).

[12429] ● ***Revision cannot be dismissed in default.***—Criminal revision should not be dismissed in default but should be decided on merits. *Madan Lal Kapoor* v. *Rajiv Thapar*, (2007) 7 SCC 623 : 2007 SCC (Cri) 437 : 2007 CrLJ 4684.

[12430] ● ***Criminal appeal not to be dismissed default.***—In *Beni Singh* v. *State of Uttar Pradesh*, (1996) 4 SCC 720, a three Judge Bench of the Supreme Court held that criminal appeal should not be dismissed in default but should be decided on merits. If despite notice neither the appellant nor his counsel is present the Court should decide the appeal on merits. If the appellant is in jail, the Court can appoint a lawyer at State expense to assist it. Thus would equally apply to revision. *Madan Lal Kapoor* v. *Rajiv Thapar*, (2007) 7 SCC 623 : 2007 SCC (Cri) 437 : 2007 CrLJ 4684.

DEFECTIVE INVESTIGATION

[12431] ● ***Defective investigation Court to be circumspect in evaluating evidence.***—In the case of a defective investigation the Court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Section 311 or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective if the lapse or omission is committed by the investigating agency designedly or because of negligence, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of Courts getting at the truth by having recourse to Sections 311, 391 of the Code and Section 165 of the Evidence Act at the appropriate and relevant stages and evaluating the entire evidence; otherwise the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate casualty. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2004 SC 3114

(2004) 4 SCC 158 : 2004 SCC (Cri) 999 : (2004) 2 Crimes 213.

[12432] ● ***Investigation when faulty.***—After having clearly concluded that the investigation was faulty and there were serious doubts about the genuineness of the investigation, it would have been proper for the High Court to accept the prayer made for additional evidence and/or retrial. Abrupt conclusions drawn about false implication not only cannot stand the test of scrutiny but also lack judicious approach and objective consideration, as is expected of a Court. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2004 SC 3114 : (2004) 4 SCC 158 : 2004 SCC (Cri) 999 (1018) : (2004) 2 Crimes 213.

[12433] ● ***Defective investigation.***—When witnesses are branded as partisan or inimical, their evidence has to be analysed with care and scrutiny. Even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. *Dhanaj Singh alias Shera* v. *State of Punjab*, AIR 2004 SC 1920 : (2004) 3 SCC 654 : 2004 SCC (Cri) 851 (854) : (2004) 1 JCC 607 : 2004 CrLJ 1807 : JT 2004 (3) SC 380 : (2004) 2 Crimes 2.

[12434] ● ***Defective investigation Court to be circumspect in evaluating evidence.***—In the case of a defective investigation, the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigation Officer if the investigation is designedly defective. *Dhanaj Singh alias Shera* v. *State of Punjab*, AIR 2004 SC 1920 : (2004) 3 SCC 654 : 2004 SCC (Cri) 851 (854) : 2004 CrLJ 1807 : JT 2004 (3) SC 380 : (2004) 2 Crimes 2 : (2004) 1 JCC 607.

[12435] ● ***Statement of witness—Reliability.***—The evidence of PW-32 to the effect that he awake because of barking dogs and saw four persons running by and when he flashed the torch, he noticed three of the respondents and a fourth persons whom he could not recognise is also disbelieved by the High Court on the ground that the place where PW-32 was sleeping was not shown in the site plan. The High Court also attached importance to the fact that the investigating officer had not put the date on which the statement of this witness was taken, although the investigating officer explained that he had forgotten to mention the date. The High Court assumes that on the date of the incident itself, the police knew the names of the assailants, therefrom it deduces that the fact that they were arrested till 30.8.1993 makes the statement of the witness unreliable. This, to say the least is another price of perverse reasoning. *Prithvi* v. *Mam Raj*, 2005 SCC (Cri) 198 (206).

[12436] ● ***No ground for rejection of testimony of witness.***—A further reason for disbelieving the evidence of Prithvi by the High Court is that while Prithvi stated that he could see the assailants because there was light on the spot coming from a bulb fitted in the electric pole near the chaki of Birbal, (which was situated about fifteen steps from the place of occurrence) the investigating officer when cross-examined said that he did not remember anything about it nor did he include any electric pole in the site plan. Assuming that this was faulty investigation it could hardly be a ground for rejection of the testimony of Prithvi which had a ring of truth met. *Prithvi* v. *Mam Raj*, 2005 SCC (Cri) 198 (205-06).

[12437] ● ***Testimony of eye-witness rejection of.***—Assuming that this was a faulty by Investigating Officer, investigation could hardly be a ground for rejection of the testimony of eye-witness which, has a ring of truth in it. *Prithvi* v. *Mam Raj*, 2005 SCC (Cri) 198 (205-06).

[12438] ● ***Defective Investigation.***—From the evidence of PW-26, it is seen that he states that he noticed a person of medium height with curly hair having somewhat darkish complexion coming out of the house of the MLA who after threatening him shot the deceased three times. According to him, there was a tubelight near the place of the incident, hence, he could identify the accused. The High Court in its judgment has observed that the factum of the existence of a tubelight at the place of the incident is doubtful because the sketch of the place of the incident as prepared by the prosecution did not indicate any such light. It is only for the first time while giving evidence before the Court, PW-26 pointed out a place in the sketch where according to him the tubelight was placed. The trial Court accepted it and came to the conclusion that there was sufficient light at the place of the incident. The High Court, per contra, observed that if really there was a tubelight at the place of the incident, the investigation officer would not have failed to mark the existence of that tubelight in the sketch. If really there was a tubelight by which PW-26 identified the respondent, then the investigating agency would certainly have shown the existence of a tubelight and its placement in the sketch because it was a very important fact mainly because the identification of the accused is a vital factor to be proved by the prosecution. The benefit of the omission to point out the existence of such light in the sketch should go to the accused. *State of M.P.* v. *Ghudan,* 2005 SCC (Cri) 801 (804).

DEFENCE

[12439] ● ***Defence.***—The right given by Section 340(1) does not extend to a right in an accused person to be provided by a lawyer by the State or by the police or by the Magistrate. The practice which has developed of giving an accused a lawyer at the expense of the State in cases in which he is charged with a capital offence, is only a privilege and not a right. If the accused in such a case desires to be defended by a lawyer or if he desires to engage one himself, or desires to get his relations to engage one for him, it is his duty to inform the Magistrate about it. The only duty cast on the Magistrate is to afford him the necessary opportunity. In the present case, the trial proceedings had continued for several days and there was nothing on the record to show that the accused had objected to his not being represented by a lawyer. It was held that under these circumstances it had to be assumed that he had not been denied the opportunity to engage a lawyer and no breach of Section 340 had taken place. *Tara Singh* v *State*, AIR 1951 SC 441 : 52 CrLJ 1491 : 1951 SCJ 518 : 1951 SCR 729 : 1951 (2) MLJ 291 : 1951 MWN 757 : 1951 MWN (Cri) 225 : 1951 ALJ 640 : 64 MLW 996.

[12440] ● ***Adequate opportunity of engaging lawyer in defence.***—Adequate opportunity of engaging a lawyer in his own defence. If in fact such opportunity is afforded to the accused, and yet though he has ample means of his own, he refuses to avail himself of that opportunity and insists upon a lawyer being engaged for him by the State, or if an accused for whom a lawyer is so engaged at Government cost refuses to accept that lawyer and insists upon the engagement of a lawyer of his own choice, then, in such cases, the Court has no option except to proceed with the trial though the accused is not represented by any lawyer. In such a case if the trial results in conviction, it cannot be said that the trial is vitiated merely because the accused had remained unrepresented at the trial. On the other hand, if it is found that the accused in a capital case who had no means of his own was desirous of a lawyer being engaged in his defence and yet the opportunity was denied to him with the result that he was handicapped in his defence, such denial amounts to a negation of a fair trial. In that case, the Court can presume that a failure of justice has been occasioned and after setting aside the conviction may direct a re-trial. However, in any such case it is for the accused to show that he had been denied a fair opportunity to obtain a lawyer in his defence, and a denial of such opportunity cannot be presumed merely from the fact that the accused was not represented at the trial by a lawyer. *Janardhan Reddy* v. *State of Hyderabad*, AIR 1951 SC 217 : 52 CrLJ 736 : 1951 SCJ 320 : 1951 SCR 344 : 1951 MWN 613.

[12441] ● ***Conviction of accused not to be based upon his own statement.***—Conviction of an accused person cannot be based only upon his own statement recorded under Section 342. In the absence of any other evidence on record which establishes the guilt of the accused, conviction cannot rest merely on the answers given by an accused when examined under that section, because such answers are not "evidence" and cannot take the place of evidence on which alone conviction can legally be based.

An admission made by an accused person under Section 342 can be used and relied upon only for the purpose of lending corroboration to the prosecution evidence, when it exists. In the present case the accused was charged under Section 66(*b*) of the Bombay Prohibition Act on the ground that he was found in possession of rectified spirit without a permit as required by law. The prosecution case rested on the evidence of witnesses that the goods were recovered from a particular godown and that the accused was in possession of that godown. When examined under Section 342, CrPC, the accused admitted that he was in charge of the godown but denied that the goods were found in the godown and said that they were found outside it. The Magistrate relied on the admission of the accused that the godown was in his possession and holding the evidence on record established that the goods were recovered from the godown, rejected his statement that the goods were not recovered from the godown as false. Under these circumstances it cannot be said that the conviction of the accused was based solely on his statement recorded under Section 342. The Magistrate had only used that statement as supporting the prosecution evidence concerning the possession of the godown, which had not been challenged in the cross-examination of the prosecution witness, and the Magistrate was fully justified in doing this. If the conviction of the accused had been based solely on his statement recorded under Section 342, he would have been justified in his contention that the conviction was bad, because in the absence of any evidence as to his possession of the godown, it would have been wrong to hold that the admission of the accused was "evidence" on which his possession of the godown was established. Conviction was confirmed and the appeal was dismissed. *Vijendrajit Ayodhya Prasad* v. *State of Bombay*, AIR 1953 SC 247 : 1953 CrLJ 1097 : 1953 SCJ 328 : 1953 SCA 395.

[12442] ● ***Circumstances under which Supreme Court not to interfere.***—In a criminal appeal under Article 136, the Supreme Court will not interfere with the decision appealed against merely on the ground (*a*) that there has occurred in the proceeding some error or irregularity which is only technical and has not occasioned any failure of justice, or (*b*) that it is possible to take a view of the evidence in the case which is different from that of the Courts below. An illegality or irregularity in procedure will be a good ground for interference with the decision appealed against only when it is of such a nature that a failure of justice or a denial to the accused of a fair trial may either be presumed to have been occasioned thereby, or such failure or denial is shown to have in fact been occasioned. Applying this principle, a refusal to give to the accused an opportunity to produce and examine defence witnesses at his trial is an illegality which is fatal to he proceeding, and if on appeal the High Court had rejected his plea of prejudice and has confirmed his conviction, it is a fit case for interference. *Habeeb Mohammad* v. *State of Hyderabad*, AIR 1954 SC 51 : 1954 CrLJ 338 : 1954 SCA 514 : 1953 SCJ 678 : 1954 SCR 475 : 1954 MWN 233.

[12443] ● ***Provisions of Sections 256 and 257, CrPC (1898) imperative.***—The provisions of Sections 256 and 257 of the Code are imperative, and except when a Magistrate is satisfied, on grounds which must be clearly set out in his order, that an application for the issue of summons to defence witnesses has been made for the purpose of vexation or delay only, the Magistrate is bound to issue the process applied for. Rules of procedure designed for the purpose of ensuring that the accused receives a fair trial should be scrupulously observed, and Courts should be zealous to see that there occurs no breach or contravention of those rules. If the appellate Court finds that for no fault of the accused he has been denied an opportunity to adduce his evidence during the trial, it must be held that he has been deprived of a fair trial. Such a deprivation vitiates the trial straightway, and in such a case conviction of the accused has to be set aside even though the prosecution evidence may have established a strong case for holding him to be guilty, because a failure of justice resulting from such a denial must be presumed. It cannot be said that Section 537 cures such irregularity. *Ronald Wood Mathams* v. *State of W.B.*, AIR 1954 SC 455 : 1954 CrLJ 1161 : 1954 SCA 907 : 1954 SCJ 649 : 1955 SCR 216 : 1954 MWN 738 : 1954 AWR (Sup) 74.

[12444] ● ***Breach of proviso to Section 342-A CrPC 1898 committed by commenting on failure of accused to give evidence.***—Under Cl. (b) of the Proviso to Section 342-A of the old Code (Section 315 now) it is specifically provided that the failure of an accused to give evidence shall not be made the subject of any comment, by any of the parties, or the Court, or give rise to any presumption against himself, or any person charged, together with him, at the same time. As such, it is illegal for the High Court to have commented upon and to have also drawn a presumption against the accused DP to give evidence under Section 342-A (Section 315 now) as also the appellant. In a prosecution for committing fraud by attesting loan applications in the names of fictitious persons, the accused pleaded that he attested the same on the assurance of one S and he was acquitted by the trial Court but on appeal by the State, the High Court convicted him under Section 467 read with Section 109, IPC, on the ground that he had not examined himself as a witness under Section 342-A of the old Code nor did he adduce any other evidence. The conviction cannot be sustained as the High Court has thrown the burden of proof on the accused instead of finding out whether the prosecution has proved its case and whether the order of acquittal was erroneous and further it has committed a breach of proviso to Section 342-A (Section 315 now) by commenting on the failure of the accused to give evidence and by drawing a presumption against him, both of which were illegal under Cl. (b) of Proviso to Section 342-A (Section 315 now) and hence the conviction was reversed and the accused acquitted. *Baidyanath* v. *State of Bihar*, AIR 1968 SC 1393 : 1968 CrLJ 1650 : (1968) 2 SCA 552 : (1968) 2 SCJ 922 : (1968) 2 SCWR 813 : 1968 ACrR 474 : 1968 AWR(HC) 764 : 1969 MLJ(Cri) 1.

[12445] ● ***Defence witness not to be cross-examined with previous statement to police.***—A defence witness cannot be cross-examined with his previous statement to the police under S. 161, CrPC. *Laxman Kalu* v. *State of Maharashtra*, AIR 1968 SC 1390 : 1968 CrLJ 1647 : (1968) 2 SCJ 930 : (1968) 2 SCWR 557 : 1969 MLJ (Cri) 3.

[12446] ● ***PFA Act not infringes guarantee of Article 20(3) of Constitution.***—Prevention of Food Adulteration Act, 1954 does not infringe the guarantee of Art. 20 (3). But by enacting that a plea by the vendor in a prosecution for an offence pertaining to sale of adulterated or misbranded article of good, that he was ignorant of the nature, substance or quality will not be a defence. *Andhra Pradesh Grain and Seed Merchants' Association* v. *Union of India*, AIR 1971 SC 2346 : (1970) 2 SCC 71 : 1970 SCC (Cri) 307 (315, 316) : 1971 CrLJ 1556 : (1971) 1 SCR 166.

[12447] ● *Defence of accused not to be ignored.*—The Additional Sessions Judge was not right in observing that the defence that the accused was entitled to claim the toll may be ignored because defence of an accused person can legitimately be taken into consideration while assessing the value of the evidence and judging the guilt or innocence of the accused. The appellant's defence in this case would clearly tend to support the complainant's case that the amount received was demanded as toll which was an unlawful demand. *Basudev Hazra* v. *Matiar Rahaman Mandal*, AIR 1971 SC 722 : (1971) 1 SCC 433 : 1971 SCC (Cri) 189 (192) : 1971 CrLJ 646 : (1971) 3 SCR 478 : 1971 UJ (SC) 270 : 1971 Cr AppR (SC) 165.

[12448] ● *Acquittal of accused on ground that his participation doubtful.*—Where the High Court maintained the acquittal of one accused because his participation appeared to be doubtful, though he was also present at the time of the incident but that his name was not mentioned in the F.I.R. and that he was said to have been empty-handed and only in the dying declaration his name was mentioned, and further that the evidence disclosed that he and another accused moved aside after two others had given blows to the deceased, but the High Court did not give the benefit of the same doubt to another accused, as it thought, that his participation had been proved by the defence evidence and also by the fact that he had received injuries, the Supreme Court held that the said reasoning and the distinction drawn on its basis was entirely unsustainable and that the prosecution had to stand on its own legs and it could not take advantage of the weakness of the defence and also that injuries found on the accused were more compatible with the conclusion, that he was a victim rather than a participant in the assault. *Omkar Singh* v. *State of U.P.*, AIR 1974 SC 1550 : (1975) 3 SCC 276 : 1974 SCC (Cri) 884 : 1974 CrLJ 1015 : 1974 SCD 708.

[12449] ● *Specific defence taken by accused.*—The burden of proving a plea specifically set up by the accused which may absolve him from criminal liability, certainly lies upon him. It is a different matter that the quantum of evidence by which he may succeed in discharging his burden of creating a reasonable belief, that circumstances absolving him from criminal liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt. Neither an application of S. 103 nor of S. 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may lie upon the accused. *Sawal Das* v. *State of Bihar*, AIR 1974 SC 778 : (1974) 4 SCC 193 : 1974 SCC (Cri) 362 (366) : 1974 CrLJ 664 : 1974 CrLR (SC) 186.

[12450] ● *Both trial Court and Session Court relying on conjectures and surmises disbelieved defence evidence.*—In the instant case, the prosecution case was that the Managing Committee of a Co-operative Society passed a resolution to raise a loan of Rs. 4,000/- from a Co-operative Bank and authorised the appellant, who was an ordinary member of the Society, to receive the sum from the Bank on the basis of a promissory note executed by some members of the Executive Committee on behalf of the Society. According to the Manager of the Bank, the Secretary of the Society, Mahnga Ram had accompanied the appellant when the payment was made to him in the Bank and also attested the signatures of the persons on the management of the Society. According to the President, the appellant had to pay the amount to the cashier who would make the entry in the accounts. The cashier was dead. Thereafter, a notice was sent to the appellant that he had not got the amount received by him entered in the books of the Society and an explanation was called for. The appellant replied to that notice that as per the instructions of the committee he had given the amount to Mahnga Ram, the Secretary, and he did not know whether it was entered in the book or not and that it was only on the receipt of the notice, that he had come to know that the entries regarding that amount had not been made. He also stated that the money was paid to the Secretary in the presence of three named persons. The appellant was charged under Section 406, IPC, in respect of the sum of Rs. 4,000/- entrusted to him. The appellant examined the three witnesses named by him in his defence. The witnesses were disbelieved by the Magistrate for the reason, that they had not represented at the earliest to any higher authorities against the false implication of the appellant in this case. One of the witnesses was a shareholder of the Society and he was not cross-examined by the Prosecution. His evidence was disbelieved because if his evidence was true he would naturally have told the office-bearers of the Society about the payment by the accused to the Secretary and the case would have been asked to be dropped by the Society but no such thing had been done. It was not known wherefrom the Magistrate drew that inference. No such question was asked from the witness and there was no material to support that observation. Another witness was disbelieved on the ground that he did not report to the higher authorities when the police did not hear when he represented to them of the false implication of the accused. The criticism was invalid, for it depended upon a person's nature whether he should write or not to high officers in a particular case. As regards the third witness the criticism was that he did not remember any other transaction done at his shop by him on that day when the accused was alleged to have paid the amount to the Secretary and also that he should have advised the accused to obtain a receipt from the Secretary, or got the payment entered in the registers of the Society. The Sessions Court and the High Court disbelieved the D.Ws. like the trial Court. It seemed that the defence version could not be disbelieved merely because if the money had not been paid, as stated by the appellant, it would have been expected that the non-payment would be known to the President and the Cashier much sooner. The only foolish thing the appellant did was that he delivered the money and did not take the receipt from Mahnga Ram. The evidence of the D.Ws. had been disbelieved on pure conjectures and surmises. It was not common that the persons who were witnesses to a transaction go about complaining to the higher authorities if the transaction was impugned. A person could not be allowed to be convicted on mere suspicion and hence the appeal was allowed. *Des Raj* v. *State of Punjab,* AIR 1974 SC 2292 : (1971) 3 SCC 235 : 1971 SCC (Cri) 443 : 1974 CrLJ 1531 : 1971 SCD 876 : 74 PunLR 20.

[12451] ● ***Appointment of defence counsel—Need for.***—Sessions Judges should view with sufficient seriousness the need to appoint State Counsel for undefended accused in grave cases. Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent Advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the bar. Sufficient time and completed papers should also be made available to the Advocate chosen so that he may serve the cause of justice with all the ability at his command and the accused felt confident that his counsel chosen by the Court has had adequate time and material to defend him properly. *R.N. Wasawa* v. *State of Gujarat,* AIR 1974 SC 1143 : (1974) 3 SCC 581 : 1974 SCC (Cri) 59 : 1974 CrLJ 799 : 1974 SCD 139.

[12452] ● ***Non-examination of most material evidence to prove defence version in criminal case strongest possible circumstance to discredit defence version.***—The High Court further points out that Smt. Rambeti who is said to have been hit by a gun-shot fired by Shyampal Singh was the most material witness to prove the defence version and yet she has not been examined and no explanation for her non-examination has been given by the defence. Mr. Garg suggested that as she was a woman so the defence did not take the risk of examining her. In our opinion the non-examination of Smt. Rambeti is the strongest possible circumstance to discredit the defence version, because she alone could have been in the best position to explain whether the injuries were caused as a result of the shot fired by Shyampal Singh or just accidentally. *Gajendra Singh* v. *State of U.P.,* AIR 1975 SC 1703 : (1975) 4 SCC 241 : 1975 SCC (Cri) 499 (503) : 1975 CrLJ 1494 : 1975 CrLR (SC) 385.

[12453] ● ***Appeal against conviction.***—Where the High Court in appeal against conviction dealt with the defence case even before it considered and gave a finding on the truth or otherwise of the prosecution case against the accused, the approach of the High Court was wrong. *Gajendra Singh* v. *State of U.P.,* AIR 1975 SC 1703 : (1975) 4 SCC 241 : 1975 SCC (Cri) 499 : 1975 CrLJ 1494.

[12454] ● ***Statements made to Police—Use of.***—Statements of witnesses recorded by police officer: User for contradiction: Who can be contradicted: Court witness and defence witness not liable to be contradicted. Only witnesses on behalf of the prosecution can be contradicted by reference to their statements made to the police, and not Court witnesses or defence witnesses. *Shakila Khader* v. *Nausher Game,* AIR 1975 SC 1324 : (1975) 4 SCC 122 : 1975 SCC (Cri) 379 : 1975 CrLJ 1105.

[12455] ● ***Defence not to prove its case with same rigour as prosecution.***—It is well settled that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version. *Lakshmi Singh* v. *State of Bihar,* AIR 1976 SC 2263 : (1976) 4 SCC 394 : 1976 SCC (Cri) 671 (679) : 1976 CrLJ 1736 : 1977 CrLR (SC) 76.

[12456] ● ***Duty of prosecution and Court.***—It is well settled that the prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the Court on its own make out a new case for the prosecution and convict the accused on that basis. From whatever angle the matter may be looked at the prosecution case had miserably failed to make out a case against the appellant. When the substratum of the evidence given by the eye-witnesses examined by the prosecution was found to be false, the only prudent course, in the circumstances of this case, left to the Court was to throw out the prosecution case in its entirety against all the accused. *Bhagirath* v. *State of Madhya Pradesh,* AIR 1976 SC 975 : (1976) 1 SCC 20 : 1975 SCC (Cri) 742 (745, 746) : 1976 CrLJ 706 : 1975 CrLR (SC) 560.

[12457] ● ***Standards to be employed to judge truth or falsity of version of defence.***—Another question that arises is what are the standards to be employed in order to judge the truth or falsity of the version given by the defence? Should the accused prove his case with the same amount of rigour and certainty, as the prosecution is required, to prove a criminal charge, or it is sufficient if the accused puts forward a probable or reasonable explanation which is sufficient to throw doubt on the prosecution case? Three cardinal principles of criminal jurisprudence are well-settled, namely :

(i) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from the weakness or falsity of the defence version while proving its case;

(ii) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and

(iii) that the onus of the prosecution never shifts. *Rabindra Kumar Dey* v. *State of Orissa,* AIR 1977 SC 170 : (1976) 4 SCC 233 : 1976 SCC (Cri) 566 : 1977 CrLJ 173 : 1976 CrLR (SC) 436.

[12458] ● ***Onus of proving exception mentioned in IPC lies on accused.***—It is true that under Section 105 of the Evidence Act the onus of proving exceptions mentioned in the Indian Penal Code lies on the accused, but this section does not at all indicate the nature and standard of proof required. The Evidence Act does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge. In fact from the cardinal principles referred to above, it follows that, it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by Section 5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Indian Penal Code on which he seeks to rely. It is sufficient for the defence to give a version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the Court. *Rabindra Kumar Dey* v. *State of Orissa,* AIR 1977 SC 170 : (1976) 4 233 : 1976 SCC (Cri) 566 : 1977 CrLJ 173 : 1976 CrLR (SC) 436.

[12459] ● ***Obligatory on accused to produce evidence in defence.***—In a criminal trial, it is not at all obligatory on the accused to produce evidence in support of his defence and for the purpose of proving his version he can rely on the admissions made by the prosecution witnesses or on the documents filed by the prosecution. In these circumstances, the Court has to probe and consider the materials relied upon by the defence instead of raising an adverse inference against the accused, for not producing evidence in support of his defence, because the prosecution cannot derive any strength or support from the weakness of defence case. The prosecution has to stand on its own legs, and if it fails to prove its case beyond reasonable doubt, the entire edifice of the prosecution would crumble down. *Rabindra Kumar Dey* v. *State of Orissa,* AIR 1977 SC 170 : (1976) 4 SCC 233 : 1976 SCC (Cri) 566 : 1977 CrLJ 173 : 1976 CrLR (SC) 436.

[12460] ● ***Accused to prove his defence from admission made by prosecution witnesses.***—The learned sessions Judge dismissed the plea of consent in a rape case on the ground that it was not pleaded by the accused completely losing sight of the fact that in a criminal case the accused is not bound by his pleading and it is open to the accused to prove his defence even from the admission made by the prosecution witnesses or the circumstances. *Pratap Misra* v. *State of Orissa,* AIR 1977 SC 1307 : (1977) 3 SCC 41 : 1977 SCC (Cri) 447 (448) : 1977 CrLJ 817 : 1977 CrLR (SC) 233 : 1977 CrAppR (SC) 164.

[12461] ● ***At the beginning and initial stage of trial truth veracity and effect of evidence not to be meticulously judged.***—Reading the provisions contained in Sections 227 and 228, CrPC together in juxta-position, as they have got to be, it would be clear that at the beginning and the initial stage of the trial, the truth, veracity and the effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or 228 of the Code. At the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against him. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. If the scales of a balance as to the guilt or innocence of the accused are something like even at the conclusion of trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227. *State of Bihar* v. *Ramesh Singh,* AIR 1977 SC 2018 : (1977) 4 SCC 39 : 1977 SCC (Cri) 533 : 1977 CrLJ 1606 : 1977 CrLR (SC) 375 : 1977 BBCJ (SC) 226 : 1977 CrAppR (SC) 267 : 1977 ChandLR (Cri) SC 274 : 1977 CurLJ (Cri) 214 : (1977) 3 ALR 443.

[12462] ● ***Prosecution witnesses contradicting their earlier statements.***—The defence case was that the appellant was overpowered by three or four persons on the canal bank on the evening of the 16th May and in the scuffle his shirt was torn. Inspector Shiv Narain said in his evidence that at the time when he lodged the accused in the Police custody the clothes the accused was wearing were not torn. It is not clear what made him note the condition of the appellant's wearing apparel that evening. But he went on to add that next day, on the 17th May, when the accused was brought before him he found that the "shirt worn by the accused was torn from the right arm and both the shoulders". According to PW 12 he had the shirt removed from the person of the accused and too possession of the same. It is difficult to see wh this was necessary. Counsel for the appellan suggests that this story was introduced in antic pation of a defence case built on the torn shir We do not think that is an entirely baseles suggestion. *Bhajan Singh* v. *State of Punjab,* AI 1977 SC 674 : (1977) 4 SCC 596 : 1977 SC (Cri) 290 (293) : 1977 CrLJ 439 : 1976 CrL (SC) 556.

[12463] ● ***Right to adduce evidence in rebutta one of inevitable steps in defence case.***—Th right to adduce evidence in rebuttal is one of th inevitable steps in the defence of a case by th accused and a refusal of the same amounts no only to an infraction of the provisions of th Criminal Procedure Code but also of the principles of natural justice and offends the famou maxim *audi alteram partem*. *Rameshwar Dayal* v *State of U.P.,* AIR 1978 SC 1558 : (1978) 2 SC 518 : 1978 SCC (Cri) 311 (318) : 1978 CrL (SC) 182 : (1978) 3 SCR 59.

[12464] ● ***Accused not required to prove hi defence by strict standards of proof.***—It is wel settled that the accused is not required to prov his defence by strict standard of proof but it i sufficient if he offers an explanation or defenc which is probable and once this is done, the presumption under S. 4 of the Prevention of Corruption Act, 1947 stands rebutted. *Man Singh* v *Delhi Administration,* AIR 1979 SC 1455 : (1979 3 SCC 425 : 1979 SCC (Cri) 528 (529) : 197 CrLJ 1118 : 1979 CrLR (SC) 625 : 1979 UJ (SC 798.

[12465] ● ***Defence taken by one accused not t be treated as evidence against co-accused.***—It i well settled that the defence taken by one accuse cannot in law be treated as evidence against hi co-accused. *S.P. Bhatnagar* v. *The State o Maharashtra,* AIR 1979 SC 826 : (1979) 1 SC 535 : 1979 SCC (Cri) 323 (347) : 1979 CrLJ 566 1979 CrLR (SC) 328 : (1979) 2 SCR 875.

[12466] ● ***Rash and negligent driving— Conventional defences.***—In our current considerations, the law under S. 304-A, IPC and under th rubric of negligence, must have due regard to th fatal frequency of rash driving of heavy dut vehicles and of speeding menaces. Thus viewed it is fair to apply the rule of *res ipsa loquitur* o course with care. Conventional defences, excep under compelling evidence, must break dow before the pragmatic Court and must be give short shrift. *Rattan Singh* v. *State of Punjab,* AIR 1980 SC 84 : 1980 SCC (Cri) 17 (19) : 1980 CrL 11 : 1980 CrLR (SC) 44 : (1980) 1 SCR 846.

[12467] ● *Medico-legal report led in evidence without objection effect.*—Defence did not produce the Doctor who examined the injuries of the accused. However, the medico-legal report was led in evidence without any objection. The prosecution cannot profit by their failure to examine the Doctor. This medico-legal report (Ex PW-15/DY) was proved by Om Pal Singh (PW-15), record keeper of Police Hospital, who was acquainted with the hand writing and signature on Ex PW-15/DY. The medico-legal report shows that the possibility of Ramzani appellant having received these injuries on his hands with an iron bar, cannot be ruled out.

The injuries on the person of the accused have not been explained by the prosecution. So the prosecution has failed to discharge the burden of bringing home the guilt to the appellant beyond reasonable doubt. *Mohd. Ramzani* v. *State of Delhi*, AIR 1980 SC 1341 : 1980 SCC (Cri) 907 : 1980 CrLJ 1010 : 1980 Supp SCC 215.

[12468] ● *Prosecution for exhibition of cinema film constituting offences under Sections 292 and 293, IPC.*—In a prosecution under Sections 292 and 293 for exhibiting a cinema film certificate granted by the Film Censor Board gives rise to a rebuttable presumption. Function of Court is to decide, whether the ingredients of the offences are established. It is its primary and essential function and cannot abdicate that function in favour of another, no matter how august and qualified be the statutory authority. Act of recognition of moral worthiness by a statutory agency is not opinion evidence but an instance or transaction where the fact in issue has been asserted, recognised or affirmed. Certificate is a relevant material, important in its impact, though not infallible in its verdict. But Court is not barred, from trying the case because the certificate is not conclusive. Nevertheless, the Magistrate shall not brush aside what another tribunal has, for similar purpose, found. *Raj Kapoor* v. *State (Delhi Administration),* AIR 1980 SC 258 : (1980) 1 SCC 43 : 1980 SCC (Cri) 72 (80) : 1980 CrLJ 202 : 1982 CrLR (SC) 64.

[12469] ● *False defence version does not strengthen prosecution case.*—The defence version taken by the accused, appellant though false, would not strengthen the prosecution case. *Baldev Raj* v. *State of Himachal Pradesh*, AIR 1980 SC 436 : (1980) 2 SCC 564 : 1980 SCC (Cri) 491 : 1980 CrLJ 385.

[12470] ● *Gun-shot injury—Gun broke when snatched.*—According to the Investigating Officer, PW-14, when the licensed gun of Suraj Nath Chaudhary, PW-12, was seized by the witness from the house of Radha Chamar, its butt was found in a broken condition. This circumstance also lends some support to the defence version that PW-12 and his party men had attacked the appellant party and PW-12 opened the score by causing gun-shot injury to Chit Bahal, and when PW-12 reloaded the gun to fire again, Ram Ashrit, appellant, snatched the gun from PW-12 and broke it. *Ram Ashrit* v. *State of Bihar,* AIR 1981 SC 942 : (1981) 2 SCC 60 : 1981 SCC (Cri) 324 (328, 329) : 1981 CrLJ 484 : 1981 CrLR (SC) 177.

[12471] ● *Defence witnesses entitled to equal treatment with those of prosecution.*—Defence witnesses are entitled to equal treatment with those of the prosecution. The Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. *Dudh Nath* v. *State of Uttar Pradesh*, AIR 1981 SC 911 : (1981) 2 SCC 166 : 1981 SCC (Cri) 379 : 1981 CrLJ 1618.

[12472] ● *Difficult to hold from medical evidence that defence version false.*—In the state of evidence in the present case, specially the medical evidence, it is difficult to hold with any certainty that the occurrence had taken place in the way the prosecution witnesses allege. From the medical evidence it is difficult to reach a firm conclusion that the defence version is altogether false. In these circumstances we do not find it safe to maintain the conviction of the appellants. *Milkiyat Singh* v. *State of Rajasthan,* AIR 1981 SC 1579 : 1981 SCC (Cri) 264 (267) : 1981 CrLJ 1000 : 1980 CrLR (SC) 645 : 1981 UJ (SC) 127.

[12473] ● *Falsity of defence not to take place of proof of facts.*—Falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance if other circumstances point unfailingly to the guilt of the accused. *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra,* AIR 1981 SC 765 : (1981) 2 SCC 35 : 1981 SCC (Cri) 315 (322) : 1981 CrLJ 325 : 1981 CrLR (SC) 616 : (1981) 2 SCR 384.

[12474] ● *Section 76 Illus (a), IPC—Applicability of.*—The illustration to Section 76, IPC says that if a soldier fires on a man by the order of his superior officer in conformity with the commands of the law he commits no offence. The occasion to apply the provision of the section does not arise in the instant case, since the question as to whether the accused believed in good faith on account of a mistake of fact that he was bound by law to do the act which is alleged to constitute an offence, would arise only if the order is not justified or is otherwise unlawful. Since the situation prevailing at the scene of the offence was such as to justify the order given by the Deputy Commissioner of Police to open fire, the respondents can seek the protection of that order and plead in defence that they acted in obedience to that order and, therefore, they cannot be held guilty of the offence with which they are charged. That is the purport of the illustration of S. 76, IPC. *State of West Bengal* v. *Shew Mangal Singh,* AIR 1981 SC 1917 : (1981) 4 SCC 2 : 1981 SCC (Cri) 782 (785) : 1981 CrLJ 1683 : 1981 CrLR (SC) 501.

[12475] ● ***Authorities permitting sale of goods and granting amendment of licence.***—The mere fact that the concerned authorities permitted sale of goods and granted amendment of licences to include also items other than the one for which originally the licence was issued, would not provide an irrebutable defence and entitle the accused to protection under Section 79, IPC. *Jayantilal K. Kataka* v. *P. Govindan Nair,* (1981) 2 SCC 423 : 1981 SCC (Cri) 458 : 1981 CrLR (SC) 508 : 1981 UJ (SC) 174.

[12476] ● ***Accused persons defended by public prosecutor who earlier had brief.***—In the present case the accused persons were defended by the Public Prosecutor, who earlier, had the brief of the case with him. Also, it was found that the accused were supported by the ruling party in the State and when the trial was going on and the witnesses were giving evidence, there were a large number of supporters of the party who were allowed to assemble in the Court compound and who created a hostile atmosphere by shouting against the prosecution and in favour of the accused. Though the brother of the deceased and the complainant as also the witnesses were intimidated, no steps were taken for according protection to them, so that they might be able to give evidence truly and fearlessly in a proper atmosphere consistent with the sanctity of the Court. A few witnesses also turned hostile. It was further found, that when the trial commenced, the Special Public Prosecutor who was appointed only two days earlier was granted adjournment only for one day to prepare the case. In the abovesaid circumstances the trial could not be regarded as fair and just so far as the prosecution was concerned. The entire course of events showed that the conduct of the trial was heavily loaded in favour of the accused persons. The trial was vitiated and the acquittal of the accused was set aside, as confirmed by the High Court rejecting the application of appellant The Supreme Court ordered a re-trial of respondents Nos. 1 to 9 on the self-same charges for which they were tried before the learned Additional Sessions Judge and the trial ordered to be conducted, in a place other than Krishna Nagar because the atmosphere was not congenial to the appellant and the complainant. Hence the Sessions case was transferred to be tried by a City Civil and Sessions Judge to be appointed by the Chief Judge of that Court. It was also directed that a Senior Advocate practising on the criminal side in that Court should be appointed by the State Government as Special Public Prosecutor in consultation with the appellant and the complainant. *Sunil Kumar Pal* v. *Phota Sheikh,* AIR 1984 SC 1591 : (1984) 4 SCC 533 : 1985 SCC (Cri) 18 : 1985 CrLR (SC) 598.

[12477] ● ***Presence of accused at place of occurrence not proved by evidence.***—Adverting to the case of Purna, his specific and positive defence was that on the date of occurrence that is on March 11, 1973 he was assigned the duty from 8.00 a.m. to 5.00 p.m. in Hydel Sub-Division at Mathura. In order to substantiate this defence, he examined DW-1, Mani Kant Trivedi, as clerk in the office of SDO Hydel who deposed that appellant Purna was on duty from 8.00 a.m. to 5.00 p.m. on March 11, 1973 in Hydel Sub-Division at Mathura. In support of this statement, he produced the time keepers' record made at the gate of power station at the time of entering the power station at 8.00 a.m. He stated that the gate is locked at 8.00 a.m. and reopened at 5.00 p.m. and the record shows that appellant-Purna was in the Hydel Sub-Division on that day from 8.00 a.m. to 5.00 p.m. According to PW 1 and PW 2 the incident occurred around between 2.00 p.m. to 3 p.m. But Mr. Chauhan the Prosecution witness does not say a single word about the register maintained at the gate. He has no knowledge whether the appellant Purna was or was not present in Hydel Sub-Division at Mathura. Witness Chauhan himself was working at Aurangabad Sub-Station. He had no personal knowledge about the presence of appellant Purna at the power station. His evidence is of a general nature and is very vague and it could not be accepted in preference to the evidence of DW-1 Mani Kant Trivedi, whose evidence was borne out by the contemporaneous record. *Purna* v. *State of U.P.,* AIR 1984 SC 454 : (1984) 2 SCC 393 : 1984 SCC (Cri) 261 (262, 263) : 1984 CrLJ 187 : 1983 CrLR (SC) 258 : 1983 UJ (SC) 532 : (1983) 1 Crimes 973.

[12478] ● ***Demanding and accepting illegal gratification.***—A Doctor in a Government Hospital was found guilty of demanding and accepting illegal gratification from the father of a patient under his treatment at the Hospital and was convicted for an offence under S. 5(1)(*d*) of the Prevention of Corruption Act, 1947 and for an offence under S. 161 of the IPC. The High Court allowed the appeal on forming the opinion that the respondent might have demanded and accepted the amount as and by way of his professional fees inasmuch as Government Doctor was permitted to have private practice of his own as per the relevant rules, though such was not his defence at any stage. The respondent accused had not offered any such explanation in his statement recorded under S. 313 of the CrPC. In fact the defence of the respondent before the Sessions Court was that he had never accepted any such amount form PW-3. It was his case that the story regarding passing of the currency notes was concocted and that he had not accepted any currency notes from PW-3, as alleged by the prosecution. According to him he had been "framed". What is more, it is obvious that if the respondent had accepted monetary consideration in respect of a patient being treated at the Government Hospital, it could scarcely have been contended that it was a part of permissible private practice and not illegal gratification. The High Court resorted to surmises and conjectures for which there was not the slightest basis, apart from the fact that no such defence was taken and no such plea was ever advanced by the respondent accused. Under the circumstances, the decision of the High Court cannot be sustained on the basis of the reasoning which found favour with it. *State of U.P.* v. *Dr. G.K. Ghosh,* AIR 1984 SC 1453 : (1984) 1 SCC 254 : 1984 SCC (Cri) 46 (48, 49) : 1985 CrLJ 904 : 1983 CrLR (SC) 490 : (1983) 3 SCR 993 : (1983) 2 Crimes 856.

[12479] ● ***No contention taken before trial Court or before High Court that petitioner only 15-1/2 years at time of occurrence.***—The statement of the petitioner made before the trial Court under Section 313, CrPC was that the deceased was his aunt and had no issues and she wanted to adopt him as her son and there was no justification for the petitioner to murder her before she adopted him. The further statement and suggestion was that PW-4 suspected that the petitioner had illicit connection with the deceased and, therefore, if the petitioner would have thought of murdering, it would have been of PW-4 and not the deceased. If the petitioner was only 15-1/2 years old at the time of the occurrence and only a little over 18 years of age at the time of trial, it is improbable that such a stand would have been taken on behalf of the petitioner. Plea appears to be an after thought. *Sushil Kumar Mehrotra* v. *State of Uttar Pradesh,* AIR 1984 SC 1232 : (1984) 3 SCC 123 : 1984 SCC (Cri) 418 (420, 421) : 1984 CrLJ 990 : 1984 CrLR (SC) 266 : 1984 UJ (SC) 716.

[12480] ● ***Murder Trial—Circumstantial evidence.***—The appellant in his defence took the stand that he was the driver of the taxi in which three persons came as passengers. Soon after the bridge had been crossed, the passengers started quarrelling among themselves. That diverted the attention of the appellant and resulted in a cyclist being dashed against. When the car came to standstill the three people who were quarrelling among themselves got down and two of them started assaulting the deceased with a knife after going a little away from the road. The appellant went there to rescue the deceased. In that process his wearing apparel got blood soaked. After fatally assaulting the deceased the assailants ran away when some people started collecting there. *Ramesh Chand* v. *State of Uttar Pradesh,* AIR 1985 SC 766 (767) : (1985) 1 SCC 464 : 1985 SCC (Cri) 100 : 1985 CrLJ 530 : 1985 CrLR (SC) 70 : (1985) 1 Crimes 336.

[12481] ● ***High Court rejecting defence version and convicting accused.***—PW-7 was admittedly present at the spot and he has categorically spoken that when the appellant's fingers were put into the mixture they did not turn rosy. The Trial Court had referred to this fact and relied upon it. That evidence which had been accepted, probabilises the defence plea that the currency notes had not been received by the appellant in his left hand and, therefore, the insertion of the notes into the pocket of the appellant by some other persons were more probable. This is the defence plea which had been accepted by the Trial Court. We are inclined to think that reversal by the High Court was not warranted. *Salim Khan Sardar Khan* v. *State of Gujarat,* AIR 1986 SC 307 (309) : (1985) 4 SCC 234 : 1985 SCC (Cri) 511 : 1985 CrLJ 1901 : 1985 CrLR (SC) 547.

[12482] ● ***Murder of wife by husband—High Court in appeal against conviction entertaining unwarranted doubts.***—The High Court has been obsessed with the defence plea that the accused could not have inflicted a clean cut wound on the throat of Sulochana without holding her head firm with his left hand. Since PWs-1 and 2 have stated that the accused was holding the torch in his left hand while inflicting the cut on Sulochana's neck with MO-1 held in his right hand, the High Court has concluded that the occurrence could not have taken place in that manner and, hence, their evidence is unacceptable. The High Court has failed to see that Sulochana was a woman of very weak constitution and furthermore the accused had knelt over her chest and pinned her hands to the ground with his knees and as such it would not have been possible for Sulochana to offer any resistance when the accused cut her throat. *State of Kerala* v. *Bahuleyan,* AIR 1987 SC 482 : (1986) 4 SCC 124 : 1986 SCC (Cri) 361 (364, 365) : 1986 CrLJ 1579 : 1986 CrLR (SC) 473 : JT (1986) SC 190 : (1986) 3 Crimes 364.

[12483] ● ***Confirming authority considered report of Advisory committee.***—The report of the Advisory Committee was considered by the confirming authority. In the circumstances, it cannot be said that the confirming authority had not applied his mind to the evidence of the defence witness as contended on behalf of the appellant. It is, however, submitted by the learned Counsel for the appellant that the relevant portion of the evidence of the defence witness has not been mentioned in the report of the Advisory Committee, and accordingly, the confirming authority had no occasion to consider the same. We do not think that it is incumbent upon the Advisory Board to refer in detail the evidence of defence witness in its report. It will not be unreasonable to presume that all the records including the deposition of the said M.L. Khanna (defence witness) were before the confirming authority. It will be a mere surmise to hold that the confirming authority has not applied his mind to the deposition of the defence witness, even though such deposition has been referred to in the report of the Advisory Committee. *Madhu Khanna* v. *Administrator Union Territory of Delhi,* AIR 1987 SC 48 : (1986) 4 SCC 240 : 1986 SCC (Cri) 426 (430, 431) : 1986 CrLJ 318 : 1986 CrLR (SC) 401.

[12484] ● ***Defence founded on relevant and vital document.***—Where defence is founded on a relevant and vital document seized from the custody of the accused and not deliberately produced, it is difficult to sustain the conviction of the accused. In the instant case it was the duty of the prosecution to produce the release order. The said statement of PW-2 that in the release order dated March 7, 1968 delivery was marked in respect of the goods which were dispatched outside without producing the release order in question, is no evidence at all and is also no answer to defence plea that the said 22 bags of wheat were loaded in the truck as per the release order No. 115. *Chittaranjan Choudhary* v. *State of Bihar*, AIR 1987 SC 856 : 1987 SCC (Cri) 287 : 1987 CrLJ 773 : 1987 (1) Crimes 383.

[12485] ● ***Vital document seized from custody of accused not produced.***—Where, as in the instant case, the defence is founded on a relevant and vital document seized from the custody of the accused and not deliberately produced, it is difficult to sustain the conviction of the accused. It was the duty of the prosecution to produce the release order No. 115 in order to remove all doubts by showing that the goods which were being despatched by the appellant, were not covered by the release order. The said statement of PW-2 that in the release order dated March 7, 1968 delivery was marked in respect of the goods which were despatched outside without producing the release order in question, is no evidence at all and is also no answer to the defence plea that the said 22 bags of wheat were loaded in the truck as per the release order No. 115. The Munsif Magistrate completely overlooked that the said release was seized from the custody of the appellant. The Magistrate was, therefore, not justified in rejecting the defence plea on the ground of non-production of the release order by him. *Chittaranjan Choudhury* v. *State of Bihar,* AIR 1987 SC 856 : (1987) 2 SCC 104 : 1987 SCC (Cri) 287 : 1987 CrLJ 773 : 1987 CrLR (SC) 195 : 1987 UJ (SC) 477 : 1987 CrAppR (SC) 347 : (1987) 1 Crimes 383.

[12486] ● ***No explanation of injuries on accused person.***—There is no clear explanation of the injuries on the accused person. The appellant has set up a defence that the scuffle started and it is only in that situation that he took out the knife and inflicted a blow. It is also not in dispute that it was only one blow which was inflicted by the present appellant. In these circumstances, the evidence of the prosecution does not clearly establish the manner in which the incident took place and, therefore, it could not be held that the incident did not take place in the manner suggested by the present accused appellant and in that situation it could not be held that he inflicted this injury with an intention to cause death. At best, knowledge could be imputed to him that it may result in death. In view of this, the conviction of the appellant under Section 302 could not be maintained and it is altered to S. 304, Part II, IPC. *Katar Singh* v. *State of Punjab,* AIR 1988 SC 2122 : (1988) 1 SCC 690 : 1988 SCC (Cri) 264 (265) : 1988 CrLR (SC) 77 : JT 1988 (1) SC 116.

[12487] ● ***Circumstantial evidence of deceased last seen with accused.***—The prosecution has suggested that the appellant did not search for his father, but according to the appellant, the deceased had been taken away by Manjit Singh to their place on the pretext that Manjit Singh's wife, *i.e.*, the appellant's sister was not well and this was also put in cross-examination to Nihal Singh. In the absence of evidence of Manjit Singh, the suggestion of the appellant cannot be brushed aside. *Makhan Singh* v. *State of Punjab,* AIR 1988 SC 1705 : 1988 SCC (Cri) 916 (919) : 1988 CrLR (SC) 501 : JT 1988 (3) SC 126.

[12488] ● ***Evidence of living person—Mode of adducing.***—The appellant's counsel submitted that the Courts below had failed to take into account the affidavit of Haliman filed by the defence which goes to show that the appellant was not involved in the incident. He submitted that Haliman being a close relative the deceased would not ordinarily come forward to file an affidavit exonerating the appellant notwithstanding the fact that the appellant is also his close relation. Haliman was not examined as a defence witness, nor was any request made to the Court at any time during the trial to examine her as a prosecution or Court witness. Proof of Haliman's signature on the affidavit is not forthcoming. Besides, if the defence wanted to rely on the evidence of this witness, the proper course was to call her as a defence witness. S. 3, Evidence Act, contemplates oral evidence or documentary evidence. In the case of a living person evidence in judicial proceedings must be tendered by calling the witness to the witness stand and cannot be substituted by an affidavit unless the law permits it, *e.g.* Ss. 295 and 407(3), CrPC, or the Court expressly allows it. *Munir Ahmed* v. *State of Rajasthan,* AIR 1989 SC 705 : 1989 SCC (Cri) 455 (462) : 1989 CrLJ 845 : 1989 CrLR (SC) 196 : JT 1989 (1) SC 76 : 1989 CrAppR (SC) 127 : (1989) 2 Crimes 81.

[12489] ● ***All defence witnesses came to give evidence on being requested by accused.***—All the defence witnesses came forward to give evidence on being requested by the accused. None of them was summoned. Many of them are from Rajwara of which the accused has been the Mukhiya for the last several years. It is, therefore, not surprising that they have tried to support his version. *Kanti Kumari Roy* v. *Suresh Kumar Roy,* AIR 1990 SC 1631 : 1990 SCC (Cri) 546 (553) : 1990 CrLJ 1630 : 1990 CrLR (SC) 278 : JT 1990 (2) SC 121 : 1990 CrAppR (SC) 194.

[12490] ● ***Conduct of accused throwing mattress over deceased burning woman.***—"According to the witness, particularly PW-2 the deceased was found under a mattress and accused No. 1 was pressing the same on her and in the process he also got burns. The High Court has rightly observed that the culprits who had decided to put an end to the life of the deceased would never go to the extent of extinguishing the fire after throwing a mattress on her and in this view according to the High Court, the prosecution has not proved beyond reasonable doubt that this was a case of homicide and not suicide. The conduct of the accused in throwing the mattress over the burning woman is an important circumstance which creates a doubt about the prosecution version." *State of Gujarat* v. *Mohan Bhai Raghbhai Patel,* AIR 1990 SC 1379 (1381) : 1990 CrLJ 1462 : 1990 CrLR (SC) 313 : JT 1990 (2) SC 440.

[12491] ● ***Prosecution to succeed on basis of its own evidence.***—The prosecution has to succeed on the basis of its own evidence and it cannot rely on the absence of defence to sustain the guilt as there is no justification for raising assumption against the appellants. The circumstances established by the prosecution are not sufficient to conclusively point to the appellants as the perpetrator of the crime or rule out the hypothesis of their innocence. The High Court was not justified in drawing adverse inference for completing the chain of circumstances to uphold the appellants conviction merely on the appellants false explanation in defence. *Harendra Narain Singh* v. *State of Bihar,* AIR 1991 SC 1842 : (1991) 3 SCC 609 : 1991 SCC (Cri) 905 (906) : 1991 CrLJ 2666 : 1991 CrLR (SC) 581 : JT 1991 (3) SC 167 : (1991) 3 Crimes 297.

[12492] ● ***Appreciation of evidence—Presence of blood near tube-well.***—If the defence version has to be rejected, this factor which weighs in favour of the defence ought to have been explained as an innocuous circumstance not affecting the genesis of the prosecution case. *Buta Singh* v. *State of Punjab,* AIR 1991 SC 1316 : (1991) 2 SCC 612 : 1991 SCC (Cri) 494 (498) : 1991 CrLJ 1464 : 1991 CrLR (SC) 384 : (1991) 2 Crimes 46.

[12493] ● ***No blood found from spot where incident occurred.***—When two versions are before the Court, the version which is supported by objective evidence cannot be brushed aside lightly unless it has been properly explained. As stated earlier, the prosecution has not explained how blood was found from near the tubewell and no blood was found from the spot where according to them the incident occurred. *Buta Singh* v. *State of Punjab,* AIR 1991 SC 1316 : (1991) 2 SCC 612 : 1991 SCC (Cri) 494(499) : 1991 CrLJ 1464 : 1991 CrLR (SC) 384 : (1991) 2 Crimes 46.

[12494] ● ***Cumulative effect of all facts established to be consistent with hypothesis of guilt.***—The circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. *State of U.P.* v. *Ashok Kurmar Srivastava,* AIR 1992 SC 840 : (1992) 2 SCC 86 : 1992 SCC (Cri) 241 (249) : 1992 CrLJ 1104.

[12495] ● ***Removal of dead bodies—Two fields away from disputed land.***—It is beyond one's comprehension in the circumstances of the case that the respondents would have tried to remove the dead bodies of the accused persons after the occurrence because such a removal would be detrimental to their defence. Therefore, if at all any one had obliterated the scene of occurrence by removing the dead bodies, it must have been only by the prosecution, obviously, for putting up a theory that the occurrence did not take place in the field in dispute but in some other pasture land, that is, two fields away from the disputed land. *Bir Singh* v. *State of U.P.,* 1992 Supp (2) SCC 264 : 1992 SCC (Cri) 915 (929) : 1992 CrLJ 1510.

[12496] ● ***Inquest report though not to be treated as evidence can be looked to test veracity of witness.***—DW-2 was a panch witness in the inquest report which he attested and in which the presence of PW-3 is given as witness of the occurrence. DW-2 has no explanation except stating that he did not read the contents. Admittedly, he knows Punjabi language in which the inquest report was written. Therefore his explanation is not acceptable. The evidence of DW-2 is not of much consequence. DW-3 deposed that he is brother-in-law of the accused and that his wife had taken the son and daughter of the accused from the village. His evidence is not of much consequence. DW-1 also deposed that he heard an alarm from the house of the accused and went to the house of accused and saw the accused and his wife grappling and he tried to intervene, but before he could do so, the gun of the accused fired accidentally. Therefore, he took the accused to DW-2, village Sarpanch and thereafter they went to the Police Station and gave a report. But DW-2 was a panch witness in the inquest report wherein the version was that the accused deliberately shot at the deceased. No doubt the contents of the inquest report cannot be treated as evidence but they can be looked into to test the veracity of DW-2. Thus the evidence of DWs 1 to 3 is not of any help to the accused. *Kuldip Singh* v. *State of Gujarat,* AIR 1992 SC 1944 : 1992 SCC (Cri) 946 (948) : 1992 CrLJ 3592 : (1992) 3 SCC (Supp) 1.

[12497] ● ***Plea of accidental firing of gun.***—In the instant case, the appellant's case was that he held the gun in his hands: Since the gun was loaded and the butt of it was severely hit by an axe blow the loaded gun went off. There was a scuffle between the parties and it is quite likely that in such scuffle, the butt of the gun was damaged by an axe blow. The Ballistic Expert has clearly stated that as soon as the gun was loaded it became automatically locked and the gun could not be fired unless the safety lock was moved forward. He has categorically stated that the axe blow on the butt could not move the safety lock forward so that the gun would go off. *Raja Bhaiya alias Raghubir Singh* v. *State of Madhya Pradesh,* AIR 1993 SC 2567 (2571, 2572) : 1993 CrLJ 3658 : JT 1993 (5) SC 234 : (1993) 3 Crimes 382.

[12498] ● ***Quarrel over taking water from tubewell—Accused firing shot in exercise of right of private defence killing deceased.***—The case of the appellant is that the deceased during the course of his insistence to take water to his land abused the appellant which led to a quarrel. According to him, when he and the deceased were grappling each other, the appellant's brother separated both of them. The deceased left the spot threatening that he would teach a lesson to the appellant. Therefore, the appellant fearing imminent danger to his life loaded his gun and sat there. Half an hour thereafter the deceased came with a *gandasi* and attack the appellant. Apprehending danger to his life, the appellant fired a shot in the air to scare away the deceased and others but it did not have any effect. When the deceased again attacked with *gandasi,* the appellant reloaded the gun and fired at the abdomen of the deceased for self-defence.

The medical evidence discloses that there was a contusion and two abrasions on the body of the deceased which injuries according to the Medical Officer could have been caused by any blunt weapon. It is not the case of the prosecution that the deceased was attacked by any blunt weapon. This fact indicates that the deceased had sustained these two injuries during the scuffle while they were grappling each other and rolling on the ground. In other words, the defence theory alone amply explains the injuries found on the deceased. Considering all the facts and circumstances of the case we feel that the appellant has fired the shot in the exercise of his right of private defence but has exceeded his right in putting an end to the life of the deceased. On the strength of the above findings we hold that the appellant would be liable to be convicted under S. 304, Part I and not under S. 302, IPC. *Jasbir Singh* v. *State of Punjab,* AIR 1993 SC 968 (969, 970) : 1993 SCC (Cri) 800 : 1993 CrLJ 301 : JT 1992 (3) SC 303.

[12499] ● ***Presence of accused at place of incident highly doubtful.***—A-2 pleaded *alibi*. He stated that he was on duty at Patiala from 10 a.m. to 5 p.m. and even after office hours he remained at Patiala and during the subsequent days also he had been attending to his duties. No doubt he has not examined any witness in support of his *alibi* but PW-25, the Investigating Officer, admitted that he has verified the office records which show that both A-1 and A-2 attended their offices on 2nd Dec. 1978. It, therefore, emerges that A-2 was at Patiala and attended his office at least till 5 p.m. and Patiala is about 40 miles away from the scene of occurrence. In such a situation his presence at the scene of occurrence at about 7 p.m. becomes highly doubtful. *Dharam Singh* v. *State of Punjab,* AIR 1993 SC 319 : 1993 SCC (Cri) 1059 (1069) : 1993 CrLJ 150 : JT 1992 (6) SC 98 : (1992) 3 Crimes 748.

[12500] ● ***Acceptance of bribe complainant tried to thrust money in packet.***—The case of the accused is that the complainant had tried to thrust the money in his pocket and he had resisted the said attempt, and thrown down the money on the floor. This version of the accused has been supported by the prosecution witness Raghubir Singh who is the adjacent shopkeeper and in whose shop the testing of ultraviolet rays on the currency notes was made. Since he was aware of what was going to happen he had naturally moved near the shop of the trap. According to this witness, he was standing outside the said shop and had heard the conversation inside the shop where the trap was laid. There is no reason why this witness who is a stranger both to the prosecution as well as to the accused would support the version of the accused, as stated above, if that was not the true version. *Babu Lal Bajpai* v. *State of U.P.,* AIR 1994 SC 1538 (1539) : (1993) 4 SCC 414 : 1994 CrLJ 1383.

[12501] ● ***Accused case of false implication established to be false.***—The defence of the accused is false when he says that it was his father who killed his wife and thereafter tried to inflict injures on him. The evidence shows that the father was not there when the incident occurred. This false explanation was rightly used by the learned Sessions Judge as an additional link to the chain of events presented by the prosecution. *State of Madhya Pradesh* v. *Rattan Lal,* AIR 1994 SC 458 (460) : 1994 CrLJ 131.

[12502] ● ***Grave and sudden provocation.***—The defence case is that when the appellant took strong objection to the conduct of Bhikam for supplying liquor to his brother Bhura, the deceased threw a challenge saying that the appellant could do whatever he could do which resulted in exchange of gross insult by words. It was only under such piquant and provocative situation that the appellant (who had already become imbalanced with a broken heart on seeing the dead body of his brother, Bhura who suddenly passed away due to the consumption of liquor, administered by Bhikam) on being deprived of self-control by grave and sudden provocation, took a knife which was lying nearby and stabbed Bhikam. In support of his defence the appellant examined DW-1 to 3. After carefully examining the evidence, we are left with an impression that the defence version is more probable than that of the prosecution. In our opinion the appellant had been deprived of his self-control by the grave and sudden provocation on the indifferent and impertinent reply as well as of the gross indecent word uttered by the deceased against the appellant in a piquant situation when his brother was lying dead on account of the consumption of liquor administered by the deceased. The High Court has overlooked this defence theory but proceeded only on the evidence adduced by the prosecution. Taking an overall survey of the evidence it is felt that the appellant is entitled for Exception 1 to S. 300, IPC. *Dayal* v. *State of Madhya Pradesh,* AIR 1994 SC 30 (31) : 1994 CrLJ 10.

[12503] ● ***No material that accused participated in dacoity or caused injury.***—The accused, particularly A-2, pleaded that they were innocent and they were going to a neighbouring place and the villagers who were running hither and thither caught hold of them and on suspicion they were implicated. The Sessions Judge acquitted all the accused.

The High Court convicted these two accused solely on the ground that they were caught while running. No recovery was effected from them. There is no material whatsoever that they participated in dacoity or caused injuries to inmates including the witnesses. The explanation given by the accused cannot be rejected outright. It is well-settled that the accused need not prove their plea beyond all reasonable doubt. *Latel* v. *State of Madhya Pradesh,* AIR 1994 SC 763 (764) : 1994 CrLJ 1122.

[12504] ● ***Right of private defence exceeded in view of type of injuries and weapon used.***—It is well settled that the accused need not prove his defence. It is enough if he can show by preponderance of the probability that the plea taken by him is plausible and raises a reasonable doubt. Then he is entitled to the benefit. Having examined the material on record and the nature of the injuries found on the accused and the injuries on the deceased, the accused has exceeded the right of private defence. Accordingly conviction is set aside. *Nizamuddin* v. *State of Madhya Pradesh,* AIR 1994 SC 1041 (1043) : 1994 CrLJ 1386.

[12505] ● ***Evidence of defence not suffering from any infirmity.***—There is nothing on record to show that the evidence of said defence witnesses suffers from any infirmity whatsoever. Kewal Krishan, DW-4, was neither questioned about the reports made by him to SDM and DC, by registered post nor about the contents of the letter/complaints. This suggests that the prosecution neither disputed the complaints made by the complainant nor the contents thereof.

The appeal was allowed. *Daulat Ram* v. *State of Haryana*, AIR 1995 SC 1998 : (1996) 11 SCC 711 : 1995 CrLJ 3648.

[12506] ● ***Accused killing his brother by axe—Defence witnesses falsely deposing to save accused.***—Considering the evidence of the defence witnesses it can be said that they have deposed falsely in order to save the appellants. DW-1, the father having lost one son (Surjit Singh) obviously did not want to lose his other son (appellant No 2) by getting him convicted. So also DW-2 being the brother tried to save appellant No. 2 by deposing like that. The evidence of PW 5 and PW 7 does not suffer from serious infirmity. Their evidence establishes beyond doubt that appellant No. 2 has been rightly convicted under Section. 302, IPC. *Jaswinder Kaur* v. *State of Punjab,* AIR 1995 SC 2327 (2328) : 1995 CrLJ 3982 : (1995) 3 Crimes 396 : (1995) 2 UJ 528.

[12507] ● ***Murder committed due to grave and sudden provocation.***—In his statement as his own defence witness, he has narrated the sequence of events by which he was provoked by the deceased. It stands out prominently that the deceased was a member of a high caste and the appellant of a low caste. Unfortunately, the appellant was subjected to repeated insults at the end of which, when his tolerance broke down, he made use of the knife and inflicted repeated injuries on the deceased who had unabashedly and lecherously asked the appellant to make available his wife to him for immoral purpose. This part of the statement of the appellant cannot be doubted. It is also in evidence that there was a job available in the school of the deceased Headmaster and that the appellant wanted to apply for the same to headmaster. This may have provided enough opportunity to the deceased to exploit the situation, as the appellant was unemployed in those days when the occurrence took place. Thus, from this analysis it becomes abundantly clear that the appellant was driven to the crime which was not premeditated and the occasion had sprung up at the moment, gradually leading to the point when the appellant lost his self-control, and due to grave and sudden provocation, inflicted the injuries on the deceased, successively within seconds. We think, therefore, that the offence made out against the appellant is under S. 304, Part I, IPC. Accordingly, the offence is scaled down from one punishable under S. 302, IPC to one under S. 304, Part I, IPC. *Devku Bhikha* v. *State of Gujarat,* AIR 1995 SC 2171 (2172) : 1995 CrLJ 3975 : (1996) 1 CCR 221.

[12508] ● ***Allegation in complaint make out prima facie case—Relevant consideration.***—At the stage of issuing process, the Court is to see whether the allegations made in the complaint make out the offence *prima facie*. Whether the offence has been made out, whether he is liable and what are the defences open to him are not matters at this stage for consideration. It is for the learned Magistrate to proceed with the trial and to deal with according to law. *Anil Saran* v. *State of Bihar,* AIR 1996 SC 204 (206) : (1995) 6 SCC 142 : 1995 SCC (Cri) 1051 : 1996 CrLJ 408 : JT 1995 (6) SC 428.

[12509] ● ***Dowry death—Distressing to note practising Advocates without any compunction spoken falsehood.***—It is most distressing to note that practising advocates, PW-6 and DW-2 with a view to exculpate the first respondent from the clutches of law, have, without any compunction, spoken falsehood and have no regard for truth betraying their duty of being responsible law officers who are expected to uphold truth and nothing but truth. *State of U.P.* v. *Ramesh Prasad Misra,* AIR 1996 SC 2766 (2768) : (1996) 10 SCC 360 : 1996 SCC (Cri) 1278 : 1996 CrLJ 4002.

[12510] ● ***False theories of stranger causing death.***—These false theories set up by the first respondent are yet other circumstance to complete the chain to inculpate the first respondent in the commission of the offence of murder and scratching the evidence of murder. *State of U.P.* v. *Ramesh Prasad Misra,* AIR 1996 SC 2766 : (1996) 10 SCC 360 : 1996 SCC (Cri) 1278 (1283) : 1996 CrLJ 4002 : JT 1996 (9) SC 566 : (1996) 3 Crimes 181.

[12511] ● ***Circumstantial evidence—Evidence and proof.***—It was next contended by Mr. Lalit that neither the Trial Court nor the High Court was justified in relying upon the evidence of the defence witness (DW-5) to record the conviction against the appellant. The prosecution having failed to prove its case against the appellant through its eye-witnesses, namely, PW-4 and PW-6 could not claim its success solely on the basis of the evidence of DW-5, more so, when he figured as a witness not on behalf of the appellant but on behalf of some of the other accused persons. We might have persuaded ourselves to accept the above contention of Mr. Lalit if the learned Courts below had, after discarding the evidence of PW-4 and PW-6 altogether, based their findings against the appellant solely relying upon the ocular version of the incident given out by DW-5 who was examined on behalf of two of the other accused persons to prove that they were not party to the murders but admitted, in cross-examination by the learned Public Prosecutor, that the appellant had fired at the deceased for in criminal cases the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and, therefore, if it fails to adduce satisfactory and reliable evidence to discharge that burden, it cannot fall back upon the evidence adduced by the accused persons in support of their defence to rest its case solely thereupon. In the instant case, we however, find that the Courts below made use of the evidence of DW-5 only for lending assurance to the conclusions already drawn by the learned Courts on the basis of the evidence of PWs-4 and 6. Such a course is legally and legitimately permissible. *Jarnail Singh* v. *State of Punjab,* AIR 1996 SC 755 : (1996) 1 SCC 527 : 1996 SCC (Cri) 146 : 1996 CrLJ 1139 : (1996) 2 SCJ 130.

[12512] ● ***Dying declaration—Reliability.***—The High Court took into consideration the statements of certain persons for purposes of testing the reliability of the alleged dying declaration. Such evidence could be adduced in defence during the trial but surprisingly enough the High Court took into account the statement of certain persons to the effect that the deceased was a person of unsound mind at the investigation stage itself whose evidence is yet to be recorded at the trial and made observations that the deceased was a person of unsound mind and, therefore, the dying declaration could not be relied on. Such an approach to the case cannot be appreciated. We are satisfied that it was a case where the taking of cognizance of offence against the respondent deserved quashing by the High Court. *State of Orissa* v. *Bansidhar Singh,* AIR 1996 SC 938 (940) : (1996) 2 SCC 194 : 1996 SCC (Cri) 259.

[12513] ● ***Despite having full proof defence—Designated Court rejecting on ground that it was after thought.***—"It has pained us to know that despite her having a full-proof defence, it has come to be rejected by the Designated Court on the ground that it was "an afterthought". The appellant's defence was that the. 315 bore rifle, which was said to have been recovered from his possession on 25-5-1990, was to bolster up a false case against him under S. 307, IPC, and the weapon was in fact one which was licensed in the name of Avtar Singh, a partner of the appellant in a liquor business, and was taken possession of on 23-5-1990, to prove which Avtar Singh was examined as DW-1. The Designated Court, however, regarded the defence as "an afterthought" because prosecution witnesses had not been asked about the same by giving any suggestion to them in cross-examination. We are afraid the Court made an apparent error in saying so inasmuch as PW-1, Sub-Inspector Gurinder Singh, who deposed that the recovery of the arm from the appellant, had been specifically asked whether the rifle was licensed in the name of Avtar Singh, and PW-2, Sub-Inspector Karnail Singh was suggested that the rifle in question belonged to Avatar Singh and had been taken possession from him. It is a different matter that these suggestions were denied. What is more, PW-2 admitted that in the DDR (Daily Diary Report). There was no mention about the details of the case property recovered from the appellant and the learned Additional Judge committed gross error in rejecting the aforesaid plea on the ground that it was an afterthought." *Jagtar Singh* v. *State of Punjab,* (1996) 8 SCC 364 : 1996 SCC (Cri) 683 (683-684) : (1996) 2 Crimes 105.

[12514] ● ***Appreciation of evidence—Appellants going to house of deceased on false pretext of searching for unauthorised fire-arms.***—Where the evidence of the eye-witnesses is considered in the light of the respective cases of parties it stands fully established that the appellants came together to the premises of Phoola Devi on the plea that they wanted to search it. If the defence contention that on search an unlicensed pistol was recovered was true, it was obligatory on their part to prepare the seizure memo in respect of the same and then register a case against Phoola Devi. Similarly it must also be said that if really she had managed to run away from the Police Station after she was brought there under arrest, it was expected that not only there would be some daily diary entry in the Police Station in support thereof but also a prosecution launched against her for escaping from lawful custody. In absence of any evidence either oral or documentary to support the defence story, we are unable to accept the same.

We hasten to add that we are not unmindful of the settled principle of law that the prosecution must stand on its own feet and not on the weakness of the defence, but then these telltale circumstances not only falsify the defiance story but also lend credence to the prosecution case that to wreak their vengeance on Phoola Devi for having lodged complaint against them to their superiors that the appellants came to her house on the false pretext of searching for unauthorised firearms and forcibly took her to the Police Station - beating her all the way - as testified by the three eye-witnesses. *Sukhpal* v. *State of M.P.*, AIR 1997 SC 468 (470) : (1997) 9 SCC 773 : 1997 SCC (Cri) 789 : JT 1997 (1) SC 387.

[12515] ● ***Failure of prosecution to prove that deceased met with homicidal death.***—Having regard to the facts and circumstances, we are of the considered view that Prosecution has failed to prove beyond reasonable doubt that Surinder Kaur met with a homicidal death. The defence plea of suicide cannot be ruled out." *Prem Singh* v. *State of Punjab* and *Amarjit Singh* v. *State of Punjab* and *State of Punjab* v. *Bimal Kaur*, AIR 1997 SC 221 (224) : 1997 SCC (Cri) 255 : 1997 CrLJ 69 : JT 1996 (9) SC 504.

[12516] ● ***Non-engaging of defending officer despite several opportunities.***—"We find for the record that sufficient time was given to the appellant either to engage defence Counsel of his choice or to have a defending officer, but the appellant kept on changing defending officers or asked for adjustments for the purpose of engaging defence Counsel. He did not cross-examine witnesses when they were offered for cross-examination. He was given sufficient indulgence in this behalf by the Court. . . . The appellant repeatedly sought adjournments on one pretext or the other and was not satisfied with the various defence officers who were made available to him as per his request. The appellant who has argued the appeal before us is well versed with the Army Law and Army Rules and was quite capable of arguing his own case. He was throughout present at the Court Martial and could have cross-examined the witnesses had he so desired. He has been given sufficient indulgence by the Court and we do not see how any principles of natural justice have been violated in this case. The court-martial, therefore, cannot be faulted on the ground of non-compliance with the principles of natural justice." *Major General Inder Jit Kumar* v. *Union of India*, AIR 1997 SC 2085 (2089) : (1997) 9 SCC 1 : JT 1997 (4) SC 8.

[12517] ● ***Evidence of Police Officer—On examination of case diary prepared by Investigating officer and after interrogation accused found to be innocent.***—"Coming now to the defence witnesses, we find that Swaran Singh (DW-1) and K.S. Kailey (DW-5), Deputy Superintendent of Police and Additional Deputy Superintendent of Police respectively of Ferozepur were examined to testify that they had perused the case diary prepared by the Investigating Officer and interrogated some of the accused and other persons. On their such exercise they found that three of the accused, namely, Dalip Singh (appellant), Shabeg Slingh and Arjan Singh were innocent. In our considered view, the Designated Court ought not to have permitted the defence to adduce the above evidence as it is not legally admissible. We may further add that if the result of investigation was to be made the basis of a Court's verdict regarding guilt or innocence of an accused, there would be no need of a trial in a Police case for, relying on the report submitted under S. 173(2), CrPC, a Court would be entitled to decide the fate of the person arraigned. The evidence of DWs-1 and 5 must, therefore, be left out of our consideration. Incidentally, we may mention that inspite of the opinion expressed by the above two superior officers, charge-sheet was submitted by the Investigating Officer against the abovementioned three accused." Dalip Singh v. State of Punjab, AIR 1997 SC 2985 (2988) : (1997) 11 SCC 573 : 1997 CrLJ 3647 : 1997 CrLR (SC) 447 : JT 1997 (5) SC 724 : (1997) 2 Crimes 6.

[12518] ● ***Statement of accused recorded under Section 313, CrPC—Use of.***—"The law is 'That burden of proving Exception I to Section 300, IPC, as on the accused. But the mere fact that accused adopted another alternative defence during his examination under S. 313 of the IPC without referring to Exception No. 1 of S. 300 of the IPC is not enough to deny him of the benefit of the Exception, if the Court can cull out materials from evidence pointing to the existence of circumstances leading to that exception. It is not the law that failure to set up such a defence would foreclose the right to rely on the exception once and for all. It is axiomatic that burden on the accused to prove any fact can be discharged either through defence evidence or even through prosecution evidence by showing a preponderance of probability." *State of U.P.* v. *Lakhmi*, AIR 1998 SC 1007 (1010) : (1998) 4 SCC 336 : 1998 SCC (Cri) 929 : 1998 CrLJ 1411 : 1998 CrLR (SC) 578 : JT 1998 (1) SC 679.

[12519] ● ***Defence plea that complainant under influence of liquor—Beaten by villagers.***—"From the cross-examination of PW-6, Devi Lal, it appears that the attempt of the defence was to point out that he was in an intoxicated condition on the date of the incident and was beaten by the villagers as he was found teasing women. This suggestion was denied by the witness and there is no other material on the basis of which it can be said that this witness was under influence of liquor and had misbehaved with anyone. He had categorically stated that when he was returning after taking medicine for his mother and was near Sri Ram Mandir, he was attacked by the appellant. Nothing was brought in the cross-examination on the basis of which it can be said that he was not telling the truth. The defence was able to extract only 2 or 3 omissions which are on minor points and do not affect the veracity of this witness. There is evidence to show that there was enough light at the place of incidence. The accused was a known person and, therefore, there was no difficulty in identifying him. As soon as this witness had regained consciousness and was in a position to give a statement, he had named appellant as the person who had given him the knife blows. Even if evidence of his father Hari Singh is discarded on the ground that possibly he could not have seen the actual assault on his son as he had come out of his house after hearing his cries, as contended by the learned Counsel for the appellant, that will not have any effect on the conviction of the appellant as the evidence of Devi Lal is quite sufficient to sustain it. As we find no infirmity in the trial Court's judgment even after reappreciating the evidence, the appellant's conviction deserves to be maintained." *Shankar Lal* v. *State of Haryana*, AIR 1998 SC 3271 (3272) : (1998) 6 SCC 239 : 1998 SCC (Cri) 1434 : 1998 CrLJ 4595 : JT 1998 (6) SC 239 : (1998) 3 Crimes 73.

[12520] ● ***Offences under TADA—Tried separately.***—In the present case, the defence was that the appellant was taken into custody by the Police 15 days before the date of incident and that the complaint in that behalf was made to the Panchayat which had passed a resolution protesting against the detention of the appellant. This defence was considered by the Designated Court and was found not acceptable.

There was no reason for the Police to falsely involve the appellant. Moreover, the Designated Court has pointed out that no complaint was made to the Police authorities by the Panchayat regarding alleged unlawful detention of the appellant. In our opinion the Designated Court was justified in not accepting the defence raised by the appellant. *Mohinder Singh* v. *State of Punjab*, AIR 1999 SC 211 (212) : (1998) 7 SCC 390 : 1998 SCC (Cri) 1638 : 1999 CrLJ 263 : 1998 CrLR (SC) 746 : JT 1998 (7) SC 187.

[12521] ● ***Right of private defence—Determination of aggressor.***—"While considering the right of private defence advanced by the appellant, the defence version that deceased and his party had trespassed into Periyanna's house and made a retaliatory attack for the forenoon incident has to be looked at. That version of the appellant had come on official record at 3.00 p.m. when appellant told like that to PW-6, Doctor. We do not think that appellant would have had sufficient time to concoct a false story to tell the Doctor so soon after the incident." *Vijayan alias Vijayakumar* v. *State*, AIR 1999 SC 1311 (1314) : (1999) 4 SCC 36 : 1999 SCC (Cri) 505 : 1999 CrLJ 2037 : 1999 CrLR (SC) 211 : JT 1999 (2) SC 322.

[12522] ● ***Court below not right in relying upon oral dying declaration.***—Even though Saroj was cited as a witness in the charge-sheet, the prosecution did not examine her and this witness and Asha Kumari also tried to establish that she had not accompanied them in the car. At the instance of the defence, Saroj (PW-8) was summoned for cross-examination. She clearly stated that while Chandrakanta was being taken to Ranchi she was almost unconscious and she had not said anything to anyone in the car. No evidence was led by the prosecution to show that Chandrakanta was conscious when she had reached Ranchi. The Courts below were therefore not right in relying upon the oral dying declaration stated to have been made to her by Chandrakanta without any independent corroboration. *Ramesh Prasad* v. *State of Bihar*, AIR 2000 SC 398 (401) : (1999) 9 SCC 433 : 2000 SCC (Cri) 242 : 2000 CrLJ 503 : 1999 CrLR (SC) 694.

[12523] ● ***Appellant given three opportunities to produce defence evidence.***—In the instant case, three opportunities were given to the appellant to produce defence evidence. The appellant failed to lead any evidence and file list of witnesses. Ultimately the trial Court closed the evidence for defence and posted the case for arguments. Though the appellant was given opportunities to present the defence evidence or to produce the list of defence witnesses and the appellant failed to avail of those opportunities, one more opportunity can be granted to the appellant for examining the defence witnesses if appellant proposes to do so. *Selvi J. Jayababthα* v. *State,* JT 2000 (8) SC 202 : (2002) 4 Crimes 230 (SC).

[12524] ● ***Circumstances surrounding dying declaration clear and convincing.***—The circumstances surrounding the dying declaration are clear and convincing which we have found to be corroborated in material particulars. The general criticism of the defence cannot in any way be made basis for discarding the statement which was later on rightly treated as dying declaration of the deceased. *Gulam Hussain* v. *State of Delhi*, AIR 2000 SC 2480 : (2000) 7 SCC 254 : 2000 SCC (Cri) 1343 (1349) : 2000 CrLJ 3949 : 2002 CrLR (SC) 634.

[12525] ● ***Accused Director not participating in affairs of company issuing cheque.***—In this case, the accused director contends that he was not participating in the affairs of the company which issued the cheques. It is a defence which he can adopt in the prosecution. But merely raising such a contention now is no ground for quashing the prosecution. *V.K. Jain* v. *Union of India*, AIR 2000 SC 3609 : (2000) 1 SCC 709 : 2000 SCC (Cri) 302 (302-303) : (2000) 5 SLT 329.

[12526] ● ***No reason found to disbelieve evidence of prosecutrix.***—The accused guilty under S. 376(1), I.P.Code, the Trial Court found no reason to disbelieve the evidence of the prosecutrix. The enmity alleged by the accused for falsely implicating him was rejected in our view correctly on the ground that given the present social ethos in this country, it was improbable that either the girl or her parents would set up such a case.

This was a case rape on a school girl. *State of Karnataka* v. *Manjanna*, AIR 2000 SC 2231 : (2000) 6 SCC 188 : 2000 SCC (Cri) 1031 (1034) : 2000 CrLJ 3471 : 2000 CrLR (SC) 343.

[12527] ● ***Passing away of defence counsel in midway of trial.***—The unfortunate development took place during trial, *i.e.*, the passing away of the defence Counsel midway of the trial The Counsel who was engaged for defending the appellant, had cross-examined the witnesses but he could not complete the trial because of his death. When the new Counsel took up the matter, he would certainly be under the disadvantage that he could not ascertain from the erstwhile Counsel as to the scheme of the defence strategy which the predeceased Advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in S. 311 of the Code, After all the trial is basically for the prisoners and Courts would afford the opportunity to them in the fairest manner possible. We think that the plea of the defence that a further opportunity to put more questions to the three prosecution witnesses can be permitted on account of the unfortunate death of the defence Counsel *pendente lite,* and a new Counsel has to evolve his defence strategy afresh. The Court shall summon PW-1, PW-2 and PW-3 to be cross examined again on behalf of the accused. *Hoffman Andreas* v. *Inspector of Customs, Amritsar*, (2000) 10 SCC 430 : 2000 (4) Crimes 228 : JT 2000 (8) SC 155 : (2000) 7 Supreme 489 : (2000) 7 SLT 143.

[12528] ● ***Purpose of furnishing list of witnesses and document to Court.***—The purpose of furnishing a list of witnesses and documents to the Court, before the accused is called upon to enter on his defence, is to afford an occasion to the Court to peruse the list. On such perusal, if the Court feels that examination of at least some of the persons mentioned in the list is quite unnecessary to prove the defence plea and the time which would be needed for completing the examination of such witnesses would only result in procrastination, it is the duty of the Court to short list such witnesses. We may also add that if the Court feels that the list is intended only to delay the proceedings, the Court is well within its powers to disallow even the whole of it. *Arivazhagan* v. *State*, AIR 2000 SC 1198 (1202) : (2000) 3 SCC 328 : 2000 SCC (Cri) 638 : 2000 CrLJ 1714 : 2000 CrLR (SC) 401.

[12529] ● ***Demand of illegal gratification.***—The appellant was working as Assistant in the office of the Tehsildar. The appellant demanded illegal gratification for mutation of names in the Revenue record. It was argued that the appellant had not received any amount by way of illegal gratification and the amount recovered from the appellant was paid by PW-11 for the purchase of mustard oil. We do not find much force in the contention in view of clear and satisfactory evidence adduced by the prosecution that PW-11 had visited the appellant or 24-2-82 and that he had submitted 11 applications. It is pertinent to note that alongwith the money recovered from the appellant, the eight mutation applications were also found to be in possession of the appellant. The three applications, which were filed earlier, were also found in the office of the appellant. The defence plea set up by the appellant is highly improbable. Even according to the appellant himself, he was not having good relationship with PW-11. The appellant could not give any other satisfactory explanation for having received Rs. 48 from PW-11. The Courts below have rightly held that the appellant accepted the tainted money as illegal gratification. *Biranchi Narayan Mohanty* v. *State of Orissa*, (2001) 9 SCC 288 : 2002 SCC (Cri) 562 : 2001 CrLJ 720 : 2001 CrLR (SC) 96 : (2000) 8 Supreme 489 : (2001) 1 Crimes 77.

[12530] ● ***Accused not required to prove his case beyond reasonable doubt.***— Where an accused sets up a defence or offers an explanation, he is not required to prove his defence beyond a reason doubt but only by preponderance of probabilities. *M. Abbas* v. *State of Kerala*, 2001 (3) Crimes 110 (SC).

[12531] ● ***Prosecution not bound to explain injuries found on accused.***—The prosecution is not bound to explain injuries found on the accused in all cases. It is to be kept in mind that according to the defence case the occurrence took place when the respondent-Hanuman wanted to use the facility of drawing water from the tube-well when his turn came at 6.00 p.m. on the fateful day, then Panchu assaulted him with a *lathi* whereafter Hanuman in his defence pushed him and Panchu fell on the ground hitting a stone which resulted in the head injury. It was the further case of the defence that the two ladies PWs-1 and 2 pelted stones on the accused persons causing injuries to them. *State of Rajasthan* v. *Hanuman*, AIR 2001 SC 282 (284) : (2000) 1 SCC 337 : 2001 SCC (Cri) 143 : 2001 CrLJ 485 : 2001 CrLR (SC) 1.

[12532] ● ***Plea of self defence when to be taken.***—A plea of self-defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under S. 313, CrPC or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes, still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case as held in Vijaya Singh case (AIR 1990 SC 1459). It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness-box. *Kashi Ram* v. *State of Madhya Pradesh*, AIR 2001 SC 2902 : (2002) 1 SCC 71 : 2002 SCC (Cri) 68 (80) : (2001) 4 Crimes 344 : (2001) 5 SCJ 164.

[12533] ● ***Evidence tendered by defence witnesses not to be termed tainted one.***—Incidentally, be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one—the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by defence witness has been effected rather casually by the High Court. *State of Haryana* v. *Ram Singh*, AIR 2002 SC 620 (625) : (2002) 2 SCC 426 : 2002 CrLJ 987 : (2002) 1 Crimes 247.

[12534] ● ***Plea of alibi taken by both accused.***—In the instant case the plea of *alibi* was taken by both the accused. Molai (A-2), has produced a certified copy of the proceeding sheet in criminal case No. 764/92, from the Court of Shri S.K. Srivastava, Ist Class Magistrate. We see no substance in this contention because the other evidence on record has positively established that Molai (A-2) was working in the house of Somvanshi (PW-6) and he was there till Pratibha (PW-3) came from the school at about 12 noon. The incident in question had occurred between 10 a.m. and 11.30 a.m. The proceeding sheet, Ex D-9, produced on record does not even remotely suggest at what point of time Molai (A-2) had gone to the Magistrate's Court. This document in our opinion does not help Molai (A-2) to show even *prima faice* his absence from the place of occurrence. The defence witness examined on behalf of the accused also does not take the defence case any further. *Molai* v. *State of M.P.*, AIR 2002 SC 177 (184) : 1999 CrLR (SC) 779.

[12535] ● ***Evidence of defence witness not to be ignored by Court.***—It is true, the evidence of the defence witness is not to be ignored by the Courts. Like any other witness, his evidence has to be tested on the touchstone of reliability, credibility and trustworthiness, particularly when he attempts to resile from and speak against records and in derogation of his earlier conduct and behaviour. If after doing so, the Court finds it to be untruthful, there is no legal bar in discarding it. *Banti* v. *State of M.P.*, AIR 2004 SC 261 : (2004) 1 SCC 414 : 2004 SCC (Cri) 294 (298) : 2004 CrLJ 372 : (2003) 4 Crimes 415.

[12536] ● ***Defence of false implication based on alleged motive of complainant—Unacceptable.***—The defence of false implication due to alleged incident of the complainant having not been able to purchase some property in competition with the accused party had not taken place in the immediate past. It could not be ground to falsely implicate the accused after such a long period. Such defence plea based on alleged motive of the complainant is also unacceptable when the specific defence taken through deposition of DW-1 was involvement of complainant in the chit fund business and alleged grudge over it with the accused party. *State of Maharashtra* v. *Jagmohan Singh Kuldip Singh Anand*, AIR 2004 SC 4412 : (2004) 7 SCC 659 : 2004 CrLJ 4257 : 2004 (3) Crimes 319.

[12537] ● ***Defence version—Some material required to support defence.***—While it is true that burden is heavy on the prosecution to prove every ingredient of the offence, while the defence has only to probabilize the defence taken, there must be some material on record to support the defence plea and probabilize its case. In the instant case the counsel for the accused appellant submitted that the accused-appellant had also received injuries in the course of the occurrence, which remained unexplained by the prosecution. However, there was no evidence on the record to prove that the accused appellant had received any injury. Moreover, there was no suggestion made to PWs that they assaulted the accused appellant as a result of which he had suffered any injury. In the absence of any such suggestion to the prosecution witness, the argument of the counsel for the accused appellants which was not supported by any evidence on the record was not accepted. *Nasir Sikandar Shaikh* v. *State of Maharashtra*, AIR 2005 SC 9 : (2005) 1 SCC 122 : 2005 CrLJ 2621 (2622) : (2004) 4 Crimes 282.

[12538] ● ***Mutually destructive defences.***—Mutually destructive defences taken by the accused persons would go a long way to disbelieve their story. *Hafiz* v. *State of Uttar Pradesh*, AIR 2006 SC 632 : (2005) 12 SCC 599 : 2006 CrLJ 522 (528) : 2005 (4) Crimes 128.

[12539] ● ***Summoning or recalling witness.***—The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the Court in case such evidence appears to it be essential for a just decision of the case. Under Section 233, Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as DWs. In the presence case PW-8 and PW-9 were juxtaposed as DW-1 and DW-2. This situation is not one what was contemplated by sub-section (3) of Section 233, Cr.P.C.

When such frivolous and vexatious petitions are filed, a Judge is not powerless. He should have used his discretionary power and should have refused relied on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. In the present case, the witnesses were examined by the prosecution as eye-witnesses on 18.12.1990, cross-examined and discharged. Thereafter, an application under Section 311, Cr.P.C. was rejected. They were recalled purportedly in exercise of power under sub-section (3) of Section 233, Cr.P.C. and examined as DW-1 and DW-2 on behalf of the accused on 17.7.1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under the law.

In the present case, both PW-8 and PW-9 are related to the deceased. PW-8 is the elder brother of the deceased and PW-9 is the friend of the deceased. Being the close relative and friend of the deceased there is no rhyme and reason to depose falsely against the accused and allowing the real culprit to escape unpunished. On 21.9.1989, their statements were recorded under Section 164, Cr.P.C. before the Magistrate. On 18.12.1990, their depositions were recorded before the Sessions Judge. In both the statements they have stated that they were eye-witnesses and witnessed the occurrence. Both of them have stated that they saw the accused assaulting the deceased with knives and swords. They were subjected to lengthy cross-examination but nothing could be elicited to discredit the statement in-chief. Their examination as defence witnesses was recorded on 17.7.1995 when they resiled completely from the previous statements as prosecution witnesses. It, therefore, clearly appears that the subsequent statements as defence witnesses were concocted well as afterthought. They were either won over nor were under threat or intimidation from the accused. No reasonable person, properly instructed in law, would have acted upon such statements. *State of Madhya Pradesh* v. *Badri Yadav*, AIR 2006 SC 1769 : (2006) 9 SCC 549 : 2006 CrLJ 2128 (2131, 2132) : 2006 (2) Crimes 82.

[12540] ● ***Plea of self defence—Burden of proof on accused.***—Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence, he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. *Krishna* v. *State of Uttar Pradesh*, AIR 2007 SC 2452 : (2007) 15 SCC 320 : 2007 CrLJ 3525 : 2007 (7) SCR 1157 : 2007 (3) Crimes 77 (SC).

[12541] ● ***Insanity of accused—Burden of proof.***—Burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. Burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. *Bapu* v. *State of Rajasthan*, (2007) 8 SCC 66 : 2007 (3) SCC (Cri) 509 : JT 2007 (9) SC 110.

[12542] ● ***Duty of prosecution.***—Even in cases where burden as on accused, prosecution must prove foundational facts. *State of Maharashtra* v. *Dnyaneshwar Laxman Rao Nankhede*, (2009) 15 SCC 200 : 2009 CrLJ 4425 : 2009 (11) SCR 513.

[12543] ● ***Weakness of defence—Effect on prosecution.***—The prosecution must stand or fall on its own legs and it cannot derive any strength from weakness of defence. *Nanhar* v. *State of Haryana*, 2010 CrLJ 3450 (SC).

DEFENCE WITNESS
§ (See also "DEFENCE")

[12544] ● ***Defence witness.***—So far as the question as to whether equal treatment being given to the evidence of prosecution and defence witnesses is concerned, there can be no quarrel with the proposition in law. In the present case, it was not that the Courts below glossed over the evidence of defence witnesses. In fact detailed analysis had been made to conclude as to why no importance could be attached to their evidence. After carefully analyzing the prosecution evidence and that tendered by the accused, the Trial Court recorded the conviction. The High Court in appeal made further detailed analysis of the evidence and came to hold that there was no infirmity in the conclusions of the Trial Court. The conclusions were not shown to suffer from any infirmity whatsoever to warrant interference. *Anil Sharma* v. *State of Jharkhand*, AIR 2004 SC 2294 : (2004) 5 SCC 679 : 2004 SCC (Cri) 1706 (1713) : 2004 CrLJ 2527 : JT 2004 (1) (Supp) SC 559 : (2004) 2 Crimes 373.

DEFICIENCIES

[12545] ● ***Deficiencies.***—During the course of arguments this Court came across certain deficiencies which crept in the trial proceedings. One is that the deposition of Baburam, PW remained unsigned by him. How it happened is not explained by the counsel. A plea was made that the entire record purported to be the testimony of Baburam should be kept aside on account of that deficiency. Such a course will not be consistent with the principles of criminal justice. Therefore, this Court thinks it more expedient to remit the case to the Trial Court for filling up the said deficiency, for which Baburam has to be re-called and re-examined afresh. *Balwinder Singh* v. *State of Punjab*, 2004 SCC (Cri) 461 (461).

DEFILING OR INJURING PLACE OF WORSHIP
(Ss. 295, 296, IPC)

[12546] ● ***Defiling or injuring place of worship.***—The factual matrix of this case may be stated in brief as it would be conducive to proper appreciation of the words "object held sacred by any class of persons". The first accused was the leader of Dravida Khazakam (a community of persons who profess to be religious reformers, one of whose creeds is to carry on propaganda against idol worship), and as such, he was out to "vilify a certain section of the Hindu Community and do propaganda by holding meetings and writing articles. Having announced in a public meeting that he would break the image of Ganesh, the accused bought a clay image from market and in public broke it. This clay image was not consecrated.

"In the first place whether any object is held sacred by any class of persons, must depend upon the evidence in the case, so also the effect of words" with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction damage or defilement as an insult to their religion. In this case, the facts alleged in the petition, do not appear to have been controverted, but the learned magistrate, as also the learned Sessions Judge and the learned Judge in the High Court, have thrown out the petition of complaint solely on the ground that the image of God Ganesa, treated by the respondents as alleged by the complainant, could not be said to be held sacred by any class of persons. In the instant [illegible] the insult alleged was by destruction of the image of God Ganesa. Apart from the question of evidence which had yet to be adduced, it is a well-known fact that the image of Lord GANESA or any objective representation of a similar kind, is held sacred by certain classes of Hindus, even though the image may not have been consecrated. The learned Judge in the Court below, has given much too restricted a meaning to the words "any object held sacred by any class of persons", by holding that only idols in temples or idols carried in processions on festival occasions, are meant to be included within those words. There are no such express words of limitation in Section 295, IPC and in our opinion the learned Judge has clearly misdirected himself in importing those words of limitation. Idols are only illustrative of those words. A sacred book, like the Bible or the Koran, or the Granth Saheb is clearly within the ambit of those general words. If the Courts below were right in their interpretation of the crucial words in Section 295, the burning or otherwise destroying or defiling such sacred books, will not come within the purview of the penal statute. In our opinion, placing such a restricted interpretation on the words of such general import, is against all established canons of construction. Any object however trivial or destitute of real value in itself, if regarded as sacred by any class of persons would come within the meaning of the penal section. Nor is it absolutely necessary that the object, in order to be held sacred, should have been actually worshipped. An object may be held sacred by a class of persons without being worshipped by them. *Veerabhadran Chettiar* v. *Ramaswami Naicker*, AIR 1958 SC 1032 : 1958 CrLJ 1565 : 1959 SCR 1211.

[12547] ● ***Object to be sacred actually worshipped.***—Any object however trivial or destitute of real value in itself, if regarded as sacred by any class of persons would come within the meaning of Section 295, IPC nor is it absolutely necessary that the object in order to be held sacred, should have been actually worshipped. *Veerabhadran Chettiar* v. *Ramaswami Naicker*, AIR 1958 SC 1032 : 1958 CrLJ 1565.

[12548] ● ***Religion—Meaning.***—Religion means (1) a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being; (2) a religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well; (3) religion need not be theistic; (4) "religious denomination" means a religious sect or body having a common faith and organisation and designated by a distinctive name. *S.P. Mitfal* v. *Union of India*, AIR 1983 SC 1 : (1983) 1 SCC 51 : (1983) 1 SCR 729.

DEFINITION

[12549] ● ***Definition.***—While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted. *K.V. Muthu* v. *Angamuthu Ammal*, AIR 1997 SC 626 (631) : (1997) 2 SCC 53 : (1997) 1 SCJ 48.

"DEFRAUD"

[12550] ● ***"Defraud".***—The expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss and it will include any harm whatever caused to any person in body, mind, reputation or such others. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Where, therefore, a document is prepared with the intention to deceive and by means of deceit, an advantage is obtained, then there is a fraud and judged from this stand point, the preparation of a forged bail order by the utilisation of which the person concerned obtained an advantage of being released deceiving the Courts and the society at large cannot but be said to have made the document fraudulently, thereby attracting S. 466 of the IPC. *State of Uttar Pradesh* v. *Ranjit Singh*, AIR 1999 SC 1201 (1203) : (1999) 2 SCC 617 : 1999 SCC (Cri) 293 : 1999 CrLJ 1830 : 1999 CrLR (SC) 153 : JT 1999 (1) SC 626.

DELAY IN ARREST

[12551] ● ***Delay in arrest.***—If really the name of the assailant was known, there was no reason for his being arrested several days after the occurrence on 5.4.1994. It is not disputed that the accused lived near the house of PW-3, and his house is also very near to the house of the deceased. His address known to all and in fact in the FIR itself his name and address had been disclosed. Despite this he was arrested 10 days later, and it appears from the deposition of the investigating officer that this delay was on account of the fact that the correct address of the appellant was not disclosed by the witness. This explanation is hardly convincing. Counsel for the appellant submitted that in fact even the statement of PW-3 may have been recorded much later but was shown to have been recorded on 26.3.1994. That is why the appellant was arrested many days after the arrest after the occurrence. It is not for the Court to speculate on this aspect of the matter, particularly when at that stage even PW-2 claimed to be an eye-witness, though he turned hostile at the trial. There is serious doubt about PW-3 in remaining silent for a long time, and his failure to disclose the facts to the persons who had gathered near the place where the lay injured, creates a serious doubt about the truthfulness of this witness. *Joseph alias Jose* v. *State of Kerala*, 2004 SCC (Cri) 93 (99).

DELAY IN FILING APPEAL AGAINST ACQUITTAL

[12552] ● ***Delay in filing appeal against acquittal.***—The respondent was tried for an offence under Section 376, IPC on the allegation of having committed rape on a minor girl aged about 11 years. The appeal filed against acquittal by the State with a delay of 31 days was dismissed by the High Court on the ground of "inordinate delay". The delay in filing appeal against acquittal was only of 31 days. A perusal of the medical evidence as also the testimony of the prosecutrix, did warrant the High Court to examine the case on merits and not to dismiss it on the ground of delay of 31 days only. Keeping in view the unfortunate rise in crime against women and particularly minor children, the Courts owe an obligation to the society to examine such cases with utmost sensitivity. The order of the High Court dismissing the appeal against acquittal on the ground of inordinate delay cannot be sustained. Therefore this Court remands the matter to the High Court for a fresh disposal in accordance with law. *State of Rajasthan* v. *Madan*, 2004 SCC (Cri) 1191 (1192).

DELAY IN FILING COMPLAINT

[12553] ● ***Two days delay on lodging complaint explained.*** Where it was only after the effort of PW-1 and another person to get back money failed that PW-1 decided to file the complaint. The delay of two days in lodging the complaint was held properly explained. *Rattan Singh* v. *State of Haryana*, AIR 1989 SC 1401 : 1989 SCC (Cri) 582 : 1989 CrLJ 1445.

[12554] ● ***Delay in FIR.***—"The learned counsel for the appellants contended that the evidence of PW 1 who is the sole eye-witness in this case cannot be accepted and acted upon since his evidence is highly interested besides being highly artificial. .... As we have pointed out earlier that PW 1 is none other than the son-in-law of the deceased. After witnessing the occurrence he did not go to the villagers, but on the other hand, he went to his village which is said to be at the distance of four furlongs. He states that he informed only his mother-in law (PW-3). PW 1 came with the present version only on the next morning. The conduct of PW-1 in not reporting to any of the villagers about the occurrence throws a considerable doubt on the veracity of his evidence which is incredible. The report about the occurrence was given by a delay of 15 hours. *Peddireddy Subbareddi* v. *State of A.P.*, AIR 1991 SC 1356 : 1991 CrLJ 1391.

[12555] ● ***Delay in FIR.***—The fact that PW-15 Cheluvamma, the ace-witness of the prosecution, having not disclosed the information at the earliest opportunity to any one till November 10, 1978, though the alleged murder took place on the night of November 8, 1978 has created serious doubts about genuineness of the prosecution case. ...The conduct of PW-8 Madai, PW 14, Javariah and PW-25, Cheluvaraju is so unnatural that it would not be safe to place any reliance on their testimony. No explanation, much less a satisfactory one has been given by the prosecution for their long silence. *State of Karnataka* v. *Venkatesh*, AIR 1994 SC 575 : 1994 SCC (Cri) 329 : 1994 CrLJ 602 : (1992) 1 SCC (Supp) 539.

[12556] ● ***Delay in filing complaint.***—The High Court has rightly observed that the private complaint was filed after a long lapse of time. If there was inaction to deal with the information lodged with the Police in October 1983, there was no reason for the complainant to wait for more than one year to approach the Court by making a private complaint. Though, delay *per se* may not affect the credibility of the complainant's version, each individual case has to be tested to see whether delay has been properly explained. *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble*, AIR 2003 SC 4567 : (2003) 7 SCC 749 : 2003 SCC (Cri) 1918 (1931) : 2003 CrLJ 4548 : (2003) 4 Crimes 420.

[12557] ● ***Unexplained delay in filing complaint.***—There was unexplained delay in filing the complaint inasmuch as according to the prosecution the incident in question took place at about 1.30 p.m. on 4.4.1980 and a complaint was lodged only at 3.15 a.m. on 5.4.1980. Though the distance was about 30 miles from the place of incident, the complainant had the facility of using the tractors available in the village and they did use the same for traveling to the Police Station. In such circumstances the unexplained long delay also created a doubt mind as to the genuineness of the prosecution case. The appellant was entitled to the benefit of doubt. *Shankarlal* v. *State of Rajasthan*, AIR 2004 SC 3559 : (2004) 10 SCC 632 : 2004 CrLJ 2874 (2876) : 2004 (3) Crimes 132 (SC).

[12558] ● ***Complaint filed cannot be thrown out at threshold on ground of limitation.***—The complaint cannot be thrown out at the threshold on the ground of limitation, if apart from the question of limitation, the effect of delay if any in instituting the complaint is necessary to be determined for considering the merits of the charge, that can only be done at the stage of trial on the basis of the evidence on record. *Harnam Singh* v. *Everest Construction Co.*, (2004) 6 SCC 754 : 2004 CrLJ 4178 (4179, 4180) : 2004 (3) Crimes 284 (SC). TO THE SAME EFFECT : *Srinivas Pal* v. *Union Territory of Arunachal Pradesh*, AIR 1988 SC 1729 : (1988) 4 SCC 36 : 1988 (2) Crimes 950.

[12559] ● ***Undue delay in lodging complaint.***—In the present case undue delay in lodging the complaint without acceptable evidence has contributed to the doubt in the prosecution case. Hence the High Court in justified in allowing the appeal. *State of Karnataka* v. *Mapilla P.P. Soopi*, AIR 2004 SC 85 : (2003) 8 SCC 202 : 2003 SCC (Cri) 1977 (1979) : 2004 CrLJ 44.

[12560] ● ***Delay in FIR.***—Merely because the informant and the father of the deceased did not choose to use a tractor to go to the police station, that cannot be a suspicious circumstance. It has only been brought on record that the informant owned a tractor. There is no evidence to show that the tractor was in usable condition. Even if it was in usable condition, the frame of mind of one who had lost his son and the other a close relative, using a tractor to cover a distance of 9 km at that point of time, has been lost sight of by the High Court. It is not unusual for a person to avail public transport facility to go to a police station. Much has been made of not lodging the case at the police post. An explanation has been offered as to why it has not been done. The High Court very lightly brushed it aside. Unfortunately, the High Court came to conclude on surmises and conjectures that the FIR was lodged after deliberation. There was no material to support such a conclusion. *State of Punjab* v. *Phola Singh*, 2004 SCC (Cri) 276 (281).

[12561] ● ***Delay in filing complaint.***—There has been some delay in filing the complaint which has been explained by PW-1 mother. The fact that their father was out of station on the date of occurrence was not disputed. In such circumstances, since it is a minor who has been violated the possibility of there being hesitation on the part of mother to lodge a complaint cannot be overruled. Even otherwise the mere factum of delay in filing complaint in regard to an offence of this nature by itself would not be fatal so as to vitiate the prosecution case. The fact that the accused did not suffer any injury on his private part also will not be of much help to him because he was medically examined 4 days after the incident in question. For the reasons stated above we are satisfied that the High Court was in error in taking a view different from that of the Trial Court and acquitting the accused. *State of Chhattisgarh* v. *Derha,* (2004) 9 SCC 699 : 2004 CrLJ 2109 : JT 2004 (1) (Supp) SC 189 : (2004) 2 Crimes 446.

[12562] ● ***Delay in lodging FIR—Explanation for delay not raised before High Court—Effect.***—It has been explained by the prosecution as to why there was some delay in lodging the FIR. It has been categorically stated that there was no bus available and, therefore, it could be only done when the bus was available. The question was not raised before the High Court and apart from that, explanation offered appears to be plausible, in the absence of any material to the contrary. *Ram Bali* v. *State of Uttar Pradesh,* AIR 2004 SC 2329 : 2004 SCC (Cri) 2045 (2052) : 2004 CrLJ 2490 : JT 2004 (1) (Supp) SC 211 : (2004) 2 Crimes 493.

[12563] ● ***Delay in lodging FIR—Held explained.***—The High Court has doubted veracity of the prosecution case on the ground that there was delay in lodging the first information report. In this regard, it may be stated that during night, the members of prosecution party could not have gone to the Police Station for lodging the first information report as during those days, terrorist activities in the State of Punjab were at its peak. In the first information report, it was specifically stated that the informant could not go to the Police Station to lodge the first information report during the night out of fear of the accused persons. That apart PW-2 has stated in his evidence that accused persons had given out threats to their lives in case the witnesses go to the Police Station for lodging the first information report. On the next morning, PW-2 went to Sarpanch at 5.00 a.m., and as it was raining, they started from the house of Sarpanch at 7.45 a.m. for lodging the first information report at the Police Station while on the way, they met PW-4, the officer-in-charge of the Police Station, who was on patrolling duty and recorded the statement of PW-2 at 9.00 a.m. on the basis of which formal first information report was drawn up at 9.40 a.m. Thus the Court finds was no inordinate delay in lodging the first information report inasmuch as the delay has been duly explained and the High Court was not justified in observing that there was inordinate delay in lodging the same. *State of Punjab* v. *Mela Singh,* AIR 2004 SC 257 (260) : (2003) 12 SCC 464 : 2004 CrLJ 368 : (2003) 4 Crimes 412.

[12564] ● ***Delay in lodging FIR in cases of offences against reputation of women.***—It is seen that though there is some delay in lodging the FIR, it is but natural in a traditional bound society to avoid embarrassment, which is inevitable when reputation of a woman is concerned. Delay in every case cannot be a ground to arouse suspicion. It can only be so when the delay is unexplained. In the instant case, the delay has been properly explained. Further, PW-2 is an independent witness and a neighbour of both the accused-appellant and PW-1. There is no reason as to why he would falsely implicate the appellant. *Vidyadharan* v. *State of Kerala,* AIR 2004 SC 536 : (2004) 1 SCC 215 : (2004) 1 JCC 133 : 2004 SCC (Cri) 260 (265) : 2004 CrLJ 605.

[12565] ● ***Delay in lodging FIR.***—In the instant case the informant instead of going to police station adopted a circuitous route for the reason that one of the accused was Sarpanch of the village where occurrence took place. Hence it was quite natural that the informant would not be approaching anybody in the said village or adjoining village risking his life. Held, there could be no delay if the FIR was lodged at 6.30 p.m.. *State of Punjab* v. *Hardam Singh,* AIR 2003 SC 4343 : (2003) 12 SCC 679 : 2005 SCC (Cri) 834 (838, 839).

[12566] ● ***Delay in lodging FIR—Place of terrorist activities in Punjab not accepted.***—The High Court has observed that there was considerable delay in lodging the first information report. If really the occurrence had taken place as alleged, there was no reason for PW-4 to keep sitting in the village till 7.00 a.m. and only thereafter to start for the Police Station for lodging the report. The plea sought to be urged before this Court, that in those days the terrorists were active in the State of Punjab, is unacceptable in the facts of this case, because PW-4 knew that the assailants were not members of a terrorist group but were members of the family of his brother's wife. *State of Punjab* v. *Ajaib Singh,* AIR 2004 SC 2466 : (2005) 9 SCC 94 : 2005 SCC (Cri) 43 (50) : 2004 CrLJ 2547 : (2004) 2 Crimes 459.

[12567] ● ***Delay in lodging complaint—Unexplained.***—The complaint attempted to explain the delay by stating that the matter was reported to the police but the police did not take any action. Such statement can hardly be taken to have explained the delay. It is the simplest of things to contend that the police, though report had been lodged with it, had not taken any steps. But it has to be established by calling for the necessary records from the police to substantiate that in fact a report with the police had been lodged and that the police failed to take up the case. *Dilawar Singh* v. *State of Delhi,* (2007) 12 SCC 641 : AIR 2007 SC 3234 : 2007 CrLJ 4709 (4712) : 2007 (3) Crimes 388 (SC).

DELAY IN IDENTIFICATION PARADE
§ (See also "IDENTIFICATION")

[12568] ● ***Delay in identification parade.***—The appellants were arrested on 28th December, 1980 and they were put up for identification in a test identification parade on 4th February, 1981. This Court does not think that this delay can be said to be inordinate in the facts and circumstances of this case. Though it is desirable to hold the test identification parade at the earliest possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probabilising the possibility of the accused having been shown to the witnesses, the Court may not act on the basis of such evidence. Moreover, cases where the conviction is based not preferred solely on the basis of identification in Court, but on the basis of other corroborative evidence, such as recovery of looted articles stand on a different footing and the Court has to consider the evidence in its entirety. *Lal Singh* v. *State of U.P.,* AIR 2004 SC 299 : 2004 CrLJ 378 : (2003) 4 Crimes 482 (SC).

DELAY IN RECORDING STATEMENT OF WITNESS

[12569] ● ***Delay in recording statement of witness.***—In the instant case, the statement the sole eye-witness, aged 7 years, was recorded by the Investigating Officer for the first time three days after the occurrence and her statement was recorded by the Judicial Magistrate six days after the occurrence. The trial Court took the view that since she was under a shock she was not in a position to make a statement and, therefore, the statement was recorded later. Held, the reasoning of the trial Court could not be sustained, in view of the prosecution case that she regained consciousness on 30.8.1996 and thereafter she was fully conscious and also the medical certificate of her fitness. *Jagjit Singh* v. *State of Punjab,* 2005 SCC (Cri) 893 (903).

DELAY IN SUBMISSION OF FIR TO MAGISTRATE

§ (See also "FIR")

[12570] ● ***Delay in submission of FIR to magistrate.***—So far as the delay in despatch of the FIR is concerned, it was noted by the High Court that the informant's Fardbayan was recorded at 10.00 a.m. on 22.1.1999. The inquest report was prepared on 22.1.1999 at 19.25 hours. The inquest report was prepared by Executive Magistrate and the case number is also mentioned. That being so, plea that the Fardbayan being ante-timed has not been established. Post-mortem was conducted on 22.1.1999 at 22.00 hours. Above being the position, there can be no grain of doubt that the Fardbayan was recorded on the date of occurrence and filed at the indicated time and the case had been instituted on the basis of the said Fardbayan. Finding recorded by the High Court that Fardbayan was not ante-timed amply supported by evidence on record and no adverse view as claimed by the accused-appellants can be taken. *Anil Sharma* v. *State of Jharkhand,* AIR 2004 SC 2294 : (2004) 5 SCC 679 : (2004) 2 JCC 1082 : 2004 SCC (Cri) 1706 (1713) : 2004 CrLJ 2527 : JT 2004 (1) (Supp) SC 559 : (2004) 2 Crimes 373.

[12571] ● ***Delay in sending complaint.***—While it is true that Section 157, CrPC makes it obligatory on the officer in charge of the police station to send the information to the Magistrate's Court forthwith but that does not mean and imply to denounce and discard an otherwise positive and trustworthy evidence on record. The first complaint of missing person although was sent late, in fact, has not moved the investigating agency to real investigation except, informing various other police stations regarding disappearance of Madhu. The complaint which was taken note of was Exhibit P-1 which was sent in due time to the Magistrate. Unless it is found that the evidence led by the prosecution is not reliable, the delay in sending the first complaint would not lead to the inference that the complaint lodged of missing person contained some other facts that may have revealed some other story which is not consistent with the prosecution case. *A.N. Venkatesh* v. *State of Karnataka*, 2005 SCC (Cri) 1935 (1941-42).

[12572] ● ***Delay in despatching Special Report.***—The special report dispatched on the night intervening 27.9.1986 and 28.9.1986 reached the Magistrate concerned on 8.10.1986. The Investigating Officer categorically stated that he was not in a position to give any explanation for it. The delay was held fatal. *Balam Singh* v. *State of M.P.*, 2005 SCC (Cri) 861 (870).

[12573] ● ***Delay in dispatch of special report to Magistrate.***—Information in regard to the incident was lodged on the same day at 8.20 pm. The occurrence had taken place at 4.00 pm on 10.10.1997 and therefore, there does not seem any delay in lodging FIR. Not only this, after FIR was lodged, investigation proceeded, the statement of the witnesses recorded the inquest report sent for post-mortem examination without delay. It is also on record that the special report was sent by post. In the background of the aforesaid facts, mere delay in receipt of Special Report, in no way causes doubt to the case of prosecution. Further more, none of the witnesses including the investigating officer have been cross-examined in this point. Therefore, the case of the prosecution cannot be rejected merely on the ground that there was delay in dispatch of the FIR. *Dharamveer* v. *State of U.P.*, AIR 2010 SC 1378 : (2010) 4 SCC 469 : 2010 CrLJ 2393 (2397) : (2010) 2 Crimes 31.

DELAY IN TRIAL

[12574] ● ***Delay in trial.***—The extremely excessive delay in the disposal of the case of the appellant would itself be sufficient for imposing a lesser sentence of imprisonment for life under S. 302, IPC. In this case the appellant was committed to trial by the Presidency Magistrate as early as on July 31, 1963, and he was convicted by the Trial Judge on September 4, 1964. It is now January 1971, and the appellant has been for more than six years under the fear of sentence of death. This must have caused him unimaginable mental agony. In our opinion it would be inhuman to make him suffer till the Government decides the matter in a mercy petition. We consider that this is now a fit case for awarding the sentence of life imprisonment. *Vivian Rodrick* v. *State of West Bengal*, AIR 1971 SC 1584 : (1971) 1 SCC 468 : 1971 SCC (Cri) 192 (195) : 1971 CrLJ 1171 : (1971) 3 SCR 546 : 1971 UJ (SC) 224 : 1971 CrAppR (SC) 135.

[12575] ● ***Undue delay in final disposal of criminal cases to defeat purpose of criminal justice.***—Undue delay in the final disposal of criminal cases tends, to some extent, to defeat the very purpose of criminal justice. Speedy disposal of criminal cases for commission of offences promotes confidence of the society in the administration of criminal justice which is essential for sustaining the faith of the law abiding members of the society in the effectiveness of the rule of law. It also saves the accused from avoidable harassment inherent in unreasonably prolonged trials and appeal. *Mahendra Singh* v. *State of West Bengal*, AIR 1973 SC 2288 : (1974) 3 SCC 409 :

1973 SCC (Cri) 974 (976) : 1973 CrLJ 1450 : 1973 CrLR (SC) 470 : (1974) 1 SCR 62 : 1973 UJ (SC) 666.

[12576] ● ***Murder—Death sentence—Mitigating factor.***—Doubtless, the appellant is under a sentence of death since his conviction on March 20, 1972 by the trial Court. But it is to be noted that after the dismissal of his appeal by the High Court on September 20, 1972, he did not for a period of more than 18 months move this Court. It was only after condonation of this delay that special leave to appeal under Art 136 was granted. In view of extremely heavy load of work with the High Court and this Court, the delay in hearing this appeal cannot be said to be extra-ordinary. Be that as it may, the value of such delay is a mitigating factor depends upon the features of a particular case. It cannot be divorced from the diabolical circumstances of the crime itself, which in the instant case fully justify the award of capital sentence. We, therefore uphold the award of capital sentence. *Lajor Masih* v. *State of U.P.*, AIR 1976 SC 653 : (1976) 1 SCC 806 : 1976 SCC (Cri) 195 (198) : 1976 CrLJ 580.

[12577] ● ***Party seeking permission of Court to be represented by private person—Discretion of Court to grant permission.***—A private person who is not an advocate has no right to barge into Court and claim to argue for a party. He must get prior permission from Court, for which the motion must come from the party himself. It is open to Court to grant or withhold permission in its discretion. The Court even after grant of permission may withdraw it halfway through if the representative proves himself to be reprehensible. The antecedents, the relationship, the reasons for requisitioning the service of the private person and a variety of other circumstances must be gathered before grant or refusal of the permission. *Harishankar Rastogi* v. *Girdhari Sharma*, AIR 1978 SC 1019 : (1977) 3 SCC 179 : 1978 CrLJ 778 : (1977) 2 SCR 511.

[12578] ● ***Appeal against conviction.***—In the instant case the offence was committed in November, 1968 and the conviction by the trial Court in 1970. It will not be justified in sending back the appellants to jail. While, therefore, confirming the conviction of the appellants the period of imprisonment is reduced to the period already undergone and a fine of Rs. 300/- is imposed in addition to the fine of Rs. 200/- already imposed on them by the Courts below. *Alam* v. *State of Rajasthan*, AIR 1980 SC 1657 : 1980 Supp SCC 694 : 1981 SCC (Cri) 624 (625) : 1980 CrLJ 1248.

[12579] ● ***Refusal to adjourn case for examination of witnesses of prosecution.***—Refusal to adjourn the case for examination of witnesses of the prosecution and closing the prosecution case by the Sessions Judge as he made it clear on the earlier date of hearing, *i.e.*, about one year before, that no further adjournment would be allowed. No witness was present on the adjourned date. The High Court observed that the prosecution took 4 years before the committing Court to examine 3 P.Ws and had taken 15 months to produce 14 witnesses. Order of the Sessions Judge cannot be questioned as wrong or unreasonable and the High Court was perfectly justified in affirming it. *State (Delhi Admn.)* v. *Vishwanath Lugnani*, AIR 1981 SC 1239 : 1981 CrLJ 745 : 1981 CrLR (SC) 470 : 1980 UJ (SC) 832 : 1980 CrAppR (SC) 343 : 1981 SCCrR 239 : (1981) 83 PunLR (D) 160.

[12580] ● ***Economic offences—Quashing of complaint on account of delay not called for.***—In case of economic offences where the delay is on account of working of the judicial system due to ever-increasing workload, quashing of proceedings on account of delay is not called for. *V.K. Agarwal* v. *Vasantraj Bhatia*, AIR 1988 SC 1106 : 1988 SCC (Cri) 679 : 1988 CrLJ 1106 : 1988 CrLR (SC) 263 : 1988 (2) Crimes 6.

[12581] ● ***Delay of about 20 years for which Managing Director responsible.***—In the instant case, the offence was committed between 1967 and 1969 which is some 20 years back. While we have no sympathy for the respondent No. 2 and we are clearly of the opinion that he has no equity in his favour and the delay after the complaint had been filed has been mostly on account of his *mala fide* move, we do not think it would be in the interest of justice to allow a prosecution to start 20 years after the offence has been committed. Keeping in view the background of the case, the manner in which the respondent 2 has behaved and the fact that he is squarely responsible for delaying the proceedings by retreating the same contention twice over. We are of the definite view that the respondent 2 should be made to suffer exemplary cost. We accordingly direct the proceedings to be closed on imposition of cost of Rs. 10,000=00. *T.J. Stephen* v. *M/s. Parle Bottling Co. (P) Ltd.*, AIR 1988 SC 994 : 1988 SCC (Cri) 690 (693) : 1988 CrLJ 1095 : 1988 CrLR (SC) 231.

[12582] ● ***Rash and negligent driving—Delay of 9-1/2 years for taking cognizance.***—In the instant case the offence is of rash and negligent driving. It is, as such, neither a grave and heinous offence nor an offence against the community as such though all criminal offences are crimes against society..... Having regard to the nature of the offence there is enormous delay in proceeding with the criminal prosecution by the appellant — 9-1/2 years for a trial for rash and negligent driving, is too long a time. Quick justice is a *sine qua non* of Art 21 of the constitution. Keeping a person in suspended animation for 9-1/2 years without any cause at all—and none was indicated before the learned Magistrate or before the High Court or before us — cannot be with the spirit of the procedure established by law. In view of the matter, it is just and fair and in accordance with equity to direct that the trial or prosecution of the appellant to proceed no further. *Sriniwas Pal* v. *Union Territory of Arunachal Pradesh*, AIR 1988 SC 1729 : (1988) 4 SCC 36 : 1988 SCC (Cri) 889 (894, 895) : 1988 CrLJ 1803 : 1988 CrLR (SC) 506 : 1988 (2) Crimes 950.

[12583] ● ***Criminal proceedings pending for more than 10 years.***—Though a criminal prosecution is pending against the appellant but no effective progress have been made in the case except filing a challan. It appears to us that the state is not serious in pursuing the criminal proceedings and even otherwise more than 10 years have already elapsed since the alleged commission of the offence. It would be against the interest of justice to continue any criminal proceedings in the case. We therefore, direct to drop the criminal proceedings launched and pending against the appellant. *Munshi Ram, Ram Niwas* v. *Collector, Food and Supplies Department*, AIR 1993 SC 1203 : 1991 SCC (Cri) 1037 (1040) : JT 1991 (4) SC 151 : (1991) 2 SCC (Supp) 310.

[12584] ● ***Undue delay in trial on account of default of prosecution.***—Unexplained delay in trial entirely on account of default by prosecution, defeats right of accused to speedy trial. *Santosh De* v. *Archana Guha*, AIR 1994 SC 1229 : 1994 Supp (3) SCC 735 : 1995 SCC (Cri) 194 : 1994 CrLJ 1975.

[12585] ● ***Pendency of criminal proceedings.***—The very pendency of criminal proceedings for long periods by itself operates as an engine of oppression. Quite often, the private complainants institute these proceedings out of oblique motives. Even in case of offences punishable for seven years or less with or without fine the prosecutions are kept pending for years and years together in Criminal Courts. It appears essential to issue appropriate directions to protect and effectuate the right to life and liberty of the citizens guaranteed by Article 21 of the Constitution. It is also necessary to ensure that these criminal prosecutions do not operate as engines of oppression. Accordingly, the following directions are made:

(1) (*a*) Where the offences under Indian Penal Code or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding three years with or without fine and if trials for such offences are pending for one year or more and the concerned accused have not been released on bail but are in Jail for a period of six months or more, the concerned Criminal Court shall release the accused on bail or on personal bond to be executed by the accused and subject to such conditions, if any, as may be found necessary, in the light of Section 437 of the Cr.P.Code.

(*b*) Where the offences under Indian Penal Code or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding five years, with or without fine, and if the trials for such offences are pending for two years or more and the concerned accused have not been released on bail but are in Jail for a period of six months or more, the concerned Criminal Court shall release the accused on bail or on personal bond to be executed by the accused and subject to the imposing of suitable conditions, if any, in the light of Section 437, Cr.P.Code.

(*c*) Where the offences under Indian Penal Code or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with seven years or less, with or without fine, and if the trials for such offences are pending for two years or more and the concerned accused have not been released on bail but are in Jail for a period of one year or more, the concerned Criminal Court shall release the accused on bail or on personal bond to be executed by the accused and subject to imposing of suitable conditions, if any, in the light of Section 437, Cr.P.Code.

(2) (*a*) Where criminal proceedings are pending regarding traffic offences in any

Criminal Court for more than two years on account of non serving summons to the accused or for any other reason whatsoever, the Court may discharge the accused and close the cases.

(*b*) Where the cases pending in Criminal Courts for more than two years under Indian Penal Code or any other law for the time being in force are compoundable with permission of the Court and if in such cases trial have still not commenced, the Criminal Court shall, after hearing the Public Prosecutor and other parties representing before it or their Advocates, discharge or acquit the accused, as the case may be, and close such cases.

(*c*) Where the cases pending in Criminal Courts under Indian Penal Code or any other law for the time being in force pertain to offences which are non-cognizable and bailable and if such pendency is for more than two years and if in such cases trials have still not commenced, the Criminal Court shall discharge or acquit the accused, as the case may be, and close such cases.

(*d*) Where the cases pending in Criminal Courts under Indian Penal Code or any other law for the time being in force are pending in connection with offences which are punishable with fine only and are not of recurring nature, and if such pendency is for more than one year and if in such cases trial have still not commenced, the Criminal Court shall discharge or acquit the accused, as the case may be, and close such cases.

(*e*) Where the cases pending in Criminal Courts under Indian Penal Code or any other law for the time being in force are punishable with imprisonment upto one year, with or without fine, and if such pendency is for more than one year and if in such cases trials have still not commenced, the Criminal Court shall discharge or acquit the accused, as the case may be, and close such cases.

(*f*) Where the cases pending in Criminal Courts under Indian Penal Code or any other law for the time being in force are punishable with imprisonment upto three years, with or without fine, and if such pendency is for more than two years and if in such cases trial have still not commenced, the Criminal Court shall discharge or acquit the accused, as the case may be, and close the cases.

(3) For the purpose of directions contained in Clauses (1) and (2) above, the period of pendency of criminal cases shall be calculated from the date the accused are summoned to appear in the Court.

(4) Directions (1) and (2) made hereinabove shall not apply to cases of offences involving (a) corruption, misappropriation of public funds, cheating, whether under the Indian Penal Code, Prevention of Corruption Act or any other statute; (b) smuggling, foreign exchange violation and offences under the Narcotics Drugs and Psychotropic Substances Act; (c) Essential Commodities Act, Prevention of Food Adulteration Act, Acts dealing with environment or any other economic offences; (d) offences under Arms Act, Explosive Substances Act, Terrorist and Disruptive Activities Act; (e) offences relating to the Army, Navy and Air Force; (f) offences against public tranquility; (g) offences relating to public servants; (h) offences relating to coins and Government stamp; (i) offences relating to elections; (j) offences relating to giving false evidence and offences against public justice; (k) any other type of offences against the State; (l) offences under the taxing enactments and (m) offences of defamation as defined in Section 499, I.P.Code.

(5) The Criminal Courts shall try the offences mentioned in Para (4) above on a priority basis.

(6) These directions are applicable not only to the cases pending on this day but also to cases which may be instituted hereafter. As and when a particular case gets covered by one or the other direction mentioned in directions (1) and (2) read with direction (4) above, appropriate orders shall be passed by the concerned Court without any delay. *Common Cause, a Registered Society* v. *Union of India*,

AIR 1996 SC 1619 : (1996) 4 SCC 33 : 1996 SCC (Cri) 589.

[12586] ● ***Guidelines issued by Supreme Court in view of large pendency of cases.***—In cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the Court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined all the witnesses or not, within the said period and the Court can proceed to the next step provided by law for the trial of the case. (ii) In such cases as mentioned above, if the accused has been in jail for a period of not less than one half of the maximum period of punishment prescribed for the offence, the trial Court shall release the accused on bail forthwith on such conditions as it deems fit. (iii) If the offence under trial is punishable with imprisonment for a period exceeding 7 years, whether the accused is in jail or not, the Court shall close the prosecution evidence on completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period and the Court can proceed to the next step provided by law for the trial of the case, unless for very exceptional reasons to be recorded and in the interest of justice the Court considers it necessary to grant further time to the prosecution to adduce evidence beyond the aforesaid time limit. (iv) But if the inability for completing the prosecution within the aforesaid period is attributable to the conduct of the accused in protracting the trial, no Court is obliged to close the prosecution evidence within the aforesaid period in any of the cases covered by clauses (i) to (iii). (v) Where the trial has been stayed by orders of Court or by operation of law such time during which the stay was in force shall be excluded from the aforesaid period for closing prosecution evidence. The above directions will be in addition to and without prejudice to the directions issued by this Court in "*Common Cause*" v. *Union of India*, (1996) 4 SCC 33 : 1996 AIR SCW 2279 as modified by the same Bench through the order reported in "*Common Cause*" *a Registered Society* v. *Union of India*, (1996) 6 SCC 75 : (1997 AIR SCW 290). TO THE SAME EFFECT : *Raj Deo Sharma* v. *State of Bihar*, AIR 1998 SC 3281 : (1998) 7 SCC 507 : 1998 SCC (Cri) 1692 : 1998 CrLJ 4596 : 1998 (4) Crimes 53 : (1999) 1 SCJ 140.

[12587] ● ***Undue delay in culminating proceedings—Old ladies murdered in case—Proceedings quashed.***—Undue delay in culminating the criminal proceedings is antithesis of the Constitutional protection enshrined in Article 21 of the Constitution. Court, when approached by accused to quash proceedings on the ground of delay, must consider each case on its own facts. Unfortunately, the delay has so permeated in our legal system that at all levels tardiness has become the leitmotif. Such a malady has been judicially reprobated and efforts have been made to curtail the delay which has developed as a systemic canker.

Appellants, divided the post FIR period of the present case into three different stages. First is the period from 1986 to 1990 which is claimed to be the period taken for investigation. Second is from 1990 to 1993, which is said to be the period taken for obtaining sanction of the Government for laying charge-sheet before the Court. Third is the period from 1994 till the date of filing of the writ petition in the High Court in 1997, during which the progress in the Trial Court was slower than creeping through the process and, consequently, no charge could be framed until the appellants filed the writ petition before the High Court.

The only offence alleged against the two senescent lady appellants is that they abetted the public servant to commit the offence under Section 13(2) of the Prevention of Corruption Act. For two reasons, proceedings against them are liable to be quashed. First is, the materials are too insufficient to prove that those two old ladies intentionally abetted the public servant in acquiring assets which are disproportionate to his known sources of income. If that is the position, why should those two old ladies be compelled to embark upon a trial which, in all probabilities, cannot end in conviction against them, even assuming that the octogenarian ladies would be able to survive till the end of the trial. Second is, the trial is not likely to end within one or two years. Two lady octogenarians feel that there is not much time ahead of them to complete a trial which is yet to begin, and counting the number of years which the investigation consumed for finalising the charge-sheet, the trial would not be anything less than a long drawn out one.

It would be unfair and unreasonable to compel the two ladies, who by the advancement of old age would possibly have already crossed into geriatric stage, to stand the long trial having no reasonable prospect of ultimate conviction against them. Quash the criminal prosecution so far as those two ladies are concerned. *Seeta Hemchandra Shashittal* v. *State of Maharashtra*, AIR 2001 SC 1246 : 2001 SCC (Cri) 787 : (2001) 4 SCC 525 : 2001 CrLJ 1242 : 2001 (1) Crimes 248.

[12588] ● *Appellant already undergone 8 years R. 9—Interference by Supreme Court.*—In a case where the accused-appellant had already undergone eight years', R. 9 out of the total sentence of 10 years R. 9 awarded to him, the Supreme Court directed that hearing of the appeal be expedited. *Vijay Singh Chandubha Jadeja* v. *State of Gujarat*, (2005) 12 SCC 574 : (2006) 1 SCC (Cri) 634 (636).

[12589] ● *Rate of interest—Interference by Supreme Court.*—In the present case the accident took place in the year 1988. The Tribunal decided the claim petition on 1990 rewarding compensation along with interest at the rate of 12% per annum. The High Court maintained the rate of interest granted by the Tribunal. The only challenge of the Insurance Co. before the High Court was on the question of rate of interest. The Supreme Court held that "though the petitioner may have on point on the issue of rate of interest in view of the decision of this Court in *Kaushnuma Begum* v. *New India Assurance Co. Ltd.*, (2001) 2 SCC 9 : 2001 SCC (Cri) 268, but having regard to the facts and circumstances of the case and that the accident took place seven years ago, we are not inclined to interfere with the impugned order in exercise of powers under Art. 136 of the Constitution." *National Insurance Co. Ltd.* v. *Swaroop*, AIR 2006 SC 2472 : (2005) 11 SCC 419 : (2006) 1 SCC (Cri) 779 (780).

DELEGATION

[12590] ● *Delegation.*—Central Government's delegation of power is not unconstitutional: An order under Section 3 can be special as well as general and hence, Central Government or the authority to whom power is delegated can issue directions to a particular producer or dealer requiring any specific act to be done or forborne in regard to production, *etc.* Section 3(2) confers no further or other powers than what are conferred under sub-section (1). *Santosh Kr. Jain* v. *State*, AIR 1951 SC 201 : 1952 CrLJ 757 : 1951 SCR 303 : LLR 30 Pat 681 : 6 DLR SC 188 : 64 LW 513 : 1951 Al CrD 362 : 1951 Mad WN (Cri) 98.

[12591] ● *Permission to construct Cinema in Greater Bombay granted by Commissioner of Police cancellation of by State Govt.*—In the instant case, the action of the commissioner of Police in canceling the permission granted to the respondent for construction of cinema in Greater Bombay at the behest of the State Government was not upheld, as the concerned rules had conferred this power on the Commissioner because of which it was stated that the Commissioner was bound to bear his own independent and unfettered judgment and decide the matter for himself, instead of forwarding an order which another authority had purported to pass. *Commissioner of Police* v. *Gadhandas Bhanji*, AIR 1952 SC 16 : 1952 SCR 135 : 1951 SCJ 803.

[12592] ● *Legislature not to delegate its function of laying down legislative policy.*—The Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally exacting that policy into binding rule of conduct. The preamble and the body of the sections in the Essential Supplies (Temporary Powers) Act sufficiently formulate the legislative policy and the ambit and character of the Act, is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the frame work of that policy. Section 3 of the Act, therefore, does not amount to delegation of legislative power outside the permissible limits. Case law referred. *Hari Shankar Bagla* v. *State of M.P.*, AIR 1954 SC 465 : 1954 CrLJ 1322 : 1954 SCA 824 : (1955) 1 SCR 380.

[12593] ● *Power conferred canalised by clear legislative policy validity.*—Where the power conferred is canalised by clear legislative policy, validity of the provision cannot be challenged as excessive delegation. *Union of India* v. *Bhanamal Gulzarimal Ltd.*, AIR 1960 SC 475 : 1960 CrLJ 664 : 1960 (2) SCR 627.

[12594] ● *Detention under defence of India Act—Challenge to.*—There is yet another ground on which the validity of the detention may be open to challenge. If a detenue contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is therefore, invalid, the plea thus raised by the detenue cannot at the threshold be said to be barred by the Presidential order. In terms it is not a plea which is relatable to the fundamental rights specified in the order. It is a plea which is independent of the said rights and its validity must be examined. The argument that in conferring power on the Central Government to make rules, the legislature has abdicated its essentially legislative function in favour of the Central Government is wholly tenable. What the legislature is prohibited from doing is to delegate its essentially legislative function and power. If it appears from the relevant provisions of the impugned statute that powers which have been delegated include powers which can legitimately be regarded as essentially legislative powers, then the legislation is bad and it introduces a serious infirmity in the Act itself. On the other hand, if the legislature lays down its legislative policy in clear and unambiguous terms and leaves it to the delegate to execute that policy by means of making appropriate rules, then such delegation is not impermissible. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 381 : (1964) 1 CrLJ 269 (288) : (1964) 4 SCR 797.

[12595] ● *Section 3(2)—15(1) of Defence of India Act not suffers from excessive delegation.*—In the present case, one has merely to read Section 3(1) Defence of India Act, 1962 and the detailed provisions contained in the several clauses of Section 3(2), Defence of India Act, 1962 to be satisfied that attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority. The Contention that Section 3(2) (15)(i) of the Act suffers from excessive delegation must be rejected. What we have said about this section applies with equal force to Section 40 of the said Act. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 381 : (1964) 1 CrLJ 269 (288) : (1964) 4 SCR 797.

[12596] ● *Rule 30(1) of Defence of India Act—Valid.*—Rule 30(1) of the Defence of India Rules must be held to be valid since it is consistent with the operative provisions of the Act and in making it, the Central Government has acted within its delegated authority. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 381 : (1964) 1 CrLJ 269 (288) : (1964) 4 SCR 797.

[12597] ● *Section 40 of Defence of India Act confer authority to Central Govt. for delegation of its powers.*—It is true that S. 40 of the Defence of India Act gives authority to the Central Government to delegate its powers under the Act or the Rules to the State Government and others. But no delegation under that section is required for the exercise of the power under R. 30 by the State Government, for R. 30 itself lays down that the power therein can be exercised by the Central Government or the State Government. No further delegation, therefore, was necessary in favour of the State Government in so far as the exercise of power under Rule 30 is concerned. *Godavari Shamrao Parulekar* v. *State of Maharashtra*, AIR 1964 SC 1128 : (1964) 2 CrLJ 222 (229) : (1964) 6 SCR 446.

[12598] ● *Power under Section 418(1) Delhi Municipal Corporation Act—Delegation of.*—The power under Section 418(i) of the Delhi Municipal Corporation Act, 1957 can be delegated by the Commissioner. The section does not require the names of the particular officers in whose favour the delegation is made to be mentioned. What it requires is to specify the officers to whom the power is delegated. This only means that the designation of the officers to whom the power has been delegated need only be mentioned. We may add that Section 491 of the Delhi Corporation Act permits delegation to any municipal officer or employee, and therefore, specific individual authorisation is not necessary. *Kanwar Singh* v. *Delhi Administration*, AIR 1965 SC 871 : 1965 (2) CrLJ 1 : (1965) 1 SCR 7.

[12599] ● *Delegation—Connotation.*—In *Huth* v. *Clarks* (1890) 25 QBD 391, WELLS J. observed at p. 395 "Delegation" as the word is generally used, does not imply parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself." In our opinion in issuing the notification on the State Govt. has not denuded itself of the power to act under R. 30. *Godawari S. Parulekar* v. *State of Maharashtra*, AIR 1966 SC 1404 : 1966 CrLJ 1067 (1089) : (1966) 3 SCR 314.

[12600] ● *Equality of official status with delegate.*—Mere equality of official status with a delegate cannot clothe the other officer with delegated powers. *Rahubir Singh* v. *State of Haryana*, AIR 1974 SC 1516 : (1974) 4 SCC 560 : 1974 SCC (Cri) 596 (600) : 1974 CrLJ 1062 : 1974 CrLR (SC) 430.

[12601] ● *Delegation of powers to inspector.*—Section 491, Delhi Municipal Corporation Act, 1957 does not require the conferment of the Commissioner's power upon every inspector by name. It is enough if there is a general order, as there is in this case, indicating the class of officers to whom the Commissioner had delegated his powers under any section. *Kesho Ram* v. *Delhi Administration*, AIR 1974 SC 1158 : (1974) 4 SCC 509 : 1974 SCC (Cri) 545 (547) : 1974 CrLJ 814 : 1974 CrLR (SC) 439.

[12602] ● *Ordinance made by President executive not legislative act.*—By clause (a) of Art. 357(1), the Parliament can not only confer on the

President the power of State Legislature to make laws but it can even authorise the President to delegate the power so conferred to any authority to be specified by him in that behalf. There cannot be the slightest doubt that not only the power exercised by the president under Article 357(1)(a) but even the power exercised by his delegate under that clause is legislative in character. It is, therefore, not true to say that under our Constitution, the exercise of Legislative power by the Legislature properly so-called is the only source of law. Ordinances issued by the President and Governors and the laws made by the President or his delegate under Art. 357(1)(*a*) partake fully of legislative character and are made in the exercise of legislative power, within the contemplation of the Constitution.

So it is wrong to say that an Ordinance made by the President is an executive and not a legislative act. *A.K. Roy* v. *Union of India*, AIR 1982 SC 710 (721) : (1982) 1 SCC 271 : 1982 SCC (Cri) 152 : 1982 CrLJ 340 : 1982 CrLR (SC) 176.

[12603] ● *Section 20 of PFA Act not envisage further delegation of powers by person authorised by Central or State Govt.*—The provision contained in Section 20(1) of the Prevention of Food Adulteration Act, 1954. Act does not contemplate the institution of a prosecution by any person other than those designated. The terms of Section 20(1) do not envisage further delegation of powers by the person authorised, except that such prosecution may be instituted with the written consent of the Central Government or the State Government or the person authorised. The use of the negative words in Section 20(1) "no prosecution for an offence under this Act....... shall be instituted except by or with the written consent of " plainly make the requirements of the section imperative.

Where a power is given to do a certain thing in a certain way, the thing must be doe in that way or not at all. Other modes of performance are necessarily forbidden. The intention of the Legislature in enacting Section 20(1) was to confer a power on the authorities specified therein which power had to be exercised in the manner provided and not otherwise.

The use of words 'in this behalf' in Section 20(1) of the Act shows that the delegation of such power by the Central Government or the State Government by general or special order must be for a specific purpose, to authorise a designated person to institute such prosecutions on their behalf. The terms of Section 20(1) of the Act do not postulate further delegation by the person so authorised; he can only give his consent in writing when he is satisfied that a *prima facie* case exists in the facts of a particular case and record his reasons for the launching of such prosecution in the public interest. The maxim "*delegatus non potest delegare*" merely indicates that this is not normally allowable but the Legislature can always provide for sub-delegation of powers. The provision contained in Section 24(2)(e) enables the State Government to frame a rule for delegation of powers and functions under the Act but it clearly does not envisage any sub-delegation. That apart, a rule framed under Section 24(2)(e) can only provide for delegation of minor administrative functions *e.g.* appointment of Food Inspectors, Food (Health) Authority, *etc*. In the case of important executive functions like the one contained in Section 20(1) of the Act to authorise launching of prosecutions for an offence under the Act which is in the nature of a safeguard, the Courts may be disposed to construe general powers of delegation restrictively. *A.K. Roy* v. *State of Punjab*, AIR 1986 SC 2160 : 1986 SCC (Cri) 443 : 1986 CrLJ 2037 : 1986 CrLR (SC) 456.

[12604] ● *State Govt.—Power of—Delegation to Commissioner of Police.*—It is obvious from the language of Section 3(2) of the Act that the powers of the State Government under Section 3(1) of the Act can only be delegated to the Commissioner of Police "if the circumstances prevailing or likely to prevail" necessitate the issuing of such an order. The disjunctive word "or" in Section 3(2) of the Act signifies either of the two situations on the basis of which an order under Section 3(2) of the Act can be issued by the State Government. The satisfaction of the State Government for the exercise of the power under sub-section (2) of Section 3 of the Act may be based on circumstances prevailing on the date of the order or likely to prevail at a future date. The power can also be exercised by taking into consideration the circumstances prevailing on the date of the order as well as the circumstances likely to prevail in future. *State of Tamil Nadu* v. *Vela alias Velangani alias Johney, Abdul Samad*, AIR 1993 SC 1460 : (1993) 2 SCC 540 : 1993 CrLJ 1653 : 1993 (1) Crimes 1199.

[12605] ● *Delegated powers to be exercised by persons on whom conferred.*—The Courts are normally rigorous in requiring the power to be exercised by the persons or the bodies authorised by the statutes. It is essential that the delegated power should be exercised by the authority upon whom it is conferred and by no one else. At the same time in the present administrative set up extreme judicial version to delegation cannot be carried to an extreme. A public authority is at liberty to employ agents to exercise its powers. That is why in many statutes, delegation is authorised either expressly or impliedly. Due to the enormous rise in the nature of the activities to be handled by statutory authorities, the maxim *delegatus non-potest delegare* is not being applied specially when there is question of exercise of administrative discretionary power. By now it is almost settled that the legislature can permit any statutory authority to delegate its power to any other authority of course, after the policy, has been indicated in the statute itself within the frame work of which such delegate is to exercise the power. The real problem or the controversy arises when there is a sub-delegation. It is said that when Parliament has specifically appointed authority to discharge a function, it cannot be readily presumed that it had intended that is delegate should be free to empower another person or body to act in its place. *Salini Silk Mills (P) Ltd.* v. *E.S.I. Corporation*, (1994) 5 SCC 346 : (1995) 2 SLR 81 : 1994 (2) LLJ 1105 : JT 1994 (5) SC 11 : 1995 (2) SLR 81 : 1995 (1) SCJ 36.

[12606] ● ***Complaint under Section 20 of PFA Act—Institution of.***—"A complaint under S. 20 of the Prevention of Food Adulteration Act, 1954 could be instituted apart from Central or State Government, by a person authorised in that behalf. Such a person who is authorised to institute complaint could, "give his written consent for the prosecution by the Food Inspector", A.K. Roy, Chief Medical Officer, Chandigarh undisputedly, and as is clear from Notification No. 5210-UTF-4-67/9461 issued on 29th April, 1967 by the Chandigarh Administration in exercise of powers conferred by sub-section (1) of S. 20 of the Act was a person authorised to institute a complaint. Therefore, he could give his consent as well for launching of prosecution. In doing so he was neither delegating his power nor acting contrary to S. 20. He was acting within the scope of authority as a person authorised to institute complaint under S. 20(1) of the Act and has been placed at par with other authorities designated in the sub-section for purposes of granting consent." *Food Inspector, Health Deptt., U.T. Chandigarh* v. *Krishna Dhaba*, AIR 1994 SC 664 (665) : 1995 SCC (Cri) 172 : 1994 CrLJ 624.

[12607] ● ***Maxim "delegatus non-protest delegare"—Invocation of.***—The maxim "*delegatus non-protest delegare*" was originally invoked in the context of delegation of judicial powers saying that in the entire process of adjudication, a judge must act personally except in so for as he is expressly absolved from his duty by a statute. The basic principle behind the aforesaid maxim is that "a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority. This intention may, however, be negatived by any contrary indication found in the language, scope or object of the statute." *Sahni Silk Mils (P) Ltd.* v. *ESI Corporation*, (1994) 5 SCC 346 : 1994 SCC (L&S) 1096 : (1995) 2 SLR 81 : (1994) 2 LLJ 1105.

[12608] ● ***Recording of information under TADA—Grant of approval by DSP.***—The case against the appellants originally was registered under the Arms Act. The DSP. did not give any prior approval on his own to record any information about the commission of an offence under TADA on the contrary he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. This is a case of power conferred upon one authority being really excused by another. If a statutory authority has been vested without jurisdiction he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authorities instructions, then it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this case by Section 20A(1), TADA Act, 1987 was not exercised at all by DSP. The present case was thus a clear case of exercise of power on the basis of external direction. *Anirudh Singhji Karan Singhji Jadeja* v. *State of Gujarat*, AIR 1995 SC 2390 (2393) : (1995) 5 SCC 302 : 1995 SCC (Cri) 902 : 1995 CrLJ 4154 : (1995) 3 Crimes 518.

[12609] ● ***Delegation of powers under Section 34 Industrial Disputes Act, 1947.***—If the powers under Section 34 of the Industrial Disputes Act, 1947 have been delegated under Section 39 of the Industrial Disputes Act, 1947, the delegatee can file the complaint himself or authorise someone else to file it. The words "or under the authority of" necessarily must be given due meaning and the meaning is that the appropriate Government may authorise someone other than itself, even a non-Government servant, to file a complaint under Section 34 of the Industrial Disputes Act, 1947. *Raj Kumar Gupta* v. *Lt. Governor, Delhi*, AIR 1997 SC 2680 : (1997) 1 SCC 556 : JT 1996 (10) SC 559.

[12610] ● ***Consent for prosecution under Section 7 of Explosive Substances Act, 1908.***—In the instant case the consent for the prosecution of the respondent was granted by the Additional District Magistrate of the district concerned and, in this behalf, reliance was placed, on behalf of the appellant, upon a notification dated 24th

April, 1995 issued by the appellant whereunder it appointed the Joint Collector and Executive Magistrate as Additional District Magistrate for the District of Gwalior and directed that he should "exercise powers of District Magistrate conferred under the said Code (Criminal Procedure Code) or under any other law for the time being in force."

Power of giving consent rests with the Central Government. The Central Government has delegated it to the District Magistrate. It is not competent for the State Government to further delegate to the Additional District Magistrate a power of the Central Government which the Central Government has delegated to the District Magistrate. *State of Madhya Pradesh* v. *Bhupendra Singh*, AIR 2000 SC 679 : (2000) 1 SCC 555 : 2000 CrLJ 805 : JT 2000 (1) SC 82.

DELHI POLICE ACT

[12611] ● ***Delhi Police Act.***—Therefore, Ss. 47 and 50 have to be read strictly. Any police apprehension is not enough. Some ground or other is not adequate. There must be a clear and present danger based upon credible material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence. Likwise, there must be sufficient reason to believe that the person proceeded against is so desperate an dangerous that his mere presence in Delhi or any part thereof is hazardous to the community and its safety. We are clear that the easy possibility of abuse of this power to the detriment of the fundamental freedoms of the citizen persuades us to insist that a stringent test must be applied. We are further clear that natural justice must be fairly complied with and vague allegations and secret hearings are gross violations of Articles 14, 19 and 21 of the Constitution as expounded by this Court in *Maneka Gandhi*, (1978) 1 SCC 918 : AIR 1978 SC 597. *Prem Chand* v. *Union of India*, AIR 1981 SC 613 : (1981) 1 SCC 639 : 1981 SCC (Cri) 239 : 1981 CrLJ 5 : 1981 UJ 27.

[12612] ● ***Externment and surveillance—Vague allegations and secret hearing not permissible—Use of stock witnesses deprecated.***—The Petitioner in the year 1965, when he was 25 year old was involved in a gambling case by the police and to mould him a permanent stock witness and lest he should be militant to defy them. Despite his hesitation and unwillingness he was forced to become a permanent pawn of the police. This is how, the petitioner landed himself in the web of the police, he had no alternative than to be like that as his livelihood was dependent upon the mercy and indulgence of the police. The version of the petitioner is that once he yielded to the pressure of the Police to give false testimony disclosing a rubberised conscience and unveracious readiness to forswear himself, there was escalation of demands upon him and he became a regular peddler of perjury "on police service. Indeed, counsel for the petitioner arranged that his client was a stockwitness because he had to keep the Police in good humour and obliged them with tailored testimony in around 3,000 cases because the alternative was police wrath. We are flabbergasted at this bizarre confession but to lend credence to his assertion counsel produced a few hundred summonses where the petitioner was cited as a witness. Were he not omnipresent how could he testify in so many cases save by a versatile genius for loyal unveracity? For sure, the consternation of the community at this flood of perjury will shake its faith in the veracity of Police investigation and the validity of the judicial verdict. We have no doubt that the petitioner, who has given particulars of a large number of cases where he had been cited as witness, is speaking the truth even assuming that 3,000 cases may be an exaggeration. In Justice, Justices and Justicing and likewise in the Police and Policing, the Peril to the judicial process is best left to imagination if professional perjurers like the self-confessed Paniwala are kept captive by the Police, to be pressed into service for proving "cases". Courts, trusting the Police may act on apparently veracious testimony and sentence people into prison. The community, satisfied with such convictions, may well believe that all is well with law and order. We condemn, in the strongest terms, the systematic pollution of the judicial process and the consequent threat to human rights of innocent persons. We hope that the higher authorities in the Department who, apparently, are not aware of the nefarious goings-on at the lesser levels will immediately take measures to stamp out this unscrupulous menace. *Prem Chand* v. *Union of India*, AIR 1981 SC 613 : (1981) 1 SCC 639 : 1981 SCC (Cri) 239 : 1981 UJ 27 : 1981 CrLJ 5.

[12613] ● ***Malicious prosecution suit against member of Delhi Police, Limitation.***—Since the Act is a special law which prescribes a period of limitation different from the period prescribed in the Schedule to the Limitation Act for suits against persons governed by the Act in relation to matters covered by Section 140, by virtue of Section 29(2) of the Limitation Act, the period of limitation prescribed by Section 140 of the Act would be the period of limitation prescribed for such suits and not the period prescribed in the Schedule to the Limitation Act. This means that if the suit filed by the appellant falls within the ambit of Section 140 then the period of limitation for institution of the suit would be that prescribed in Section 140 and not the period prescribed in Article 74 of the Limitation Act. Having regard to the period laid down in this Court decisions on the present case falls within the ambit of Section 140 of the Act. What is alleged against respondents Nos. 3 and 4 by the appellant in the plaint is that respondent No. 4, who was in charge of Mayapuri police post had registered a false, vexatious and malicious report against the appellant, and respondent No. 3, who was Station House Officer, P.S. Naraina, had filed the challan in the Court against appellant and other accused on the basis of the said report ... Similarly in the present. It was the duty of respondent No. 4 being incharge of Police Post Mayapuri, to record the report and so also it was the duty of respondent No. 3 the SHO of P.S. Naraina to file the challan in Court. The acts complained thus had a reasonable connection and nexus with the duties attached to the offices held by respondents Nos. 3 and 4 The acts complained of were, therefore, done under the colour of office of the said respondents and fell within the ambit of Section 140(1) of the Act. It is not disputed that if Section 140(1) is found applicable to the suit filed by the appellant, as against the respondents, was barred by limitation having been filed after the expiry of three months and it could not be entertained against them. *Sumer Chand* v. *Union of India*, AIR 1993 SC 2579 : (1994) 1 SCC 64 : 1994 SCC (Cri) 99 : (1993) 2 UJ 599 : 1993 CrLJ 3531.

[12614] ● ***Externment order, Sections 47, 51, Delhi Police Act.***—It is true that some material must exist but what is required is not an elaborate decision akin to a judgment. On the contrary the order directing externment should show existence of some material warranting an order of externment. While dealing with question mere repetition of the provision would not be sufficient. Reference to be made to some material on record and if that is done the requirements of law are met. It is not the sufficiency of material but the existence of material which is sine qua non.

The satisfaction of the authority can be interfered with if the satisfaction recorded is demonstratively perverse based on no evidence, misreading of evidence or which a reasonable man could not form or that the persons concerned was not given due opportunity resulting in prejudice. To that extent, objectivity is inbuilt in the subjective satisfaction of the authority.

The material justifying extrenment can also throw light on options to be exercised. If referring to the materials, the authority directing externment also indicates the option he thinks to be proper and appropriate it cannot be said to be vitiated even though there is no specific reference to the other options. It is a matter of legitimate inference that when considering materials to adjudicate on the question of desirability for externment, options are also considered and one of the three options can be adopted. There cannot be any hair-splitting in such matters. A little play in the joints is certainly permissible while dealing with such matters. All the relevant aspects were considered and High Court was justified in holding to the contrary and quashing the externment order. *State of N.C.T. of Delhi* v. *Sanjeev*, AIR 2005 SC 2080 : (2005) 5 SCC 181 : 2005 CrLJ 2179 (2186) : 2005 (2) Crimes 70.

[12615] ● ***Scope of Section 140, Delhi Police Act.***—By jumping road divider and coming-face on the incoming traffic was the factor which had caused the accident and was clearly not a matter within the colour of duty. Therefore, the case was not covered by Section 140. *Paul George* v. *State of NCT of Delhi*, (2008) 4 SCC 185 : 2008 (2) SCC (Cri) 768 : JT 2008 (3) SC 545 : 2008 (4) SCR 1208.

[12616] ● ***"Under the colour of duty".***—While on his way by Police vehicle for a task officially entrusted to him a Head Constable suddenly went over the road divider and hit the scooter resulting into death of one person, and injuries to the other. It was held that by virtue of Section 140, any action against a wrongful act by a police officer done under the colour of duty, has to be initiated within three months from the date of the act complained off and if this time limit is exceeded, it would bar the suit or prosecution. *Paul George* v. *State of N.C.T. of Delhi*, (2008) 4 SCC 185 : 2008 (2) SCC (Cri) 768 : 2008 (4) SCR 1208 : JT 2008 (3) 545.

DELHI SPECIAL POLICE ESTABLISHMENT ACT, 1946

SYNOPSIS

1. **Section 1(2)** 2581
2. **Section 3** 2582
3. **Section 5** 2584
4. **Section 6** 2584

[12617] ● ***Delhi Special Police Establishment Act.***—The Delhi special Police Establishment, a Central Police Force is constituted under the Delhi special Police Establishment Act, 1946.

Under Section 2 of the Act, the Central Government may constitute a special police force, called the Delhi Special Police Establishment, for investigation of certain offences or class of offences as notified under Section 3 of the Delhi Act. Under Section 4 of the Act the superintendence of the Delhi Special Police Establishment vests in the Central Government and administration of the Special Police Establishment vests in an officer appointed by the Central Government who exercises powers exercisable by an Inspector General of Police as the Central Government may specify. Under Section 5 the powers and the jurisdiction of the Establishment can be extended by the Central Government to other areas in a State although not a Union Territory. Once there is an extension of the powers and jurisdiction of the members of the Establishment, the members thereof while discharging such functions are deemed to be members of the police force of the area and are vested with the powers, functions and privileges and are subject to the liabilities of a police officer belonging to that force. The police officer also subject to the orders of the Central Government exercises the powers of the officer-in-charge of a police station in the extended area. Under Section 6 consent of the State Government is necessary to enable the officer of the Establishment to exercise powers and jurisdiction in any area in the State not being a Union territory or railway area. Investigation under the Delhi Act, is, therefore, a central investigation and the officers concerned are under the superintendence of the officer appointed by the Central Government. The superintendence of the Establishment is also under the Central Government. The Central Government, therefore, is concerned with the investigation of the cases by the Establishment and its ultimate result. It is in that back-ground that in 1955, Section 417 was amended by adding sub-section (2) to the section to provide for appeal against acquittal in cases investigated by the Establishment also on the direction of the Central Government. In view of the provisions of the Delhi Act it was necessary to introduce sub-section (2) in Section 417 so that this Central agency which is solely and intimately connected with the investigation of the specified offences may also approach the Central Government for direction to appeal in appropriate cases. This, however, does not bar the jurisdiction of the State Government also to direct presentation of appeals when it is moved by the Establishment. The Establishment can move either the Central Government or the State Government. It will be purely a matter of procedure whether it moves the State Government directly or through the Central Government or in a given case moves the Central Government alone. It will again be a matter of procedure when the Central Government decides to appeal it requests the State Government to do the needful through the Public Prosecutor appointed under the Code. The word 'also' in sub-section (2) of Section 417 is very significant. This word seems not to bar the jurisdiction of the State Government to direct the Public Prosecutor to present an appeal even in cases investigated by the Establishment. Sub-section (1) of Section 417 is in general terms and would take in its purview all types of cases since the expression used in that sub-section is "in any case". *Khemraj* v. *State of M.P.*, AIR 1976 SC 173 : (1976) 1 SCC 385 : 1976 SCC (Cri) 3 : 1976 CrLJ 192 : 1976 CrLR (SC) 37 : 1976 UJ 74 : (1976) 2 SCR 753.

1. SECTION 1(2)

[12618] ● ***Section 1(2).***—When the Extension Act was passed, Parliament had the competence to extend the impugned Act to the State of Jammu and Kashmir because the Delhi Special Police Establishment was a police force belonging to a Part 'C' State. The contention of the learned counsel that because Parliament could not extend the powers and jurisdiction of members of the Delhi Special Police Force after November 1, 1956, assuming it to be correct, does not invalidate the powers exercised earlier. When the Extension Act was passed there is no doubt that the Parliament had the power. The fact that the Parliament ceased to have power, as from November 1, 1956, does not make any difference. Although legislative power may not exist to legislate on the subject of existing laws executive power would be exercised under the laws saved by Article 277 and Article 372. No authority has been cited in support of the contention that executive power to execute a valid law ceases to exist if power to make that law has been transferred to another authority or ceases to exist.

The impugned legislation is a law with respect to entry 80, even if there is repugnancy it must override any laws repugnant thereto in Jammu and Kashmir, Article 246.

There is nothing is sub-section (2) of Section 1 which makes it obligatory that the notification should issue simultaneously with the date of the coming into force of the Act. On the contrary, notification must ordinarily issue earlier than the date of the coming into force of the Law. It seems to us clear that the notification could have been issued any time after the President had given his assent, and as soon as the notification was issued Section 2 came into effect and all the Acts and Ordinance mentioned in the Schedule, stood automatically extended and came into force. *Ishwar Das Malhotra* v. *Union of India*, AIR 1972 SC 1193 : (1972) 1 SCC 646 : 1972 SCC (Cri) 375 : 1972 CrLJ 751.

[12619] ● *Scope of Section 2.*—Section 2 empowers the Central Government to constitute a special force. Indisputably, the first respondent has been constituted in terms thereof. Sub-section (2) of Section 2 provides that subject to any orders which the Central Government may make in this behalf, members of the said police establishment shall have throughout any Union Territory in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers of that Union territory have in connection with the investigation of offences committed therein. The said Act indisputably applies in regard to charges of corruption made against the employees of Union of India. It is also not disputed that the C.B.I. Manual was made by the Central Government providing for detailed procedure as regards the mode and manner in which complaints against public servants are to be dealt with. *Shashikant* v. *Central Bureau of Investigation*, AIR 2007 SC 351 : (2007) 1 SCC 630 : JT 2006 (9) 603 : 2006 (11) Scale 272 : 2006 (8) Supreme 564.

[12620] ● *Extradition Treaty.*—Power is exercised by the CBI or a police officer to arrest a person, although no warrant is issued in terms of Section 4(1)(g) of the Code of Criminal Procedure. It presupposes satisfaction of a Police officer to arrest a person, if he has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received in, any act committed at any place out of India, which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition or otherwise, liable to be apprehended or detained in India.

Any action taken by the Union of India through the Ministry of External Affairs or the C.B.I., on the request of INTERPOL, is Executive Power as contained in Article 73 of the Constitution. We have noticed hereto before the relevant entries in the Legislative List being Entry Nos. 8, 10 to 14 and 18 of List-1 of the Seventh Schedule of the Constitution. We may also notice that in regard to the matter relating to criminal law the Concurrent List provides therefor in Entry Nos. 1 and 2. *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*, (2009) 9 SCC 551 : JT 2009 (11) SC 279.

2. SECTION 3

[12621] ● *Section 3.*—There can be no doubt that the overall administration of the said force, *i.e.* CBI vests in the Central Government, which also includes, by virtue of Section 3, the power of specify the offences or class of offences which are to be investigated by it. The general superintendence over the functioning of the Department and specification of the offences which are to be investigated by the agency is not the same as and would not include within it the control of the initiation and the actual process of investigation, *i.e.*, direction. Once the CBI is empowered to investigate an offence generally by its specification under Section 3, the process of investigation, including its initiation, is to be governed by the statutory provisions which provide for the initiation and manner of investigation of the offence. This is not an area which can be included within the meaning of "superintendence" in Section 4(1). The word "superintendence" in Section 4(1) cannot be construed in a wider sense to permit supervision of the actual investigation of an offence by the CBI contrary to the manner provided by the statutory provisions. The broad proposition urged on behalf of the Union of India that it can issue any directive to the CBI to curtail or inhibit its jurisdiction to investigate an offence specified in the notification issued under Section 3 by a directive under Section 4(1) of the Act cannot be accepted. The jurisdiction of the CBI to investigate an offence is to be determined with reference to the notification issued under Section 3 and not by any separate order not having that character. There is no similarity between a mere executive order requiring prior permission or sanction for investigation of the offence and the sanction needed under the statute for prosecution. The requirement of sanction for prosecution being provided in the very statute which enacts the offence, the sanction for prosecution is a prerequisite for the Court to take congnisance of the offence. In the absence of any statutory requirement of prior permission or sanction for investigation, it cannot be imposed as a condition precedent for initiation of the investigation once jurisdiction is conferred on the CBI to investigate the offence by virtue of the notification under Section 3 of the Act. The word "superintendence" in Section 4(1) of the Act in the context must be construed in a manner consistent with the other provisions of the Act and the general statutory powers of investigation which govern investigation even by the CBI. The necessity of previous sanction for prosecution is provided in Section 6 of the Prevention of Corruption Act, 1947 (Section 19 of the 1988 Act) without which no Court can take cognizance of an offence punishable under Section 5 of that Act. There is no such previous sanction for investigation provided for either in the Prevention of Corruption Act or the Delhi Special Police Establishment Act or in any other statutory provision. The above is the only manner in which Section 4(1) of the Act can be harmonised with Section 3 and the other statutory provisions. The law does not classify offenders differently for treatment thereunder, including investigation of offences and prosecution for offences, according to their status in life. Every person accused of committing the same offence is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone, The Single Directive is applicable only to certain persons above the specified level who are described as "decision making officers". The question is whether any distinction can be made for them for the purpose of investigation of an offence of which they are accused. Obviously, where the accusation of corruption is based on direct evidence and it does not require any inference to be drawn dependent on the decision making process, there is no rational basis to classify them differently. In other words, if the accusation be of bribery which is supported by direct evidence of acceptance of illegal gratification by them, including trap cases, it is obvious that no other factor is relevant and the level or status of the officer is irrelevant. It is for this reason that it was conceded that such cases, *i.e.* of bribery, including trap cases, are outside the scope of the Single Directive. There may be other cases where the accusation cannot be supported by direct evidence and is a matter of inference of corruption motive for the decision, with nothing to prove directly any illegal gain to the decision maker. Those are cases in which the inference drawn is that the decision must have been made for a corrupt motive because the decision would not have been reached otherwise by an officer at that level in the hierarchy. This is, therefore, an area where the opinion of persons with requisite expertise in decision making of that kind is relevant and, may be even decisive in reaching the conclusion whether the allegation requires any investigation to be made. In view of the fact that the CBI or the Police force does not have the expertise within its fold for the formation of the requisite opinion in such cases, the need for the inclusion of such a mechanism comprising of experts in the field as a part of the infrastructure of the CBI is obvious, to decide whether the accusation made discloses grounds for a reasonable suspension of the commission of an offence and it requires investigation. In the absence of any such mechanism within the infrastructure of the CBI, comprising of experts in the field who can evaluate the material for the decision to be made, introduction therein of a body of experts having expertise of the kind of business which requires the decision to be made, can be appreciated. But then, the final opinion is to be of the CBI with the aid of that advice and not that of anyone else. It would be more appropriate to have such a body within the infrastructure of the CBI itself.

The Single Directive cannot, therefore, be upheld as valid on the ground of it being permissible in exercise of the power of superintendence of the Central Government under Section 4(1) of the Act. The matter has now to be considered *dehors* the Single Directive. *Vineet Narain* v. *Union of India*, AIR 1998 SC 889 : (1998) 1 SCC 226 : 1998 SCC (Cri) 307 : 1998 CrLJ 1208 : (1998) 1 Crimes 12.

[12622] ● ***Statutory jurisdiction not to be subject to executive control.***—Statutory jurisdiction cannot be subject to executive control. Once the jurisdiction is conferred on CBI under Section 3, of the Act, the investigating powers are governed by statutory provisions which cannot be curtailed by any executive directive. *Vineet Narain* v. *Union of India*, AIR 1998 SC 889 : (1998) 1 SCC 226 : 1998 SCC (Cri) 307 : 1998 CrLJ 1208 : (1998) 1 Crimes 12 : 1998 (1) SLT 518.

[12623] ● ***Power of CBI—CBI acting under Treaty.***—CBI has different roles to play. When it acts as NCB, being a department of CBI, it acts under a Treaty. It acts in terms of the Constitution of the INTERPOL. It acts as a authority of the Central Government. By reason of such an act it does not carry out investigation, although it is entitled therefor. It functions as an NCB which is to give effect to the request received from INTERPOL and/or foreign country. When it does so, indisputably it has to apply its mind. It can take any action only because it is lawful to do so. It does not exercise absolute discretion. It has to act if a case therefor has been made out including the question as whether any extraditable offence has been made out. For the aforementioned purpose it does not Act as an agency within the four corners of the DSPE Act. It acts, it will be a repetition to state, has an authority of the Central Government. *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*, (2009) 9 SCC 551 : JT 2009 (11) SC 279

[12624] ● ***Authority for making reference for investigation to CBI.***—It is, however, now beyond any controversy that the High Court and this Court also direct investigation by the CBI. Our attention has been drawn to the provisions of the CBI Manual, from a perusal whereof it appears that the Director, CBI exercises his power of superintendence in respect of the matters enumerated in Chapter VI of the CBI Manual which includes reference by the State and/or reference by the High Courts and this Court as also the registration thereof. The reference thereof may be received from the following:

"(a) Prime Minister of India

(b) Cabinet Ministers of Government of India/Chief Ministers of State Government or their equivalent

(c) The State Governments

(d) Supreme Court/ High Courts"

The CBI Manual having been framed by the Union of India, evidently, it has accepted that reference for investigation to the CBI may be made either by this Court or by the High Court. *Nirmal Singh Kahlon* v. *State of Punjab*, AIR 2009 SC 984 : (2009) 1 SCC 441 : 2009 CrLJ 958.

3. SECTION 5

[12625] ● ***Section 5.***—There is no provision in law under which, while granting consent or extending the powers and jurisdiction of the Delhi Special Police Establishment to the specified state and to any specified case any reasons are required to be recorded on the face of notification. *Central Bureau of Investigation* v. *Rajesh Gandhi*, AIR 1997 SC 93 : (1996) 11 SCC 253 : 1997 SCC (Cri) 88 : 1997 CrLJ 63 : 1996 (4) Crimes 104.

[12626] ● ***Investigation by CBI in Fodder scam—Monitoring by High Court.***—For the purpose of properly monitoring the case in terms of the order of this Court, keeping in view the nature of this proceeding and the manner in which the exercise is to be performed to ensure performance of its duty by the C.B.I. guidance through the counsel for the C.B.I. could have been given by the High Court without entering into the merits of any of the accusations. *Union of India* v. *Sushil Kumar Modi*, AIR 1997 SC 1672 : (1997) 4 SCC 770 : 1997 CrLJ 1168 : (1997) 2 Supreme 108.

[12627] ● ***In case of difference of opinion during investigation—Final decision not to be taken by Director CBI but by Attorney General.***—In the case of difference of opinion at any stage during the investigation, the final decision is not to be taken by the Director, C.B.I. or any other officer but by the Attorney General on reference being made to him of the difference of opinion between the concerned officers. The High Court is only required to ensure that the Director, C.B.I. does not close any investigation based only upon his individual opinion if there be any difference of opinion between him and the concerned officers in the C.B.I. Such a matter is then required to be referred by the Director to the Attorney General for his opinion which would govern the further action to be taken therein. *Union of India* v. *Sushil Kumar Modi*, AIR 1997 SC 314 : (1996) 6 SCC 500 : 1997 CrLJ 1168 : JT 1996 (10) SC 23 : 1997 (1) UJ 331.

[12628] ● ***Personal presence of Director CBI in High Court required when essential.***—"It is sufficient for us to observe that the High Court would take into account the fact that the personal presence of the Director C.B.I. in the High Court may be required only when it is essential for a purpose which cannot be served by the presence of the other officers of the C.B.I. who normally represent the C.B.I. at the hearing in the High Court. In view of the numerous cases pending in different High Courts, the Director, C.B.I. personally may not be left with sufficient time from his official duties to appear personally at the hearings of these matters in the High Courts. However, it is the duty of the Director, C.B.I. to ensure proper representation on his behalf in the High Court so that the High Court gets all the assistance needed at the hearings". *Union of India* v. *Sushil Kumar Modi*, AIR 1997 SC 314 : (1996) 6 SCC 500 : 1997 CrLJ 1168 (SC) : JT 1996 (10) SC 23.

[12629] ● ***Powers and jurisdiction of Central Government to extend jurisdiction of Special Police Establishment.***—Section 5 of the Special Police Act empowers the Central Government to extend the powers and jurisdiction of the Special Police Establishment to any area in a State, not being a under territory for the investigation of any offences specified on the notification under Section 3. When, the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the Court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Art. 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Delhi Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restrictions imposed by Section 6 on the powers of union cannot be read as restriction on the powers of the constitutional Court. *State of West Bengal* v. *Committee for Protection of Democratic Rights, West Bengal*, AIR 2010 SC 1476 : (2010) 3 SCC 571.

4. SECTION 6

[12630] ● ***Section 6.***—As regards jurisdiction of the members of the Delhi Police Establishment, we do not think the procedure under Section 6 need be followed where this Court exercised jurisdiction under Art. 142 of the Constitution. *Maniyeri Madhavan* v. *Sub Inspector of Police*, AIR 1994 SC 1033 : 1994 SCC (Cri) 442 : 1994 CrLJ 3063 : 1993 (3) Crimes 550 (SC).

[12631] ● ***Supreme Court directing CBI to make investigation—Procedure under Section 6 of Delhi Special Police Establishment Act not followed.***—Supreme Court has given careful consideration to the above submissions and thinks that it cannot come to the rescue of the police officer. Whether they are guilty or not of the offences for which they are charged is a matter to be established in a criminal trial. Therefore, it remains from making any observation. As regards jurisdiction of the members of the Delhi Special Police Establishment, Supreme Court thought the procedure under Section 6 need be followed where this Court exercised jurisdiction under Article 142 of the Constitution. The Supreme Court of India in their order dated 24-9-1992 has directed the Central Bureau of Investigation to Investigate the complaint of 'M', editor Sudinam Daily, Kannur against the attacks made on him and his property allegedly at the investigation of certain police officers of the State of Kerala and to submit a report within four months, hence this notification. All that Supreme Court has to do is merely recorded in the report and let the law take its course. The special leave petition was ordered on the above terms. *Maniyari Madhavan* v. *Sub-Inspector of Police*, AIR 1994 SC 1033 : 1994 (1) SCC 536 : JT 1996 (10) SC 23 : (1993) 3 Crimes 550.

[12632] ● ***Subsequent withdrawal of consent by State Govt. for further investigation by state Police—Permissibility.***—To put it differently, if any further investigation is to be made it is the C.B.I. alone which can do so, for it was entrusted to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law. *K. Chandrashekhar* v. *State of Kerala*, AIR 1998 SC 2001 : (1998) 5 SCC 223 : 1998 SCC (Cri) 1291 : 1998 CrLJ 2897 (2905) : (1998) 2 Crimes 300.

[12633] ● ***"Further"—Meaning.***—The question that falls for our determination is altogether different: and that when the investigation into an offence transferred and entrusted to C.B.I. for investigation pursuant to consent given under Section 6 of the Delhi Establishment Act, 1946 and the C.B.I. has not only started but completed the investigation armed with that consent and submitted its report under Section 173(2) of the Code of Criminal Procedure can the State Government withdraw its consent and, if so, what is the effect thereof. That the Government of Kerala was conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated June 27, 1996 (quoted earlier) that the consent was being withdrawn in public interest to order a 're-investigation' of the case by a special team of State police officer, in the amendatory notification (quoted earlier) it made it clear that they wanted a 'further investigation of the case' instead of ' re-investigation of the case'. The dictionary meaning of 'further' (when used as an adjective) is 'additional', more supplemental. 'Further' investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started *ab initio* wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports— and not fresh report or reports—regarding the 'further' evidence obtained during such investigation. Once it is accepted—and it has got to be accepted in view of the judgment in *Kazi Lhendup Dorji*, (1994 AIR SCW 2190) (supra) that an investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that 'further investigation' is a continuation of such investigation which culminates in a further police report under sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State police, to further investigate into the case. To put it differently, if any further investigation is to be made it is the C.B.I. alone which can do so, for it was entrusted to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law. In view of this finding of ours we need not go into the questions, whether Section 21 of the General Clauses Act applies to the consent given under Section 6 of the Act and whether consent given for investigating into Crime No. 246/94 was redundant in view of the general consent earlier given by the State of Kerala. Even if we were to hold that the State Government had the requisite power and authority to issue the impugned notification, still the same would be liable to be quashed on the ground of *mala fide* exercise of power. *K. Chandrasekhar* v. *State of Kerala*, AIR

1998 SC 2001 : (1998) 5 SCC 223 : 1998 SCC (Cri) 1291 : 1998 CrLJ 2897 : 1998 (2) Crimes 300.

[12634] ● ***Applicability and Scope of Act dismissed.***—Section 2 of the Act empowers the Central Government to Constitute a special force. Indisputably, the first respondent has been constituted in terms thereof. Sub-section (2) of Section 2 provides that subject to any orders which the Central Government may make in this behalf, members of the said police establishment shall have throughout any Union Territory in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers and duties, duties, privileges and liabilities which police officers of that Union Territory have in connection with the investigation of offences committed therein. The said Act indisputably applies in regard to charges of corruption made against the employees of the Union of India. It is also not disputed that the CBI Manual was made by the Central Government providing for detailed procedure as regards the mode and manner in which complaints against public servants are to be dealt with. *Sashi Kant* v. *Central Bureau of Investigation*, AIR 2007 SC 351 : (2007) 1 SCC 630 : JT 2006 (9) SC 603 : (2006) 4 Crimes 318.

[12635] ● ***Section 6—Scope.***—Section 6 is very important which requires consent of State Government for exercising powers and jurisdiction under the Act by Special Police Establishment to any area in a State not being Union Territory or Railway. *M. Balakrishna Reddy* v. *Director, CBI, New Delhi*, AIR 2008 SC 1754 : 2008 (4) SCC 409 : 2008 (2) SCC (Cri) 391 : 2008 (4) SCR 1154 : JT 2008 (4) 162.

[12636] ● ***Power and jurisdiction of Special Police Establishment in State—Consent of State Government.***—"A closer scrutiny of the relevant provisions of the Delhi Act also add credence to the view which we are inclined to take Section 3 refers to '*notification*' and requires the Central Government to issue notification specifying offences or class of offences to be investigated by Special Police Establishment. Section 5 uses the term '*order*' and enables the Central Government to extend powers and jurisdiction of Special Police Establishment to other areas not covered by the Act. Section 6 which speaks of consent of State Government for the exercise of powers and jurisdiction of the Special Establishment neither refers to 'notification' nor 'order'. It merely requires consent of the State Government for the application of the Delhi Act. Parliament, in our considered opinion, advisedly and deliberately did not specify the mode, method or manner for granting consent though in two preceding sections such mode was provided. If it intended that such consent should be in a particular form, it would certainly have provided the form as it was aware of different forms of exercise of power. It, therefore, depends on the facts of each case whether the consent required by Section 6 of the Delhi Act has or has not been given by the State Government and no rule of universal application can be laid down.

On the facts stated hereinabove, there is no doubt that State of Madhya Pradesh has given consent as envisaged by Section 6 of the Delhi Act and prosecution instituted by CBI against the appellant cannot be said to be without jurisdiction. We see no infirmity in the order passed by the trial Court and confirmed by the High Court. The appeal, hence, deserves to be dismissed and we accordingly do so". *M. Balakrishna Reddy* v. *Director, CBI, New Delhi*, AIR 2008 SC 1754 : (2008) 4 SCC 409 : 2008 (2) SCC (Cri) 391 : 2008 (4) SCR 1154 : JT 2008 (4) 162.

[12637] ● ***Power of conducting investigation and lodging of FIR.***—In terms of Section 3 of the Act, first information reports are required to be lodged. For the said purpose, the C.B.I. which has several branches all over India is an officer incharge of a police station within the meaning of Section 154 of the Code of Criminal procedure. The authority specified in the DSPE Act, namely the Superintendent of Police of C.B.I. is an officer entitled to carry out any investigation. Only when an investigation is carried out in relation to an offence which has been committed in a State and not in the Indian territory or within the territorial jurisdiction of the Central Government the consent of the State concerned is required to be obtained. *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*, (2009) 9 SCC 551 : JT 2009 (11) SC 279.

DEMEANOUR OF WITNESS

[12638] ● ***Demeanour of witness.***—Few men are really good actors and there is a remarkable difference between the demeanour of a witness who is describing a scene or occurrence which he actually saw, and that of a witness who repeats from memory a story which has been taught to him. In the case of former, his eyes are lit with intelligence, his features are all in motion and his hands make unconscious indications. The latter stands motionless or is fidgety and restless, his features are impassive, the pupil of his eye is fixed, he gazes at empty space, he hurries on with his story lest he should lose the thread of it and is impatient of interruption occasionally as he forgets the cue, he thrusts out his tongue and hurriedly withdraws it and the apple in his throat rises and as suddenly falls. *Field's Law of Evidence in Br. India*, 8th Ed., P. XXXIII

[12639] ● ***Witness over-zealous on behalf of his party—When.***—When we find a witness over-zealous on behalf of his party, exaggerating circumstances, answering without waiting to hear the question, forgetting facts where he would be open to contradiction, minutely remembering others, which he knows cannot be disputed, reluctant in giving adverse testimony, replying evasively or flippantly, pretending not to hear the question for the purpose of gaining time to consider the effect of his answer, affecting indifference or often avowing to God and protesting his honesty—we have indications, more or less conclusive of insincerity and falsehood. On the other hand, in the evidence of truthful witness there is calmness and simplicity, a naturalness of manner, an unaffected readiness and copiousness of detail, as well in one part of the narrative as another; and an evident disregard of either the facility or difficulty of vindication or detection. *Taylor on Evidence, 8th Ed., Vol. I., S. 44, S. 52, See Field's Law of Evidence in Br. India* 8th Ed. at Pp. XXXIII—XXXIV.

[12640] ● ***High Court powers with regard to interference with order of Sessions Court wide in appeal.***—The powers of the High Court as regards interference with an order of the Sessions Court are wide in appeals from acquittal as in appeals from conviction, subject to the observance of the principle that great weight should be attached to the view taken by the trial Judge who had the advantage of hearing the witnesses and observing their demeanour. *Wilayat Khan* v. *State of U.P.*, AIR 1953 SC 122 : 1953 CrLJ 62.

[12641] ● ***Remarks respecting demeanour of witnesses—Proper time for recording.***—No doubt the omission to record remarks respecting the demeanour of the witness as provided in S. 363, CrPC by the trial Judge either during or at the close of the examination of the witness does not mean that the recording of the remarks about the demeanour by him latter in the judgment is not to be taken into consideration. The remarks made in the judgment will be given due weight by the Appellate Court in the appraisal of the witness. *Ganeshbhai Shankarbhai* v. *State of Gujarat*, AIR 1972 SC 1618 : (1972) 2 SCC 73 : 1972 SCC (Cri) 647 : 1972 CrLJ 1029 (1032).

[12642] ● ***Rape—Evidence and proof.***—In the instant case the prosecutirx is a fully grown up lady and habituated to sexual intercourse and was pregnant. She was experienced inasmuch as she had acted a midwife. It is true that learned Sessions Judge was impressed with the demeanour of this witness, but that by itself is not sufficient to prove the case if the allegation of the prosecution suffers form inherent probabilities. *Pratap Misra* v. *State of Orissa*, AIR 1977 SC 1307 : (1977) 3 SCC 41 : 1977 SCC (Cri) 447 (454) : 1977 CrLJ 817 : 1977 CrLR (SC) 233.

DENIAL

[12643] ● ***Denial.***—Where in a murder charge, the accused falsely denied several relevant facts which had been conclusively established the Court would be justified in drawing an adverse inference from this against the accused. *Pershadi* v. *State of U.P.*, AIR 1957 SC 211 : 1957 CrLJ 328.

[12644] ● ***Execution of document—Denial.***—"Under the proviso to S. 68, Evidence Act, the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered is not specifically denied. Therefore, everything hinges on the recording of this fact of such denial. If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply" *Rosammal Issetheenammal Fernandez* v. *Joosa Mariyan Fernandez*, AIR 2000 SC 2857 (2859) : (2000) 7 SCC 189 : JT (2000) 9 SC 240 : (2000) 5 Scale 600 : (2000) 5 Supreme 565 : (2000) 6 SLT 270 : (2000) 8 SRJ 180.

DE NOVO TRIAL

[12645] ● ***De novo* trial.**—From a comparative reading of sub-section (i) of Section 350, CrPC as it stood prior to its amendment in 1955 and as it stands since then with the change in its numeral and inclusion of the word "judge" therein we find that the discretion earlier given to the Presiding officer of the Court to act on the evidence recorded by his predecessor and partly recorded by him still remains. But so far as the other option is concerned, while earlier he could resummon the witnesses and recommence the enquiry or trial which necessarily mean a *de novo* trial—he can now only resummon a witness who has already been examined for further cross-examination and discharge him after such further examination, cross-examination and re-examination, if any. It is evident therefore that now the Magistrate or Judge can exercise his judicial discretion only for further examination of a witness already examined and not for fresh examination of witnesses for a fresh trial. Obviously, keeping in view the inevitable frequent changes in the office of the Magistrate and Judge and in order to provide a speedy trial, the Legislature has taken away the well established right of the accused to claim a *de novo* trial and that of the Court to so direct by express words of the amending statute of 1955.

Pyare Lal v. *State of Punjab*, AIR 1962 SC 690 : (1962) 1 CrLJ 688 : (1962) 2 SCJ 492 : (1962) 3 SCR 328 has no relevance as at that time S. 350 of the old CrPC was operating but now after the amendment the provisions have been changed. *Ranbir Yadav* v. *State of Bihar*, AIR 1995 SC 1219 (1226) : (1995) 4 SCC 392 : 1995 SCC (Cri) 728 : 1995 CrLJ 2665 : (1995) 2 Crimes 161.

[12646] ● *Party to criminal proceedings if aggrieved must raise objection at earliest stage.*—We are distressed to note that learned single judge was not told by the Government advocate the fall out of such a view, if taken by the single Judge, that it means that all the witnesses once examined in full should be called back again, and the whole chief examination, cross-examination or re-examination and questioning of the accused under Section 313 of the code, hearing arguments, then examination of defence witnesses further, again final arguments to be heard and preparation of judgment once again. The very object underlined in Section 465 of the code is that if on any technical ground any party to criminal proceedings is aggrieved he must raise the objection thereof at the earliest stage. If he did not raise it at the earliest stage, he cannot be heard on that aspect after the whole trial is over. *State of H.P.* v. *Gita Ram*, AIR 2000 SC 2940 : (2000) 7 SCC 452 : 2000 SCC (Cri) 1390 : 2000 CrLJ 4039.

[12647] ● *Reversal of finding sentence or order of trial Court—De novo trial.*—A *de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a *de novo* trial. This is because the Appellate Court has plenary powers for re-evaluating or re-appraising the evidence and even to take additional evidence by the Appellate Court itself or to direct such additional evidence to be collected by the trial Court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the Court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence, the said course can be resorted to when it becomes unpreventable for the purpose of averting " a failure of justice". The superior Court which orders a *de novo* trial cannot afford to overlook the realities and the serious impact on the pending cases in trial Courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the Court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law in not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation. *State of M.P.* v. *Bhooraji*, AIR 2001 SC 3372 : (2001) 7 SCC 679 : 2001 SCC (Cri) 1373 (1379, 1380).

[12648] ● *Conditions for invoking bar under S. 300, CrPC.*—The essential conditions for invoking the bar under Section 300, CrPC are (i) the Court had requisite jurisdiction to take cognizance and tried the offence and (ii) the Court has recorded an order of conviction or acquittal, and such conviction/acquittal remains in force. *State of Karnataka* v. *C. Nagarajaswamy*, AIR 2005 SC 4308 : (2005) 8 SCC 370 : (2006) 1 SCC (Cri) 47 (53) : 2005 CrLJ 4534 : 2005 (4) Crimes 160.

[12649] ● *Applicability of S.300, IPC.*—Even if a judgment of conviction or acquittal was recorded the same would not make any distinction for the purpose of invoking the provisions of Section 300, CrPC as, even then it would be held to have been rendered illegal and without jurisdiction. *State of Karnataka* v. *C. Nagarajaswamy*, AIR 2005 SC 4308 : (2005) 8 SCC 370 : (2006) 1 SCC (Cri) 47 (55) : 2005 CrLJ 4534 : 2005 (4) Crimes 160.

[12650] ● *Trial should be a search for truth.*—Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2006 SC 1367 : (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8 (p. 30) : 2006 CrLJ 1694 : 2006 (2) Crimes 36.

[12651] ● *Failure to accord fair hearing.*—Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage-managed, tailored and partisan trial. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2006 SC 1367 : (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8 (30) : 2006 CrLJ 1694 : 2006 (2) Crimes 36.

[12652] ● *Importance of witness.*—"Witnesses" as Bentham said : are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery. *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2006 SC 1367 : (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8 (p. 30) : 2006 CrLJ 1694 : 2006 (2) Crimes 36.

DEPENDENT

[12653] ● *Dependent.*—Section 27 of the Hindu Adoption and Maintenance Act, 1956 provides that the dependents claim for maintenance under the Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of Court, by agreement between the dependent, and the owner of the estate or portion or otherwise. The word "dependent" is defined under Section 21 of the said Act to mean relatives of the deceased namely (1) his or her father (2) his or her mother (3) his widow, so long as she does not remarry. The word "dependent" does not include the wife whose husband is surviving. In any case, admittedly, no charge for maintenance was created in favour of the appellant on the properties which are forfeited under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. She has not suffered any legal grievance and has no legal peg for a justiciable claim to hang on. *Shobha Suresh Jumani* v. *Appellate Tribunal, Forfeited Property*, AIR 2001 SC 2288 (2292) : (2001) 5 SCC 755 : 2001 SCC (Cri) 1334.

DEPOMEDROL

[12654] ● *Depomedrol.*—It is a "long acting" steroid recommended for treatment of "chronic" clinical conditions like "asthma" or "arthritis" for its prolonged immunosuppressive action—Maximum recommended does of Depomedrol is 40-120 mg at 1-4 week intervals as clearly mentioned by the drug manufacturer, Pharmacia. *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, AIR 2010 SC 1162 : (2009) 9 SCC 221 : 2009 (13) SCR 1 : JT 2009 (10) 256 : 2009 (10) Scale 675.

DEPORTATION

[12655] ● *Deportation.*—It appears that the State cannot directly deport the petitioner but has to refer the matter to the Central Government for making necessary arrangements and this has taken some time. But we are unable to hold that this delay in making arrangements affects the validity of the detention, though we trust that arrangements will be made very soon to deport him to Pakistan. *Barkat Ali* v. *The State of Jammu and Kashmir*, AIR 1971 SC 217 : (1970) 3 SCC 213 : 1971 SCC (Cri) 31 : 1971 CrLJ 267.

[12656] ● *Citizenship—Determination of.*—On principle it does not matter whether the question which can only be determined by the Central Government under Section 9 of the Citizenship Act arises in a civil suit or in a criminal prosecution. If the real question which arises for determination is whether a person, who was an Indian citizen when the Constitution came into force, had acquired the citizenship of another country or not during the specified period, the proper thing to do for a Court where the question arises is to refuse to adjudicate on that question. *State of Gujarat* v. *Yakub Ibrahim*, AIR 1974 SC 645 : (1974) 1 SCC 283 : 1974 SCC (Cri) 107 : 1974 CrLJ 597 : 1974 CrLR (SC) 63.

[12657] ● ***Deportation of aliens.***—Having regard to the facts and circumstances of the case, particularly, having regard to the fact that the petitioner has entered this country legally upon the single entry permit issued to him, it is only fair that the competent authority must inform him the reasons for his deportation. If such a decision is taken, the petitioner must be given an opportunity to submit his representation against his proposed expulsion. The competent authority may thereafter consider his representation and pass appropriate order. As observed by this Court, this procedure may be departed from for compelling reasons of national security, *etc*. In the instant case, we have not so far noticed any fact which may provide a compelling reason for the State not to observe this procedure. *Hasan Ali Raihany* v. *Union of India*, AIR 2006 SC 1714 : (2006) 3 SCC 705 : (2006) 2 SCC (Cri) 33 (35) : 2006 CrLJ 2106 : JT 2006 (3) SC 533.

DEPOSITION

[12658] ● ***Certificate of Committing Magistrate.***—The certificate of the Committing Magistrate endorsed on the deposition sheet stated that the deposition was read out to the witness and that the witness admitted it to be correct. The Court is bound to accept this as correct under Section 80 of the Evidence Act. The burden is on the person seeking to displace the statuary presumption and if he chooses to rely on the testimony of a witness which the Court is not prepared to believe the matter ends there. The duty displacing the presumption has on the person who questions it. The Court is, of cause, bound to consider such evidence as is adduced but it is not found to believe such evidence nor is there any duty whatever on the Court to conduct an enquiry on its own. *Bhagwan Singh* v. *State of Punjab*, AIR 1952 SC 214 : 1952 CrLJ 1131 : 1952 SCR 812.

[12659] ● ***Evidence of eye-witness recorded under Chapter XVIII of CrPC, 1898 cannot be treated as evidence under Section 288, CrPC, 1898.***—The evidence of eye-witnesses duty recorded in the presence of the accused under Chapter XVIII of the Code of Criminal Procedure can be treated, in discretion of the Presiding Judge, as evidence in the case if such witness is produced and examined at the trial. In the instant case, the evidence of witness could not be recorded by the Sessions Judge because by that time he was dead. His evidence on the Committal Court as PW-4, however was treated as evidence though the High Court incorrectly thought that it could be so treated under Section 288 of the Code of Criminal Procedure. *Tarlok Singh* v. *State of Punjab*, AIR 1974 SC 1797 : (1973) 2 SCC 458 : 1973 SCC (Cri) 872 (878) : 1974 CrLJ 1265.

[12660] ● ***Section 278—Object—Correction in recorded statement of witness.***—The correction slip was not filed when the day to day evidence of PW-34 was recorded and read over to him. Nor it was filed on the last day or recording his evidence. It does not bear any signature or the date. The Trial Judge, however, thought it fit to correct typographical errors in the statement of PW-34 which he would have corrected even otherwise. He refused to make any correction or alter the substantive part of the evidence. Indeed, he was right in not tinkering with the substantive part of the evidence on the basis of an unsigned correction slip.

The object of Section 278, Cr.P.Code is two fold, firstly, to ensure that the evidence of the witness as recorded as accurate and secondly to give the witness concerned an opportunity to point out mistakes, if any. If the correction suggested by the witnesses is one which the Judge considers necessary he will make it at once as required by sub-section (1) but if the correction is such that the Judge does not consider necessary, sub-section (2) requires that a memorandum of the objection be made and the Judge add his remarks, if any, thereto. In the present case, the learned Trial Judge corrected all the typographical errors which he considered necessary but refused to carry out the substantive part of his deposition. The section is not intended to permit a witness to resile from his statement in the name of correction. The learned Trial Judge was justified in refusing to effect the change which he thought was intended to change the earlier version. *Mr. Mohd. Umar* v. *State of West Bengal*, AIR 1989 SC 1785 : 1989 SCC (Cri) 750 (754, 755) : 1989 CrLJ 2070.

DESCRIPTION/DETAILS OF INCIDENT

[12661] ● ***Description/Details of incident.***—In the instant case, in the first information report the ull description of the appellant had been given by he complainant. The complainant also had an mple opportunity to see the appellant when they oth went in a taxi. It was never argued either efore the trial Court or before the High Court hat the appellant does not answer the description o be found in the first information report. All that as been suggested is that his height is given as 6 t 6 inches whereas in fact it was 5ft 6 inches. It eems to us that 6ft 6 inches was either a printing rror or was an error in writing when the first nformation report was recorded. A height of 6ft 6 nches is very unusual and ordinarily one does not ee many persons of that height in India. At any ate it was open to the appellant to invite the ttention of the trial Magistrate to this matter and hat had been done the trial Magistrate would ave examined the same and also made his comments on the question of height of the appellant. *Bhopat Singh Kishan Singh* v. *State of Maharashtra*, AIR 1973 SC 446 : (1972) 3 SCC 367 : 972 SCC (Cri) 537 (539) : 1973 CrLJ 343.

12662] ● ***Recovery of churis from accused hop—Conviction.***—The circle, at the least did ot bring to bear enough care in the discharge of is functions. The churis which were produced efore the Court are bronze-based but he wrote brass' for 'bronze'. Instead of mentioning in the eizure memo that 4 'churis' were seized. Both he learned counsel who are familiar with local onditions are agreed that in Bengal a distinction s made between 'churis' and 'bangles'. The explanation of the circle Inspector that he committed mistake in describing the articles may or may ot be true but the fact that he made a significant rror in a material part of the description of the rticles seized by him shows that no implicit eliance can be placed on his word. It also seem to s important that the 'churis' after seizure, were vrapped in a loose sheet of proper and were not ept under seal. *Naba Kumar Das* v. *State of V.B.*, AIR 1974 SC 777 : (1974) 3 SCC 582 : 974 SCC (Cri) 60 (61) : 1974 CrLJ 512 : 1974 CrLR (SC) 3.

12663| ● ***Expression "specified description"* in Section 48(3) of Motor Vehicles Act 1939.**—The expression "specified description" in Section 48(3) of the Vehicles Act, 1939 did not cover ccording to dictionaries, the year of manufacture f the vehicle. BLACK'S *Law Dictionary* on Description" shows the model of a vehicle is bviously a fact of its description. "Description" neans : (*Black's Law Dictionary*, p. 532). "A elineation or account of a particular subject by he recital of its characteristic accidents and qualities. So, dictionary versus dictionary leaves the matter at large, apart from the plain function of the Court to gather the meaning, not under the dictatorship of dictionaries but guided by the statutory purpose without being defected by Logomachic exercises, the mischief to be countered and the public interest to be advanced. A late model is a better safeguard and, more relevantly to the point, the year of the make and the particulars of the model are part of the description." *Subhash Chandra* v. *State of U.P.*, AIR 1980 SC 800 : (1980) 2 SCC 324 (326) : (1980) 2 SCR 1024 : 1980 UJ 369.

[12664] ● ***Dacoity with murder—Appreciation of evidence.***—In a case of dacoity with murder, none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity nor did they give any identification marks, *viz.*, stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In the absence any such description, it will be impossible to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded. T.I. parade was held about 3-1/2 month after the dacoity. In view of such a long lapse of time, it is not possible for any human being to remember the features of the accused, and he is very likely to commit mistakes. Unless evidence is absolutely clear, it is unsafe to convict an accused for such a serious offence on the testimony of a single witness. *Wakil Singh* v. *State of Bihar*, AIR 1981 SC 1392 : 1981 SCC (Cri) 634 : 1981 CrLJ 1014 : 1981 CrLR (SC) 319 : 1981 BBCJ (SC) 138 : 1981 CurLJ (Cri) 131 : 1981 BLJ 462 : 1981 CrAppR (SC) 301.

[12665] ● ***Accused—Identification of in identification parade.***—It is seen from the evidence of PW-12 that the home guards did not give him the description of any of the culprits when he examined them and that he did not even ask them about it though it is stated in the report Ex Ka-1 that the home guards had seen the culprits thoroughly and identified them. If at the earliest opportunity the home guards did not mention any identifying features of the culprits when they were examined by PW-12, it is difficult for us to believe how PW-2 could have identified both the appellants nearly two months later on November 17, 1978. It has to be noted that the appellants have stated in the trial Court that they were shown to the witnesses before the identification parade was held. In these circumstances we are impressed with the evidence of PW 1 and 2. *Manzoor* v. *State of Uttar Pradesh*, AIR 1983 SC 295 : (1982) 2 SCC 72 : 1982 SCC (Cri) 356 (360) : 1983 CrLJ 441 : 1982 CrLR (SC) 134.

[12666] ● ***Victim giving no description of accused—Identification could hardly furnish any evidence.***—In this case, the information who is victim of robbery, did not give the name of the present appellant or that of any of the accused. He did not also give some description of the present appellant who was supposed to be sitting next to him in the auto rickshaw and who thrust his hand in his pocket and removed Rs. 100/-. The total absence of any such description which would have provided, a yardstick to evaluate the identification of the present appellant, at a latter date by the victim would render his latter identification weak, but that was not the only error. The victim did not know the names of the persons who robbed him. In such a situation ordinarily after the accused were arrested, the test identification parade should have been held. But it was not held. It was only the victim when he came to give evidence in the Court and when the four accused were sitting in the Court that he identified them as the miscreants. Further, there was a lapse of 4 months from the date of offence to the date of giving evidence, during which period it was not possible to believe that the victim had no occasion to see the accused. Such identification in the circumstances of the case would hardly furnish any evidence against the present appellant. *Mohd. Abdul Hafeez* v. *State of A.P.*, AIR 1983 SC 367 : (1983) 1 SCC 143 : 1983 SCC (Cri) 139 : 1983 CrLJ 689 : 1983 CrLR (SC) 26 : (1983) 1 Chand LR (Cri) 130 : 1983 IJR (Cri) 32 : 1983 UJ (SC) 145 : 1983 CrAppR (SC) 25 : 1983 (1) CrLC 274.

[12667] ● ***Multiple murder—Testimony of witnesses.***—"PWs 1 and 6 have stated clearly that the women accused (13 to 15) were followed by the other accused and other accused and accused 16 shot Shital Das on his thigh and then rest of the accused dragged him out and attacked him with various weapons. When Kesho Bai attempted to run away she was also shot and then chased and killed in the hut of Karma Ram. As the accused had come in large body and attacked the victims in quick succession it will be futile to expect a vivid description of the details of attack on the victims. Moreover, the attack on Kesho Bai had taken place inside Karma Ram's hut and as such Pws 1 and 6 could not have known in what manner she was attacked by her pursuers". *State of U.P.* v. *Ranjha Ram*, AIR 1986 SC 1959 : (1986) 4 SCC 99 : 1986 SCC (Cri) 374 (379, 380) : 1986 CrLJ 1906 : 1986 CrLR (SC) 414.

[12668] ● ***Deceased fully conscious when she made statement to police.***—The High Court has view Ex Ka with suspicion because of the detailed narration therein by Kishori of the motive for the occurrence and the manner in which the assailants had attacked her and as to how the witnesses had gained entry into the house. When the doctors say that Kishori could have retained her consciousness and been able to make a statement, there is no reason why the statement should be disbelieved merely because it contains the details of the motive for the attack and the manner in which the occurrence had taken place. *State of U.P.* v. *Chet Ram*, AIR 1989 SC 1543 : (1989) 2 SCC 425 : 1989 SCC (Cri) 388 (397) : 1989 CrLJ 1785 : 1989 CrLR (SC) 314 : (1989) 2 Crimes 13.

[12669] ● ***Description of accused established by eye-witnesses.***—In the instant case there are clear and positive evidence by which it was established beyond all reasonable doubts that the thief who entered the house of Jaisingh and was locked from outside where the poor lady was staying is the accused/appellant. From the evidence of the eye-witnesses the description of the accused/appellant was clearly established and his wearing apparel also tallied with the first information report lodged with the Police before the accused/appellant was apprehended. There are positive evidences to the effect that the deceased, Mst. Kapothin, cried for help and shouted that she had been assaulted by the thief. Barring the said thief, there was no other person inside the room where the deceased must. Kapothin was staying. The deceased admittedly had suffered several burn injuries and a faggot with which the injuries were caused on the person of the deceased had also been found lying inside the room. There is no occasion to hold in the face of the case that an innocent person who had gone to case himself by the side of road was apprehended on a mistaken identity. There is evidence that the accused/appellant came out of the said room and when he was attempting to escape he was apprehended by the villagers. *Chamardas* v. *State of Madhya Pradesh*, AIR 1993 SC 332 (334) : 1993 SCC (Cri) 556 : 1993 CrLJ 167 : JT 1992 (6) SC 91 : (1992) 3 Crimes 623.

[12670] ● ***Person making dying declaration not required to make elaborate and exhaustive statement.***—It is not the requirement of law that the person making the dying declaration should make an elaborate and exhaustive statement so as to cover each and every aspect of the incident and narrate the whole history of the case. The fact could not be lost sight of that according to the medical evidence the deceased—Nageswari had suffered 90 per cent burns and must have been under a severe stress and agony. According to the evidence on record she was talking in a low voice which indicated that she was able to speak with some difficulty and, therefore, it was not possible for her to make a very detailed statement covering the minutest details which could not be expected under the facts and circumstances of the present case. *Charipalli Shankararao* v. *Public Prosecutor, High Court of Andhra Pradesh, Hyderabad*, AIR 1995 SC 777 (781) : (1995) 4 (Supp) SCC 24 : (1996) SCC (Cri) 21 : (1995) 1 Crimes 393.

[12671] ● ***Murder—Testimony of eye-witness for offence under Section 302, IPC.***—PW-1 was severely injured and he might not have been in mood to narrate the incident in great details and therefore, the High Court could not have expected of Pw 1 nor was it necessary to give the graphic details of roles played by each of the accused in the murder. While on this point it will be pertinent to refer to the statements made therein. After giving the background of the enmity between their family and that of the accused, PW 1 stated that on July 31, 1992 at or about 5.00 p.m., when he, his father and coolies were in their field, the six accused persons came there armed with knives and spears and suddenly attacked his father. A-1 hacked him with a knife on the head and A-2 with a spear on the neck and than the other accused assaulted him (the deceased) with knife and spears indiscriminately. This was followed by a statement as to the manner of assault on him by some of the accused. Lastly, he stated that PW-2 witnessed the incident and PW-4 had brought him to the hospital. It would thus be seen that all material facts relating to the incident find place in the FIR, and, therefore, the High Court was not at all justified in brushing aside the prosecution case regarding participation of A 3 to A 6 in the murder on the sole ground that the manner in which they actually assaulted the deceased was not mentioned therein. Absence of the names of A 3 and A 4 in the FIR should not also have been made one of the grounds to discard their evidence when it was specifically mentioned therein that coolies were working with them in their field at the time of the assault. *Kovvuri Surya Bhaskara Reddy* v. *State of A.P.*, AIR 1998 SC 1570 (1573) : (1998) 9 SCC 504 : 1998 SCC (Cri) 1047 : 1998 CrLJ 1628 : 1998 CrLR (SC) 293.

DESERTER

[12672] ● ***Deserter.***—"Desertion" as contemplated by Clause (a) of Section 10 of the Hindu Marriage Act, 1955, means intentional permanent abandonment of one spouse by the other, without the other's consent and without reasonable cause. So far as the deserting spouse is concerned, there must be two essential conditions : (i) the factum of separation, and (ii) the intention to bring material life permanently to an end *(animus deserendi)*. Similarly, two elements are essential, so far as the deserted spouse is concerned; firstly, absence of consent and, secondly, absence of conduct giving reasonable cause to the deserting spouse to form the necessary intention aforesaid. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. *Bipin Chandra Jai Singhbhai Shah* v. *Prabhavati*, AIR 1957 SC 176 : 1956 SCR 838 : 1957 SCJ 144.

[12673] ● ***Gist of desertion existence of animus not to return ship.***—The gist of desertion, therefore, is the existence of an animus not to return to the ship or, in other words, to go against the agreements under which the employment of seamen for sea voyages takes place. *Ibrahim* v. *State of W.B.*, AIR 1968 SC 731 : 1968 CrLJ 874 : (1968) 1 SCWR 40 : 1968 MLJ (Cri) 482 : (1968) 2 SCJ 264 : (1968) 2 SCR 306.

[12674] ● ***"Desertion" and "absence without leave"—Distinction.***—Sections 38 and 39 and Sections 104 and 105 of the Army Act, 1950 make a clear distinction between "desertion" and "absence without leave" and Section 106 prescribes the procedure to be followed, when a person absent without leave is deemed to be a deserter. Clearly every absence without leave is not treated as desertion but absence without leave may be deemed to be desertion of the procedure prescribed by Section 106 is followed since every desertion necessarily implies absence without leave the distinction between desertion and absence without leave must necessarily depend on the *animus*. If there is *animus deserendi* the absence is straightaway desertion. The Army Act, 1950 makes a pointed distinction between "Desertion" and "Absence without leave" simpliciter. Absence without leave may be desertion if accompanied by a necessary "*animus deserendi*" or deemed to be desertion if the Court of Inquiry makes the declaration of absence prescribed by S. 106 after following the procedure laid down and the person declared absent had neither surrendered nor been arrested. In the present case, the Military Authorities appear to have treated the Officer as a deserter and did not deem him to be a deserter. The apprehension roll as well as tentative charge-sheet issued to him treat him as a deserter. According to the authorities the Officer, when he failed to report as directed had no intention of rejoining duty, in other words he had the necessary "*animus deserendi*". This is what is said in the counter-affidavit. If the authorities thought that the Officer who was absent without leave had even then no intention of coming back to duty, then there was no question of observing the procedural requirements of S. 106, and then deeming him to be a deserter. It was within the competence of the authorities to *prima facie* decide whether the Officer when he absented himself did or did not intend to return to duty. Whether, in the instant case, the authorities were justified in concluding that Capt. Virendra Kumar had no intention of resuming duty, is not a matter upon which we are entitled to express any opinion. The position would be otherwise if the decision of the authorities could be shown to be *mala fide*. *Vrendra Kumar* v. *Chairman, Disciplinary Committee, Bar Council of India*, AIR 1986 SC 1060 : (1986) 2 SCC 217 : 1986 SCC (Cri) 149 (160, 162, 163) : 1986 CrLJ 848 : 1986 CrLR (SC) 131 : (1986) 2 Crimes 353.

DESIGNATED COURT

[12675] ● ***Designated Court.***—Section 12 of the TADA Act, 1987 empowers the Designated Court to convict a person of any offence under any other law if he is found to have been guilty of the same during the course of a trial under that Act and to punish appropriately. *Paras Ram* v. *State of Haryana*, AIR 1993 SC 1212 (1214, 1215) : (1992) 4 SCC 662 : 1993 CrLJ 416 : 1993 CrLR (SC) 56.

[12676] ● ***Appointment of Judge or Additional Judge to—Designated Court.***—"Observation of this Court with reference to clause (7) of the Special Courts Bill cannot be strictly applied to the situation of the continuance of a Judge of a Designated Court under Section 9(7) for the reason that the person who was to be nominated by the Central Government in consultation with the Chief Justice of India under clause (7) of the Special Courts Bill was a person who had held the office as a Judge of the High Court, that is to say the appointment was after the retirement. But in the present Act, the Judge is permitted to continue the same judicial service as a Judge or Additional Judge, as the case may be, on the attainment of superannuation. In other words, the Judge on the attainment of the age of superannuation does not retire. Therefore, we see no force in the above argument challenging the Constitutional validity of Section 9(7) by availing the observation in In re Special Courts Bill, (AIR 1979 SC 478). However, we would like to suggest that the Central Government and the State Government at the time of appointing a Judge or an Additional Judge to the Designated Court with the concurrence of the Chief Justice of the High Court concerned should keep in mind that the Judge designate has sufficient tenure of service even at the initial stage of appointment, so that no one may entertain any grievance for continuance of service of a Judge of the Designated Court after attainment of superannuation. Hence Section 9(7) does not offend any Constitutional provision. We uphold sub-section (7) of Section 9 of the TADA Act with a suggestion that the Central Government and the State Governments at the time of appointing a Judge or an Additional Judge to the Designated Court should keep in mind that the Judge designate has sufficient tenure of service even at the initial stage of appointment so that no one may entertain any grievance for continuance of service of a Judge of the Designated Court after attainment of superannuation". *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 CrLJ 3139 (3189, 3190, 3229, 3230) : JT 1994 (2) SC 423 : 1994 (1) Crimes 1031.

[12677] ● ***Offence under TADA—Scope.***—The words "any other offence under this Act or any rule made thereunder or under any other law" denote all offences other than those falling in the first category. The intention of the Parliament in conferring such a power on the designated Court is to prevent unmerited escape of offenders from the clutches of penal consequences even in cases where the Designated Court is satisfied during a valid trial that some other offence has been established beyond reasonable doubt. Once cognizance of any offence under TADA has been taken validly by the Designated Court with a proper sanction the Court is not disabled from convicting an accused for any other offence proved during the trial whether or not sanction has been accorded in respect of such other offence. The *raison d' etre* is that it is the Court of law which after a judicial scrutiny is satisfied on the materials placed before it that another offence has been made out and such satisfaction is of a higher calibre than the satisfaction of a sanctioning authority. The sanction envisaged in Section 20A is, of course, a curb imposed on the prosecution agency to approach the Designated Court with a case. But once such approach is validly made with the proper sanction then the Court gets a wider jurisdiction to deal with the offenders in respect of all offences made out in the trial. *Kalpnath Rai* v. *State (through CBI)*, AIR 1998 SC 201 (209, 210) : 1998 SCC (Cri) 134 : 1998 CrLJ 369 : 1997 (4) Crimes 227.

[12678] ● ***Cognizance taken on defective sanction order.***—Since for all purposes the designated Court is a Court of Session to which the provisions of the Code of Criminal Procedure come to aid, Section 465 of the code falling in chapter XXXV regarding irregular proceedings cures the defect. *Lal Singh* v. *State of Gujarat*, AIR 1999 SC 475 : (1998) 5 SCC 529 : 1998 SCC (Cri) 1360 (1361) : 1999 CrLJ 595.

DESUETUDE

[12679] ● ***Desuetude.***—According to Craies Statute Law desuetude is a process by which an Act of Parliament may lose its force without express repeal. It does not, however, consist merely of obsolescence or disuse; there must also be a contrary practice which must be of some duration and general application.

Though in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, there is no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead of contrary practice being in use, he is still required to act as per the "dead letter". It would advance the cause of justice to accept the application of doctrine of desuetude in our country also. Our soil is ready to accept this principle; indeed there is need for its implantation because persons residing in free India, who have assured fundamental rights including what has been stated in Article 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become "dead letter". A new path is, therefore, required to be laid and trodden. *Municipal Corporation for City of Pune* v. *Bharat Forge Co. Ltd.*, AIR 1996 SC 2856 : (1995) 3 SCC 434.

DETAINING AUTHORITY
§ (See "DETENTION")

DETAINING MOTOR VEHICLE

[12680] ● ***Carrying passengers more than number specified in permit—No Power of Police Officer to detain Vehicle.***—The Police Officer would be authorised to detain a vehicle, it he has reason to believe that the vehicle has been or is being used in contravention of any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used. Reading the provisions (Sections 3, 39, 66 and 207 of the Motor Vehicles Act, 1988) as it is, the conclusion is irresistible that the condition of permit relating to the route on which or the area in which or the purpose for which the vehicle could be used if contravened, would only authorise the Police Officer to detain the vehicle and not each and every condition of permit on being violated or contravened, the Police Officer would be entitled to detain the vehicle. But carrying passengers more than the number specified in the permit will not be a violation of the purpose for which the permit is granted. The power, therefore, is required to be exercised with care and caution and the power has to be exercised only when the precondition for exercise of power is fully satisfied.

Held, carrying passengers beyond the number mentioned in Column 5, indicating the seating capacity, would be a violation of the conditions of permit relating to either the route or the area or the purpose for which the permit is granted. The detention of the vehicle has rightly been held to be unauthorised. *State of Maharashtra* v. *Nanded Parphani Z.I. B.M.* v. *Operator Singh*, AIR 2000 SC 725 : (2000) 2 SCC 69 : 2000 SCC (Cri) 318.

DETENTION
§ (See also "COFEPOSA ACT" AND "PREVENTIVE DETENTION")

[12681] ● ***Detention.***—Even when the charge under Section 498 is based upon 'detention' there is no difference in principle, and it is immaterial whether the detention was against the woman's will or with her consent. The object of the section is to protect the rights of the husband and not those of the wife, and therefore it is not a good defence to the charge to say that, though the husband has been deprived of his rights, that deprivation is with the full consent or willing co-operation of the wife. 'Detention' in this context means keeping back the wife from her husband with the intention of illicit intercourse, even though such keeping back is with her full consent and co-operation. In other words, willingness of the wife, which is immaterial when considering a case falling under either of the first three categories mentioned under Section 498, is equally immaterial when dealing with a case falling under the last category of 'detention' mentioned in that section. There is a consensus of opinion among the various High Courts, as regards the construction of Section 498 so far as concerns the offence committed by "detaining'' the wife of another man, and it has been held that the gist of the offence lies in depriving the husband of his control over his wife, whether such deprivation is caused by use of physical force upon the wife or is brought about by any allurement or blandishment offered to her for the purpose of obtaining her assent to being kept back from her husband. *Alamgir* v. *State of Bihar*, AIR 1959 SC 436 : 1959 CrLJ 527 : 1959 SCJ 45.

[12682] ● ***Order of detention of person in Jail custody.***—In the instant case the petitioner was detained by an order of the District Magistrate under the provisions of Preventive Detention Act.

1950. The order recited that the District Magistrate was satisfied that it was necessary to detain the petitioner with a view to prevent him from acting in a manner prejudicial to the maintenance of public order. The order was served on the petitioner on February 15, 1963, while he was in Jail custody as an undertrial prisoner in connection with a criminal case pending against him. The petitioner is ordered to be released on the ground that he was served with the order of detention while he was in jail custody. *Rameshwar Shaw* v. *District Magistrate Burdwan*, AIR 1964 SC 334 : 1964 (1) CrLJ 257 : (1964) 4 SCR 921.

[12683] ● ***Order of detention passed against person in Jail when.***—Whether an order of detention could be passed against a person who was in detention or in jail will always have to be considered in the facts and circumstances of each case. *Makhan Singh Tarsikka* v. *State of Punjab*, AIR 1964 SC 1120 : 1964 (2) CrLJ 217 : (1964) 4 SCR 932 (937).

[12684] ● ***Detention order passed during pendency of habeas corpus.***—The mere fact that the detention order is passed during the pendency of *habeas corpus* proceedings, cannot by itself lead to the conclusion that the order is vitiated by *malice* in law. It depends on the circumstances of the case. The detenus would have to prove not only that the detention order has been passed during the pendency of *habeas corpus* proceedings but also that there are facts showing *malice*. If the Government considers detention, which is the subject matter of challenge, to be invalid, there is no reason why it should not pass a valid order. In this case, three successive orders of release and then detention were passed, before the orders of release were actually carried out but those were held legal. *Godawari Shamrao Parulekar* v. *State of Maharashtra*, AIR 1966 SC 1404 : 1966 CrLJ 1067 (1076) : (1966) 3 SCR 314.

[12685] ● ***Person in Jail Custody under detention order and criminal proceedings finding against him—When.***—When a person is in jail custody and the criminal proceedings are pending against him, the appropriate authority might in a given case take the view that the criminal proceedings might end very soon and might terminate in his acquittal. In such a case, it would be open to the appropriate authority to make an order of detention, if the requisite conditions of the rule or the section was satisfied, and serve it on the person concerned even after he was acquitted in the said criminal proceedings. *Gopi Ram* v. *State of Rajasthan*, AIR 1967 SC 241 : 1967 CrLJ 279.

[12686] ● ***Where accused illegally detained—Detention becomes lawful when subsequently arrested.***—Even if the petitioner had been under illegal detention between January 10 to January 24, 1968—though we do not decide this point—the detention became lawful on January 24, 1968, when he was arrested by the civil Police and produced before the Magistrate on January 25, 1968. *Saptawna* v. *State of Assam*, AIR 1971 SC 813 : (1972) 4 SCC 45 : 1971 SCC (Cri) 247 (248) : 1971 CrLJ 679.

[12687] ● ***Order confirming detention—Limitation.***—*West Bengal Prevention of Violent Activities Act, 1970, Section 12.*—The rule is well established that where a particular time is given from a certain date within which an act is to be done the day on that date is to be excluded. As a general rule the effect of defining the period of limitation such a day within which an act is to be done is to exclude the first day and to include the last day in computing the period of three months from the date of detention, which was February 5, 1971, before the expiration of which the order or decision for confirming the detention order and continuation of the detention thereunder had to be made, the date of the commencement of detention, namely. February 5, 1971 had to be excluded. So done, the order of confirmation was made before the expiration of the period of three months from the date of detention. *Haru Das Gupta* v. *State of West Bengal*, AIR 1972 SC 1293 : 1972 SCC (Cri) 368 (370) : (1972) 1 SCC 639 : 1972 CrLJ 872 : (1972) 3 SCR 329.

[12688] ● ***Judicial trial for punishing accused—Jurisdiction district from that of detention.***—Judicial trial for punishing the accused for the commission of an offence is a jurisdiction distinct from that of detention under the Act which had in view the object of preventing the detenue from acting prejudicial to the security of the State and maintenance of public order. The fields of these two jurisdiction are not co-extensive nor are they alternatives. The grounds of detention relate to past act an which an opinion as to the likelihood of repetition of similar acts can be based. *Mohd. Salim Khan* v. *C.C. Bose*, 1972 SCC (Cri) 35. **TO THE SAME EFFECT :** (1) *Barjahar Gorey* v. *State of West Bengal*, 1972 SCC (Cri) 888.

[12689] ● ***Whether act affects law and order or public order—Test.***—*Maintenance of Internal Security Act, 1971.*—The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order, is a question of degree and extent of the reach of the act upon the society. Public order is what the french call "*order publique*" and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order is : "Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed. *Kanu Biswas* v. *State of West Bengal*, AIR 1972 SC 1656 : (1972) 3 SCC 831 : 1973 SCC (Cri) 16 (19) : 1972 CrLJ 1006 : 1973 UJ (SC) 80.

[12690] ● ***Jurisdiction of preventive detention sometimes described as jurisdiction of suspicion.***—If the grounds are relevant and germane to the object of the detaining Act then merely because the objectionable activities covered thereby also attracted the provisions of Chapter VIII, Criminal Procedure Code, the preventive detention cannot for that reason alone be considered to be *mala fide* provided the authority concerned is satisfied of the necessity of the detention as contemplated by the Act. The jurisdiction of preventive detention sometimes described as jurisdiction of suspicion depended on the subjective satisfaction of the detaining authority. If the detaining authority is of the opinion on grounds which are germane and relevant, then it is necessary to detain a person from acting prejudicially then it is not for this Court to consider objectively how imminent was the likelihood of the detenue indulging in those activities. *Masood Alam* v. *Union of India*, AIR 1973 SC 897 : (1973) 1 SCC 551 : 1973 SCC (Cri) 435 : 1973 CrLJ 627 : 1973 CrLR (SC) 173.

[12691] ● ***Past conduct activities and antecedents history taken into account in making detention order.***—It is always the past conduct, activities and the antecedents history of a person which the detaining authority takes into account in making a detention order. No doubt, the past conduct, activities or antecedent history should always be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary but it is for the detaining authority who has to arrive at a subjective satisfaction in considering the past activities and coming to his conclusion if on the basis of those activities he is to be satisfied that the activities of the person concerned are such that he is likely to indulge in prejudicial activities necessitating his detention. *Masood Alam* v. *Union of India*, AIR 1973 SC 897 : (1973) 1 SCC 551 : 1973 SCC (Cri) 435 : 1973 CrLJ 627 : 1973 CrLR (SC) 173.

[12692] ● ***Earlier order of detention either revoked or expired when.***—Where an earlier order of detention is either revoked or has expired, any subsequent detention order can be passed only on fresh facts arising after the expiry or revocation of the earlier order. *Masood Alam* v. *Union of India*, (1973) 1 SCC 551 : 1973 SCC (Cri) 435.

[12693] ● ***Theft of electric copper wires if relevant for making detention order under Section 3 of MIS Act.***—*Maintenance of Internal Security Act, 1971, Section 3.*—The grounds or the basis of which the petitioner has been detained are clear, relevant and germane to the object and purpose for which preventive detention is authorised by the Act. The petitioner is stated to have committed theft of electric copper wires on January 6 and 12, 1972, when he was challenged by the inhabitants of the area, he and his associates hurled bombs towards them. The theft of electric wire totally disrupted electric supplies for several hours in the areas concerned. This conduct is very relevant for satisfying the authority concerned that it is prejudicial to maintenance of supplies and services essential to the community and if such authority considers it necessary on this ground to detain him with a view to preventing him from repeating such acts, then, the order of detention would indubitably and legitimately fall within the purview of Section 3 of the Act. The detention order is not open to challenge in these proceedings on the grounds averred in the writ petition. *Mohd. Subrati* v. *State of West Bengal*, AIR 1973 SC 207 : (1973) 3 SCC 256 : 1973 SCC (Cri) 245 (250, 251) : 1974 CrLJ 397 : 1973 CrLR (SC) 75.

[12694] ● ***Detenu's liability to be tried in criminal Court.***—The fact the petitioner could be tried for the commission of offences disclosed on the ground is immaterial because his liability to be tried in a Court of law cannot debar the authority concerned from detaining him if his acts bring his case within the purview of Section 3 of the Act. The respective fields of operation of the law providing for trial and punishment for the commission of the offences and of Maintenance of Internal Security Act, 1971 are not co-extensive. One is meant to punish for past offence while the other is designed to prevent the person concerned from future mischief irrespective of his liability to be punished in a Court of law on the basis of the same facts. *Indradeo Mahato* v. *State of West Bengal*, AIR 1973 SC 1062 : (1974) 4 SCC 4 : 1973 SCC (Cri) 645 (649) : 1973 CrLJ 862 : 1973 CrLR (SC) 301.

[12695] ● *Failure to mention period of detention in order of confirmation by Govt. no illegality.*—S. 13 of the Maintenance of Internal Security Act, 1971, as amended by S. 6(*d*) of the Defence of India Act, 1971, provides that the maximum period for which any person may be detained shall be twelve months from the date of detention or until the expiry of Defence of India Act, 1971, whichever is latter. This statutory provision places an outside limit on the period of detention and the proviso to Section 13 leaves it open to the appropriate Government to revoke or modify the order of detention at any earlier time. It is, therefore, not possible to say that the failure to mention the period of detention in the order for confirmation constituted an illegality vitiating the order of detention. *Habibullah Khan* v. *State of West Bengal*, AIR 1974 SC 493 : (1974) 4 SCC 275 : 1974 SCC (Cri) 437 (439, 440) : 1974 CrLR (SC) 114 : 1974 CrLJ 461 : 1974 UJ (SC) 105.

[12696] ● *Order of detention—When not bad in law.*—Merely because the detaining authority had chosen to base the order of detention on the discharge of the petitioner by Court for want of evidence, it cannot be held that the order is bad in law. *Golam Hussain alias Gama* v. *Commissioner of Police*, AIR 1974 SC 1336 : (1974) 4 SCC 530 : 1974 SCC (Cri) 566 : (1974) 3 SCR 613.

[12697] ● *Detention—Vague and uncertain ground supplied.*—*Constitution of India, Art. 22(5).*—It is well-settled that in a case of preventive detention under the Act it is absolutely necessary to communicate the grounds of detention to the detenue in clear and unambiguous terms giving as such particulars as will facilitate making of an effective representation in order to satisfy the detaining authority that the order is unfounded or invalid. *Ajit Kumar Kaviraj* v. *District Magistrate, Birbhum*, AIR 1974 SC 1917 : (1975) 3 SCC 264 : 1974 SCC (Cri) 872 (873) : 1974 CrLJ 1304.

[12698] ● *Power to detain and right to liberty to be balanced.*—The jurisprudence dealing with the prohibitory detention or preventive detention is well settled and it can no longer be a valid contention that because the accused had been discharged in a criminal case, the ground of charge cannot be relied upon by the appropriate authority, passing an order of preventive detention. The former relates to the prohibitory branch of criminal law and relies on the past commission the latter to the preventive branch of social defence and protect the community for future injury. It is not possible to urge that simply because a man has been discharged in a criminal case those grounds cannot be grounds for preventive detention. But there must be live link between the grounds of criminal activities alleged by the detaining authority and the purpose of detention. This credible chain will be snapped if there is too long and unexplained an interval between the offending acts and the order of detention. There must be proximity, but no mechanical test of counting months of interval can be laid down—it depends on the nature of the acts alleged or relied, gravity of the situation and the reason for the delay. It is in that background only it can be said that casual connection is broken. The power to detain and right to liberty must be harmoniously balanced in the large interest of the community. *Golam Hussain alias Gama* v. *Commissioner of Police*, AIR 1974 SC 1336 : (1974) 4 SCC 530 : 1974 SCC (Cri) 566 : (1974) 3 SCR 613.

[12699] ● *Detention order on cyclostyled sheet.*—The mere fact that detention order was on cyclostyled sheet wherein necessary particulars were filled in ink would not go to show that the particulars in ink were filled subsequent to the signing of the detention order. *Sk. Ibrahim* v. *State of West Bengal*, AIR 1974 SC 736 : (1975) 3 SCC 13 : 1974 SCC (Cri) 709 (710) : 1974 CrLJ 657 : 1974 CrLR (SC) 101 : (1974) 2 SCR 803.

[12700] ● *Detention for unlawful possession of Railway property.*—The District Magistrate, in his counter affidavit says, that the goods which were recovered from the godown of the petitioner are of a special kind used exclusively by the Railways and are not available in the open market. The petitioner has produced stamped receipt in respect of the purchases made by him and those receipts show that even sales tax and surcharge on sales-tax was charged on the sale price. All that the District Magistrate says in regard to the receipt is that "The receipts which have been annexed to the writ petition would not be of any material assistance''. This statement makes no sense because the receipts constitute the very foundation of the petitioner's defence to the charge that he was in unlawful possession of railway property. On the material which was available to the detaining authority, it was impossible to arrive at the conclusion that the possession of the petitioner was unlawful. *Srilal Shaw* v. *State of West Bengal*, AIR 1975 SC 393 : (1975) 1 SCC 336 : 1975 SCC (Cri) 172 (174, 175) : 1975 CrLJ 423.

[12701] ● *Detention order—Wagon breaking—No referring to any incident of.*—In the particulars furnished to the petitioner it was mentioned that he had committed theft of an elective copper wire and of an aluminium conductor wire on

April 16 and April 24, 1972. In the affidavit filed in this Court by the Deputy Secretary, Home (Special) Department Government of West Bengal, it in stated in paragraph 8, that the record showed that the petitioner was "a notorious, anti-social and criminal indulging in wagon breaking and theft of overhead electric copper wire''. The particulars furnished to the petitioner do not refer to any incident of wagon breaking and, therefore, the petitioner had no opportunity of making an effective representation to the Government. It is clear from the affidavit that the detaining authority was influenced by the consideration that the petitioner was concerned with incidents involving breaking of wagons. The order is also in violation of Art. 22(5) of the Constitution. *Fogla & S.K. Jalil* v. *State of West Bengal*, AIR 1975 SC 245 : (1974) 4 SCC 501 : 1974 SCC (Cri) 537 (538) : 1974 CrLJ 1252 : 1974 CrLR (SC) 383.

[12702] ● ***Petitioner when discharged in two criminal cases.***—Solely or mainly because the petitioner has been discharged in two criminal cases he is not entitled to be enlarged from preventive captivity. *Sadhu Ray* v. *State of West Bengal*, AIR 1975 SC 919 : (1975) 1 SCC 660 : 1975 SCC (Cri) 296 (301) : 1975 CrLJ 785.

[12703] ● ***Order under Section 3(1)(a) MIS Act against undertrial prisoner in Jail Custody.***—Section 3(1)(a) of the Maintenance of Internal Security Act, 1971 presuppose that on the date of the order of detention or in the near future the person sought to be detained has or will have freedom of action. If a person, therefore, is serving a long term of imprisonment or is in jail custody as an undertrial and there is no immediate or early prospect of his being released on bail or otherwise the authority cannot legitimately be satisfied on the basis of his past history or antecedents that he is likely to indulge in similar prejudicial activities after his release in the distant or indefinite future. *Dulal Ray* v. *District Magistrate, Burdwan*, AIR 1975 SC 1508 : (1975) 1 SCC 837 : 1975 SCC (Cri) 329 : 1975 CrLJ 1322 : 1975 CrLR (SC) 147.

[12704] ● ***Period of detention contemplated for set officer Section 428, CrPC.***—It is true that S. 428 Cr.P. Code speaks of the "period of detention" undergone by an accused person but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be during the investigation, enquiry or trial in connection with the "same case'' in which he has been convicted. *Govt. of Andhra Pradesh* v. *Anne Venkateswara Rao*, AIR 1977 SC 1096 : 1977 SCC (Cri) 508 (513) : (1977) 3 SCC 298 : 1977 CrLJ 935 : 1977 CrLR (SC) 155 : (1977) 3 SCR 7 : 1977 Cr App R (SC) 193.

[12705] ● ***Section 428, CrPC provides only for set off.***—S. 428 of the CrPC provides that the period of detention of an accused as an under-trial prisoner shall be set off against the term of imprisonment imposed on him on conviction. This section only provides for a "set-off'', it does not equate an "under-trial detention or remand detention with imprisonment on conviction''. The provision as to set-off expresses a legislative policy; this does not mean that it does away with the difference in the two kinds of detention and puts them on the same footing for all purposes. *Govt. of Andhra Pradesh* v. *Anne Venkateswara Rao*, AIR 1977 SC 1096 : 1977 SCC (Cri) 508 (512) : (1977) 3 SCC 298 : 1977 CrLJ 935 : 1977 CrLR (SC) 155 : (1977) 3 SCR 7 : 1977 Cr App R (SC) 193.

[12706] ● ***Representation not considered vitiates order of detention.***—Representation made by the counsel on instructions from his client, namely, the detenu, was not considered by the Government at all. The High Court was in error in construing the representation made by the petitioner as being made not by him but by his counsel. It is manifest that the counsel had no personal matter and he was only advocating the cause of his client. In matters where the liberty of the subject is concerned and a highly cherished right is involved, the representations made by the detenu should be construed liberally and not technically so as to frustrate or defeat the concept of liberty engrained in Article 21. As the representation has not been considered at all by the Government which it was duty bound to consider, that by itself vitiates the order of detention. *Balchand Chorasia* v. *Union of India*, AIR 1978 SC 297 : (1978) 1 SCC 161 : 1978 SCC (Cri) 77 : 1978 CrLJ 159.

[12707] ● ***Subjective satisfaction of authority vitiated when.***—It is well-settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. *Ashadevi* v. *K. Shivraj*, AIR 1979 SC 447 : (1979) 1 SCC 222 : 1979 SCC (Cri)

262 : 1979 CrLJ 203 : 1979 CrLR (SC) 9 : 1979 UJ (SC) 92 : (1979) 2 SCR 215.

[12708] ● ***Power to preventively detain person not to be exercised except in accordance with constitutional safeguards.***—It is now settled law that the power to preventively detain a person cannot be exercised except in accordance with the constitutional safeguards provided in Cls. (4) and (5) of Art. 22 of the Constitution and if any order of detention is made in violation of such safeguards, it would be liable to be struck down as invalid. It is immaterial whether these constitutional safeguards are incorporated in the law authorising preventive detention, because even if they are not, they would be deemed to be part of the law as a super-imposition of the Constitution which is the supreme law of the land and they must be obeyed on pain of invalidation of the order of detention. *Vimal Chand Jawantraj Jain* v. *Pradhan*, AIR 1979 SC 1501 : (1979) 4 SCC 401 : 1980 SCC (Cri) 4 (7) : 1979 CrLJ 1131 : 1979 CrLR (SC) 647 : (1979) 3 SCR 1007 : 1979 UJ (SC) 814.

[12709] ● ***Detention Authority to communicate grounds on which order made.***—When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the "grounds'' on which the order has been made and shall afford him the earliest opportunity of making representation against the order. These procedural safeguards are ingrained in our system by political interpretation. *Narendera Purshotam Umrao* v. *B.B. Gujral* : *Vijayaben Purshotam* v. *B.B. Gujral*, AIR 1979 SC 420 : (1979) 2 SCC 637 : 1979 SCC (Cri) 557 (563) : 1979 CrLJ 469 : 1979 CrLR (SC) 50.

[12710] ● ***Purpose of detention under COFEPOSA Act not punitive.***—*COFEPOSA Act 1974.*—The purpose of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is not punitive but preventive. The purpose is to prevent organised activities and to conserve and augment foreign exchange. *Bhawarlal Ganeshmalji* v. *State of Tamil Nadu*, AIR 1979 SC 541 : (1979) 1 SCC 465 : 1979 SCC (Cri) 318 (321) : 1979 CrLJ 462 : 1979 CrLR (SC) 380 : (1979) 2 SCR 633.

[12711] ● ***Detention of under trial for more than sentence period.***—*Constitution of India, Art. 21.*—The under trial persons who are accused of multiple offences and who have already been in jail for the maximum term for which they could be sentenced on conviction, even if the sentence awarded to them were consecutive and not concurrent, should not be allowed to continue to remain in jail for a moment longer, since such continuance of detention would be already violative not only of a human dignity but also of their fundamental right under Art. 21 of the Constitution. It is therefore, directed that these undertrial prisoners be therefore forthwith. *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, AIR 1979 SC 1819 (1819) : 1980 SCC (Cri) 57 : 1979 CrLJ 1134.

[12712] ● ***Power of Central Govt. to revoke order of detention.***—"The power conferred on the Central Government by S. 11 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, is wide enough to enable the Central Government to revoke the detention order at any stage for the words used are a detention order may at any time be revoked or modified.'' The power of the Central Government to revoke the order of detention implies that the detenu can make a representation for exercise of that power. . . . In any event it is clear that a representation properly addressed by the detenu to the Central Government was not forwarded to the Central Government and as such no action had been taken up to date. It may be permissible for the Central Government to take reasonable time for disposing any revocation petition. But it would not be justified by ignoring the representation for revocation of the detention as a statutory duty is cast upon the Central Government. It is necessary that the Government should apply its mind and either revoke the order of detention or dismiss the petition, declining to order for revocation. *Shyam Ambalal Siroya* v. *Union of India*, AIR 1980 SC 789 : (1980) 2 SCC 346 : 1980 SCC (Cri) 447 (450) : 1980 CrLJ 555 : (1980) 2 SCR 1078 : 1980 UJ (SC) 372.

[12713] ● ***Detention of accused for six years—Release of.***—*Criminal Procedure Code, 1973, Section 167(2).*—The accused were kept in custody for 6 years and the Magistrate concerned mechanically authorised repeated detentions unconscious of the provisions which obligated him to monitor the proceedings which warrant such detention. S. 167(2) empowers the Magistrate to authorise detention of an accused in such custody as he thinks fit for a term not exceeding 15 days in the whole. More importantly, there is a precious interdict protective of personal freedom which states that no Magistrate shall authorise detention of the accused person exceeding 90 days in grave cases and 60 days in lesser cases. The petitioners were ordered to be released forthwith. *Mantoo Majumdar* v. *State of Bihar*, AIR 1980 SC 847 : (1980) 2 SCC 406 : 1980 SCC (Cri) 504 : 1980 CrLJ 546 : 1980 Cr App R (SC) 117 : 1980 UJ (SC) 452 : 1980 BLJ 368.

[12714] ● ***Order to bind over—Condition precedent.***—*Criminal Procedure Code, 1973, Section 110.*—There is not slightest doubt that expressions like by habit, "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of a man with laxity of semantics. Thus Court must insist on specificity of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference that by confirmed habit, which is second nature, the counter-petitioner is sure to commit the offences mentioned if he is not kept captive. Preventive sections preventive if freedom, of uncautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry on with it judicial imprimatur, to boot. To call a man dangerous is itself dangerous; to call a man desperate it to affix a desperate adjective to stigmatise a person as hazardous to the community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. A sociologist may pardonably take the view that it is the poor man, the man without political clout the person without economic stamina, who in practice gets caught in the coils of Section 110 of the Code, although we, as Court cannot subscribe to any such proposition on mere assertion without copious substantiation. Even so the Court cannot be unmindful of social realities and be careful to require strict proof when-personal liberty may possibly be the casualty. After all, the judicial process must not fail functionally as the Protector of personal liberty. *Gopalanachari* v. *State of Kerala*, AIR 1981 SC 674 : 1980 Supp SCC 649 : 1981 CrLJ 337 : 1981 SCC (Cri) 546 : 1981 CrLR (SC) 94.

[12715] ● ***Order of detention with grounds of detention—When served on detenu.***—*Conservation of foreign Exchange and Prevention of Smuggling Activities Act, 1974, Section 3.*—When an order of detention together with the grounds of detention is served on a detenu, the detenu may ask for particulars on which a ground is based if they are not already there. When a document contains what are called "grounds" which often consist of the background of a case, narration of facts and instances of the detenu's activities, the detenu is not entitled to know which part or parts of the 'grounds' was or were taken into consideration and which not. The Court may not take into consideration any reply given by the detaining authority to such an enquiry; for, the reply may be an afterthought. It will be for the Court to judge whether the facts narrated constitute a ground of detention or which facts might possibly enter and influence the detaining authority in coming to its subjective satisfaction. The information sought as per Clause (4) of the letter, namely, the provision under which the import of Palladium is prohibited is equally untenable. Whether or not the import of Palladium is prohibited or not is an information on a question of law and can be obtained from Statutes, Rules or Notifications. In our opinion, the Government is not under any liability to furnish the detenu with legal information available from legal literature. The liability of the detaining authority is only to comply with the requirement of sub-article (5) of Article 22 of the Constitution. The submission of learned counsel is that the detenu even did not know whether Palladium was a precious metal belonging to the platinum group and the Government's failure to furnish him with that 'information' prevented him from filing a proper representation. We are unable to accept this submission, inasmuch as the plea is not permissible on the ground of public policy, for, any detenu may plead that he does not know whether gold or silver is a precious metal. *Hemlata Kantilal Shah* v. *State of Maharashtra*, AIR 1982 SC 8 (12) : 1982 SCC (Cri) 16 : 1982 CrLJ 150 : 1982 CrLR (SC) 644.

[12716] ● ***Documents relied on by authorities not furnished with grounds of detention.***—*COFEPOSA Act, 1974, S. 3.*—Perusal of the grounds of detention would show that the pivotal ground on the basis of which the detenu was detained was the allegation that he smuggled out huge amount of silver from India to foreign countries. The documents regarding the facts mentioned in the grounds of detention referred to above and relied upon by the detaining authority were not admittedly furnished to the detenu at the time when the grounds were served on him or *pari passu* the same. On the other hand, these documents were supplied to him much later, *i.e.*, on January 5, 1981. This infirmity, therefore, is clearly violative of the Constitutional safeguard enshrined in Art. 22(5) of the Constitution, as held by this Court in a series of cases. *Mohd. Zakir* v. *Delhi Administration*, AIR 1982 SC 696 : (1982) 3 SCC 216 : 1982 SCC (Cri) 695 (696) : 1982 CrLJ 611 : 1982 CrLR (SC) 568.

[12717] ● ***Copies of documents and material in support of grounds of detention not supplied alongwith grounds of detention.***—It is true that under sub-s. (3) of S. 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 it is provided that for the purpose of Art. 22(5) of the Constitution, the communication to a person detained in pursuance of the detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention. This provision under which five days' period in normal circumstances and fifteen days' period in exceptional circumstances has been provided relates to the supply or communication of the grounds on which the order of detention has been made to the detenu. It has no reference to the documents and material on the basis of which the detention order has been made and it is quite clear that there is no reason why the documents and materials in support of the grounds on the basis of which the detention order has been made, the same being ex-hypothesis in existence at the time of the issuance of the detention order and framing of the grounds, should not be supplied to the detenu alongwith the grounds. Non-supply of such material and documents alongwith the grounds would clearly amount to a violation of the safeguard guaranteed under Art. 22(5) of the Constitution. *Sunil Dutt* v. *Union of India*, AIR 1982 SC 53 : (1982) 3 SCC 405 : 1983 SCC (Cri) 62 (64, 65) : 1982 CrLJ 193 : 1982 CrLR (SC) 535.

[12718] ● *Acquittal of accused by High Court.*—*Criminal Procedure Code, 1973, S. 426.*—The petitioner had been acquitted by the High Court before any of the orders of detention were made against him. There can be no question of the detention being considered as detention pursuant to conviction; nor can the detention be treated as that of an under-trial. It is only in circumstances where the prisoner would have unquestionably been in detention in connection with a criminal case if he had not preventively detained, his preventive detention might be reckoned as detention as an under-trial prisoner or detention pursuant to conviction, for the purposes of S. 428, CrPC. *Champalal Poonjaji Shah* v. *State of Maharashtra*, AIR 1982 SC 791 : (1982) 1 SCC 507 : 1982 SCC (Cri) 265 (267) : 1982 CrLJ 612 : 1982 CrLR (SC) 61 : (1982) 3 SCR 61 : 1982 UJ (SC) 166.

[12719] ● *Documents relied on by authorities not supplied with grounds of detention.*—*COFEPOSA Act, 1974, S. 3.*—It is manifest that the question of demanding the documents is wholly irrelevant because it is the Constitutional mandate which requires the detaining authority to give the documents relied on or referred to in the order of detention *pari passu* the grounds of detention in order that the detenu may make an effective representation immediately instead of waiting for the documents to be supplied with. In the instant case, the detenu did make a representation promptly on Dec. 30, 1980 but was seriously handicapped in making an effective representation because the aforesaid documents which were of vital importance were not supplied to him. *Mohd. Zakir* v. *Delhi Administration*, AIR 1982 SC 696 : (1982) 3 SCC 216 : 1981 SCC (Cri) 695 (696) : 1982 CrLJ 611 : 1982 CrLR (SC) 568.

[12720] ● *Detention not illegal.*—*COFEPOSA Act, 1974.*—The passage of time from the date of initial apprehension of the detenu and the making of the order of detention was not occasioned by any laxity on the part of the agencies concerned, but was the result of a full and detailed consideration of the facts and circumstances of the case by the various departments involved. It cannot be held that there was any tardiness of any one or that the detention is in any manner illegal. *Ashok Narain* v. *Union of India*, AIR 1982 SC 1222 : (1982) 2 SCC 437 : 1982 SCC (Cri) 466 (467) : 1982 CrLJ 1729 : 1982 CrLR (SC) 285 : 1982 UJ (SC) 484.

[12721] ● *Single solitary instance of attempt to export Indian currency to foreign countries.*—It was contended for the detenue that a single solitary instance of attempt to export Indian currency to foreign countries in hardly sufficient to warrant an inference that the detenu will repeat his activity in future also and his detention may be necessary to prevent him from so doing in future. . . . An inference in each case will depend on the nature of the act and the attendant circumstances. In the present case, the detenue tried to export Indian currency to the tune of Rs. 2,88,900 to a foreign country in a planned and premeditated manner by clever concealment of it in several parts of his baggage. This fully justified the detaining authority in coming to the conclusion that he might repeat his illegal act in future also and that his detention was necessary to preventing him from repeating the same in future. His past act in the circumstances might be an index of his future conduct. *Saraswathi Seshagiri* v. *State of Kerala*, AIR 1982 SC 1165 : (1982) 2 SCC 310 : 1982 SCC (Cri) 423 (426) : 1982 CrLJ 1251 : 1982 CrLR (SC) 252 : 1982 UJ (SC) 389.

[12722] ● *Non-application of mind of detaining authority.*—In every infraction of law having a penal sanction by itself is a ground for detention danger looms large that the normal criminal trials, and criminal Courts set up for administering justice will be substituted by detention laws often described as lawless law. There is not the slightest suggestion that witnesses are not forthcoming in respect of the alleged infraction of law. Why the normal investigation was not pursued is a question difficult to answer. If in respect of the incident of January 10, 1981, a charge could have been laid under S. 307, IPC, on the face of it, a serious charge, the detenu as accused could have been arrested and if he moved for bail the same could have been legally resisted. The incident dated August 1, 1981 at best disclosed a threat and the offence could at best be one under Section 504 and 506, IPC. It is not made clear in the return why normal procedure of investigation, arrest and trial has not been found adequate to thwart the criminal activities of the detenue it is not for a moment suggested that power under the preventive detention law cannot be exercised where a criminal conduct which could not be easily prevented, checked or thwarted, would not provide a ground sufficient for detention under the preventive detention laws. But it is equally important to bear in mind that every minor infraction of law cannot be upgraded to the height of an activity prejudicial to the maintenance of public order. Non-application of the mind of the detaining authority becomes evident from the frivolity of grounds on which the detention order is founded. *Jaya Mala* v. *Home Secretary, Government of Jammu & Kashmir*, AIR 1982 SC 1297 : (1982) 2 SCC 538 : 1982 SCC (Cri) 502 (504) : 1982 CrLJ 1777 : 1982 UJ (SC) 859 : 1982 Cr App R (SC) 241 : 1982 CrLR (SC) 441.

[12723] ● ***Past conduct or antecedent history of person be taken into consideration in making detention order.***—The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed largely from prior events showing tendencies or inclinations of a person that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the national economy. *Hemlata Kantilal Shah* v. *State of Maharashtra*, AIR 1982 SC 8 : (1981) 4 SCC 647 : (1981) 4 SCC 647 : 1982 SCC (Cri) 16 : 1982 CrLJ 148 : 1982 CrLR (SC) 587. TO THE SAME EFFECT : (1) *Saraswathi Seshagiri* v. *State of Kerala*, AIR 1982 SC 1165 : (1982) 2 SCC 310 : 1982 SCC (Cri) 423 : 1982 CrLJ 1251 : 1982 CrLR (SC) 252 : 1982 UJ (SC) 389.

[12724] ● ***Subjective satisfaction of authority making detention order.***—When the Legislature has made only the subjective satisfaction of the authority making the order of detention, it is not for the Court to question whether the grounds given in the order are sufficient or not for the subjective satisfaction of the authority. *Saraswathi Seshagiri* v. *State of Kerala*, AIR 1982 SC 1165 : (1982) 2 SCC 310 : 1982 SCC (Cri) 423 (427) : 1982 CrLJ 1251 : 1982 CrLR (SC) 252 : 1982 UJ (SC) 389.

[12725] ● ***Preventive detention devised to afford protection to society.***—Those who are responsible for the national security or for the maintenance of public order must be the sole Judges of what the national security or public order requires. Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does and to prevent him from doing. Justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. It follows that any preventive measures even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. It is a matter of grave concern that in urbanised areas like cities and towns and particularly in the metropolitan city of Delhi the law and order situation is worsening everyday and the use of knives and fire-arms have given rise to a new violence. There is a constant struggle to control the criminal activities of the persons engaged in such organised crimes for the maintenance of public order. It is difficult to appreciate the argument that the detention here is with a view to punish the detenu for a series of crimes that he is alleged to have committed, but which the law enforcement agency is not able to substantiate. There is no reason why the executive cannot take recourse to its power of preventive detention in those cases where the Court is genuinely satisfied that no prosecution could possibly succeed against the detenu because he is a dangerous person who has overawed witnesses or against whom no one is prepared to depose. *Ashok Kumar* v. *Delhi Administration*, AIR 1982 SC 1143 : (1982) 2 SCC 403 : 1982 SCC (Cri) 451 (457, 458) : 1982 CrLJ 1191 : 1982 CrLR (SC) 289 : (1982) 3 SCR 707 : 1982 UJ (SC) 4845.

[12726] ● ***Person against whom detention order proposed to be made in Jail.***—Undoubtedly, for a period of one month and 18 days the detenu was in jail, his bail application having been rejected nearly 25 days before the date of the impugned detention order. It is difficult to appreciate how the District Magistrate was subjectively satisfied that a detention order in respect of the detenu was necessary with a view to preventing him from acting in a manner prejudicial to the maintenance of public order. This aspect we have most meticulously examined in four decision of this Court, and therefore, we need not examine the same again. As early as in *Rameshwar Shah* v. *D.M. Burdwan*, AIR 1964 SC 334 : (1964) 4 SCR 921 : (1964) 1 CrLJ 257 and as late as in *Vijay Kumar* v. *State of J&K*, AIR 1982 SC 1023 : (1982) 2 SCC 43 : 1982 SCC (Cri) 348 : 1982 CrLJ 988, the two recent most decisions in *Biru Mahto* v. *D.M. Dhanbad*, AIR 1982 SC 1539 : (1982) 3 SCC 322 : 1983 SCC (Cri) 31 : 1982 CrLJ 2354 : (1982) 1 Crimes 57 and *M. Satya Narayana* v. *State of A.P.*, AIR 1982 SC 1543 : (1982) 3 SCC 301 : 1983 SCC (Cri) 18 : 1982 CrLJ 2357 : (1983) 1 Crimes 267, it has been held that one can envisage a hypothetical case in which a preventive detention order may have to be made against a person already deprived of his personal liberty by being confined or detained in Jail but in such a situation the detaining authority must show awareness of this fact that the person against whom the detention order is proposed to be made is already in Jail and is incapable of acting in a manner prejudicial to the maintenance of public order and yet for the reason which may appeal to the District Magistrate on which his subjective satisfaction is grounded a preventive detention order is required to be made. It is further held that this awareness must appear either in the order or in the affidavit justifying the impugned detention order when challenged. Neither in the order nor in the affidavit we find even a whimper of this aspect, being present to the mind of the detaining authority while making the detention order. *Devi Lal Mahto* v. *State of Bihar*, AIR 1982 SC 1548 : (1982) 3 SCC 328 : 1983 SCC (Cri) 37 (39) : 1982 CrLJ 2363 : 1982 CrLR (SC) 485 : 1982 Cr App R (SC) 395 : (1983) 1 SCR 630 : 1983 UJ (SC) 894.

[12727] ● ***Detaining authority not chosen to file affidavit.***—"In this case the District Magistrate, the detaining authority, has not chosen to file his affidavit. The affidavit in opposition is filed by a Sub-Inspector of Police. Would this imply that Sub-Inspector of Police had access to the file of the decision of the District Magistrate for making the detention order. . . We have serious apprehension as to whether the District Magistrate completely abdicated his functions in favour of the Sub-Inspector of Police. The file was not available to the Court. But number of inferences are permissible from the fact that the District Magistrate though a party did not file his affidavit justifying the order and left it to the Sub-Inspector of Police to fill in the bill. And the Sub-Inspector of Police does not say how he came to know about the subjective satisfaction of the District Magistrate. He does not say that he had access to the file or he is making the affidavit on the basis of the record maintained by the District Magistrate. Therefore, the inference is irresistible that at the behest of the Sub-Inspector of Police who appears to be the Investigating Officer in some criminal case in which each of the detenu is implicated, the District Magistrate completely abdicating his responsibilities, made the detention order. . .

If the District Magistrate is to act in the manner he has done in this case by completely abdicating his functions in favour of an officer of the level of a Sub-Inspector of Police, the safeguards noticed by this Court are likely to prove wholly illusory and the fundamental right of personal liberty will be exposed to serious jeopardy.'' *Merugu Satyanarayana* v. *State of Andhra Pradesh*, AIR 1982 SC 1543 : (1982) 3 SCC 301 : (1983) SCC (Cri) 18 (25, 26) : 1982 CrLJ 2357 : 1982 CrLR (SC) 488 : (1983) 1 SCR 635.

[12728] ● ***Mere service of grounds of detention not complaint.***—It has undoubtedly been held by this Court in several cases, a mere service of the grounds of detention is not a compliance of the mandatory provisions of Art. 22(5) of the Constitution unless the grounds are accompanied with the documents which are referred to or relied on in the grounds of detention. In view of this serious *lacuna*, the continued detention of the petitioner becomes void. *Ram Baochan Dubey* v. *State of Maharashtra*, (1982) 3 SCC 383 : 1983 SCC (Cri) 59 (60) : 1983 CrLR (SC) 532 (2).

[12729] ● ***Grounds of detention identical.***—The grounds of the detention in respect of the detenu-petitioner and his brother Dharamraj Raj, Ram Kedar Dubey were absolutely identical and the approving authority had before it the grounds in case of Dharam Ram Kedar Dubey in these circumstances, therefore it cannot be said that there was no application of mind by the approving authority to the grounds of detention on the basis of which the petitioner was detained because the identical grounds were undoubtedly considered by the approving authority. *Ram Baochan Dubey* v. *State of Maharashtra*, (1982) 3 SCC 383 : 1983 SCC (Cri) 59 (60) : 1983 CrLR (SC) 532 (2).

[12730] ● ***Right of detenu to be represented by friend.***—The right of the detenu to be represented by a friend, who in truth and substance is not a legal practitioner, cannot be disputed and no reasons were given by the Board why it was denied to the petitioner. There is nothing to suggest that the petitioner wanted to be represented by any so called friend who in reality was a legal practitioner. The counsel for the respondent urged that the petitioner had not furnished the name of the friend so as to enable the Board to ascertain whether the friend was a lawyer or not but the Board could have asked the petitioner to do so. *Abdul Zabbar* v. *State of Rajasthan*, AIR 1983 SC 505 : (1984) 1 SCC 443 : 1984 CrLJ 853 : 1984 CrLR (SC) 141.

[12731] ● ***Identical ground—No sufficient cause of detention.***—If the detaining authority in the instant case were apprised that the Advisory Board had reported on examining, *inter alia*, an identical ground that there was no sufficient cause for detention of another person involved in the same transaction, it may not have passed the order of detention against the petitioner, which is based on similar facts. It is clear that Shamsi was detained for engaging in a smuggling activity arising out of the same incident and transaction which forms the subject-matter of ground 1 in the instant case. The opinion of the Advisory Board that there was no sufficient cause for Shamsi's detention may not have been binding on the detaining authority which ordered the detention of the petitioner but, it cannot be gainsaid that the fact that the Advisory Board had recorded such an opinion and identical facts involving a common ground was atleast a relevant circumstance which ought to have been placed before the detaining authority in this case. That ground is similar to one of the grounds on which Shamsi was detained, the transaction being one and the same as also the incident on which the two orders of detention are based. That is why the opinion of the Advisory Board in Shamsi's case becomes relevant in the petitioner's case. The failure of the State Government to place before the detaining authority in the instant case, the opinion which the Advisory Board had recorded in favour of a detenu who was detained partly on a ground relating to the same incident deprived the detaining authority of an opportunity to apply its mind to a piece of evidence which was relevant, if not binding. *Mohd. Shakeel Wahid Ahmed* v. *State of Maharashtra*, AIR 1983 SC 541 : (1983) 2 SCC 392 : 1983 SCC (Cri) 509 (511, 512) : 1983 CrLJ 967 : 1983 CrLR (SC) 243 : (1983) 2 SCR 614 : (1983) 1 Crimes 1013.

[12732] ● ***Basis of order of preventive detention reasonable prognosis of future behaviour.***—*National Security Act, 1988, S. 3.*—The basis of an order of preventive detention is the reasonable prognosis of the future behaviour of the person based upon his past conduct. It is open to the detaining authority to take note of the past conduct of detenu and apprehending repetition of such conduct in future an order of detention can be made with a view to preventing such action. *District Magistrate, Now Gong* v. *Sarat Mudoi*, AIR 1984 SC 43 : (1984) 1 SCC 25 : 1984 SCC (Cri) 21 (25) : 1983 CrLJ 1728 : 1983 CrLR (SC) 487 : (1983) 3 SCR 957.

[12733] ● ***Power of revocation statutory power.***—The power of revocation conferred on the Central Government under Section 14 of the National Security Act, 1980 is a statutory power which may be exercised on information received by the Central Government from its own sources including that supplied by the State Government under sub-section (5) of Section (3) or from the detenu in the form of petition for representation. It is for the Central Government to decide whether or not it should revoke the order of detention in a particular case. In the present case, the detenue was not deprived of the right of making a representation to the detaining authority under Art. 22(5) of the Constitution read with Section 8(9) of the Act. Although the detenu had no right to simultaneously make a representation against the order of detention to the Central Government under Art. 22(5) and there was no duty cast on the State Government to forward the same to the Central Government, nevertheless the State Government forwarded the same forthwith. The Central Government duly considered that representation which in effect was nothing but a representation for revocation of the order of detention under S. 14 of the Act. That being so it was not obligatory on the part of the Central Government to consider a second representation for revocation under S. 14. We may profitably refer to *Phillipa Anne Duke* case 1982 SCC (Cri) 444 where some similar circumstances it was held that failure of the Central Government to consider a representation for revocation of an order of detention under S. 11(1)(b) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act handed over to the Prime Minister during her visit to England did not render the continued detention invalid. *State of Uttar Pradesh* v. *Zavad Zama Khan*, AIR 1984 SC 1095 : (1984) 3 SCC 505 : 1984 SCC (Cri) 425 (432) : 1984 CrLJ 922 : 1984 CrLR (SC) 280 : (1984) 3 SCR 789 : 1984 UJ (SC) 964 : (1984) 2 Crimes 1.

[12734] ● ***Duty of authority passing detention order.***—This Court has observed in numerous cases that while passing orders of detention great care must be taken by the detaining authority. Preventive detention is a necessary evil but essentially an evil. Therefore, deprivation of personal liberty, if at all, has to be on the strict terms of the Constitution. Nothing less. *State of Punjab* v. *Jagdev Singh Talwandi*, AIR 1984 SC 444 : (1984) 1 SCC 596 : 1984 SCC (Cri) 135 (145) : 1984 CrLJ 177 : 1984 CrLR (SC) 409 : (1984) 2 SCR 50 : (1984) 1 Crimes 224.

[12735] ● ***Detenu not entitled to be informed of source of information.***—The detenu is not entitled to be informed of the source of information received against him or the evidence which may have been collected against, as, for example, the evidence corroborating that the report of the CID is true and correct. *State of Punjab* v. *Jagdev Singh Talwandi*, AIR 1984 SC 444 : (1984) 1 SCC 596 : 1984 SCC (Cri) 135 (147) : 1984 CrLJ 177 : 1984 CrLR (SC) 409 : (1984) 1 Crimes 224.

[12736] ● ***Details of prejudicial activity given in ground of detention.***—The detenu reminded the detaining authority that the CID report did not refer to any speech made by him in a shaheedi conference at a given time, on a given date at a given place at Baba Bakala and before a Sikh gathering numbering 2000/2200. The detaining could not have possibly replied to that question by saying merely that the detenue was right. The detenu was right only formally or technically. That is because, the CID report supplied to him alongwith the grounds of detention with the express stipulation that it formed "the base of the grounds of detention''. The grounds mention every one of the details which need have been mentioned. The CID report was furnished to the detenu as forming the source of information leading to the conclusion that he had made a speech which necessitated his detention in the interests of public order. In the circumstances, the grounds and the material furnished to the detenu have to be read together as if the material in the form of the CID report was a continuation of the grounds of detention. *State of Punjab* v. *Jagdev Singh Talwandi*, AIR 1984 SC 444 : (1984) 1 SCC 596 : 1984 SCC (Cri) 135 (142) : 1984 CrLJ 177 : 1984 CrLR (SC) 409 : (1984) 2 SCR 50 : (1984) 1 Crimes 224.

[12737] ● ***One of grounds mentioned in order old and stale.***—The first ground mentioned in the order of detention was that the detenu alongwith the companion surrounded one Kanhiya Lal Sharma and had committed an offence under S. 307 of the IPC on or about 10th April, 1981. Apart from the fact that the ground was old and stale, it is irrelevant in as much as the detenu has been acquitted on 2nd February, 1984 whereas the detention order was passed on 29th February, 1984. The respondents in their counter do not dispute this position but state that the information had not reached the detaining or the recommending authority. In certain criminal charges mentioned in grounds numbers 2, 3, 4 and 5, there is no difficulty in arresting the detenu. The grounds mentioned therein are not of such magnitude as to amount to apprehend disturbance of public order, nor was there any evidence that for any conduct of the detenu public order was endangered, or there could be reasonable apprehension about it. *Ajay Dixit* v. *State of Uttar Pradesh*, AIR 1985 SC 18 : (1984) 4 SCC 400 : 1984 SCC (Cri) 625 (632, 633) : 1985 CrLJ 487 : 1984 CrLR (SC) 443 : (1985) 1 SCR 843 : (1984) 2 Crimes 766.

[12738] ● ***Grounds of detention stale and irrelevant—When.***—When a challenge is made to a detention on the grounds that the stale and irrelevant grounds were the basis for the detention then the detenu is entitled to be released and to that extent the order is subject to judicial review not on the ground of sufficiency of the grounds nor the truth of the grounds but only about the relevancy of the grounds which would come under judicial scrutiny. *Ajay Dixit* v. *State of Uttar Pradesh*, AIR 1985 SC 18 : (1984) 4 SCC 400 : 1984 SCC (Cri) 625 (632) : 1985 CrLJ 487 : 1984 CrLR (SC) 443 : (1985) 1 SCR 843 : (1984) 2 Crimes 766.

[12739] ● ***Preventive detention not beyond judicial scrutiny.***—*Bihar control of crimes Act, 1981, Section 2(D)(1)(ii) and (iv) and 12.*—Preventive detention is considered so treacherous and such an anathema to cruised thought and democratic polity that safeguards against undue exercise of the power to detain without trial, have been built into the constitution itself and incorporated as Fundamental Rights. There are two sentinels, one at either end. The legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the Courts are required to examine when demanded whether there has been any excessive detention that is whether the limits set by the Constitution and Legislature have been transgressed. Preventive detention is not beyond judicial scrutiny. While adequacy or sufficiency may not be a ground of challenge, relevancy and proximity are certainly grounds of challenge. Nor is it for the Court to put itself in the position of the detaining authority and to satisfy itself that the untested facts reveal a path of crime. *Vijay Narain Singh* v. *State of Bihar*, AIR 1984 SC 1334 : (1984) 3 SCC 14 : 1984 SCC (Cri) 361 (366) : 1984 CrLJ 909 : 1984 CrLR (SC) 240 : (1984) 3 SCR 435 : (1984) 1 Crimes 914.

[12740] ● ***Failure to file affidavit by District Magistrate not to vitiate order of detention.***—In the matters of routine nature, if indeed there are any matters of a routine nature in the field of detention, a counter-affidavit may be sworn by a person who derives bus knowledge from the record of the case. However, in sensitive matters of the present nature, the detaining authority ought to file his own affidavits in answer to the writ petition and place the relevant facts before the Court which the Court is legitimately entitled to know. In *Shark Hany* v. *State of W.B.*, AIR 1974 SC 679 : 1974 CrLJ 606 this Court held that the failure to furnish the counter-affidavit of the District Magistrate who had passed the order of detention, was an impropriety though in most of the cases it may not be of much consequence, especially if there was no allegation of *mala fides* against the detaining authority.

In the present case too there are no allegations of *mala fides* against the District Magistrate and so, his failure to file a counter affidavit will not vitiate the order of detention. We cannot, however, leave this subject without emphasising once again the importance of the detaining authority filing his own affidavit in cases of the present nature. There are degrees of impropriety and the line which divides grave impropriety from illegality is too thin to draw and even more so to Judge. Conceivably, there can be cases in which such impropriety arising out of the failure of the detaining authority in filing his own affidavit may vitiate the order of detention. *State of Punjab* v. *Jagdev Singh Talwandi*, AIR 1984 SC 444 : (1984) 1 SCC 596 : 1984 SCC (Cri) 135 (148, 149) : 1984 CrLJ 177 : 1984 CrLR (SC) 409 : (1984) 1 Crimes 224.

[12741] ● ***Fresh order of detention under Section 11(2) of conservation of foreign Exchange and Prevention of Smuggling Activities Act.***—Where an order is quashed by a Court in exercise of extra-ordinary jurisdiction, the power of making a fresh order under sub-section (2) of Section 11 as not available to be exercised. *Ibrahim Bachn Bafan* v. *State of Gujarat*, AIR 1985 SC 697 (700) : (1985) 2 SCC 24 : 1985 SCC (Cri) 149 : 1985 CrLJ 533 : 1985 CrLR (SC) 232 : 1985 (1) Crimes 602.

[12742] ● ***Words 'without prejudice'—Meaning.***—The words without prejudice to the provision of S. 21 of the General Clauses Act, 1897'' used in S. 11(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 give expression to the legislative intention that without affecting that right which the authority making the order enjoys under S. 21 of the General Clauses Act, an order of detention is also available to be revoked or modified by authorities named in cls. (a) and (b) of S. 11(1) of the said Act. Power conferred under cls. (a) and (b) of S. 11(1) of the Act could not be exercised by the named authorities under S. 21 of the General Clauses Act as these authorities on whom such power has been conferred under the Act are different from those who made the orders. Therefore, conferment of such power was necessary as Parliament rightly found that S. 21 of the General Clauses Act was not adequate to meet the situation. Thus, while not affecting in any manner and expressly preserving the power under S. 21 of the General Clauses Act of the original authority making the order, power to revoke or modify has been conferred on the named authorities. *Ibrahim Bachu Bafan* v. *State of Gujarat* : *Mithu Bawa Pandhiyar* v. *State of Gujarat*, AIR 1985 SC 697 (699) : (1985) 2 SCC 24 : 1985 SCC (Cri) 149 : 1985 CrLJ 533 : 1985 CrLR (SC) 232 : (1985) 2 SCR 891 : (1985) 1 Crimes 602.

[12743] ● ***Detenu not entitled to disclosure of confidential source of information.***—*National Security Act, 1980, Section 10.*—In order that personal freedom may not be curtailed beyond necessity and the administration may not make it an empty guarantee detailed provision were made in Art. 22 providing an effective procedure in the matter of making representation and scrutiny of the materials in the presence of the detenue and even hearing him, if he so desired by an independent Board with adequate judicial bias what that is so, the detenue is not entitled to a disclosure of the confidential source of information used in the grounds or utilised for the making of the order. What is necessary for the making of an effective representation is the disclosure of the material and not the source thereof. By indicating that the facts have been gathered from confidential reports, a suggestive disclosure of the source has also been made. *State of Rajasthan* v. *Shamsher Singh*, AIR 1985 SC 1082 (1085) : 1985 SCC (Cri) 421 : 1985 CrLJ 1348 : 1985 CrLR (SC) 270 : 1985 Cr App R (SC) 218 : (1985) 2 Crimes 242.

[12744] ● ***Detenu detained for being principal conspirator to smuggle hashish from Pakistan.***—The detenu is one of the principle conspirators in the conspiracy to smuggle hashish into India from Pakistan and to smuggle it out of India. He is under detention from 23.3.84 under an order dated 11.1.84 by the Government of Maharashtra under S. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Anticipatory bail orders had been obtained by the detenue from the Punjab &

Haryana High Court which had been extended uptill 13.1.1984. There is no satisfactory material to hold that the detention authority was aware of the detenue having been granted anticipatory bail by the Punjab & Haryana High Court. In view of the above the detention order was not bad. *Tusher Govindji Shah* v. *Union of India*, AIR 1985 SC 511 (513) : (1985) 1 SCC 571 : 1985 SCC (Cri) 135 : 1985 CrLJ 793 : 1985 CrLR (SC) 143.

[12745] ● ***Detenu already in custody in connection with criminal case.***—The liberty of a subject is a serious matter and it is not to be trifled with in casual, indifferent and routine manner. In the petition the detenue has given details of where he was taken and when. He has also referred to the circumstances that an application for bail was moved on his behalf on the 18th before the High Court and it was only thereafter that the order of detention was made. These facts have not been denied in the counter-affidavit filed by the respondents. There is nothing in record, either in the police dossier submitted to the DM for action or in any other document that the District Magistrate was aware that the petitioner was already in jail. There is nothing to indicate that the District Magistrate applied his mind to the question whether an order of detention under the Jammu & Kashmir Safety Act was necessary despite the fact that the petitioner was already in custody in connection with the criminal case. *Jai Singh* v. *State of Jammu & Kashmir*, AIR 1985 SC 764 (764) : (1985) 1 SCC 561 : 1985 SCC (Cri) 125 : 1985 CrLJ 527 : 1985 CrLR (SC) 140 : 1985 UJ (SC) 410.

[12746] ● ***Board to forward entire material before it alongwith its report to State Govt.***—*National Security Act, 1980, Section 11 and 12.*—There is no dispute that the Board had not sent the entire record to the State Government under S. 11(2) of the National Security Act, 1980. The Board is required to submit its report and there is no obligation cast by the Act that the entire record of the Board should be placed before the State Government. It is, however, not disputed by learned Advocate General that the report of the Board is only a recommendation and the ultimate decision on the basis of the report as to what further action has to be taken is for the State Government to make S. 12 in its two sub-sections indicates two alternative courses open to the State Government on the basis of the report. If the Board is of the view that there is no sufficient cause for detention of the person, the appropriate Government is obliged to revoke the detention and release the detenue. On the other hand, where the Board is of the view that there is sufficient cause for the detention of the person, the appropriate Government may confirm the detention order and continue the detention. The two provisions have been expressed in different language. Where the report is against the detention no option is left to the State Government and a duty is cast on it to release the detenue. When the Board recommends that there is sufficient cause for detention, the State Government may confirm the detention or even revoke it. Since the final order has to be made by the State Government, we are inclined to agree with the submission that the entire record or at least all relevant materials should be available to the State Government when it proceeds to apply its mind to decide whether the detention should be continued or revoked. *State of Rajasthan* v. *Shamsher Singh*, AIR 1985 SC 1082 (1090) : 1985 SCC (Cri) 421 : 1985 CrLJ 1348 : 1985 CrLR (SC) 270 : (1985) 2 Crimes 242.

[12747] ● ***Appropriate Govt. to forward representation when received.***—*National Security Act, 1980, Section 10.*—It is obligatory for the appropriate Government to forward the representation, when received to the Board without delay because unless on the basis of the representation the appropriate Government rescinds the order of detention, the representation is a document intended for the Board. Where the representation has been received the same should, as expeditiously as possible, reach the Board. In this case the State Government received the representation on August 30, 1984, and placed the same before the Board on September 6, 1984. Six clear days have intervened between the receipt of the representation by the Government and the placing thereof before the Board. Admittedly, if the representation had reached the Board by September 5, 1984, respondent would not be entitled to raise any objection. In the circumstances indicated it cannot be said to be non-compliance with Section 10 of the Act. *State of Rajasthan* v. *Shamsher Singh*, AIR 1985 SC 1082 (1087) : 1985 SCC (Cri) 421 : 1985 CrLJ 1348 : 1985 CrLR (SC) 270 : (1985) 2 Crimes 242.

[12748] ● ***No request by detenu for being represented by his friend.***—In this case it is not the contention of the petitioner that the Advisory Board had the assistance of any lawyer or attorney when the matter of the detention of the detenue was examined and any request of the detenue for assistance by a lawyer was refused. There was no request at all by the detenue for assistance by friend who is not a lawyer when the matter of his detention came to be considered by the Advisory Board. In view of the above the detention is not bad. No principle of natural justice has been violated. *Tushir Govendji Shah* v. *Union of India*, AIR 1985 SC 511 (514) : (1985)

1 SCC 571 : 1985 SCC (Cri) 135 : 1985 CrLJ 793 : 1985 CrLR (SC) 143.

[12749] ● ***Grounds of detention verbatim reproduction of dossier submitted by senior Supdt. of Police.***—The grounds of detention is a verbatim reproduction of the dossier submitted by the Senior Superintendent of Police, Udhampur to the District Magistrate requesting that a detention order may kindly be issued. At the top of the dossier, the name is mentioned as Sardar Ram Singh father's name is mentioned as Sardar Ram Singh and the address is given as village Bharakh, Tehsil Reasi. Thereafter it is recited "The subject is an important member of. . .'' Thereafter follow various allegation against Jai Singh paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is'' into "you Jai Singh S/o. Ram Singh resident of village Bharakh, Tehsil Reasi.'' Thereafter word for word the Police dossier is repeated and the word "he'' wherever it occurs referring to Jai Singh in the dossier is changed into "you'' in the grounds of detention. We are afraid it is difficult to find greater proof of non-application of mind. *Jai Singh* v. *State of Jammu & Kashmir*, AIR 1985 SC 764 (764) : (1985) 1 SCC 561 : 1985 SCC (Cri) 125 : 1985 CrLJ 527 : 1985 CrLR (SC) 140 : 1985 UJ (SC) 410.

[12750] ● ***Non-application of mind by detaining authority to relevant material.***—From what has been stated in the counter filed by the Union of India and the two counters filed by the State of Rajasthan it appears to be clear to us that the documents mentioned by the appellant in his petition were not placed before the detaining authority and, therefore, were not considered by the detaining authority. It is possible that they were placed before the screening Committee in the first instance, but that is immaterial. It was the detaining authority that had to consider the relevant material before taking a decision whether it was necessary to detain the appellant under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. That was not done and there was, therefore, a clear non-application of mind by the detaining authority to relevant material. *Sita Ram Somani* v. *State of Rajasthan*, AIR 1986 SC 1072 : (1986) 2 SCC 86 : 1986 SCC (Cri) 104 (107) : 1986 CrLJ 860 : (1986) CrLR (SC) 145 : (1986) 2 Crimes 233.

[12751] ● ***Detaining authority not sole Judge of what national security or public order requires.***—It is well-settled that the detaining authority is not the sole Judge of what national security or public order requires. But neither is the Court the sole Judge of the position. When power is given to an authority to act on certain facts and if that authority acts on relevant facts and arrives at a decision which cannot be described as either irrational or unreasonable, in the sense that no person instructed in law could have reasonably taken that view, then the order is not bad and the Court cannot substitute its decision or opinion, in place of the decision of the authority concerned on the necessity of passing the order. *Raj Kumar Singh* v. *State of Bihar*, AIR 1986 SC 2173 : (1986) 4 SCC 407 : 1986 SCC (Cri) 481 (487) : 1986 CrLJ 2042 : 1986 CrLR (SC) 462 : 1986 Cr App R (SC) 266.

[12752] ● ***Exact information received from intelligence source not made available to petitioner.—COFEPOSA 1974.***—It may be that the exact information received from the intelligence source had not been made available to the petitioner or placed on record but sufficient material with reference to the intelligence report had been made available. In that view of the matter, there is no force in this submission. *Asha Keshavrao Bhosale* v. *Union of India*, AIR 1986 SC 283 (288) : (1985) 4 SCC 361 : 1985 SCC (Cri) 561 : 1986 CrLJ 177 : 1986 CrLR (SC) 4 : 1985 (2) Crimes 799.

[12753] ● ***Detenu under trial likely to get bail.***—The order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail, an order of detention under the National Security Act should not ordinarily be passed. In the circumstance, the order of detention not sustainable. *Ramesh Yadav* v. *District Magistrate*, AIR 1986 SC 315 (316) : (1985) 4 SCC 232 : 1985 SCC (Cri) 514 : 1986 CrLJ 312 : 1985 CrLR (SC) 451 : 1985 UJ (SC) 1045 : (1985) 2 Crimes 728.

[12754] ● ***Grounds served in English—Detenu pleading he only knew Gujarati.***—*COFEPOSA Act, 1974, Section 3(3).*—In this case it is to be born in mind that the grounds were given on 25th June, 1984 following the search and seizure of gold biscuits from his room in the hotel in his presence and in the background of the mercy petition as we have indicated he was in constant touch with his daughter and sons and there is no evidence that these people did not know Hindi or English. Indeed they knew English as well as

Hindi. It is difficult to accept the position that in the peculiar facts of this case, the grounds were not communicated in the sense the grounds of detention were not conveyed to the detenue Venilal. Whether the grounds were communicated or not depends upon the facts and circumstances of each case. *Prakash Chandra Mehta* v. *Commissioner and Secretary, Government of Kerala*, AIR 1986 SC 687 (697) : 1985 SCC (Cri) 332 : 1986 CrLJ 786 : 1985 CrLR (SC) 301 : (1985) 3 SCR 697.

[12755] ● *Provisions of Section 10 of National Security Act mandatory.*—*National Security Act, 1980, Section 10.*—Section 10 of the National Security Act, 1980, are mandatory and non-compliance with or infraction thereof would certainly be fatal. S. 10 provides that the State Government has the obligation to cause the papers relating to detention to be placed, alongwith the representation, if made within three weeks from the date of detention before the Advisory Board. The requirement of Section 10, of the Act are mandatory and therefore the failure to place the representation before the Advisory Board within the time vitiates the detention. *State of Uttar Pradesh* v. *Mahant Singh*, AIR 1986 SC 207 : (1986) 4 SCC 624 : 1986 SCC (Cri) 56 (58) : 1986 CrLJ 22 : 1986 CrLR (SC) 20 : 1986 UJ (SC) 451 : 1985 (2) Crimes 969.

[12756] ● *Solitary incidents—Petitioner indulging in smuggling of gold.*—Having regard to the nature of the activity of smuggling, an inference could legitimately be drawn even from a single incident of smuggling that the petitioner was indulging in smuggling of gold. Moreover, the written statement given by the petitioner clearly indicated that the petitioner was engaged in the business of purchase and sale of foreign marked gold and that this incident in which he was caught was not a solitary incident. The facts stated by the petitioner in his written statement could legitimately give rise to the inference that the petitioner was a member of a smuggling syndicate and merely because only one incident of smuggling by the petitioner came to light it did not mean that this was the first and only occasion on which the petitioner had smuggle gold. *Shiv Ratan Makim* v. *Union of India*, AIR 1986 SC 610 : (1986) 1 SCC 404 : 1986 SCC (Cri) 74 (77, 78) : 1986 CrLJ 813 : 1986 CrLR (SC) 89 : (1986) 1 Crimes 465.

[12757] ● *Detenu pleading that he understood Gujarati language—Feigning ignorance of English.*—"The Constitution requires that the grounds must be communicated. Therefore, it must follow as an imperative that the grounds must be communicated in a language understood by the person concerned so that he can make effective representation. Here the definite case of the petitioner's father is that he does not understand English or Hindi or Malayalam and does understand only Gujarati language. The facts revealed that the detenue Venilal was constantly accompanied and was in the company of his daughter as well as son. Both of them knew English very well. The father signed documents in Gujarati which was written in English which is his mercy petition in which he completely accepted that guilt of the involvement in smuggling. . . There is no rule of law that common sense should be put in cold storage while considering Constitutional provisions for safeguards against misuse of powers by authorities though there Constitutional provisions should be strictly construed. Bearing this salutary principle in mind and having regard to the conduct of the detenue—Venilal Mehta specially in the mercy petition and other communication, the version of the detenu Venilal is feigning lack of any knowledge of English must be judged in the proper perspective. He was, however, in any event given by 30th June, 1984, the Hindi translation of the grounds of which he claimed ignorance. The gist of the annexures which were given in Malayalam language had been stated in the grounds. That he does not know anything except Gujarati is merely the *ipse dixit* of Venilal Mehta and is not the last word and the Court is not denuded of its powers to examine the truth. He goes to the extent that he signed the mercy petition not knowing the contents, not understanding the same merely because his wife sent it though he was sixty years old and was in the business and he was writing at a time when he was under arrest, his room had been searched, gold biscuits had been recovered from him. The detaining authority rightly came to the conclusion that he knew both Hindi and English. It has been stated so in the affidavit filed on behalf of the respondent. We are of the opinion that the detenue, Venilal Mehta was merely feigning ignorance of English. *Prakash Chandra Mehta* v. *Commissioner and Secretary, Government of Kerala*, AIR 1986 SC 687 : 1985 SCC (Cri) 332 : 1986 CrLJ 786 : 1985 CrLR (SC) 301 : 1985 Cr App R (SC) 266 : (1985) 3 SCR 697.

[12758] ● *No indication that service of order of detention factor or question that detenu might be released or possibility of his release taken into consideration.*—In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, therefore, the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenue was in custody or that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly. In the facts and circumstances of this case, therefore, the continued detention of the detenu under the Act is not justified. It is well settled in our Constitutional frame work that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence. If a man in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case, when the actual order of detention was served upon the detenue, the detenue was in Jail. There is no indication that this factor or the question that the said detenue might be released or that there was such a possibility of his release was taken into consideration, by the detaining authority properly and seriously before the service of the order. *Binod Singh* v. *District Magistrate, Dhanbad*, AIR 1986 SC 2090 : (1986) 4 SCC 416 : 1986 SCC (Cri) 490 (494, 495) : 1986 CrLJ 1959 : 1986 CrLR (SC) 451 : (1986) 3 SCR 905 : (1986) 3 Crimes 284.

[12759] ● *Conduct of detenu prejudicial to maintenance of supplies and services essential to commodity.*—In the instant case the conduct of the detenue was prejudicial to the maintenance of supplies and services essential to the community in general as contemplated by S. 3(2),of the National Security Act and not in any particular mode contemplated by *Explanation* of S. 3(1) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 and as such is not excluded by the *Explanation* to sub-s. (2) of S. 3 of the Act. Detention under S. 3(2). National Security Act is sustainable. *Suraj Pal Sahu* v. *State of Maharashtra*, AIR 1986 SC 2177 : (1986) 4 SCC 378 : 1986 SCC (Cri) 452 (463) : 1986 CrLJ 2047 : 1986 CrLR (SC) 462 : (1986) 3 SCR 837.

[12760] ● *Proper opportunity to make representation given.*—The documents relied on were duly supplied. From the records it is clear that proper opportunity to make a representation was given and the representation made to the Advisory Board was duly considered by the Advisory Board. Their recommendations were also duly considered by the State Government. In the premises there is no substance in the grievance that the procedural safeguards had not been followed. It further appears to us that there was rational subjective satisfaction arrived at *bona fide* on the basis of the materials available to the detaining authority and the materials had rational nexus with the purpose and object of the detention as contemplated by the Act. *Suraj Pal Sahu* v. *State of Maharashtra*, AIR 1986 SC 2177 : (1986) 4 SCC 378 : 1986 SCC (Cri) 452 (474) : 1986 CrLJ 2047 : 1986 CrLR (SC) 462 : (1986) 3 SCR 837.

[12761] ● *Preventive detention laws as to be applied with circumspection.*—Preventive detention for the social protection of the community is a hard law but it is a necessary evil in the modern society and must be pragmatically continued, so that it works. But simply because it is an evil, it cannot be so interpreted as to be inoperative in any practical manner. Judged by all relevant standards, the impugned order of detention in the case of the petitioner cannot be said to be either illegal or beyond the authority of law. *Raj Kumar Singh* v. *State of Bihar*, AIR 1986 SC 2173 : (1986) 4 SCC 407 : 1986 SCC (Cri) 481 (487, 489) : 1986 CrLJ 2042 : 1986 CrLR (SC) 462 : (1986) 3 SCR 913 : (1986) 2 UJ (SC) 614 : JT 1986 SC 555 : 1986 (3) Crimes 252.

[12762] ● *Man found not guilty in criminal trial not determinative of factors alleged.*—The fact that a man was found not guilty in a criminal trial would not be determinative of the factors alleged therein. All these factors must be objectively considered and if there are casual connections and if *bona fide* belief was formed then there was nothing to prevent from serving an order of preventive detention even against a person who was in Jail custody if there is imminent possibility of his being released and set at liberty if the detaining authority was duly satisfied. *Suraj Pal Sahu* v. *State of Maharashtra*, AIR 1986 SC 2177 : (1986) 4 SCC 378 : 1986 SCC (Cri) 452 (474) : 1986 CrLJ 2047 : 1986 CrLR (SC) 462 : (1986) 3 SCR 837 : JT 1986 SC 538.

[12763] ● *Unsuccessful judicial trial or proceeding not operate as bar to detention order.*—Even unsuccessful judicial trial or proceeding would, not operate as a bar to a detention order or render it *mala fide*. If the failure of the criminal prosecution can be no bar to the making of an order of detention, a *fortiori* the mere fact that a criminal prosecution can be instituted cannot operate as a bar against the making of an order of detention. If an order of detention is made only in order to bypass a criminal prosecution which may be irksome because of the inconvenience of proving guilt in a Court of law, it would certainly be an abuse of power of preventive detention and the order of detention would be bad. But if the object of making the order of detention as to prevent the commission in future of activities injurious to the community, it would be a perfectly legitimate exercise of power to make the order of detention. The Court would have to consider all the facts and circumstances of the case in order to determine on which side of the line the order of detention falls. *Shiv Ratan Makim* v. *Union of India*, AIR 1986 SC 610 : (1986) 1 SCC 404 : 1986 SCC (Cri) 74 (79) : 1986 CrLJ 813 : 1986 CrLR (SC) 89 : (1986) 1 Crimes 465.

[12764] ● ***Petitioner caught in act of smuggling gold.***—In this case the petitioner was caught in the act of smuggling gold and the circumstances in which the gold was being smuggled as also the facts set out in the written statement of the petitioner clearly indicate that the petitioner was engaged in the activity of smuggling gold and if that be so, it is not possible to say that the order of detention was passed by the second respondent with a view to subverting, supplanting or substituting the criminal law of the land. The order of detention was passed plainly and indubitably with a view to preventing the petitioner from continuing the activity of smuggling and it was therefore, a perfectly valid order of detention. *Shiv Ratan Makim* v. *Union of India*, AIR 1986 SC 610 : (1986) 1 SCC 404 : 1986 SCC (Cri) 74 (79, 80) : 1986 CrLJ 813 : 1986 CrLR (SC) 89 : (1986) 1 Crimes 465.

[12765] ● ***Detaining authority to take into consideration rational grounds.***—Having regard to the purpose of the Act, the detaining authority must take into consideration rational grounds and that should be the basis for the horoscope for the future, so as to determine whether the person proposed to be detained comes within the mischief of the National Security Act, 1980. If the person is in detention or is under trial and his conviction is unlikely but his conduct comes within the mischief of the said Act then the authority is entitled to take a rational view of the matter. The grounds must be there. The decision must be *bona fide*. *Suraj Pal Sahu* v. *State of Maharashtra*, AIR 1986 SC 2177 : (1986) 4 SCC 378 : 1986 SCC (Cri) 452 (473) : 1986 CrLJ 2047.

[12766] ● ***Speeches referred to in certain grounds for detention as part of continuous course of conduct.***—The crux of allegation in grounds Nos. 1 and 2 was that he was a leader of Naya Sikkim Party, that as the leader of the party he had addressed public meetings at various places and times condemning the merger of Sikkim with India, pleaded for the establishment of Sikkim as it existed prior to merger and exhorted the people to fight against the Govt. of India to establish 'Sikkimese Sikkim'. The speeches referred to in ground No 1 are mentioned as a part of the continuous course of conduct brought out by the remaining grounds. *Sonam Yongda (Ex-Captain) presently detained in Hazaribagh Central Jail, Bihar* v. *State of Sikkim*, AIR 1986 SC 1736 : (1986) 3 SCC 594 : 1986 SCC (Cri) 341 (342) : 1986 CrLJ 1606 : 1986 CrLR (SC) 344.

[12767] ● ***Detaining authority jurisdiction to pass order during pendency of criminal case.***—Unfortunately the High Court viewed at as a question of jurisdiction that is to say, the High Court thought that the detaining authority had jurisdiction to make the order of detention despite the retraction by the accused of his earlier confessional statement and the pendency of the criminal case against the appellant in which bail had been granted subject to condition. No one can dispute the right of the detaining authority to make an order of detention if on a consideration of the relevant material, the detaining authority came to the conclusion that it was necessary to detain the appellant. But the question was whether the detaining authority applied its mind to relevant considerations. If it did not, the appellant would be entitled to be released. *Sita Ram Somani* v. *State of Rajasthan*, AIR 1986 SC 1072 : (1986) 2 SCC 86 : 1986 SCC (Cri) 104 (107) : 1986 CrLJ 860 : 1986 CrLR (SC) 145 : (1986) 2 Crimes 233 (SC).

[12768] ● ***Detenu under trial prisoner.***—The detaining authority was not made aware at the time, the detention order was made that the detenu had moved applications for bail in the three pending cases and that he was enlarged on bail on January 13, 1986, January 14, 1986 and January 15, 1986. We have gave through the detention order carefully. There is absolutely no mention in the order about the fact that the petitioner was an under-trial prisoner, that he was arrested in connection with the three cases, that applications for bail were pending and that he was released on three successive days in the three cases. This indicates a total absence of application of mind on the part of detaining authority while passing the order of detention. In the result we set aside the judgment of the Bombay High Court under appeal, quash the order of detention. *Anant Sakharam Raut* v. *State of Maharashtra* : *Leela Anant Raut* v. *State of Maharashtra*, AIR 1987 SC 137 : (1986) 4 SCC 771 : 1986 SCC (Cri) 535 (536) : 1987 CrLJ 323 : 1986 CrLR (SC) 549 : JT 1986 SC 847 : (1987) 1 SCR 221 : (1986) 3 Crimes 584.

[12769] ● ***Advisory Board referring to evidence to defence witnesses in report.***—"We do not think it is incumbent upon the Advisory Board to refer in detail the evidence of defence witnesses in its report. It will not be unreasonable to presume that all the records including the deposition of the said defence witness were before the confirming authority. It will be mere surmise to hold that the confirming authority had not applied his mind to the deposition of the defence witness, even though such deposition has been referred to in the report of the Advisory Committee.'' *Madhu Khanna* v. *Administrator, Union Territory of Delhi*, AIR 1987 SC 48 : (1986) 4 SCC 240 : 1986 SCC (Cri) 426 (431) : 1987 CrLJ 318 : 1986 CrLR (SC) 401 : JT 1986 SC 401.

[12770] ● ***Detaining authority not filing affidavit.***—In the instant case, the detaining authority, respondent No. 2, has not come forward to file an affidavit stating whether he has taken into consideration the fact that the appellant was already in judicial custody and on considering his past activities he was subjectively satisfied that if set free or released from Jail custody on bail, there was likelihood of the appellant indulging in criminal activities endangering public order. On the other hand, the Station Officer of the Police Station, Kydganj, Shri D.P. Ojha has filed a counter stating that the District Magistrate passed the impugned detention order when the appellant was already in Jail on the apprehension that the appellant is likely to be released on bail in the near future and if the appellant is bailed out, the public order will become worse. This clearly goes to show that the Sub-Inspector has arrogated to himself the knowledge about the subjective satisfaction of the District Magistrate on whom the power is conferred by the Act. The District Magistrate, the detaining authority in this case, has not chosen to file his affidavit. The affidavit in opposition filed by the Station Officer of Police implies that he has access to the file of the District Magistrate or he influenced the decision of the District Magistrate for making the detention order. *Gulab Mehra* v. *State of Uttar Pradesh*, AIR 1987 SC 2332 : (1987) 4 SCC 302 : 1987 SCC (Cri) 721 (735) : 1988 CrLJ 168 : 1987 CrLR (SC) 637 : JT 1987 (4) SC 559 : (1988) 1 SCR 126 : 1987 (3) Crimes 405.

[12771] ● ***No material to show that detenu would repeat misconduct.***—While detaining under Section 3 National Security Act, there must be material to show that the detenue would act in the future to the prejudice of the maintenance of public order. Though the satisfaction of the District Magistrate is subjective in nature but even the subjective satisfaction must be based upon some pertinent material. *Fazal Ghosi* v. *State of Uttar Pradesh*, AIR 1987 SC 1877 : (1987) 3 SCC 502 : 1987 SCC (Cri) 596 (597) : 1987 CrLJ 1910 : 1987 CrLR (SC) 470 : JT 1987 (4) SC 22 : (1987) 3 SCR 471 : 1987 (2) Crimes 892.

[12772] ● ***Petition challenging preventive detention on ground of non-application of mind.***—Mr. Jethmalani has rightly commented that when the allegation was that there was no application of mind in the making of the preventive detention, the return should have come either from the detaining authority or a person who was directly connected with the making of the order and not by Shri Tripathi who filed the affidavit on the basis of the record of the case. *Tsering Dolkar (Mrs.)* v. *Administrator, Union Territory of Delhi*, AIR 1987 SC 1192 : (1987) 2 SCC 69 : 1987 SCC (Cri) 275 (278) : 1987 CrLJ 988 : 1987 CrLR (SC) 265.

[12773] ● ***Detention order—Subjective satisfaction of detaining authority.***—The subjective satisfaction of the detaining authority as regards the factual existence of the condition on which the order of detention can be made *i.e.* the ground of detention constitutes the foundation for exercise of the power and the civil Court cannot be invited to consider the propriety or sufficiency of the grounds. But it does not imply that the subjective satisfaction of the detaining authority is wholly immune from the power of judicial review. It inferentially follows that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the executive, the Court can always examine whether the requisite satisfaction was arrived at by the authority; if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. The simplest case is where the authority had not applied its mind at all; in such a case, the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied. *Pushpadevi M. Jatia* v. *M.L. Wadhavan, Addl. Secretary, Government of India* : *Pushpadevi Jatia* v. *Union of India*, AIR 1987 SC 1748 : (1987) 3 SCC 367 : 1987 SCC (Cri) 526 : 1987 CrLJ 1888.

[12774] ● ***Right to make representation guaranteed.***—It goes without saying that the Constitutional right to make a representation guaranteed by the Art. 22(5) of the Constitution must be taken to include by necessary implication the Constitutional right to a proper consideration of the representation by the authority to whom it is made. The right of representation under Art. 22(5) is a valuable right and is not a mere formality. The representation made by the appellant addressed to the Chief Minister could not lie unattended to in the portals of the Secretariat while the

Chief Minister was attending to other political affairs. Nor could the Government keep the representation in the archives of the Secretariat till the Advisory Board submitted its report. *Mohinuddin* v. *District Magistrate, Beed*, AIR 1987 SC 1977 : (1987) 4 SCC 58 : 1987 SCC (Cri) 674 (682) : 1987 CrLR (SC) 560 : (1987) 3 SCR 668 : JT 1987 (4) SC 173 : (1987) 3 Crimes 1.

[12775] ● ***Habeas corpus—Rule issued by Supreme Court or High Court proper person to file affidavit in return District Magistrate.***—In return to a rule *nisi* issued by this Court or the High Court in a *habeas corpus* petition, the proper person to file the same is the District Magistrate who had passed the impugned order of detention and he must explain his subjective satisfaction and the grounds therefor, and if for some good reason the District Magistrate is not available, the affidavit must be sworn by some responsible officer like the Secretary or the Deputy Secretary to the Government in the Home Department who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or other officer duly authorised under the Rules of Business framed by the Governor under Art. 166 of the Constitution to pass orders on behalf of the Government in such matters. *Mohinuddin* v. *District Magistrate, Beed*, AIR 1987 SC 1977 : (1987) 4 SCC 58 : 1987 SCC (Cri) 674 (679, 680) : 1987 CrLR (SC) 560 : JT 1987 (4) SC 173 : (1987) 3 SCR 668 : 1987 (3) Crimes 1.

[12776] ● ***Preventive detention—Grounds of—Variation between Tamil and English version.***—The learned caused for the petitioner has contended that there is variation between Tamil and English version of the grounds of detention served on the petitioner. The order of detention in English states that the detention order has been passed to prevent the detenue from indulging in smuggling activities, while the grounds furnished to him in Tamil discloses that the detention order has been passed with a view to prevent him from transporting contraband goods. The English version would bring the ground under S. 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 while the Tamil version would bring it under S. 3(1)(iii) of the Act. The detenue knows only Tamil. The alleged difference between the two versions is not consequential. The order of detention and grounds accompanied clearly spelt out why the detenue was being detained. We are not persuaded to hold that the two versions are so different as to cause any prejudice to the detenue. *A. Alangarasamy* v. *State of Tamil Nadu*, AIR 1987 SC 1725 : (1987) 3 SCC 159 : 1987 SCC (Cri) 477 (478) : 1987 CrLJ 1887 : 1987 CrLR (SC) 305 : (1987) 2 UJ (SC) 115 : (1987) 2 Crimes 210.

[12777] ● ***No power of Court to substitute period of detention either by abridging or enlarging it.***—This pertinent to observe that the Court has no power to substitute the period of detention either by abridging or enlarging it. The only power that is available to the Court is to quash the order in case it is found to be illegal. That being so, it would not be open to the Court to reduce the period of detention by admitting the detenue on parole. *Poonam Lata* v. *M.L. Wadhawan*, AIR 1987 SC 1383 : (1987) 3 SCC 347 : 1987 SCC (Cri) 506 (517) : 1987 CrLJ 1130 : 1987 CrLR (SC) 410 : JT 1987 (3) SC 204 : (1987) 2 SCR 1123.

[12778] ● ***Detention order—Computation of period.***—*COFEPOSA Act, 1974, Section 3(ii).*—The objective underlying preventive detention cannot be achieved or fulfilled if the detenu is granted parole and brought out of detention. Even if any conditions are imposed with a view to restrict the movements of the detenue while on parole, the observance of those conditions can never lead to an equation of the period of parole with the period of detention. It will therefore, be futile to contend that the period of parole of a detenue has all the trapping of detention in prison and as such both the periods should find a natural merger and they stand denuded of their distinctive characteristics. Their plea for treating the period of parole on part of the detention has to necessarily fail. *Pushpadevi M. Jatia* v. *M.L. Wadhvan, Addl. Secretary, Govt. of India* : *Pushpadevi Jatia* v. *Union of India*, AIR 1987 SC 1748 : (1987) 3 SCC 367 : 1987 SCC (Cri) 526 (555) : 1987 CrLJ 1888 : 1987 CrLR (SC) 447 : JT 1987 (2) SC 296 : (1987) 3 SCR 46 : 1987 (2) Crimes 705.

[12779] ● ***Non-mention of representation in declaration mere omission.***—*COFEPOSA Act, Section 9(ii).*—In the circumstances, even though the representation has not been referred to in the declaration, there is ample evidence to show that respondent 2 had considered the representation before he made the declaration. The non-mention of the representation in the declaration seems to be a mere omission. There is, therefore, no merit in the contention of the appellant. *Madhu Khanna* v. *Administrator, Union Territory of Delhi*, AIR 1987 SC 48 : (1986) 4 SCC 240 : 1986 SCC (Cri) 426 (428, 429) : 1987 CrLJ 318 : 1986 CrLR (SC) 401 : JT 1986 SC 401.

[12780] ● ***Period of parole to be excluded while computing period of detention.***—The period during which the detenue is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, for in such a case he was not in actual custody. The order of detention prescribes the place where the detenue is to be detained. Parole brings him out of confinement from that place. *Poonam Lata* v. *M.L. Wadhawan*, AIR 1987 SC 1383 : (1987) 3 SCC 347 : 1987 SCC (Cri) 506 (516) : 1987 CrLJ 1130 : 1987 CrLR (SC) 410 : JT 1987 (3) SC 204 : (1987) 2 SCR 1123.

[12781] ● ***Grounds of detention should be in language understood by detenu.***—There can be no two opinions that the requirement of law within the provisions of Art. 22(5) of the Constitution is that the detenue has to be informed about the grounds of detention in a language which he understands. The fact that the detenu's wife knew the language in which the grounds were framed does not satisfy the legal requirement. It must be made clear that the law laid down by this Court clearly indicates that in the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order. *Tsering Dolkar* v. *Administrator, Union Territory of Delhi*, AIR 1987 SC 1192 : (1987) 2 SCC 69 : 1987 SCC (Cri) 275 (279, 280) : 1987 CrLJ 988 : 1987 CrLR (SC) 265 : (1987) 2 SCR 323.

[12782] ● ***Habeas corpus petition—Non-compliance of statutory requirement as to reference to Advisory Board.***—In a *habeas corpus* proceeding, it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with before the date of hearing and, therefore, the detention should be upheld. The procedural requirements are the only safeguards available to a detenue since the Court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the Constitutional rights guaranteed to him in that regard. If a reference to an Advisory Board is to be made within three weeks, it is no answer to say that the reference, though not made within three weeks, was made before the hearing of the case. If the report of the Advisory Board is to be obtained within three months, it is no answer to say that the report though not obtained within three months, was obtained before the hearing of the case. If the representation made by the detenue is required to be disposed of within a stipulated period, it is no answer to say that the representation, though not disposed of within three months, was disposed of before the hearing of the case. *Abdul Latif Abdul Wahab Sheikh* v. *B.K. Jha*, AIR 1987 SC 725 : (1987) 2 SCC 22 : 1987 SCC (Cri) 247 (248, 249) : 1987 CrLJ 700 : 1987 CrLR (SC) 289 : (1987) 2 SCR 203.

[12783] ● ***Release of detenu by Supreme Court on parole.***—It is the appropriate Government and not the Court which deals with a case of temporary release of the detenue since the Act authorises the appropriate Government to make an order of temporary release, invariably the detenue must go to the appropriate Government first. It may be that in a given case the Court may be required to consider the propriety of an adverse order by the Government in exercise of the jurisdiction under Section 12 of COFEPOSA Act, 1974. Whether it be under Art. 226 or Art. 32 of the Constitution, the Court would have no jurisdiction under the Act or under the general principles of law or in exercise of extra-ordinary jurisdiction to deal with the duration of the period of detention. There is no scope for entertaining an application for parole by the Court straightaway. *Poonam Lata* v. *M.L. Wadhwan*, AIR 1987 SC 1383 : (1987) 3 SCC 347 : 1987 SCC (Cri) 506 (518) : 1987 CrLJ 1130.

[12784] ● ***Public order and law and order—Two different concepts.***—The true distinction between the areas of 'public order' and 'law and order' has not in the nature of quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed on different contexts and circumstances might cause different reactions. In the final analysis, therefore one has to turn to the facts of each case to ascertain whether the matter relates to the larger circle or the smaller circle. An act which may not at all be objected to in certain situation is capable of totally disturbing the public tranquility. When communal tension is high, an indiscreet act of no significance is likely to disturb or dislocate the even tempo of the life of the community. An order of detention made in such a situation has to take notice of the potentiality of the act objected to. No hard and fast rule can really be evolved to deal with problems of human society. Every possible situation cannot be brought under water tight classifications and a set of tests to deal with them cannot be laid down. As and when an order of detention is questioned, it is for the Court to apply those well-known tests to find out whether the impugned activities upon which the order of detention is grounded go under the classification of public order or belong to the category of the law and order. *State of Uttar Pradesh* v. *Hari Shankar Tewari*, AIR 1987 SC 998 : (1987) 2 SCC 490 : 1987 SCC (Cri) 388 (393, 394, 395) : 1987 CrLJ 840 : 1987 CrLR (SC) 340 JT (1987) 1 SC 563 : (1987) 2 SCR 426 : (1987) 1 Crimes 729. **To the same effect :** (1) *Kanu Biswas* v. *State of West Bengal*, AIR 1972 SC 1656 : (1972) 3 SCC 831 : 1973 SCC (Cri) 16 : 1972 CrLJ 1006 : 1972 UJ (SC) 80; (2) *Superintendent, Central Prison* v. *Ram Manohar Lohia*, AIR 1960 SC 633 : 1960 CrLJ 1002 : (1960) 2 SCR 821; (3) *Madhu Limaye* v. *Sub Divisional Magistrate*, AIR 1971 SC 2486 : (1970) 3 SCC 746 : 1971 CrLJ 1720 : (1971) 2 SCR 711; (4) *Pushkar Mukherjee* v. *State of West Bengal*, AIR 1970 SC 852 : (1969) 1 SCC 10 : 1970 CrLJ 852 : (1969) 2 SCR 635; (5) *Ram Ranjan Chatterjee* v. *State of West Bengal*, AIR 1975 SC 609 : (1974) 4 SCC 143 : 1975 SCC (Cri) 400 : 1975 CrLJ 588 : 1975 CrLR (SC) 241 : 1975 UJ (SC) 398 : (1975) 3 SCR 301; (6) *Kuso Sah* v. *State of Bihar*, AIR 1974 SC 156 : (1974) 1 SCC 185 : 1974 SCC (Cri) 84 : 1975 CrLJ 543 : 1974 CrLR (SC) 777 : (1974) 2 SCR 195; (7) *Ashok Kumar* v. *Delhi Administration*, AIR 1982 SC 1143 : (1982) 2 SCC 403 : 1982 SCC (Cri) 451 : 1982 CrLJ 1191 : 1982 CrLR (SC) 289 : (1982) 3 SCR 707 : 1982 UJ (SC) 484; (8) *Babul Mitra* v. *State of West Bengal*, AIR 1973 SC 197 : (1973) 1 SCC 393 : 1973 SCC (Cri) 353 : 1974 CrLJ 395 : 1973 CrLR (SC) 107; (9) *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740 : 1966 CrLJ 608 : (1966) 1 SCR 709; (10) *Arun Ghosh* v. *State of West Bengal*, AIR 1970 SC 1228 : (1970) 1 SCC 98 : 1970 CrLJ 1136 : (1970) 3 SCR 288.

[12785] ● ***Preventive detention—Object and purpose of.***—The entire scheme of preventive detention is based on the bounden duty of the State to safeguard the interests of the country and welfare of the people from the canker of anti-national activities by antisocial elements affecting the maintenance of public order or the economic welfare of the country. Placing the interests of the nation above the individual liberty of the anti-social and dangerous elements who constitute a grave menace to society by this unlawful acts, the preventive detention laws have been made for effectively keeping out of circulation the detenus during a prescribed period by means of preventive detention. *Pushpadevi M. Jatia* v. *M.L. Wadhwan, Addl. Secretary Government of India and Pushpa Devi Jatia* v. *Union of India*, (1987) 3 SCC 367 : 1987 SCC (Cri) 526 (555).

[12786] ● ***Objective approach necessary.***—The High Court might have appraised itself of the judgment in *Shamsher Singh's case*, AIR 1985 SC 1082 and decided the matter after taking into account the law laid down therein. The approach has to be an objective approach taking into account all the relevant circumstances and considerations in order to strike a balance between the need to protect the community on the one hand and the need to preserve the liberty of a citizen. *State of Uttar Pradesh* v. *Hari Singh Thakur*, AIR 1987 SC 2080 : 1988 SCC (Cri) 44 : 1987 CrLJ 1923 : 1988 CrLR (SC) 76 : JT 1987 (2) SC 709.

[12787] ● ***Detention of person not to be for longer period than three months.***—The mandate of Article 22(4) of the Constitution is that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention. Section 10 of the Gujarat Prevention of Anti-social Activities Act, 1985 provides for the Constitution of an Advisory Board, Section 11 provides for reference to the Advisory Board and Section 12 prescribes the procedure to be followed by the Advisory Board. What is intriguing in the case is that, on the date when the detention order was made, there was no Advisory Board in existence to which a reference could be made under Section 11 and whose report of its opinion regarding sufficient cause for the detention was required to be obtained within three months of the detention under Article 22(4) of the Constitution. The period of three weeks stipulated by Section 11 of the Act expired on July 14, 1986. The petitioner was entitled to be released on July 14, 1986 as no reference had been made to the Advisory Board within the period contemplated by Section 11 of the Act. But he was not so released. This state of affairs continued till August 7, 1986 when the order of detention dated June 23, 1986 was revoked and a fresh order of detention was made on the same facts, on the same day. The Advisory Board was constituted on August 18, 1986. A reference to the Advisory Board was made on August 20, 1986. The Advisory Board made its report on September 26, 1986. The report of the Advisory Board was more than three months after the detention which commenced on the making of the order of detention, though it was within three months from the date of the second order of detention. *Abdul Latif Abdul Wahab Sheikh* v. *B.K. Jha*, AIR 1987 SC 725 : (1987) 2 SCC 22 :

1987 SCC (Cri) 244 (246, 247) : 1987 CrLJ 700 : 1987 CrLR (SC) 289 : (1987) 2 SCR 203.

[12788] ● *Cross-examination of witnesses on behalf of detaining authority by detenu.*—It is not stated in any judgment of this Court that the witnesses on behalf of the detenue produced in rebuttal of the allegation against him cannot be cross-examined. The witnesses on behalf of the detaining authority cannot be cross-examined by the detenue. Cross-examination of such witnesses has to be by the detaining authority and that right cannot be denied to them. *Harbans Lal* v. *M.L. Wadhawan*, AIR 1987 SC 217 : (1987) 1 SCC 151 : 1987 SCC (Cri) 47 (54) : 1987 CrLJ 324 : 1987 CrLR (SC) 23 : (1987) 1 Crimes 89 : (1987) 1 SCR 425.

[12789] ● *Supplementing grounds of detention by affidavit.*—It is well settled that the detaining authority cannot by an affidavit filed in Court supplement what is stated in the grounds of detention or add to it. *Ramveer Jatav* v. *State of Uttar Pradesh*, AIR 1987 SC 63 : (1986) 4 SCC 762 : 1987 SCC (Cri) 10 (13) : 1987 CrLJ 321 : 1987 CrLR (SC) 109.

[12790] ● *Every piece of evidence not to be mentioned in grounds of reaction of detaining authority.*—It is not necessary to mention in the grounds the reaction of the detaining authority in relation to every piece of evidence, separately. Besides, the recital in Annexure B that the detaining authority formed his opinion after consideration of the aforesaid document by itself clearly implied that he was not impressed by the statement therein. The detenue cannot, therefore, be heard to say that he was prejudiced in any manner. *State of Gujarat* v. *Sunil Fulchand Shah*, AIR 1988 SC 723 : (1988) 1 SCC 600 : 1988 SCC (Cri) 201 (205) : 1988 CrLJ 933 : 1988 CrLR (SC) 125 : JT 1988 (1) SC 274 : (1988) 2 SCR 903.

[12791] ● *Absence of affidavit by detaining authority—When.*—In a case where a point as to absence of affidavit by the detaining authority arises the detaining authority should personally affirm on oath the stand taken on his behalf, but it cannot be suggested as an inflexible rule applicable to all detention cases irrespective of the circumstances. In the present case, a further affidavit by Sri Pavitra Naryana Roy Chaudhary, Deputy Secretary, Home department (Special) of the State of Gujarat was filed stating that the Home Minister Sri Prabodh Ravel who was authorised under the Rules of Business framed under Article 166 of the Constitution to pass orders on behalf of the Government in detention matters had ceased to be a Minister before the filing of the affidavit in the High Court and he was, therefore, not available. Sri M.T. Parmar, the then Deputy Secretary, Home Department was fully conversant with the case and had filed his affidavit. The original file was produced before us to dispel any suspicion about the detaining authority having considered the document dated Oct. 3, 1984 and having felt satisfied that it was a proper case for detention of respondent. In this background we do not attach much importance. *State of Gujarat* v. *Sunil Fulchand Shah*, AIR 1988 SC 723 : (1988) 1 SCC 600 : 1988 SCC (Cri) 201 (204) : 1988 CrLJ 933 : 1988 CrLR (SC) 125 : JT 1988 (1) SC 274.

[12792] ● *Non-production of relevant materials.*—The non-production of relevant materials, *i.e.* the statement of the under-trial prisoners in their application in the Court that the detenues had been falsely implicated in the crime case No. 450 of 1985 under Section 307/34, IPC as mentioned in ground No. 3 and also the statement to that effect in the bail petition and the police report thereon, before the detaining authority for his consideration before passing the order of detention, renders the order of detention invalid and illegal. *State of Uttar Pradesh* v. *Kamal Kishore Saini*, AIR 1988 SC 208 : (1988) 1 SCC 287 : 1988 SCC (Cri) 107 (116) : 1988 CrLJ 405.

[12793] ● *Siphoning of foreign exchange illegally.*—The role of the petitioner has been detailed in the grounds showing how he got illegally siphoned the foreign exchange to the tune of about 2 crores of rupees out of the country. Besides the aforementioned Sita Ram Aggarwal and the petitioner's nephew Subhash Aggarwal, the other associates working in accordance with the direction of the petitioner are mentioned alongwith their activities. The grounds also referred to the statements made by Sita Ram Aggarwal which indicated that the petitioner was traveling by air under assumed names and has been dodging the authorities when they attempted to contact him, before he was apprehended in a Calcutta Hotel. It is further said that the petitioner's firm M/s. B.N. Corporation of Hong Kong received remittances through Bank worth Rs. 85-90 lacs during the year 1986 but did not supply or ship any goods for which the invoices were supposed to have been issued. Some of the documents are alleged to bear his signatures. The statements indicate that the offences, in respect of which the detenue is accused of, are in language of MUKHERJI J. in *Suraj Pal Sahu* v. *State of Maharashtra*, 1986 SCC (Cri) 514. "so interlinked and continuous in character and are of such nature" that they, fully justified the detention order. In the circumstances we do not doubt the satisfaction of the detaining authority. *Bal Chand Bansal* v. *Union of India*, AIR 1988 SC 1175 : (1988) 2 SCC 527 : 1988 SCC (Cri) 356 (359) : 1988 CrLJ 1092 : 1988 CrLR (SC) 256 : JT 1988 (2) SC 65 : (1988) 3 SCR 494 : (1988) 2 Crimes 1.

[12794] ● ***Right to move Court for bail.***—Every citizen in this country has the right to have recourse to law. He has the right to move the Court for bail when he is arrested under the ordinary law of the land. If the State thinks that he does not deserve bail the State could oppose the grant of bail. He cannot, however, be interdicted from moving the Court for bail by clamping an order of detention. Not a bold statement that the person would repeat his criminal activities would be enough. There must also be credible information or cogent reasons apparent on the record that the detenue, if enlarged on bail, would act prejudicially to the interest of public order.

There was no material made apparent on record that the detenu, if released on bail, is likely to commit activities prejudicial to the maintenance of public order. The detention order appears to have been made merely on the ground that the detenu is trying to come out on bail and there is enough possibility of his being bailed out. We do not think that the order of the detention could be justified only on that basis. *Shashi Aggarwal* v. *State of Uttar Pradesh*, AIR 1988 SC 596 : (1988) 1 SCC 436 : 1988 SCC (Cri) 178 (181, 182) : 1988 CrLJ 839 : 1988 CrLR (SC) 184 : JT 1988 (1) SC 83 : (1988) 2 SCR 593 : (1988) 3 Crimes 184.

[12795] ● ***Abscondence—Proof of—Police Diary.***—The search for the absconding persons was being continued for two months till the detenu was arrested as is fully supported by the case diary of latter dates. In the meantime two applications for anticipatory bail were filed one after the other on behalf of Madhava Rao before the Criminal Court and it is true that the orders passed thereon did not state that the accused was absconding, but for that reason the diary of various dates mentioning the fact cannot be ignored and it is not legitimate to claim that Madhava Rao was not absconding. *K. Aruna Kumari* v. *Government of Andhra Pradesh*, AIR 1988 SC 227 : (1988) 1 SCC 296 : 1988 SCC (Cri) 116 (122) : 1988 CrLJ 411 : 1988 CrLR (SC) 7 : JT 1987 (5) SC 378 : (1988) 1 SCR 973 : (1987) 3 Crimes 741.

[12796] ● ***Law and order or public order—Incidents affecting even tempo of life of community affects public order.***—In the instant case, the criminal acts referred to in ground No. 1 are to the effect that on June 4, 1985 at about 11 p.m. some persons informed the complainant that his brother has been shot by some persons and when complainant reached the spot he found his brother lying in the pool of blood and he had already died. This incident is confined to individual persons and it is private crime as distinct from public crime. It does not in any way affect the even tempo of the life of the community nor does it affect the peace and tranquility of people of that particular locality where the crime has been committed. *State of Uttar Pradesh* v. *Kamal Kishore Saini*, AIR 1988 SC 208 : (1988) 1 SCC 287 : 1988 SCC (Cri) 107 (115) : 1988 CrLJ 405 : 1988 CrLR (SC) 40 : JT 1987 (5) SC 285 : (1988) 1 SCR 859.

[12797] ● ***Warrant—Jail authorities to find out whether prisoner to be detained in Tihar Jail or Juvenile Jail.***—On the basis of the age indicated in the warrant, it shall be the obligation of the Jail authorities to find out, so far as Delhi is concerned, whether the prisoner covered by the warrant should be detained in the Tihar Jail or in the Juvenile Jail. *Sanjay Suri* v. *Delhi Administration, Delhi*, AIR 1988 SC 414 : 1988 SCC (Cri) 348 (354) : 1988 CrLJ 705 : 1988 CrLR (SC) 16 : JT 1987 (5) SC 606 : (1988) 2 SCR 234 : (1988) 1 Crimes 189.

[12798] ● ***Assistance of friend to detenu—Meaning of word "friend".***—The rule in *A.K. Ray's case*, 1982 SCC (Cri) 152 made it clear that the detenue was entitled to the assistance of a friend. The word 'friend' used there was obviously not intended to carry the meaning of the term in common parlance. One of the meanings of the word "friend", according to the Collins English Dictionary is "an ally in fight or cause; supporter". The term "friend" used in the Judgments of the Supreme Court was more in this sense than meaning "a person known well to another and regarded with liking, affection and loyalty". A person not being a friend in the normal sense could be picked up for rendering assistance within the frame of the law as settled by this Court. The Advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. As has been indicated by this Court, what cannot be permitted directly should not be allowed to be done in an indirect way. Sundararajan, in this view of the matter, was perhaps a friend prepared to assist the detenu before the Advisory Board and the refusal of such assistance to the detenue was not justified. It is not for this Court to examine and assess what prejudice has been caused to the detenue on account of such denial. This Court has reiterated the position that matter relating to preventive detention are strict proceedings and warrant full compliance with the requirements of law. In view of the position of law and the facts of the case, we must hold that the refusal by the Advisory Board to permit the detenue to be assisted by Sundararajan as a friend was bad and continued detention of the detenue became vitiated. *Johney D'Couto* v. *State of Tamil Nadu*, AIR 1988 SC 109 : (1988) 1 SCC 116 : 1988 SCC (Cri) 70 (75, 76) : 1988 CrLJ 178 : 1988 CrLR (SC) 36 : JT 1987 (5) SC 248 : (1988) 1 SCR 787 : (1987) 3 Crimes 894.

[12799] ● ***Grounds indicating that detaining authority conscious of fact that petitioner in Judicial custody.****—COFEPOSA, Act, 1974, Section 3(1)*—A perusal of the grounds clearly indicates that the detaining authority was conscious of the fact that the petitioner was in judicial custody and was apprehensive that he would be released on bail. *Bal Chand Bansal* v. *Union of India*, AIR 1988 SC 1175 : (1988) 2 SCC 527 : 1988 SCC (Cri) 356 (359) : 1988 CrLJ 1092 : 1988 CrLR (SC) 256 : JT 1988 (2) SC 65 : (1988) 3 SCR 494 : (1988) 2 Crimes 1.

[12800] ● ***Jail authorities not to accept warrant unless age of detenu shown.***—"We call upon every Magistrate or the trial Judge authorised to issue warrants for detention of prisoners to ensure that every warrant authorising detention specifies the age of the person to be detained. Judicial mind must be applied in cases where there is doubt about the age-not necessarily by a trial—and every warrant must specify the age of the person to be detained. We call upon the authorities in the jails throughout India not to accept any warrant of detention as valid one unless the age of the detenue is shown therein." *Sanjay Suri* v. *Delhi Administration, Delhi*, AIR 1988 SC 414 : 1988 SCC (Cri) 348 (353) : 1988 CrLJ 705 : 1988 CrLR (SC) 16 : JT 1987 (5) SC 606 : (1988) 2 SCR 234 : (1988) 1 Crimes 189.

[12801] ● ***Non-mentioning of detenu's name in FIR.***—It is relevant to mention that the names of the detenus were not mentioned in the FIR in respect of incident in ground No. 1 and the basis of their complicity came to be known only in the material found in the course of the investigation. The detenus were supplied only with the copy of the FIR and also extract of the charge-sheet and not the statement under Section 161 of the Code of Criminal Procedure : This rendered the detention bad. *State of Uttar Pradesh* v. *Kamal Kishore Saini*, AIR 1988 SC 208 : (1988) 1 SCC 287 : 1988 SCC (Cri) 107 (112) : 1988 CrLJ 405 : 1988 CrLR (SC) 40 : JT 1987 (5) SC 285 : (1988) 1 SCR 859.

[12802] ● ***Solitary act of omission and commission—Detention order—Passing of.****— National Security Act, 1980 Section 3(2).*—A solitary act of omission or commission can be taken into consideration for being subjectively satisfied by the detaining authority to pass an order of detention if the reach, effect and potentiality of the act are such that it disturbs public tranquility by creating terror and panic in the society or a considerable number of the people in a specified locality where the act is alleged to have been committed. Thus, it is the degree and extent of the reach of the act upon the society which is vital for considering the question whether a man has committed only a breach of law and order or has acted in a manner likely to cause disturbance to public order. *Subash Bhandari* v. *District Magistrate, Lucknow*, AIR 1988 SC 74 : (1987) 4 SCC 685 : 1988 SCC (Cri) 36 (41) : 1988 CrLJ 190.

[12803] ● ***Law and order and public order—Criminal act emanating from business rivalry between detenu and complainant.***—In the instant case, the alleged act of assault by fire-arms is confined to the complainant Surya Kumar and not to others. It is an act infringing law and order and the reach and effect of the act is not so extensive as to affect considerable members of the society. In other words, this act does not disturb public tranquility nor does it create any terror or panic in the minds of the people of the locality nor does it affect in any manner even tempo of the life of the community. This criminal act emanates from business rivalry between the detenus and the complainant. Therefore, such an act cannot be the basis for subjective satisfaction of the detaining authority to pass an order of detention. On the ground that the impugned act purports to affect public order *i.e.* even tempo of the life of the community. *Subash Bhandari* v. *District Magistrate, Lucknow*, AIR 1988 SC 74 : (1987) 4 SCC 685 : 1988 SCC (Cri) 36 (41) : 1988 CrLJ 190 : 1988 CrLR (SC) 61 : JT 1987 (5) SC 277 : (1988) 1 SCR 773 : (1987) 3 Crimes 686.

[12804] ● ***Law and order or public order Firing in public street affecting even tempo of life of community.***—So far as the second crime referred to in ground No. 2 is concerned it is to the effect that the accused chased Ram Kumar and fired twice or thrice and in consequence of it Ram Kumar fell dead on the spot and Nand Kishore and the rickshaw-puller sustained injuries. This firing was made in a public street during the day time. This incident does affect public order as its

reach and impact is to disturb public tranquility and it affects the even tempo of the life of the people in the locality where the incident is alleged to have occurred. Therefore, the finding of the High Court with regard to this incident that it did not disturb in any way the public order is not legal and valid. *State of Uttar Pradesh* v. *Kamal Kishore Saini*, AIR 1988 SC 208 : (1988) 1 SCC 287 : 1988 SCC (Cri) 107 (115) : 1988 CrLJ 405 : 1988 CrLR (SC) 40 : JT 1987 (5) SC 285 : (1988) 1 SCR 859.

[12805] ● ***Firing in Court compound—Act purports to disturb even tempo of life of community.***—As regards the incident preferred to in ground No. 3 that is the complaint regarding the firing by Kamal Kishore Saini, the detenu on Vijay Pratap Singh, an under-trial prisoner, in the Court compound while he was being taken back from the Court by the complainant and other Policemen on duty, it undoubtedly affects public order inasmuch as the firing of shot in the Court compound created panic and terror in the minds of persons present there and, thus, it affects the even tempo of the life of the community in that place. This incident certainly affects public order and not merely law and order inasmuch as the reach, effect and potentiality of the act purports to disturb the even tempo of the life of the community, *i.e.,* the people of that area. *State of Uttar Pradesh* v. *Kamal Kishore Saini*, AIR 1988 SC 208 : (1988) 1 SCC 287 : 1988 SCC (Cri) 107 (116) : 1988 CrLJ 405 : 1988 CrLR (SC) 40 : JT 1987 (5) SC 285 : (1988) 1 SCR 859.

[12806] ● ***Defence already under detention—Awareness of earlier detention enough.***—When a detenu is already under detention for an offence, whether bailable or non-bailable, the detaining authority will take into his consideration the fact of detention of the detenue and, there must be compelling reasons to justify his preventive detention in spite of the fact that he is already under detention on a charge of a criminal offence. There must be material for such compelling reasons and the material or compelling reasons must appear from the grounds of detention that will be communicated to the detenu. In other words, two facts must appear from the grounds of detention, namely, (1) awareness of the detaining authority of the fact that the detenu is already in detention and (2) there must be compelling reasons, justifying such detention, despite the fact that the detenu is already under detention. In the instant case, it has been already noticed that the detaining authority was aware of the fact that the appellant was arrested and produced before the Additional Metropolitan Magistrate, New Delhi. The grounds of detention also disclosed compelling reasons that the appellant should be preventively detained under the Act in spite of his detention on a charge under Section 135 of the Customs Act. It is not the case of the appellant that the grounds of detention do not disclose compelling reasons. All that has been urged on behalf of the appellant is that there has been non-application of mind by the detaining authority of the fact of detention of the appellant. We are however unable to accept the contention that there has been non-application of mind by the detaining authority to the relevant facts. The detaining authority, besides being aware of the fact that the appellant was already in detention, has taken into consideration the relevant facts before passing the impugned order of detention under the Act, which is apparent from the grounds of detention. In the circumstances, the contention that the impugned order of detention should be struck down on the ground of non-application of mind by the detaining authority, is rejected. *Vijay Kumar* v. *Union of India*, AIR 1988 SC 934 : (1988) 2 SCC 57 : 1988 SCC (Cri) 293 (301) : 1988 CrLJ 951 : 1988 CrLR (SC) 217 : JT 1988 (1) SC 448 : (1988) 3 Crimes 50 : (1988) 3 SCR 42.

[12807] ● ***Detenu's statement under Section 161, CrPC—Not to be brushed aside for purpose of preventive detention.***—The detenu accepted the allegations against himself in his statement recorded under Section 161 of the CrPC. It is true that it may not be a legally recorded confession which can be used as substantive evidence against the accused in the criminal case, but it cannot be completely brushed aside on that ground for the purpose of his preventive detention. *K.Aruna Kumari* v. *Government of Andhra Pradesh*, AIR 1988 SC 227 : (1988) 1 SCC 296 : 1988 SCC (Cri) 116 (124) : 1988 CrLJ 411 : 1988 CrLR (SC) 7 : JT 1987 (5) SC 378 : (1988) 1 SCR 973 : (1988) 1 UJ (SC) 103 : (1987) 3 Crimes 741.

[12808] ● ***Section 3 of National Security Act not preclude authority from making order of detention against person in Jail.***—Section 3 of the National Security Act does not preclude the authority from making an order of detention against a person while he is in custody or in Jail, but the relevant facts in connection with the making of the order would make all the difference in every case. The validity of the order of detention has to be judged in every individual case on its own facts. There must be material apparently disclosed to the detaining authority in each case that the person against whom an order of preventive detention is being made is already under custody and yet for compelling reasons, his preventive detention is necessary. *Shashi Aggarwal*

v. *State of Uttar Pradesh*, AIR 1988 SC 596 : (1988) 1 SCC 436 : 1988 SCC (Cri) 178 (181) : 1988 CrLJ 839 : 1988 CrLR (SC) 184 : JT 1988 (1) SC 83 : (1988) 2 SCR 593 : (1988) 3 Crimes 184.

[12809] ● ***Subjecting satisfaction of authority—Court not to substitute its own opinion.***—The subjective satisfaction of the detaining authority as regards the factual existence of the condition on which the order of detention can be made, namely, the grounds of detention constitute the foundation for the exercise of the power of detention and the Court cannot be invited to consider the property or sufficiency of the grounds on which the satisfaction of the detaining authority is based. Nor can the Court, on a review of the grounds substitute its own opinion for that of the authority. In the instant case the ground of detention is only one *viz.* the detenue was acting prejudicial to the maintenance of supplies of commodity, that is, levy cement, essential to the community by diverting it to the open market. The question whether the detenue was acting in a manner prejudicial to the maintenance of supplies essential to the life of the community is a matter of inference to be drawn from facts. It appears from the grounds, *i.e.* the facts set out that the detenu had made a statement admitting that he had diverted 600 bags of levy cement issued to him for use in the masonry ballast wall along the railway track and, therefore the District Magistrate was justified in coming to the conclusion that the detenu was acting in a manner prejudicial to the maintenance of supplies of the commodity essential to the community. *K. Arun Kumari* v. *Government of Andhra Pradesh*, AIR 1988 SC 227 : (1988) 1 SCC 296 : 1988 SCC (Cri) 116 (125) : 1988 CrLJ 411.

[12810] ● ***Maintenance of public order.***—It is true that the acts themselves, in relation to their effect on public order, which might otherwise be free from the vice of affecting public order might assume a sinister colour and significance from the circumstance under and the manner in which they are done. What might be an otherwise simple "law and order" situation might assume the gravity and mischief of a "public order" problem by reason alone of the manner or circumstances in which or the place at which it is carried out. These are graphically dealt with by HIDAYATULLAH J. in *Ram Manohar Lohia* v. *State of Bihar*, AIR 1966 SC 740. In the present case, the alleged attacks were directed against the same individual, a certain Anil Gautam, and, even according to the Police they constituted merely offences of a non-cognizable nature. In the facts of the case, it is difficult to impart to these acts, which were liable to be dealt with under the ordinary laws of the land a "public order" dimension within the meaning of and for purposes of the extraordinary law of preventive detention." *Ayya alias Ayub* v. *State of Uttar Pradesh*, AIR 1989 SC 364 : (1989) 1 SCC 374 : 1989 SCC (Cri) 153 (163) : 1989 CrLJ 991 : 1989 CrLR (SC) 668 : JT 1988 (4) SC 489 : 1989 UJ (SC) 157 : (1989) 1 Crimes 8.

[12811] ● ***Independent right of detenu to make representation under Article 22(5) of constitution.***—The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release to consider the said representation within the reasonable dispatch and to dispose the same as expeditiously as possible. This Constitutional requirement must be satisfied with respect but if this Constitutional imperative is observed in breach, it would amount to negation of the Constitutional obligation rendering the continued detention Constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty—the highly cherished right—which is enshrined in Article 21 of the Constitution. True, there is no prescribed period either under the provisions of the Constitution or under the concerned detention law within which the detenu's activities requiring his preventive detention with a view to prevent him from acting in a manner prejudicial to the maintenance of the public order. The newspaper reports' indicating that the detenu was already in custody could at best be relevant only to show the fact that he was already in detention prior to the making of the detention order. This fact of the detenu's custody before the making of the order of detention on September 9, 1988 was known to the detaining authority and its effect is a separate point considered latter. The other contents of the newspaper report had no other relevance for this purpose. *N. Meera Rani* v. *Government of Tamil Nadu*, AIR 1989 SC 2027 : (1989) 4 SCC 418 : 1989 SCC (Cri) 732 (742) : 1989 CrLJ 2190 : (1989) 2 SCR 901.

[12812] ● ***Supply of copies of documents to detenu.***—There is no dispute that all the documents which were considered by the detaining authority in reaching his subjective satisfaction and referred to in the grounds of detention have been furnished to the detenu. It is not necessary to furnish copies of all the documents including the bank pass books which are not material and relevant for reaching the subjective satisfaction of the detaining authority merely because they were mentioned in the Panchnama. Moreover, no application had been made before the detaining authority for giving the detenu the copies of the bank pass books necessary for making an effective representation against the order of detention. *Haridas Amarchand Shah of Bombay* v. *K.L. Verma*, AIR 1989 SC 497 : (1989) 1 SCC 250 : 1989 SCC (Cri) 111 (116) : 1989 CrLJ 983 : 1989 CrLR (SC) 136 : JT 1988 (4) SC 632 : (1989) 1 Crimes 647.

[12813] ● ***Representation of detenu pending before Advisory Board.***—Even though a representation is pending before the Advisory Board, the writ petition under Article 32 of the Constitution is maintainable before this Court. *Piyush Kantilal Mehta* v. *Commissioner of Police, Ahmedabad City*, AIR 1989 SC 491 : 1989 SCC (Cri) 438 (442) : 1989 CrLJ 956 : 1989 CrLR (SC) 150 : JT 1988 (4) SC 708 : (1989) 1 Crimes 176.

[12814] ● ***Variation in condition of bail not relevant document.***—Condition imposed by the Magistrate directing the detenue to appear before the office of the enforcement department every day between 11 am. to 2 pm. has been varied to the extent that the accused to attend Enforcement Department and when required". The order varying the condition of bail is not a relevant document and failure to produce the document before arriving at his subjective satisfaction had not vitiated the order. *Haridas Amarchand Shah of Bombay* v. *K.L. Verma*, AIR 1989 SC 497 : (1989) 1 SCC 250 : 1989 SCC (Cri) 111 (114) : 1989 CrLJ 983 : 1989 CrLR (SC) 136 : JT 1988 (4) SC 632 : (1989) 1 Crimes 647.

[12815] ● ***Detaining authority taking into consideration earlier detention and ground therefor.***—An order of detention cannot be made after considering the previous grounds of detention when the same had been quashed by the Court, and if such previous grounds of detention are taken into consideration while forming the subjective satisfaction by the detaining authority in making a detention order, the order of detention will be vitiated. It is of no consequence if the further fresh facts disclosed in the grounds of the impugned detention order have been considered. In the present case, admittedly in the grounds of detention specific reference has been made to the earlier two orders of detention made in 1985 and 1986 against the petitioner. It is also evident that in the schedule of documents annexed to the grounds of detention not only the copies of the order of detention but also of the grounds of detention in the earlier detention cases have been given to the petitioner. It also appears from the statement made in the grounds of detention that the detaining authority took into consideration the previous grounds of detention as well as the orders made therein even though the same were nullified by the High Court as well as by the Advisory Body, presumably, for the purpose of showing that the detenu inspite of those earlier orders of detention was continuing in his bootlegging activities. It has been tried to be contended that though the earlier two detention orders have been mentioned in the grounds and the copy of the orders passed were supplied to the detenue, yet these were not at all considered by him. This submission cannot be sustained. *Jahangirkhan Fazal Khan Pathan* v. *Police Commissioner, Ahmedabad*, AIR 1989 SC 1812 : (1989) 3 SCC 590 : 1989 SCC (Cri) 664 (669) : 1989 CrLJ 2097 : 1989 CrLR (SC) 568 : JT 1989 (3) SC 183 : (1989) 3 SCR 583 : (1989) 3 Crimes 24.

[12816] ● ***Authority coming to conclusion petitioners dangerous persons—Extraneous matters considered.***—It has been urged by the learned counsel for (*Gujarat Prevention of Anti-Social Activities Act, 1985, Section 3(1)*) the petitioners have been deprived of making effective and purposeful representations as envisaged under Article 22(5) of the Constitution of India to the authorities concerned, since the detaining authority for bringing them within the definition of Section 2(c) of the Gujarat Prevention of Anti-Social Activities Act has taken into consideration certain extraneous matters with which the petitioner have no connection whatsoever. This submission, in our view, cannot be easily brushed aside as having no force. *Mehboob Khan Nawab Khan Pathan* v. *Police Commissioner, Ahmedabad*, AIR 1989 SC 1803 : (1989) 3 SCC 568 : 1989 SCC (Cri) 655 (659) : 1989 CrLJ 2111 : 1989 CrLR (SC) 631 : JT 1989 (3) SC 168.

[12817] ● ***Detention order—Failure to take petitioner into custody.***—"One other argument advanced before us was that even though the order of detention had been passed on April 5, 1988, no steps were taken to take the petitioner into custody till he surrendered himself in Court on July 4, 1988. This contention is on the face of it devoid of merit because it has been specifically stated in the counter-affidavits that the petitioner was absconding and, hence, proclamations were made under Sections 82 and 83, CrPC and it was only thereafter, that the petitioner had surrendered himself in Court. It is not, therefore, a case where the petitioner was freely moving about but no arrest was effected because his being at large was not considered a hazard to the maintenance of public order." *Sharad Kumar Tyagi* v. *State of*

Uttar Pradesh, AIR 1989 SC 764 : (1989) 1 SCC 736 : 1989 SCC (Cri) 294 (315) : 1989 CrLJ 830 : 1989 CrLR (SC) 186 : JT 1989 (2) SC 21 (2) : (1989) 1 SCR 257 : 1989 UJ (SC) 432.

[12818] ● ***Detention order—Single instance supply justification for.***—It is true that if the only ground or justification for the detention is the apprehension that the detenu was likely to be enlarged on bail, the detention might be rendered infirm. But where, as here, there are other grounds, the reference by detaining authority to the prospects of grant of bail could be no more than an emphasis or the imminence of the recurrence of the offensive activities of the detenu. Even a single instance of activity tending to harm "public order" might in the circumstances of its commission; reasonably supply justification for the satisfaction as to a legitimate apprehension of a future repetition of similar activity to the detriment of "public order". *Ayya alias Ayub* v. *State of Uttar Pradesh*, AIR 1989 SC 364 : (1989) 1 SCC 374 : 1989 SCC (Cri) 153 (162) : 1989 CrLJ 991.

[12819] ● ***Detention order could be passed even if prosecution fails.***—Even if a prosecution against a person fails or bail is granted an order of detention could be passed drawing the satisfaction therefor from the facts and circumstances involved in the criminal proceedings. An offender might secure an acquittal by intimidating witnesses. It all depends upon the circumstances of each case. But it is necessary for the detaining authority to resist the temptation to prefer and substitute, as a matter of course the easy expedience of a preventive detention to the more cumbersome one of punitive detention. *Ayya alias Ayub* v. *State of Uttar Pradesh*, AIR 1989 SC 364 : (1989) 1 SCC 374 : 1989 SCC (Cri) 153 (162) : 1989 CrLJ 991.

[12820] ● ***Detention vitiated on ground of non application of mind if relevant piece of evidence not considered.***—"What weight the contents and assertions in the telegram should carry is an altogether a different matter. It is not disputed that the telegram was not placed before and considered by the detaining authority. There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering this material, but in the facts of the case the omission to consider the material assume materiality." *Ayya alias Ayub* v. *State of Uttar Pradesh*, AIR 1989 SC 364 : (1989) 1 SCC 374 : 1989 SCC (Cri) 153 (164) : 1989 CrLJ 991 : 1989 CrLR (SC) 668 : JT 1988 (4) SC 489 : 1989 UJ (SC) 157 : (1989) 1 Crimes 8.

[12821] ● ***Subjective satisfaction—Fact of acquittal in two cases.***—The requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influenced his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order.

In the case on hand, at the time when the detaining authority passed the detention order the vital fact, namely, the acquittals of the detenu in case Nos. mentioned at S. Nos. 2 and 3 have not been brought to his notice and on the other hand they were withheld and the detaining authority was given to understand that the trial of those cases was pending. The result is that the non-placing of the material fact—namely, the acquittal of detenu in the above said two cases resulting in non-application of mind of detaining authority to the said fact has vitiated the requisite subjective satisfaction, rendering the impugned detention order invalid. *Dharamdas Shamlal Agarwal* v. *Police Commissioner*, AIR 1989 SC 1282 : (1989) 2 SCC 370 : 1989 SCC (Cri) 378 (385) : 1989 CrLJ 1130 : 1989 CrLR (SC) 433 : JT 1989 (1) SC 580 : (1989) 2 SCR 43 : (1989) 2 Crimes 53.

[12822] ● ***Public order—Activities prejudicial to.***—"In the instant case the detaining authority in our opinion has failed to substantiate that the alleged anti-social activities of the petitioner adversely affect or are likely to affect adversely the maintenance of public order. It is true that some incidents of beating by the petitioner had taken place, as alleged by the witnesses. But, such incidents in our view do not have any bearing on the maintenance of public order. The petitioner may be punished for the alleged offences committed by him but, surely, the acts constituting the offences cannot be said to have affected the even tempo of the life of the community. It may be that the petitioner is a bootlegger within the meaning of Section 2(b) of the Gujarat Prevention of Anti-Social Activities Act but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in sub-section (4) of Section 3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order…….in our opinion these offences or the allegations cannot be said to have created any feeling of insecurity or panic or terror among the members of the public of the area in question giving rise to the question of maintenance of public order. The order of detention cannot, therefore, be upheld. *Piyush Kantilal Mehta* v. *Commissioner of Police, Ahmedabad City*, AIR 1989 SC 491 : 1989 SCC (Cri) 438 (445, 446) : 1989 CrLJ 956 : 1989 CrLR (SC) 150 : JT 1988 (4) SC 703 : (1989) 1 Crimes 176.

[12823] ● ***Apprehension of communal riot—Subjective satisfaction of detaining authority.***—A situation that emerged as a result of the incident, as stated in the said report, was grave and serious and prejudicially affected public order. It may be a solitary incident, but it gave rise to communal tension and there was apprehension of a communal riot as alleged in the report. The report in own opinion is a sufficient material for the subjective satisfaction of the detaining authority that there was disturbance of tranquillity and harmony of public life. The detaining authority had taken into consideration all the circumstances including the grave and serious situation that emerged as a result of the incident. In our opinion when an incident was such that it created communal tension and the authorities were apprehensive of the breaking of a communal riot, such incident in itself may be sufficient and may afford justification for the satisfaction of the detaining authority for the detention of the detenu in order to prevent him from indulging in such activity prejudicial to public order even though as submitted by the learned counsel there are no antecedent acts of similar nature or past history of commission of crime by the detenu. *Bimla Rani* v. *Union of India,* (1989) 4 SCC 509 : 1989 SCC (Cri) 756 (759, 760) : 1989 CrLR (SC) 770 : JT 1989 (3) SC 737 : (1989) 3 Crimes 578.

[12824] ● ***Detention order—Solitary offence committed by Police constable with assistance of member of public.***—Ram Ratan Head Constable and Hawa Singh Constable in the Security Unit of Delhi Police, while on duty, together committed a cognizable offence under Section 392/34 of the IPC alongwith a member of the public. Immediately they were arrested and placed on suspension. The Court, however, released them on bail. While the case was under investigation, the Commissioner of Police, Delhi thought fit to detain them under the National Security Act. Subsequently, they have been summarily dismissed from service under Article 311(ii)(b) of the Constitution. It is an isolated criminal case with no sinister significance attached to it. The offence was committed by two misguided Policemen under the cover of darkness with the assistance of a member of the public. It was certainly suicidal to those two Police personnel. But it seems to have no connection whatsoever to disturb the public order having regard to the circumstances of the case. *Angoori Devi for Ram Ratan* v. *Union of India*, AIR 1989 SC 371 : (1989) 1 SCC 385 : 1989 SCC (Cri) 164 (166, 170, 171) : 1989 CrLJ 950 : 1989 CrLR (SC) 129 : JT 1988 (4) SC 587 : (1989) 1 Crimes 145.

[12825] ● ***Non-application of mind of detaining authority.***—*Gujarat Prevention of Anti-Social Activities Act, 1985, Section 3(1)*—The detaining authority has not applied his mind properly confining his consideration only with reference to incidents mentioned in the grounds of detention, and has mechanically passed these orders taking into consideration various extraneous matters, namely, the incidents other than those shown in the grounds of detention—especially incidents under Sl. Nos. 5 and 6 of Annexure 'D' with which the detenus have no direct or indirect connection or participation. *Mehboob Khan Nawab Khan Pathan* v. *Police Commissioner, Ahmedabad*, AIR 1989 SC 1803 : (1989) 3 SCC 568 : 1989 SCC (Cri) 655 (659) : 1989 CrLJ 2111 : 1989 CrLR (SC) 631 : JT 1989 (3) SC 168.

[12826] ● ***Preventive Detention Activities concerning more than two Districts.***—The petitioner had taken a revolver with him and threatened all the shop-keepers in the market of Sardhana that if anyone failed to pay "chauth" he would not be allowed to open his shop and he would have to face the consequences. On account of this threat the shop-owners downed the shutters of their shops and at that point of time H.C. Khajan Singh happened to reach the market. Seeing what was happening H.C. Khajan Singh attempted to apprehend the petitioner but he managed to escape on his motor-cycle after firing several shots in the air with his revolver. H.C. Khajan Singh had at once returned to the Station and made an entry in the general diary about this incident.

J&K Public Safety Act, 1978, Section 8(2)—Section 8(2) of J and K Public Safety Act, 1978 does not state that inter-district activities, the Divisional Commissioner alone is competent to pass an order of detention. Power to detain has been conferred on the Divisional Commissioner as well as the District Magistrate. There is, therefore, no substance in the contention that since the activities attributed to the detenue are concerned with two districts, Jammu and Kathua, the order of detention issued by the District Magistrate, Jammu is illegal and that it ought to have been issued by the Divisional Commissioner of the Division or by the State Government. *Swaran Singh* v. *State of Jammu and Kashmir*, AIR 1989 SC 188 : 1989 (1) Supp SCC 88 : 1989 SCC (Cri) 191 : 1989 CrLJ 792 : (1989) 1 Crimes 68.

[12827] ● ***Incident affecting tempo of life in market.***—This incident cannot be considered as merely causing disturbance of the law and order situation but must be viewed as one affecting the even tempo of life in the market. The shop-keepers had closed their shops and they as well as the public in the market area would have felt terrified when they saw the petitioner moving with a revolver and demanding "chauth" payment from the shop-keepers. Viewed in the perspective of the decisions of this Court in *State of Uttar Pradesh* v. *Hari Shankar Tewari*, (1987) SCC (Cri) 388 and other cases, it cannot be said that the demands made and threats given by the petitioner to the contractors and shop-keepers as mentioned in the grounds would have its reach only to the limited extent of affecting the law and order situation and not go so far as to affect the maintenance of public order. *Sharad Kumar Tyagi* v. *State of Uttar Pradesh*, AIR 1989 SC 641 : (1989) 1 SCC 736 : 1989 SCC (Cri) 294 (300, 301) : 1989 CrLJ 830 : JT 1989 (2) SC 21 (2) : (1989) 1 SCR 257.

[12828] ● ***Grounds of detention vague—Order illegal and bad.***—The averments that have been made in the grounds are vague and without any particulars as to at what place or when and to whom the detenu threatened with Rampuri knife and whom he has alleged to have beaten. These vague averments made in the grounds of detention are bad inasmuch as the detenu could not make an effective representation against the impugned order of detention. As such the detention order is illegal and bad. *Jahangirkhan Fazal Khan Pathan* v. *Police Commissioner, Ahmedabad*, AIR 1989 SC 1812 : (1989) 3 SCC 590 : 1989 SCC (Cri) 664 (670) : 1989 CrLJ 2097 : 1989 CrLR (SC) 568 : JT 1989 (3) SC 183 : (1989) 3 SCR 583 : (1989) 3 Crimes 24.

[12829] ● ***Failure of detenu to take friend with him.***—From the materials on record, we are satisfied that the appellant was accorded permission to have the services of a friend and the radiogram sent by the Government was duly communicated to him but for some reason he had not availed the services of the friend. He did not also choose to represent to the Advisory Board that he was not given sufficient time to secure the services of a friend. The contention that in spite of the petitioner having specifically asked for the assistance of a friend at the time he was heard by the Advisory Board, he was denied the opportunity to have such assistance fails. *Sharad Kumar Tyagi* v. *State of Uttar Pradesh*, AIR 1989 SC 764 : (1989) 1 SCC 736 : 1989 SCC (Cri) 294 (315) : 1989 CrLJ 830.

[12830] ● ***Dangerous person.***—For the purpose of determining the petitioner as a dangerous person, it is also very relevant to notice that Section 2(c) of the Gujarat Prevention of Anti-Social Activities Act, 1985 defines dangerous person as a person who habitually commits or attempts to commit offences punishable under Chapter XVI a Chapter XVII of the Indian Penal Code or any of the offences under Chapter V of the Arms Act. From the seven criminal cases two cases are of 1985 and 1986 which are not proximate to the date of the order of detention and so stale. Moreover the petitioner being acquitted the said cases could not be taken into consideration. Similarly case No. 3 also falls outside the purview of Section 2(c) of the said Act. Further case No. 122/86 can also not be considered as petitioner earned acquittal. Merely on consideration of the other three criminal cases which are under investigation and are yet to be decided the detaining authority can not come to his subjective satisfaction that the detenue was a dangerous person who habitually indulges in committing offence referred to in Section 2(c) of the PSA Act. The other averments made in the said grounds are absolutely vague inasmuch as no particulars as to which persons have been robbed or what offences have been committed by showing deadly weapons at what place have not been mentioned. There is also no mention when and where the detenue in a drunken condition demanded from whom nor it has been stated when the detenue threatened whom to murder by showing razor or Rampuri knife. There is no particular instance also as to which peace-loving citizens and in which area the petitioner has beaten in public believing that they are giving information of his criminal activities to the Police. In such circumstances it is not at all possible for the detenu to make a proper and effective representation. *Abdul Razak Nanne Khan Pathan* v. *Police Commissioner*, (1989) 4 SCC 43 : 1989 SCC (Cri) 679 : JT (1989) 3 SC 231 : (1989) 2 Scale 99.

[12831] ● ***Withholding of vital fact.***—Withholding of the vital fact that the detenu has been acquitted in the criminal resulting in the non-application of the mind of the detaining authority to the said fact vitiates the impugned order *Ramesh* v. *State of Gujarat*, AIR 1989 SC 1881

(1989) 4 SCC 124 : 1989 SCC (Cri) 716 (720, 721) : 1989 CrLJ 2094.

[12832] ● *Wide gap between Law and order and public order.*—This Court has on several occasions indicated that there is a wide gap between law and order and public order. The criminal offence may relate to the field of law and order but such an offence would not necessarily give rise to a situation of public order. Depending upon peculiar situations an act which may otherwise have been overlooked as innocuous might constitute a problem of public order. Selling of liquor by the petitioner would certainly amount to an offence under the Prohibition Act but without something more would not give rise to a problem of public order. Similarly, commission of any other criminal offence—even assault or threat of assault—would not bring the matter within the ambit of public order……Four witnesses had deposed against the petitioner. Their statements were supplied to the petitioner without disclosing their names. It is the stand of the respondent that if the names were disclosed, the witnesses were likely to be bodily injured or even eliminated. There may be certain situations where the disclosure has to be withheld. The grounds provided by the detaining authority have clearly exhibited a sense of helplessness to meet the requirements of situation that however is a matter for the Legislature and the administration to consider but the Court has to zealously guard encroachments on the liberty of the citizen. *Ahmed Hussain Shaikh Hussain* v. *Police Commissioner, Ahmedabad*, AIR 1989 SC 2274 : (1989) 4 SCC 751 : 1990 SCC (Cri) 86 (92, 93) : 1989 CrLJ 2321 : 1990 CrLR (SC) 31 : 1990 UJ (SC) 151.

[12833] ● *Activities—Prejudicial to maintenance of public order.*—*Gujarat Prevention of Anti-Social Activities Act, 1985, Section 4(3).*—The materials available on record in the present case are not sufficient and adequate for holding that the alleged prejudicial activities of the detenu have either affected adversely or likely to affect adversely the maintenance of public order within the meaning of Section 4(3) of the Act and as such, the order is liable to be quashed. *Piyush Kantilal Mehta* v. *Commissioner of Police, Ahmedabad City*, AIR 1989 SC 491 : 1989 Supp (1) SCC 322 : 1989 SCC (Cri) 438 : 1989 CrLJ 956 : (1989) 1 Crimes 176, **relied upon**. TO THE SAME EFFECT : (1) *Omprakash* v. *Commissioner of Police*, AIR 1990 SC 496 (499) : 1990 SCC (Cri) 198 : 1990 CrLJ 328 : 1990 CrLR (SC) 566 : JT 1989 (4) SC 177 : (1989) 2 UJ (SC) 733 : (1990) 1 Crimes 235.

[12834] ● *Maximum period of detention twelve months.*—Once the order of detention is confirmed by the State Government, maximum period for which or detenue shall be cannot exceed twelve months from the date of detention. The Act nowhere requires the detaining authority to specify the period for which the detenue is required to be detained. The expression "the State Government are satisfied that it is necessary so to do, they may, by order in writing direct that during such period as may be specified in the order" accruing in sub-section (2) of Section 3 of the above-said Act relates to the period for which the order of delegation issued by the State Government is to remain inforce and it has no relevance to the period of detention. In this connection we have scrutinized the Preventive/ Detention Act, 1950, the Maintenance of Internal Security Act, COFEPOSA Act, National Security Act, but in none of these Acts the detaining authority is required to specify the period of detention, while making the order of detention against a person. This Court has consistently taken the view that the order of detention is not rendered illegal merely because it does not specify the period of detention. *T. Devaki* v. *Government of Tamil Nadu*, AIR 1990 SC 1086 (1091) : (1990) 2 SCC 456 : 1990 SCC (Cri) 348 : 1990 CrLJ 1140 : 1990 CrLR (SC) 260 : JT 1990 (1) SC 444 : (1990) 2 Crimes 1.

[12835] ● *Working knowledge of English enough for making representation.*—A working knowledge of English enabling him to understand the grounds would be enough for making a representation. He could very well send his representation in the language known by him. *Kubic Darusz* v. *Union of India*, AIR 1990 SC 605 (611) : (1990) 1 SCC 568 : 1990 SCC (Cri) 227 : 1990 CrLJ 796.

[12836] ● *Detention of foreign national.*—There may be cases where while a citizen and resident of the country deserves preventive detention apart from criminal prosecution in case of Foreign national, not resident of the country, he may not be justifiably subjected to preventive detention in the event of which no international legal assistance is possible unlike in case of criminal prosecution and punishment. *Kubic Darusz* v. *Union of India*, AIR 1990 SC 605 (615) : (1990) 1 SCC 568 : 1990 SCC (Cri) 227 : 1990 CrLJ 796.

[12837] ● *Representation—Delay in disposal of.*—*Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug offenders, Forest offenders, Immoral Traffic offenders and Slum Grabbers Act, 1982.*—In this case there were no laches or negligence on the part of the detaining authority or other authorities concerned in dealing with the representation of detenue. The time imperative can never be absolute or obsessive, and that the occasional observations made by this Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasis the expedition with which the representation must be considered and not that it is a marginal formula, the slightest breach of which must result in the release of the detenu. In the instant case, the detaining authority has explained the delay in the disposal of the representation made by the detenue and accordingly the order of detention cannot be rendered invalid on that ground. *Madan Lal Anand* v. *Union of India*, AIR 1990 SC 176 : (1990) 1 SCC 81 : 1990 SCC (Cri) 51 (64) : 1990 CrLJ 659 : 1990 CrLR (SC) 69.

[12838] ● ***Detenu absconding.***—Counsel for the petitioner submitted that in this case there was no material adduced on behalf of the Government indicating that the petitioner was "absconding". It was urged that there are no materials at all to indicate that the petitioner was evading arrest or was absconding. It was submitted that Section 7 of the National Security Act gave power to the authorities to take action in case the persons were absconding and in case the order of detention cannot be executed. It is stated that in this case no warrant under Section 7 of the Act has been issued in respect of his property or person. Hence, it was contended that the respondent was not justified in raising the plea that the petitioner was absconding. We are unable to accept this contention. *Shafiq Ahmed* v. *District Magistrate, Meerut*, AIR 1990 SC 220 (223) : (1989) 4 SCC 556 : 1989 SCC (Cri) 774 : 1990 CrLJ 573 : JT 1989 (3) SC 659.

[12839] ● ***Failure of authorities to take action under Section 7 of N.S. Act no ground that detention order bad.***—*National Security Act, 1980, Section 7*—If in a situation the person concerned is not available or cannot be served then the mere fact that the action under Section 7 of the Act, has not been taken, would not be a ground to say that the detention order was bad. Failure to take action, even if there was no scope for action under Section 7 of the Act, would not be decisive or determinative of the question whether there was undue delay in serving the order of detention. Furthermore, in the facts of this case, as has been contended by the Government, the petitioner has no property, no property could be attached and as the Government's case is that he was not available for arrest, no order under Section 7 could have been possibly made. *Shafiq Ahmed* v. *District Magistrate, Meerut*, AIR 1990 SC 220 (223) : (1989) 4 SCC 556 : 1989 SCC (Cri) 774 : 1990 CrLJ 573 : JT 1989 (3) SC 659.

[12840] ● ***Order of detention to be based on material.***—The Court has to ensure that the order of detention is based on materials before it. If it is found that the order passed by the detaining authority was on materials on record, the Court can examine the record only for the purpose of seeing whether the order of detention was based on no materials or whether the materials have rational nexus with satisfaction that public order was prejudiced. Beyond this, the Court is not concerned. *Shafiq Ahmed* v. *District Magistrate, Meerut*, AIR 1990 SC 220 (224) : (1989) 4 SCC 556 : 1989 SCC (Cri) 774 : 1990 CrLJ 573 : JT 1989 (3) SC 659.

[12841] ● ***Detention order—Preventing person from acting in manner prejudicial to maintenance of public order.***—*National Security Act, 1980, Section 3(2)*—The detention under the Act, is for the purpose of preventing persons from acting in any manner prejudicial to the maintenance of public order. Sub-section (2) of the Section 3 of the Act authorises the Central Government or the State Government, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State, it is found necessary then the person can be detained. Hence there must be conduct relevant to the formation of the satisfaction having reasonable nexus with the actions of the petitioner which are prejudicial to the maintenance of public order. *Shafiq Ahmed* v. *District Magistrate, Meerut*, AIR 1990 SC 220 : (1989) 4 SCC 556 : 1989 SCC (Cri) 774 : 1990 CrLJ 573 : JT 1989 (3) SC 659.

[12842] ● ***Grounds of detention—Vagueness.***—It was urged as to what the petitioner said to whom the rumour was spread as mentioned in ground No.1 and what "other provoking things" the petitioner is alleged to have said as alleged in the grounds mentioned before. It was urged, it is further not clear as to whom the petitioner wanted to teach a lesson. It has to be borne in mind that if more than one ground are stated in the grounds then the fact that one of the grounds is bad would not alter order of detention after the amendment of the Act in 1984 provided that the other grounds were valid. But apart from the same, it appears to us that none of grounds was vague.

The grounds must be understood in the light of the background and the context of the facts. It was quite clear what the detaining authority was trying to convey was that the petitioner stated things of the nature and it was to teach Hindu a lesson. Hence, it was meant to create communal tension. There is no irrelevancy or vagueness in the grounds. *Shafiq Ahmad* v. *District Magistrate. Meerut*, AIR 1990 SC 220 (224, 225) : (1989) 4 SCC 556 : 1989 SCC (Cri) 774 : 1990 CrLJ 573.

[12843] ● *Invalidity of one or some of grounds of detention.*—If more than one grounds are stated in the grounds then the fact that one of the grounds is bad, would not alter order of detention after the amendment of the National Security Act, 1980 in 1984 provided the other grounds were valid. *Shafiq Ahmed* v. *District Magistrate, Meerut*, AIR 1990 SC 220 : (1989) 4 SCC 556 : 1989 SCC (Cri) 774 : 1990 CrLJ 573 : JT 1989 (3) SC 659.

[12844] ● *Detaining authority not taken into account possibility of detenu being released on bail.*—"….the detaining authority though can take into account the possibility of the detenu being released on bail in the criminal proceedings, have to be satisfied, having regard to his past activities or by reasons of the credible information or cogent reasons, that if he is enlarged on bail, he would indulge in such criminal activities. In the present case, except the bald statement that the detenu would repeat his criminal activities after coming out of the Jail, there are no credible information or material or cogent reasons apparent on the record to warrant an inference that the detenu if enlarged on bail would indulge in such criminal activities which are prejudicial to the maintenance of essential services. There must be something more than what is found in the record here to come to the conclusion that this is not a case of solitary incident but a case of the detenu indulging in business of receiving stolen electric wires. On the other hand, it appears to us that the detention order has been made in order to supplant the criminal prosecution which is not permitted." *Anand Prakash* v. *State of Uttar Pradesh*, AIR 1990 SC 516 (521) : (1990) 1 SCC 291 : 1990 SCC (Cri) 96 : 1990 CrLR (SC) 94 : JT 1989 (4) SC 557 : (1990) 1 Crimes 265.

[12845] ● *Detention order made to prevent detenu from indulging in unlawful activities.*—*National Security Act, 1980, Section 8*—The order of detention was made under Section 8 of the National Security Act 1980 by the District Magistrate on the ground that with a view to prevent the detenue from indulging in unlawful activities which are prejudicial to the maintenance of essential services and supplies required for public life it was necessary to keep him under detention. It was contended on behalf of the detenu that he had no past criminal record. The present criminal case filed under Section 411, IPC is the first crime which had been alleged against him. In his statement Munshi Sharma the detenu.

The present criminal case filed under Section 411 of the IPC is the first crime which had been alleged against him. Munshi Sharma did not say that he purchased the stolen wire for the detenu or on the instructions of the detenu. In fact he did not even say that he is the servant or agent of the detenu. He had merely stated that 20 Kg. of melted wire recovered from him was purchased by him from Santosh and his brother Jagdish and that he had melted and sold the same to the detenu. After it is melted in the melted form it could not be distinguished from any other melted wire of legal origin. The statement also does not impute knowledge on the part of the detenu that the same was from stolen wires. In any case, it was impossible to say on the basis of this statement that the detenu was in league with other persons in the activity of stealing wire or purchasing of the same. In fact it is not known how from the melted wire weighing 20 Kg. the detaining authority or the investigating officer come to the conclusion that the gauge of the melted wire was found to be that of Government wire. Again only 20 Kg. was found in the factory and that too in the possession of Munshi Sharma though inside the factory. The statement of Munshi Sharma in the recovery memo and melted wire recovered from Sharma were the only material available before the detaining authority. In the light of the absence of past criminal history on the part of the detenu we have no doubt that the statement found in the recovery memo could not form basis of satisfaction for the detention. *Anand Prakash* v. *State of Uttar Pradesh*, AIR 1990 SC 516 (518, 519, 520) : (1990) 1 SCC 291 : 1990 SCC (Cri) 96 : 1990 CrLR (SC) 94 : JT 1989 (4) SC 557 : (1990) 1 Crimes 265.

[12846] ● *Detention order made to supplement criminal prosecution not permitted.*—The detaining authority though can take into account the possibility of the detenue being released on bail in the criminal proceedings, have to be satisfied, having regard to his past activities or by reason of the credible information or cogent reasons, that if he is enlarged on bail he would indulge in such criminal activities.

In the present case except the bald statement that the detenu would be criminal after coming out of the Jail, there are no credible information or material or cogent reasons apparent on the record to warrant an inference that the detenue if enlarged on bail would indulge in such criminal activities which are prejudicial to the maintenance of essential services. There must be something more than what is found in the record here to come to the conclusion that this is not a case of solitary incident but a case of the detenue indulging in business of receiving stolen electric wires. On the other hand it appears that the detention order has been made in order to supplant the criminal prosecution which is not permitted. *Anand Prakash* v. *State of Uttar Pradesh*, AIR 1990 SC 516 (521) : (1990) 1 SCC 291 : 1990 SCC (Cri) 96 : (1990) 1 Crimes 265.

[12847] ● ***Detenu abetting smuggling of goods and dealing with smuggled goods.***—*COFEPOSA, 1974, Section 2(e) and 3(1)*—In Para. 47 of the grounds of detention, it has been stated by the detaining authority that the detenu has played a very active and major role for obtaining advance licences in the names of the said firms, importing the polyester filament yarn and polyester fibre, getting the same cleared from Bombay customs and also for selling it in the local market in India in violation of he conditions of the said Notification dated June 6, 1978 and also of the advance licences. The detenu has been abetting the smuggling of the goods and also has been dealing with smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods. It is strenuously urged on behalf of the appellant that as an abeyance order was passed against M/s. Expo International on March 27, 1985 before the expiry of six months from the date of first clearance of the goods imported by it on December 6, 1984, the said firm was prevented from complying with the condition of the advance licence, namely, that the readymade garments were to be manufactured out of the imported polyester filament yarn and polyester fibre and the resultant products were to be exported abroad within a period of six months from the date of the first clearance. It is submitted on behalf of the appellant that as the detenu was prevented from complying with the condition of the advance licence within six months of the first clearance by the issuance of an abeyance order by the Dy. Chief Controller Imports & Exports, the provision of Section 111(o) of the Customs Act was not violated, for the goods could not be confiscated and, accordingly, there was no question of smuggling within the meaning of Section 2(e) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 read with Section 2(39) of the Customs Act, 1962. It is urged that the detaining authority should have taken into consideration the above fact and should not have passed the impugned order of detention. We regret, we are unable to accept the argument. It is true that before the expiry of six months from the date of the fist clearance of the imported goods, an abeyance order was passed against M/s. Expo International. The question is whether by such abeyance order, the said firm or the detenu was prevented from manufacturing the readymade garments and exporting the same within six month from the date of the first clearance. In the grounds of detention, it has been clearly stated with all relevant particulars that the said firms had really no existence and they did not have any factory whatsoever or any manufacturing device for the purpose of manufacturing readymade garments. It is apparent from the grounds of detention and the counter-affidavit filed on behalf of the respondents that with a view to procuring the licences for the purpose of importation of the goods without payment of any duty and for selling the same in the market the said firms were created and/or set up by the detenus including the detenu-Madan Lal Anand. In these circumstances, no exception can be taken to the passing of the abeyance order against M/s. Expo International and, as it was more than certain that the imported goods would not and could not be utilised in accordance with the condition of the advance licence, the provision of Section 111(o) of the Customs Act, was violated on the very importation of the goods. There is, therefore, no substance in the contention made on behalf of the appellant that there was no smuggling in this case and, as such, the order of detention was not at all justified. The contention is rejected. *Madan Lal Anand* v. *Union of India*, AIR 1990 SC 176 : (1990) 1 SCC 81 : 1990 SCC (Cri) 51 (55, 56, 57) : 1990 CrLJ 659 : 1990 CrLR (SC) 69.

[12848] ● ***Grounds—Communication in language understood by detenu.***—It is settled law that the communication of the grounds which is required by the earlier part of Cl. (5) of Article 22 of the Constitution is for the purpose of enabling the detenu to make a representation, the right to which is guaranteed by the latter part of the clause. A communication in this context must, therefore, mean imparting to the detenu sufficient and effective knowledge of the facts and circumstances on which the order of detention is passed, that is, of the prejudicial acts which the authorities attribute to him. Such a communication would be there when it is made in a language understood by the detenu as was held in *Harikisan* v. *State of Maharashtra*, AIR 1962 SC 911. "Communicate" is a strong word. It requires that sufficient knowledge of the basic facts constituting the grounds should be imparted effectively and fully to the detenue in writing in a language which he understands, so as to enable him to make a purposeful and effective representation. If the grounds are only verbally explained to the detenu and nothing in writing is left with him in a language which he understands, then that purpose is not served, and the Constitutional mandate in Article 22(5) is infringed. *Kubic Dariuze* v. *Union of India*, AIR 1990 SC 605 (609) : (1990) 1 SCC 568 : 1990 SCC (Cri) 227 : 1990 CrLJ 796 : 1990 CrLR (SC) 178 : JT 1990 (1) SC 38 : (1990) 1 Crimes 397.

[12849] ● ***Detention order—Delay in passing of.***—"In spite of the fact that the recovery statement itself was made as early as on 3-3-1989 no action was taken till 3-5-1989. Nothing more is stated in the detention order. The delay has also not been satisfactorily explained in the counter statement of the respondents. The ground instance, therefore, could not (be) a proximate cause for a sudden decision to take action under the National Security Act and this also vitiates the order." *Anand Prakash* v. *State of Uttar Pradesh*, AIR 1990 SC 516 (521) : (1990) 1 SCC 291 : 1990 SCC (Cri) 96 : 1990 CrLR (SC) 94 : JT 1989 (4) SC 557 : 1990 CrAppR (SC) 95 : (1990) 1 Crimes 263.

[12850] ● ***Non-application of mind by detaining authority in making detention order.***—If the detaining authority was himself present and was an eye-witness to the occurrence on the basis of which detention order was made, it was imperative for the detaining authority to have honestly and *bona fide* formed the requisite opinion in making the order of detention on the basis of his own knowledge and perception instead of relying more on the version of the incident as placed before him by the sponsoring authority. In a case where the detaining authority may not be present at the place of the incident or the occurrence, he has to form 'the requisite opinion on the basis of materials placed before him by the sponsoring authority' but where the detaining authority was himself present at the scene of occurrence, he should have relied more on his own observation and knowledge than on the report of the sponsoring authority. In the instant case, the detaining authority though present at the scene of occurrence does not support the incident as presented to him by the sponsoring authority. In the circumstances we are of the opinion that there was non-application of mind by the detaining authority in making the impugned order of detention. *T. Devaki* v. *Government of Tamil Nadu*, AIR 1990 SC 1086 (1098) : (1990) 2 SCC 456 : 1990 SCC (Cri) 348 : 1990 CrLJ 1140 : 1990 CrLR (SC) 260 : JT 1990 (1) SC 444 : (1990) 1 SCR 836 : (1990) 2 Crimes 1.

[12851] ● ***Solitary assault on one individual hardly disturb public peace or place public order in jeopardy.***—A Solitary assault on one individual can hardly be said to disturb public peace or place public order in jeopardy so much as to bring the case within the purview of the Act. Such a solitary incident can only raise a law and order problem and no more. Moreover, there is no material on record to show that the reach and potentiality of the aforesaid incident was so great as to disturb the normal life of the community in the locality or it disturbed general peace and tranquillity. *T. Devaki* v. *Government of Tamil Nadu*, AIR 1990 SC 1086 (1097) : (1990) 2 SCC 456 : 1990 SCC (Cri) 348 : 1990 CrLJ 1140 : 1990 CrLR (SC 260 : JT 1990 (1) SC 444 : (1990) 1 SCR 836 : (1990) 2 Crimes 1.

[12852] ● ***Failure to afford opportunity to detenu to appear and produce witnesses before Board.***—*National Security Act, 1980*— Admittedly, the detenu was arrested on 28-5-1988. The total period for Advisory Board's report under Section 14(A)(2)(d)(i) of the national Security Act, 1987 was five months and three weeks. Reference to Advisory Board was made on 26-8-1988. so the period would expire on or about 19-11-1988. The Board fixed 12-11-1988 for its sitting. The detenu prayed for adjournment as because of frozen joint he was unable to perform ablution and tie his turban. Whether that was a lame excuse or not need not be decided. The fact remained that he was told of another sitting of the Board. Having a week in hand it would perhaps have been possible to hold another sitting of the Board and give the detenu an opportunity which, however, did not come. Of course, the decision was that of the Advisory Board and not of the State Government. There was a communication gap. It is true that the Advisory Board is not a judicial body. It is charged with the responsibility of advising the executive Government. But when it advises in favour of the detenu, namely, that there was no sufficient cause for detention, it would be binding upon the Government under Section 12(2) of the National Security act, 1980 to release the detenu forthwith. The detenu in this case did not have that opportunity to show that there was no sufficient cause for his detention. Expressing inability to appear once could not have been treated as the detenu's not desiring to be heard under Section 11(2) of the Act. In fact he desired to be heard and to produce his witnesses. The result was that despite the State Government's communication, he was deprived of this opportunity. It can be said that Article 22(4) provides that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless the Advisory Board has reported within that period that there is in its opinion sufficient cause for such detention are therefore, mandatory a reference to a Board and for it to report on the sufficiency or otherwise of the detention which should be within three months from the date of detention. In this case, it is for this reason that after the Constitution every legislation dealing with preventive detention has made specific provision for confirmation and continuance of detention in view of the constitutional mandate in Article 22(4). In this case, Section 11 of the Act prescribes 5 months 3 weeks. If the report is submitted by the Advisory Board without hearing the detenue who desired to be heard it will be violative of Article 22 of the constitution and Section 10 and 11 of the said Act….. Failure to produce the detenu, unless it is for wilful it is for useful refusal of the detenu himself to appear will be equally violative of these provisions. *State of Punjab* v. *Sukhpal Singh*, AIR 1990 SC 231 (248) : (1990) 1 SCC 35 : 1990 SCC (Cri) 1 : 1990 CrLJ 584 : 1990 CrLR (SC) 129 : JT 1989 (4) SC 95 : (1989) 3 Crimes 742.

[12853] ● ***Detenu deprived of making effective and purposeful representation.***—The appellant has expressed his grievance that he had been deprived of making an effective and purposeful representation since no particulars or details are given in documents I & II enclosed with the grounds of detention in regard to the alleged many cases/offences said to have been registered in various Police Stations against him and in regard to the allegations that he was a hardened criminal and had a gang often committing heinous crimes and that it had become the habit of the detenu to commit offences.

He had been deprived of making an effective and purposeful representation as envisaged under Article 22(5) of the Constitution of India. *Vashisht Narain Karwaria* v. *State of Uttar Pradesh*, AIR 1990 SC 1272 : (1990) 2 SCC 629 : 1990 SCC (Cri) 372 : 1990 CrLJ 1311 : 1990 CrLR (SC) 302 : JT 1990 (1) SC 566 : (1990) 2 SCR 212 : 1990 CrAppR (SC) 201.

[12854] ● ***Statement found in recovery memo whether forming basis of detention.***—The present criminal case filed under Section 411 of the IPC is the first crime which had been alleged against him. Munshi Sharma did not say that he purchased the stolen wire for the detenu or on the instructions of the detenu. In fact he did not even say that he is the servant or agent of the detenu. He had merely stated that 20 Kg. of melted wire recovered from him was purchased by him from Santosh and his brother Jagdish and that he had melted and sold the same to the detenu. After it is melted in the melted form it could not be distinguished from any other melted wire of legal origin. The statement also does not impute knowledge on the part of the detenu that the same was from stolen wires. In any case, it was impossible to say on the basis of this statement that the detenu was in league with other persons in the activity of stealing wire or purchasing of the same. In fact it is not known how from the melted wire weighing 20 Kg. the detaining authority or the investigating officer come to the conclusion that the gauge of the melted wire was found to be that of Government wire. Again only 20 Kg. was found in the factory and that too in the possession of Munshi Sharma though inside the factory. The statement of Munshi Sharma in the recovery memo and melted wire recovered from Sharma were the only material available before the detaining authority. In the light of the absence of past criminal history on the part of the detenu we have no doubt that the statement found in the recovery memo could not form basis of satisfaction for the detention. *Anand Prakash* v. *State of Uttar Pradesh*, AIR 1990 SC 516 (518, 519, 520) : (1990) 1 SCC 291 : 1990 SCC (Cri) 96 : 1990 CrLR (SC) 94 : JT 1989 (4) SC 557 : (1990) 1 Crimes 265.

[12855] ● ***Subjective satisfaction.***—The documents which have bearing on the subjective satisfaction of the detaining authority but not relied upon by him must be before the detaining authority at the time he passed the order of detention. In the instant case the detaining authority had placed reliance upon three civil miscellaneous applications filed in the said CR No. 3694 of 1985 and supplied to the detenues copies of the said three miscellaneous applications. There is, therefore, no substance in the contention that a copy of the civil petition should have also been supplied to him. *Madan Lal Anand* v. *Union of India*, AIR 1990 SC 176 : (1990) 1 SCC 81 : 1990 SCC (Cri) 51 (60) : 1990 CrLJ 659 : 1990 CrLR (SC) 69.

[12856] ● ***Detention order justified even inadmissible ground excluded.***—In the instant case even assuming that the grounds relating to the confessional statement made by the detenue under Section 108 of the Customs Act was an inadmissible ground as the subsequent retraction of the confessional statement was not considered by the detaining authority, still then that would not make the detention order bad, for in the view of this Court such order of detention shall be deemed to have been made separately on each of such grounds. Therefore, even excluding the inadmissible ground, the order of detention can be justified

Madan Lal Anand v. *Union of India*, AIR 1990 SC 176 : (1990) 1 SCC 81 : 1990 SCC (Cri) 51 (60) : 1990 CrLJ 659 : 1990 CrLR (SC) 69.

[12857] ● ***Personal allegation of mala fide or bias where made by detenu against detaining authority.***—Where a personal allegation of *mala fide* or bias has been made by the detenue against the detaining authority, the detaining authority, should himself swear the counter-affidavit. In the instant case no allegation of malice or dishonesty has been made in the petition personally against the Minister, it is not possible to say that his omission to file an affidavit in reply by itself would be any ground to sustain the allegation of *mala fides* or non-application of mind. *Madan Lal Anand* v. *Union of India*, AIR 1990 SC 176 : (1990) 1 SCC 81 : 1990 SCC (Cri) 51 (60) : 1990 CrLJ 659 : 1990 CrLR (SC) 69.

[12858] ● ***Computation of period of 12 days.***—In our opinion sub-section (4) of Section 3 of National Security Act has given a clear indication as to the computation of twelve days. The period of twelve days had to be calculated "after" the making of the order of detention. Thus, it is apparent that the period of twelve days comes after the making of the order of detention. It is true that in sub-section (4), the officer making the order of detention shall forthwith report the fact to the State Government, but the word "forthwith" will not be taken into consideration for the purpose of computing the period of twelve days inasmuch as there is a clear indication that the said period shall be computed after the order is made. In other words, sub-section (4) itself excludes the day on which the order is made. Computation of twelve days including the day on which the detention order is made will be ignoring the direction of the Legislature, as given in sub-section (4) itself, that the said period of twelve days will commence after the making of the detention order. *Jitender Tyagi* v. *Delhi Administration*, AIR 1990 SC 487 (490) : (1989) 4 SCC 653 : 1989 SCC (Cri) 787 : 1990 CrLJ 322 : 1990 CrLR (SC) 144 : JT 1989 (4) SC 155 : (1990) 1 UJ (SC) 427.

[12859] ● ***Detention order suffering from vice of consideration of extraneous materials.***—The averments made in the two letters the copies of which are furnished to the detenu alongwith grounds of detention unequivocally and clearly spell out that the detenu is a hardened criminal, having a gang under his control often committing heinous crimes, that many cases against the detenu are registered in various Police Stations and that he is in the habit of committing offences. No doubt, these averments are not made mention of in the grounds of detention. But can it be said that these materials placed before the authority might not have influenced the mind of the detaining authority in taking the decision detaining the detenue? The above averments which are extraneous touching the character of the detenu though not referred to in the grounds of detention, might have influenced the mind of the detaining authority to some extent one way or other in reaching the subjective satisfaction to take the decision of directing the detention of the detenu. Therefore it has to be held that the detention order is suffering from the vice of consideration of extraneous materials vitiating the validity of the order. *Vashisht Narain Karwaria* v. *State of Uttar Pradesh*, AIR 1990 SC 1272 (1274) : (1990) 2 SCC 629 : 1990 SCC (Cri) 372 : 1990 CrLJ 1311 : 1990 CrLR (SC) 302 : JT 1990 (1) SC 566 : (1990) 2 SCR 212.

[12860] ● ***Order of detention to be based on material before Court.***—The Court has to ensure that the order of detention is based on materials before it. If it is found that the order passed by the detaining authority was on materials on record, the Court can examine the record only for the purpose of seeing whether the order of detention was based on no material or whether the materials have rational nexus with satisfaction that public order was prejudiced. Beyond this, the Court is not concerned. *Shafiq Ahmed* v. *District Magistrate, Meerut*, AIR 1990 SC 220 (224) : (1989) 4 SCC 556 : 1989 SCC (Cri) 774 : 1990 CrLJ 573 : JT 1989 (3) SC 659.

[12861] ● ***Detention not ordered on mere ground that detenu likely to be released on bail.***—In the instant case the facts and circumstances of each case have to be taken into consideration in the context of considering the order of detention of detenue who is already in Jail. The detaining authority was not only aware that the detenu was in Jail but also noted the circumstances on the basis of which he was satisfied that the detenu was likely to come out on bail and continue to engage himself in the smuggling of goods. Therefore, the detention was not ordered on the mere ground that he is likely to be released on bail but on the ground that the detaining authority was satisfied that the detenu was likely to indulge in the same activities if released on bail. *Sanjeev Kumar Aggarwal* v. *Union of India*, AIR 1990 SC 1202 (1205) : (1990) 3 SCC 309 : 1990 SCC (Cri) 473 : 1990 CrLJ 1238 : 1990 CrLR (SC) 292 : JT 1990 (2) SC 62 : (1990) 2 SCR 318.

[12862] ● ***Person already in custody—Detention order against.***—*COFEPOSA, 1974, Section 3.*—Even in the case of a person in custody detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing—If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper cause for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher Court. *Kamarunnisa* v. *Union of India*, AIR 1991 SC 1640 : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 (100) : 1991 CrLJ 2058 : 1990 CrLR (SC) 645.

[12863] ● *Delay in service of detention order.*— The facts of the case clearly show that the time taken in the service of the detention orders cannot be attributed to the lack of sense of urgency on the part of the authorities but it was to get the documents translated in Tamil language before they were supplied to the detenus. Under the circumstances we do not see any delay which would vitiate the detention order. *Kamarunnisa* v. *Union of India*, AIR 1991 SC 1640 (1645) : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 : 1991 CrLJ 2058 : 1990 CrLR (SC) 645 : JT 1990 (4) SC 7 : (1991) 1 Crimes 131.

[12864] ● *Expression "bailable" used in grounds of detention.*—*COFEPOSA, 1974, Section 3.*—Having regard to the background in which the expression "bailable" is used in the grounds of detention and the bearing in mind the explanation, and the fact that in such cases, Courts normally grant bail, it cannot be said that the use of the said expression discloses non-application of mind. *Kamarunnisa* v. *Union of India*, AIR 1991 SC 1640 (1645) : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 : 1991 CrLJ 2058 : 1990 CrLR (SC) 645 : JT 1990 (4) SC 7 : (1991) 1 Crimes 131.

[12865] ● *Detenus found to have secreted diamonds in rectum and other cavities created in body.*—*COFEPOSA, 1974, Section 3.*—The fact that one of the detenus secreted diamonds in two balloon rolls in his rectum speaks for itself. Similarly the fact that the other two detenues had created cavities for secreting as many as 100 capsules each in their bodies was indicative of the fact that this was a solitary instance. All the three detenus had prepared themselves for indulging in smuggling by creating cavities in their bodies after receiving training. These were not ordinary carriers. These were persons who had prepared themselves for a long term smuggling programme and, therefore, the officer passing the detention orders was justified in inferring that they would indulge in similar activity in future because they were otherwise incapable of earning such substantial amounts in ordinary life. *Kamarunnisa* v. *Union of India*, AIR 1991 SC 1640 (1646) : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 : 1991 CrLJ 2058 : 1991 CrLR (SC) 645 : JT 1990 (4) SC 7 : (1991) 1 Crimes 131.

[12866] ● *Subjective satisfaction vital documents not placed before detaining authority.*—*COFEPOSA Act, 1974 Section 3.*—The failure to supply the bail application and the order refusing bail does not in any way prejudice the detenue from making representation particularly when he was fully aware of the contents of application made by himself and also the refusal order. However when they are not referred to or relied upon the non-supply does not affect the detention. Such of those documents which are not material and to which a casual and passing reference is made in the grounds need not be supplied. *Abdul Sathar Ibrahim Manik* v. *Union of India*, AIR 1991 SC 2261 (2266, 2271) : (1992) 1 SCC 1 : 1992 SCC (Cri) 1 : 1991 CrLJ 3291 : 1992 CrLR (SC) 21 : JT 1991 (4) SC 103.

[12867] ● *Subjective satisfaction solitary incident.*—*COFEPOSA Act, 1974, Section 3.*—It has been submitted/that there were no antecedents and this being the solitary incident the detention is invalid. It is again a question of satisfaction of the detaining authority on the basis of the material placed before it. Even a solitary incident which has been detected may speak volumes about the potentialities of the detenu and merely on the ground that there were no antecedents the detention order cannot be quashed. The authorities cannot and may not in every case salvage the antecedents. *Abdul Sathar Ibrahim Manik* v. *Union of India*, AIR 1991 SC 2261 (2265) : (1992) 1 SCC 1 : 1992 SCC (Cri) 1 : 1991 CrLJ 3291 : 1992 CrLR (SC) 21 : JT 1991 (4) SC 103 : (1991) 3 Crimes 475.

[12868] ● *Preventive detention—Order of—Revocation of.*—*COFEPOSA Act, 1974, Section 11.*—On a conjoint reading of Section 21 of the General Clauses Act and Section 11 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, it becomes clear that the power of revocation can be exercised by three authorities, namely, the officer of the state Government or the Central Government, the State Government as well as the Central Government. The power of revocation conferred by Section

8(f) on the appropriate Government is clearly independent of this power. It is, thus, clear that Section 8(f) of the Act satisfies the requirement of Article 22(4) whereas Section 11 of the Act satisfies the requirement of the latter part of the Article 22(5) of the Constitution. The statutory provisions, therefore, when read in the context of the relevant clauses of Article 22, make it clear that they are intended to satisfy the Constitutional requirements and provide for enforcement of the right conferred on the detenu to represent against his detention order. Viewed in this perspective, it cannot be said that the power conferred by Section 11 of the Act has no relation whatsoever with the Constitutional obligation cast by Article 22(5) of the Constitution. *Amir Shad Khan* v. *L. Hmingliana*, AIR 1991 SC 1983 (1988) : (1991) 4 SCC 39 : 1991 SCC (Cri) 946 : 1991 CrLJ 2713 : (1991) 3 Crimes 275.

[12869] ● ***Supply of copies of documents to detenu.***—It is not sufficient to say that the detenus were not supplied the copies of the documents in time on demand but it must further be shown that the non supply has impaired the detenu's right to make an effective and purposeful representation. Demand of any or every document, however irrelevant it may be for the concerned detenu, merely on the ground that there is a reference thereto in the grounds of detention cannot vitiate an otherwise legal detention order. No hard and fast rule can be laid down in this behalf but what is essential is that the detenu must show that the failure to supply the documents before the meeting of the Advisory Board had impaired or prejudicial his right, however slight or insignificant it may be. In the present case, except stating that the documents were not supplied before the meeting of the Advisory Board, there is no pleading that it had resulted in the impairment of his right nor could Counsel for the petitioners point out any such prejudice. *Kamarunnissa* v. *Union of India*, AIR 1991 SC 1640 (1649) : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 : 1991 CrLJ 2058 : 1991 CrLR (SC) 645 : JT 1990 (4) SC 7 : (1991) 1 Crimes 131.

[12870] ● ***Fact that detenu in custody—Facts to be satisfied.***—Where the detenu was in custody at the time of passing an order of detention what is strictly required is whether the detaining authority was aware of the fact that the detenu was in custody and if so was there any material to show that there were compelling reasons to order detention in spite of his being in custody. These aspects assume importance because of the fact that a person who is already in custody is disabled from indulging in any prejudicial activities and as such the detention order may not normally be necessary. Therefore, the law requires that these two tests have to satisfied, in the case of such detention of a person in custody. *Abdul Sathar Ibrahim Manik* v. *Union of India*, AIR 1991 SC 2261 (2269) : (1992) 1 SCC 1 : 1992 SCC (Cri) 1 : 1991 CrLJ 3291 : 1992 CrLR (SC) 21 : JT 1991 (4) SC 103 : (1991) 3 Crimes 475.

[12871] ● ***Non-placement of retraction of confessional statement.***—In fact there were two grounds but only one ground and the non-placement of the retraction of the confessional statement by the detenu before the detaining authority and non-consideration of the same while arriving at his subjective satisfaction in making the order of detention goes to the root of the order of detention and makes the order of detention invalid. *K. Satyanarayan Subudhi* v. *Union of India*, AIR 1991 SC 1375 (1376) : 1991 SCC (Cri) 1013 : 1991 CrLJ 1536 : 1991 CrLR (SC) 859 : (1991) 2 SCC (Supp) 153.

[12872] ● ***Live and proximate link between grounds of detention and purpose of detention snapped by delay.—COFEPOSA, 1974, Section 3, 7.***—Incidentally, it may be mentioned that though the two gold pellets (the contrabands) were seized from the appellant on 12-11-1990, but the authorities concerned passed these orders only on 7-1-1991, *i.e.,* nearly after two months. Under these circumstances the order of detention cannot be sustained since the "live and proximate link" between the grounds of detention and the purpose of detention is snapped on account of the undue and unreasonable delay in securing the appellant/ detenu and detaining him. *K.P.M. Basheer* v. *State of Karnataka*, AIR 1992 SC 1353 (1356) : (1992) 2 SCC 295 : 1992 SCC (Cri) 387 : 1992 CrLJ 1927 : JT 1992 (3) SC 610 : (1992) 1 Crimes 996.

[12873] ● ***Custody initially not to exceed period of fifteen days.***—The Magistrate under Section 167(2) CrPC, 1973 can authorise the detention of the accused in such custody as he thinks fit but it should not exceed fifteen days on the whole. Therefore, the custody initially should not exceed fifteen days on the whole—The custody can be police custody or judicial custody as the Magistrate thinks fit. The words "such custody" and "for a term not exceeding fifteen days on the whole" are very significant. It is also well settled now that the period of fifteen days starts running as soon as the accused is produced before the Magistrate. *Central Bureau of Investigation Special Investigation Cell I, New Delhi* v. *Anupam J. Kulkarni*, AIR 1992 SC 1768 (1773) : (1992) 5

SCC 141 : 1992 SCC (Cri) 554 : 1992 CrLJ 2768 : (1992) 2 Crimes 310.

[12874] ● ***Remand of accused to police custody.***—Taking the plain language into consideration particularly the words "otherwise than in the custody of the police beyond the period of fifteen days" in the proviso it has to be held that the custody after the expiry of first fifteen days can only be judicial custody during the rest of the period, of ninety days or sixty days and that police custody if found necessary can be ordered during the first period of fifteen days. *Central Bureau of Investigation, Special Investigation Cell I, New Delhi* v. *Anupam J. Kulkarni*, AIR 1992 SC 1768 (1776) : (1992) 5 SCC 141 : 1992 SCC (Cri) 554 : 1992 CrLJ 2768 : (1992) 2 Crimes 310.

[12875] ● ***Remand order under Section 309, CrPC—Can be judicial custody.***—On a combined reading of Section 167(2) and 2 A of the CrPC 1973 it emerges that the Judicial Magistrate to whom the Executive Magistrate has forwarded the arrested person can order remand in such custody, namely, police custody or judicial custody under Section 167(2) of the rest of the fifteen days after deducting the period of detention ordered by the executive Magistrate. The detention, thereafter, could only be in judicial custody. Likewise the remand under Section 309, CrPC can be only to judicial custody in terms mentioned therein. This has been concluded by this Court and the language of the section also is clear. Section 309, CrPC comes into operation only after taking cognizance and not during the period of investigation and the remand under this provision can only be to judicial custody. *Central Bureau of Investigation, Special Investigation Cell I, New Delhi* v. *Anupam J. Kulkarni*, AIR 1992 SC 1768 (1777) : (1992) 5 SCC 141 : 1992 SCC (Cri) 554 : 1992 CrLJ 2768 : (1992) 2 Crimes 310.

[12876] ● ***Detention order passed after application of mind.***—The non-furnishing of documents relating to Cr. No. 1026/1991 with which the detenu is not concerned, does not vitiate the order of detention passed against the detenu. The order of detention was passed by him only with reference to the activities of the detenu and his associates which were prejudicial to the maintenance of public order and the detenu and his associates were involved only in Cr No. 1027/1991. The order of detention was passed after application of mind. *State of Tamil Nadu* v. *A. Vadivel alias Sundara Vadivel*, AIR 1992 SC 2161 : 1992 CrLJ 3578.

[12877] ● ***Delay—Live and proximate link between grounds of detentions snapped in convicting detenu.***—If there is unreasonable delay between the date of the order of detention and the date of arrest of the detenu, such delay unless satisfactorily explained throws a considerable doubt on the genuineness of the requisite subjective satisfaction of the detaining authority in passing the detention order and consequently render the detention order bad and invalid because the "live and proximate link" between the grounds of the detention is snapped in arresting the detenu. A question whether the delay is unreasonable and stands unexplained depends on the facts and circumstances of the case. *P.U. Iqbal* v. *Union of India*, AIR 1992 SC 1900 (1904) : (1992) 1 SCC 434 : 1992 SCC (Cri) 184 : 1992 CrLJ 2924 : (1992) 1 Crimes 166.

[12878] ● ***Activities of detenu not only bootlegging but also creating fear.***—*Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act, 1981, Section 2(a) and 3(1).*—The activities of the detenu were not 'Bootlegging' but went further to adversely affect the even tempo of the society by creating a feeling of insecurity among those who were likely to depose against him as also the law enforcement agencies. The fear Psychosis created by the detenu in the witnesses was aimed at letting crime go unpunished which has the potential of the society, and not merely some individual to suffer. The activities of the detenu, therefore, squarely fall within the seeming provision enacted in the explanation of Section 2(a) of the Act, and it, therefore, follows, as a logical consequence that the activities of the detenu were not merely prejudicial to the maintenance of "law and order" but were prejudicial to the maintenance of "public order". *Harpreet Kaur Harvinder Singh Bedi* v. *State of Maharashtra*, AIR 1992 SC 979 : (1992) 2 SCC 77 : 1992 SCC (Cri) 370 (381) : 1992 CrLJ 769.

[12879] ● ***Law and order and Public order—Distinction between.***—*National Security Act, 1980, Section 3(2).*—It is the potentiality of the act to disturb. The even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of "law and order" and "public order" is one of degree and extent of the reach of the act in question on a society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise the problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps distinguish it as an act affecting public order from that concerning "law and order" *Victoria Fernandes* v. *Lalmal Sawma*, AIR 1992 SC 687 : (1992) 2 SCC 97 : 1992 SCC (Cri) 271 (274, 275) : 1992 CrLJ 702 : (1992)1 Crimes 497.

[12880] ● ***Absence of affidavit of person passing detention order.***—The absence of the affidavit of the person who passed the order of detention would not be of much consequence except in cases where *mala fides* or extraneous considerations are attributed to the detaining authority. *Victoria Fernandes* v. *Lalmal Sawma*, AIR 1992 SC 687 : (1992) 2 SCC 97 : 1992 SCC (Cri) 271 (277) : 1992 CrLJ 702 : (1992) 1 Crimes 497.

[12881] ● ***Proviso to Section 3(2) of Maharashtra Prevention of Dangerous Activities of Slumlords Bootleggers and Drugs Offenders Act nothing to do with period of detention.***—*Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drugs Offenders Act, 1981, Section 2(a) and 3(1).*—A main reading of Section 3 shows that the State Government under Section 3(1), if satisfied, with respect to any person that was a view to preventing him from acting in a manner prejudicial to the maintenance of 'public order', it is necessary so to do, make an order of detention against the person concerned. Sub-section (2) of Section 3 deals with the delegation of powers by the State Government and provides that if the State Government is satisfied, having regard to the circumstances prevailing in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, it is necessary to empower District Magistrate or the Commissioner of Police, as the case may be to exercise the powers of the State Government to order detention of a person as provided by sub-section (1), then the State Government may, by an order in writing direct that during such period as may be specified in the order, the District Magistrate or the Commissioner of Police may also if satisfied as provided in sub-section (1), exercise the powers of the State Government as conferred by sub-section (1) The proviso to sub-section (2), only lay down that the period of delegation of powers, specified in the order to be made by the State Government under sub-section 2, delegating to the District Magistrate or the Commissioner of Police the powers under sub-section (1) shall not in the first instance exceed three months. The proviso, therefor, has nothing to do with the period of detention of a detenu. The maximum period of detention is prescribed under Section 13 of the Act which lays down that a person may be detained in pursuance of any detention order made under the Act, which has been confirmed under Section 12 of the Act. *Harpreet Kaur Harvinder Singh Bedi* v. *State of Maharashtra*, AIR 1992 SC 979 : 1992 SCC (Cri) 370 (382) : 1992 CrLJ 769 : 1992 CrLR (SC) 156 : 1992 (1) Crimes 589.

[12882] ● ***Preventive detention—Competent authority.***—T.N. Prevention of Dangerous Activities of Bootleggers, Drugs Offenders, Forest Offenders Goonda's Immoral Traffic Offenders and Slum Grabbers Act, 1982.—Since on the date of the order (October 15, 1990) the Commissioner of Police had the powers to issue the detention orders by virtue of the earlier order dated July 17, 1990 which was operating and was to continue till October 17, 1990 the Government rightly made the order dated October 15, 1990 operative from October 18, 1990. The High Court was totally oblivious of the fact that de hors the Government order dated October 15, 1990, the Commissioner of Police had the powers to issue the detention orders by virtue of the earlier Government order which was to expire on October 17, 1990. Even otherwise, it was justified for the State Government to have applied its mind 2/3 days before the expiry of the order dated July 17, 1990 as to whether the power already given to the Commissioner of Police under Section 3(2) was to be extended or not. Under the circumstances, no fault can be found with the Government action in issuing the Government order on October 15, 1990 on the ground of "prevailing circumstances" and making it operative from October 18, 1990. The appeals were allowed. *State of Tamil Nadu* v. *Vela alias Velangani alias Johney, Abdul Samad*, AIR 1993 SC 1460 (1462) : (1993) 2 SCC 540 : 1993 SCC (Cri) 54 : 1993 CrLJ 1653 : JT 1993 (2) SC 369 : (1993) 1 Crimes 1199.

[12883] ● ***Preventive Detention—Such matter handled by persons fully trained.***—*Constitution of India, Article 22(5).*—If the Government takes care that the detention cases arising under the preventive detention laws are handled by persons fully trained and having experience in such matters, the rights of the citizens can be safeguarded and the precious time of this Court can be saved. The detaining authorities are required to deal such cases with more care and circumspection. They should not leave such cases to be dealt with by lower officials and should keep a track on such cases from beginning to the end and also take care that the representations, if any, made by the detenus are also dealt with expeditiously without any delay. In matters where the detention orders are passed in relation to such persons who are already in Jail under some other laws, the detaining authorities should always apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail and stating the necessity of keeping such persons in detention under the preventive detention laws. *Birendra Kumar Rai* v. *Union of India*, AIR 1993 SC 962 (968) : (1993) 1 SCC 272 : 1993 SCC (Cri) 324 : 1993 CrLJ 158 : JT 1992 (5) SC 264 : (1992) 3 Crimes 398.

[12884] ● *Subjective satisfaction compelling necessity of issuing detention order.*—*Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, Section 3.*—The detaining authority was aware that a bail application had already been filed by the petitioner and the same was to come up for hearing on 7-12-1990 and in these circumstances the detaining authority was justified in recording the satisfaction of compelling necessity of issuing the detention order as it could not have been predicted with certainty that the petitioner would not be released on bail. *Birendra Kumar Rai* v. *Union of India*, AIR 1993 SC 962 (965) : (1993) 1 SCC 272 : 1993 SCC (Cri) 324 : 1993 CrLJ 158 : JT 1992 (5) SC 264 : (1992) 3 Crimes 398.

[12885] ● *Telegram not authentic document.*—*Tamil Nadu prevention of Dangerous Activities of bootleggers, drug offenders, forest offenders, goondas, immoral Traffic offenders and slum grabbers Act, 1982, Section 3.*—A telegram by itself is not an authentic document. It is like an unsigned/anonymous communication. Unless a telegram is confirmed by a subsequent signed application, representation or an affidavit, the contents of the telegrams have no authenticity at all and the same cannot be taken into consideration for assessing the value of the other authentic documents on the record. The detention orders were passed by the District Magistrate on the basis of the material placed before him by the police authorities. Any material received by District Magistrate in the shape of telegrams could not be taken into consideration by him in the absence of any subsequent communication confirming the same. We are, therefore, of the view that the orders of detention could not be challenged on the ground that some material contained in a telegram simpliciter was not taken into consideration by the detaining authority. The High Court was, therefore, not justified in quashing the detention orders on the ground discussed above. *District Magistrate* v. *G. Jothisankar,* AIR 1993 SC 2633 (2635) : 1994 (1) Supp SCC 59 : 1993 CrLJ 3677 : 1993 CrLR (SC) 501 : 1993(2) Crimes 1189.

[12886] ● *Voluminous documentary evidence placed on record before detaining authority for passing order of detention.*—*Prevention of illicit traffic in Narcotic Drugs and Psychotropic Substances Act 1988, Section 3.*—There was voluminous documentary evidence placed on record before the detaining authority for passing the order of detention. The voluminous record available with the detaining authority showed that the petitioner was engaged in illicit traffic in the purchase, sale, possession and abetting the export of narcotic drugs in the city of Varanasi which is an area highly vulnerable to such illicit traffic. There was enough material for the satisfaction of the detaining-authority that the petitioner and his family was engaged in the clandestine business of preparing and selling heroin for export from India. *Birendra Kumar Rai* v. *Union of India*, AIR 1993 SC 962 (965) : (1993) 1 SCC 272 : 1993 SCC (Cri) 324 : 1993 CrLJ 158 : JT 1992 (5) SC 264 : (1992) 3 Crimes 398.

[12887] ● *To which competent authority representation to be made.*—Unlike the provisions of Conservation of Foreign Exchange and Prevention or Smuggling Activities Act, 1974, there is a provision in the National Security Act to the effect that the detention order will cease to remain in force for more than 12 days if in the meantime it is not approved by the State Government and therefore the authorities to whom the representation could be made would be the Central Government and the State Government, as the case may be, and not the detaining authority. Therefore, the detaining authority is not under an obligation to tell the detenue that he can make a representation to it also. *Amin Mohammed Qureshi* v. *Commissioner of Police, Greater Bombay*, AIR 1994 SC 1333 (1334) : (1994) 2 SCC 355 : 1994 SCC (Cri) 498 : 1994 CrLJ 2095 : 1994 CrLR (SC) 120 : JT 1994 (1) SC 484 : 1994 (1) Crimes 544.

[12888] ● *Representation to appropriate authority—Delay in considering.*—*Gujarat Prevention of ante-Social activities Act, 1985, Section 3(2).*—In the instant case the representation was received by the State Government on February 20, 1993, the State Government decided to keep it pending awaiting the opinion of the Board and on receipt of the report on March 23, 1993, considered the case and the representation was rejected on the even date, namely, March 23, 1993. In view of this consistent settled law, the action of the State Government in keeping the representation without being considered and disposed of expeditiously, awaiting the decision of the Board till March 23, 1993 and consideration of the representation thereafter and rejection are illegal. *Navalshankar Ishwarlal Dave* v. *State of Gujarat*, AIR 1994 SC 1496 (1505, 1506) : 1993 SCC (Cri) 1126

(1993) (Supp) (3) SCC 754 : 1994 CrLJ 2170 : 1993 CrLR (SC) 461 : JT 1993 (3) SC 421 : (1993) 2 Crimes 449.

[12889] ● ***Unexplained delay in disposing of representation.***—There is no period prescribed in this behalf within which the representation should be dealt with but the requirement is that there should not be any indifference or callous attitude in considering the representation. Unexplained delay in disposing of the representation would be a breach of the constitutional mandate rendering the detention impermissible and illegal. *Navalshankar Ishwarlal Dave* v. *State of Gujarat,* AIR 1994 SC 1496 (1505) : (1993) Supp (3) SCC 754 : 1994 CrLJ 2170 : 1993 CrLR (SC) 461 : (1993) 2 Crimes 449.

[12890] ● ***Three detention orders made against same person.***—*COFEPOSA Act, 1974, Section 5A.*—"Now take a case where three orders of detention are made against the same person under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Each of the orders is based upon only one ground which is supplied to the detenu. It is found that the ground of detention in support of two of such orders is either vague or irrelevant. But the ground in support of the third order is relevant, definite and proximate. In such a case, while the first two orders would be quashed, the third order would stand. This is precisely what the first part (the main part) of S. 5-A seeks to do. Where the order of detention is based on more than one ground, the section creates a legal fiction, *viz.* it must be deemed that there are as many orders of detention as there are grounds which means that each of such orders is an independent order. The second part of it is merely clarificatory and explanatory, which is evident from the fact that it begins with the word "accordingly"—apart from the fact that it is joined to the first part by the word "and". In such a situation, we are unable to see how can the section be characterised as inconsistent with Art. 22(5). Had there been no first part, and had the section consisted only of the second part, one can understand the contention that the section is in the teeth of Art. 22(5) as interpreted by this Court. It is difficult to conceive any inconsistency or conflict between Art. 22(5) and the first—the main part of S. 5-A. The Parliament is competent to create a legal fiction and it did so in this case. Art. 22(5) does not in terms or otherwise prohibit making of more than one order simultaneously against the same person, on different grounds. No decision saying so has been brought to our notice. Be that as it may, we do not see why the Parliament is not competent to say, by creating a legal fiction, that where an order of detention is made on more than one ground, it must be deemed that there are as many orders of detention as there are grounds. If this creation of a legal fiction is competent, then no question of any inconsistency between the section and Art. 22(5) can arise." *Attorney General for India* v. *Amratlal Prajivandas,* AIR 1994 SC 2179 (2207, 2208) : (1994) 5 SCC 54 : 1994 SCC (Cri) 1325 : JT 1994 (3) SC 583.

[12891] ● ***Person detained to be informed of his right to make representation.***—Having regard to the provisions of Art. 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PITNDPS Act, the question posed is thus answered : Where the detention order has been made under S. 3 of the COFEPOSA Act and the PITNDPS Act by an Officer specially empowered for that purpose either by the Central Government or the State Government, the person detained has a right to make a representation to the said Officer and the said Officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an Officer specially authorised by a State Government and the Central Government where the detention order has been made by an Officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation. *Kamlesh Kumar Ishwardas Patel* v. *Union of India,* (1995) 4 SCC 51 : 1995 SCC (Cri) 643 : (1995) 3 SCJ 683 : (1995) 4 Crimes 484.

[12892] ● ***Detenu not informed of his constitutional right to make representation to specified officer.***—It is seen that the detenu was informed on 20.4.1992 that he was at liberty to make a representation to the State Government, Central Government and to the Advisory Board. It was asserted that he made a representation through the prison authorities to the Government of Andhra Pradesh. In other words, from these facts, it would be clear that the detenu was not informed of his Constitutional right to make a representation to the specified Officer for reconsideration of his detention. In view of law laid down by this

Court the failure on the part of the specified Officer to inform the detenu that he has a Constitutional right to make a representation to the specified Officer against the order of detention, violates Art. 22(5) of the Constitution. The order of detention gets vitiated. *Nutan J. Patel* v. *S.V. Prasad*, (1996) 2 SCC 315 : 1996 SCC (Cri) 269 (270-271) : (1995) 4 Crimes 767 (2) : (1996) 1 SCJ 184.

[12893] ● ***Communication of grounds of detention.***—The requirement of the supply of the grounds, as soon as may be, indicates that normally the detenue is entitled to be communicated with the grounds of detention within five days. With a view to tide over unavoidable circumstances due to which the detaining authority could not have the grounds of detention supplied, the statute engrafted a leverage and dictated him to record the reasons therefor in writing and the administration should supply the grounds of detention, before the expiry of ten days. So the delay should be exceptional and those exceptional circumstances are required to be recorded in writing what in mandatory in the supply of grounds of detention before expiry of ten days but after the expiry of five days. It is well settled legal position that the phrase "as soon as may be" means within a reasonable despatch when there is no avoidable delay. What is avoidable delay in always a question of fact. *State of Rajasthan* v. *Talib Khan*, AIR 1997 SC 1559 : (1996) 11 SCC 393 : 1997 SCC (Cri) 29 (33, 34) : 1997 CrLJ 408 : 1997 CrLR (SC) 572 : JT 1996 (10) SC 471.

[12894] ● ***Exceptional circumstances due to which grounds of detention not supplied.***—*National Security Act, 1990, Section 8(1).*—The exceptional circumstances are those due to which the grounds and the documents could not be supplied to the detenu and the same were recorded in writing in the record of the detaining authority. If the appropriate Government or the Advisory Board or the Court are not satisfied with the recorded exceptional circumstances due to which the grounds of detention could not be supplied, after 5 days but before the expiry of 10 days, that may be one of the circumstances which the appropriate Government or Advisory Board or the Court may consider whether the detention order is vitiated or is an infraction of Art. 22(5) of the Constitution. But since the Act does not envisage communication of the exceptional circumstances and the reasons recorded for non-supply of the grounds, the ground of non-communication or their non-supply by itself is not sufficient to hold that the order of detention is in violation of Art. 22(5) of the Constitution. *State of Rajasthan* v. *Talib Khan,* AIR 1997 SC 1559 : (1996) 11 SCC 393 : 1997 SCC (Cri) 29 : 1997 CrLJ 408 : 1997 CrLR (SC) 572 : JT 1996 (10) SC 471.

[12895] ● ***Delay in disposing of representation unexplained.***—In this case the representation was received on 28-10-1998, comments of Sponsoring Authority were called for on 29-10-1998 which were received on 10-11-1998. From the records we find that the order for calling for comments of the Sponsoring Authority was not passed by any of the Officers empowered by the above orders of Minister dated 7-7-1995. Therefore, we hold that the representation was dealt with in a routine manner and there was no application of mind by the competent officer as to whether it was necessary to call for comments of the Sponsoring Authority. In other words, this delay from 28-10-98 to 10-11-98 being uncalled for has to be regarded as unreasonable and, therefore, in view of ratio laid down in *Veermathi Selvam* 1998 SCC (Cri) 1359 fatal. *R. Paulsamy* v. *Union of India,* AIR 1999 SC 2004 : (1999) 4 SCC 415 : 1999 SCC (Cri) 549 (551) : 1999 CrLJ 2897 : 1999 (3) Crimes 50 (SC) : (1999) 5 Supreme 332.

[12896] ● ***Delay in passing detention order.***—*COFEPOSA Act, 1974, Section 3.*—The order of detention has been passed as the detenue was found to be smuggling 23 gold biscuits weighing 2679.5 grams into India on 8-12-1997. The detenu admitted his guilt on 8-12-1997 itself and again on 19-12-1997 when his further statement was recorded. The contention raised by the learned Counsel for the petitioner is that even then, the order of extention came to be passed as late as on 23-11-1998, that is, after 11 months and 15 days. It was further submitted by him that the satisfaction of the detaining authority regarding the need to immediately detain him with a view to prevent him from continuing the prejudicial activity was not genuine. He further submitted that because of this defect, the order of detention stands vitiated. The State Government in its counter has stated that the show cause notice was issued to the detenue under the Customs Act on 4-5-1998 and the adjudication proceedings were over on 9-1-1998. The State Government, therefore, did not proceed with the proposal till then and took up the proposal for consideration only thereafter. The order of the Ministry of Law in that behalf was obtained on 2-11-1998 and the grounds of detention were framed on 18-11-1998 and the order of detention was passed on 23-11-1998. No other explanation has been given by the State Government for not passing the detention order earlier. The State Government has not explained why it thought it necessary to wait till the adjudication proceedings before the Customs authorities were over since that was not necessary for exercising the power under the COFEPOSA Act. In absence of any satisfactory explanation as to why the State Government did not exercise the power earlier, it has to be held that delay in passing the order of detention was unreasonable. It will also have to be held that the explanation of the detaining authority as regards immediate need of detaining the detenu was not genuine. *Ahmed Mohaindeen Zabbar* v. *State of Tamil Nadu*, AIR 1999 SC 2141 (2141, 2142) : (1999) 4 SCC 417 : 1999 SCC (Cri) 552 : 1999 CrLJ 3488 : 1999 CrLR (SC) 315.

[12897] ● ***Representation before appropriate Govt. authority—Delay in considering.***—As 3rd, 4th and 5th of September, 1999 were Government holidays, the representation would have possibly reached the Department either on 2nd evening or on the 6th of September. If that be so, the question is whether placing the said representation before the COFEPOSA unit on 9-9-1999 can be treating as unreasonably delayed Learned counsel pointed out the practicalities involved in shifting and sorting various mails which would have heaped up in the Department by 6-9-1999 on account of the preceding Government holidays for a continuous three day's period. He submitted that it is enough that somebody in the Department would see the outer cover of representation.

Every mail should have been opened, read and found out as to which Department it should be placed and only after such sorting process is made the representation could be sent to the appropriate section. We are inclined to accept the explanation for the intervening period between 6th and 9th September. *Rajappa Neelkantan* v. *State of Tamil Nadu*, (2000) 7 SCC 144 : 2000 SCC (Cri) 1300 : (2000) 5 SLT 261 : (2000) 2 Scale 642.

[12898] ● ***Question of severability of grounds.***—Section 5A of the COFEPOSA Act, 1974 applies where the decision is based on more than one ground, not where it is based on a single ground. In the instant case the different members of the ground of detention are only paragraphs narrating the facts with the details of document which is being relied on but factually, the detention order is based on one ground which is revealed by ground (1) (XVI) of the grounds of detention. Thus on the facts of this case, Section 5-A has no application in the present case. *A. Sowkath Ali* v. *Union of India,* AIR 2000 SC 2662 : (2000) 7 SCC 148 : 2000 SCC (Cri) 1304 (1317, 1318) : (2000) CrLJ 3691 : 2000 CrLR (SC) 568.

[12899] ● ***Court to examine whether grounds disclosed relevant to object of preventive detention.***—The Court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is to prevent the detenue from engaging in smuggling activities. The said satisfaction is subjective in nature and such a satisfaction if based or relevant grounds cannot be stated to be invalid.

The concerned authorities have to take note of the various facts including the fact that this was a solitary incident in the case of the detenue and that he had been granted bail earlier in respect of which the application for cancellation of the same was made but was rejected by the Court. In this case, there has been due application of mind by the authority concerned to that aspect of the matter. *Union of India* v. *Arvind Shergill*, AIR 2000 SC 2924 : (2000) 7 SCC 601 : 2000 SCC (Cri) 1422 (1426) : 2000 CrLR (SC) 756.

[12900] ● ***Representation dealt with utmost expedition.***—It has been clearly indicated in counter affidavit as to how detenue's representation has been dealt with from day-to day till it was finally disposed of. Taking into account the fact that holidays intervened in between and the manner in which the representation has been dealt with by the authority concerned, we must hold that the representation has been dealt with utmost expedition and there has been no delay in the manner of disposal of the representation. *Kantilal Hirji Shah* v. *State of Tamil Nadu,* (2000) 7 SCC 606 : 2000 SCC (Cri) 1427 (1431) : 2000 CrLJ 261 : 2000 CrLR (SC) 728 : JT 2000 (7) SC 478.

[12901] ● ***Detention order—Revocation of.***—*COFEPOSA Act, 1974, Section 3.*—In the instant case the husband of the respondent evaded arrest as is obvious and obtained an interim order from the High Court which was in force till the disposal of the writ petition and thereafter on quashing the detention, the question of detention did not arise now. Therefore we do not think that it would be appropriate to state that merely by passage of time the nexus between the object for which the husband of the respondent is sought to be detained and the circumstances in which he was ordered to be detained, has snapped. However, we make it clear that if those circumstances did not exist, then it would be appropriate for the Government to revoke the order of detention and, if still certain circumstances as apprehended in the order of detention exist, it will be open to the Government to enforce the same. *Union of India* v. *Arvind Shergill*, AIR 2000 SC 2924 : (2000) 7 SCC 601 : 2000 SCC (Cri) 1422 : 2000 CrLR (SC) 756.

[12902] ● ***Parole—Grant of to detenu.***—*COFEPOSA Act, 1974, Section 12(1) and*

12(ia).—The Court, cannot, generally speaking, exercise the power to grant temporary release to detenues on parole, in cases covered by COFEPOSA Act during the period an order of detention is in force because of the express prohibition contained in sub-section (6) of S. 12. The bar of judicial intervention to direct temporary release of a detenu would not, however, effect the jurisdiction of the High Courts under Art. 226 of the Constitution or of this Court under Arts. 32, 136 or Art. 142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to be made. That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the Court leaves it to the administrative or Jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu. *Sunil Fulchand Shah* v. *Union of India*, AIR 2000 SC 1023 : (2000) 3 SCC 409 : 2000 SCC (Cri) 659 (683) : 2000 CrLJ 1444 : 2000 CrLR (SC) 281 : JT 2000 (2) SC 230.

[12903] ● ***Documents to be placed before detaining authority.***—There can be no doubt it was not necessary, while considering the case of the petitioner-detenu, to place all or any of the documents which are relevant and are relied on in the proceedings of a co-accused, but where the sponsoring authority opts out of his own volition to place any document of the other co-detenu, not merely as a narration of fact but reiterating in details the confession made by him, then it cannot be said that it would not prejudice the case of the detenu. If this has been done, it was incumbent for the sponsoring authority to have placed their retraction also. If the sponsoring authority would not have placed this then possibly no legal grievance could have been made by the detenue. But Once the sponsoring authority have chosen to place the confessional statement, then it was incumbent on it to place the retraction also made by them. In our opinion its non-placement affects the subjective satisfaction of the detaining authority. This Court has time and again laid down that the sponsoring authority should place all the relevant documents before the detaining authority. It should not withhold any such document based on its own opinion. All documents, which are relevant, which have bearing on the issue, which are likely to affect the mind of the detaining authority, should be placed before him. Of course a document which has no link with the issue cannot be construed as relevant so far as the submission that detaining authority in both being the same, presumption should be drawn that it was aware of the retraction and its non-placement would not affect its subjective satisfaction cannot be accepted, specially, firstly where the difference between the two orders being more than five months and secondly such a conjectural possibility should not be drawn in a preventive detention case. It is difficult for any authority to remember each and every document which were on the file of the other co-detenu before passing the detention order. It would be too dangerous a proposition to accept to infer that he would have known it, specially when there is a gap of more than five months and where no such affidavit is filed by he detaining authority. *A Sowkath Ali* v. *Union of India*, AIR 2000 SC 2662 : (2000) 7 SCC 148 : 2000 SCC (Cri) 1304 (1313, 1314) : 2000 CrLJ 3691 : 2000 CrLR (SC) 568.

[12904] ● ***Preventive detention—Public order.***—*Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, drug offenders and Dangerous Persons Act 1981, Section 3.*—In the instant case the appellant extorted money from businessmen and also gave threats to the people at the public place and thereby undoubtedly affected the even tempo of life of the society, therefore, such activities cannot be said to be a mere disturbance of law and order. The activities of the detenu disturbed the public order. *Hasan Khan* v. *R. H. Mendnoca*, AIR 2000 SC 1146 : (2000) 3 SCC 511 : 2000 SCC (Cri) 708 (711) : 2000 CrLJ 1729 : 2000 CrLR (SC) 361.

[12905] ● ***Preventive detention—Activities of appellant disturbed life of people in area.***—It has been urged in this case that the criminal proceedings which were started on the complaint of H.C. Gupta was under Sections 341, 323, 334, 504, 506 II and 34, IPC and all these sections were bailable and in fact bail was granted, and, therefore, this Act cannot be said to disturb public order. From the grounds of detention we find that when H.C. Gupta and his brother sought for help, none came forward to their help out of fear of the appellant and this fact would show that the activities of the appellant disturbed the life of the people of that area. *Hasan Khan* v. *R.H. Mendnoca*, AIR 2000 SC 1146 : (2000) 3 SCC 511 : 2000 SCC (Cri) 708 (710, 711) : 2000 CrLJ 1729 : 2000 CrLR (SC) 361.

[12906] ● ***Detention order—Delay in passing of.***—*Gujarat Prevention of Anti. Social Activities Act, 1985, Section 3(2).*—"We find that the inquiry was completed during the last part of February at the level of Deputy Commissioner of Police and the final order was passed on 12-4-

1999. It cannot be said that there was undue delay and action was being taken in a routine manner, as after completion of inquiry the matter had to be examined at various levels and finally the orders were passed by the Commissioner." *Hasan Khan* v. *R.H. Mendnoca*, AIR 2000 SC 1146 : (2000) 3 SCC 511 : 2000 SCC (Cri) 708 (711) : 2000 CrLJ 1729 : 2000 CrLR (SC) 361.

[12907] ● *Detaining—Authority basing his subjective satisfaction on series of contemporaneous incidents.*—*Maharashtra Prevention of Dangerous Activities of slumlords, bootleggers and drug-offenders Act, 1981, Section 3.*—From the grounds of detention and papers enclosed with it is clear that the detaining authority based his subjective satisfaction on a series of contemporaneous incidents in which the detenu was involved. The satisfaction was not based on a single or stray incident. In the *in-camera* statements, separate incidents of criminal activities of the detenu were stated. The assertions are not assailed as untrue nor can they be said to be irrelevant for the purpose of the order. On such materials on record, it cannot be said that there was no basis for the detaining authority to feel satisfied that the detenu was either himself or as a member or leader of a gang, habitually committed or attempted to commit or abetted the commission of any of the offences stated in S. 2(*b-1*). Therefore, the contention raised on behalf of the petitioner that the conclusion arrived at by the detaining authority that the detenu was a "dangerous person" within the meaning of S. 2(*b-1*) was vitiated, cannot be accepted. *Phulwari Jagdamba Prasad Pathak* v. *R.H. Mendnoca*, AIR 2000 SC 2527 : (2000) 6 SCC 751 : 2000 SCC (Cri) 1263 (1270) : 2000 CrLJ 3944 : 2000 CrLR (SC) 557.

[12908] ● *Preventive detention—Materials relied on be true and reasonable nexus with purpose.*—Preventive detention measure is harsh, but it becomes necessary in the larger interest of society. It is in the nature of a precautionary measure taken for preservation of public order. The power is to be used with caution and circumspection. For the purpose of exercise of the power, it is not necessary to prove to the hilt that the person concerned had committed any of the offences as stated in the Act. It is sufficient if from the material available on record the detaining authority could reasonably feel satisfied about the necessity for detention of the person concerned in order to prevent him from indulging in activities prejudicial to the maintenance of public order. In the absence of any provision specifying the type of material which may or may not be taken into consideration by the detaining authority and keeping in view the purpose the Statute is intended to achieve, the power vested in the detaining authority should not be unduly restricted. It is neither possible nor advisable to catalogue the types of materials which can form the basis of a detention order under the Act. That will depend on the facts and situation of a case. However, the facts stated in the materials relied upon should be true and should have a reasonable nexus with the purpose for which the order is passed. *Phulwari Jagdamba Prasad Pathak* v. *R.H. Mendonca*, AIR 2000 SC 2527 : (2000) 6 SCC 751 : 2000 SCC (Cri) 1263 (1269, 1270) : 2000 CrLJ 3944 : 2000 CrLR (SC) 557.

[12909] ● *"Likelihood to be released on bail" different from "likelihood of his moving an application for bail".*—There must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the *ipse dixit* of the officer passing the order of detention. Before passing the detention order the authority concerned must satisfy himself of the likelihood of the petitioner being released on bail. The likelihood of his moving an application for bail is not a sufficient compliance with the requirements. The reasoning that there is "likelihood to be released on bail" is different from "likelihood of his moving an application for bail". *Amritlal* v. *Union Government*, AIR 2000 SC 3675 : (2001) 1 SCC 341 : 2001 CrLJ 474 : 2001 SCC (Cri) 147 (149, 150) : 2001 CrLR (SC) 201.

[12910] ● *Prayer for being temporarily released to be disposed of within reasonable time.*—*Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, drug offenders, goondas Immoral, Traffic Offenders and Land Grabbers Act, 1986, Section 15.*—The power under Section 15 of the Act is the power of the Government to release a detenue for any specified period with such conditions to be specified in the order of release and such a prayer by no stretch of imagination can be said to be a representation against the order of detention within he meaning of Article 22(5) of the Constitution. That Being the position question of infraction of Art. 22(5) does not arise if the prayer of the detenu for being temporarily released, is not disposed of immediately and there is some delay in the disposal of the said prayer. Of course, such a prayer for being temporarily released, should be disposed of within a reasonable time but delay on the part of the authority in considering the prayer for temporary release under S. 15 of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 cannot be held to be an infraction of the Constitutional right guaranteed to a detenu under Art. 22(5). The High Court committed serious error in setting aside the order of detention, merely because there had been delay in disposing of the application for temporary release. *District Collector* v. *Shaik Hasmath Beebi*, AIR 2001 SC 1681 : (2001) 5 SCC 401 : 2001 SCC (Cri) 903 : 2001 CrLJ 2193 : JT 2001 (5) SC 67.

[12911] ● ***Delay in passing or executing detention order.***—The order of detention having been made as early as on 9-6-1998 and the same not having been effected till today, it is certainly necessary for the authorities concerned in the Government to apply mind as to whether detention of the respondent is still necessary or not and take appropriate steps either in giving effect to the order of detention or to revoke the same. In addition we may also notice that the order made by us will not prejudice the interest of the respondent that in the event the said order of detention is given effect to it is open to the respondent to raise all grounds as are permissible in law notwithstanding what we have observed in the course of order. *Union of India* v. *Muneesh Suneja*, AIR 2001 SC 854 : (2001) 3 SCC 92 : 2001 SCC (Cri) 433 (436) : 2001 CrLR (SC) 208 : JT 2001 (2) 2001 SC 416 : 2001 (1) Crimes 255.

[12912] ● ***Detention order—Delay in making.***—In the instant case the appellant was arrested on 8-11-1996 and the detention order was passed after nearly 5 months, *i.e.,* on 15-4-1997. In our view, this contention is rightly rejected by the High Court as the detaining authority has sufficiently explained the reasons for the said delay. The explanation given for the delay is also mentioned in para 4(*c*) of the counter-affidavit filed on behalf of the Union of India. *Rajan Worlikar* v. *State of Karnataka*, AIR 2001 SC 2303 : (2001) 5 SCC 295 : 2001 SCC (Cri) 883 (887) : 2001 CrLJ 2599 : JT 2001 (1) (Supp) SC 428.

[12913] ● ***Detenu apprised of his right to make representation to appropriate Govt.***—*COFEPOSA Act, 1974, Section 8(e) and (f).*—The detenu in this case was apprised of his right to make representation to the appropriate Government/authorities against his order of detention as mandated in Art. 22(5) of the Constitution. Despite knowledge, the detenu did not avail of the opportunity. Instead of making a representation to the appropriate Government or the confirming authority, the detenu chose to address a representation to the Advisory Board alone even without a request to send its copy to the authorities concerned under the Act. In the absence of representation or the knowledge of the representation having been made by the detenu, the appropriate Government was justified in confirming the order of detention on perusal of record and documents excluding the representation made by the detenu to the Advisory Board. For this alleged failure of the appropriate Government, the order of detention of the appropriate Government is neither rendered unconstitutional nor illegal. *R. Keshava* v. *M.B. Prakash*, AIR 2001 SC 301 : (2001) 2 SCC 145 : 2001 SCC (Cri) 289 (298) : 2001 CrLR (SC) 110 : JT 2001 (1) SC 183.

[12914] ● ***Detention order clearly setting out that complainant threatened.***—The detention order clearly sets out that the respondent alonwith Thiruvengadam, Parthasarathy and Kandan got down from the Tata Sumo car and that all of them were armed with knives. The detention order clearly sets out that the complainant was threatened. The detention order sets out that these persons terrorised everyone at the spot and one of them picked up a soda bottle from the nearby shop and hurled the same against the public. The detention order sets out that the normalcy of the area was completely dislocated as terror and panic had been created at the spot. We fail to see what further and better particulars could have been given in the detention order. However, the detention order was of 1999. The same had been quashed by the High Court in April 2000. The period of detention is over. In our view this is not a case where the detenue should be made to surrender to undergo the remaining period of detention. *State of Tamil Nadu* v. *Baskar*, AIR 2001 SC 1543 : 2001 SCC (Cri) 424 (425, 426) : 2001 CrLJ 1258 : 2001 CrLR (SC) 229 : JT 2001 (3) SC 47 : 2001 (1) Crimes 299.

[12915] ● ***Detention order not referring to four occurrences in four different places but only mentioning name of section.***—Undoubtedly, in the affidavit filed by the sponsoring authority, reliance has been placed on six cases. However, the detaining authority has not placed reliance on six cases. This itself shows that the detaining authority has applied its mind and not gone just by what was stated by the sponsoring authority. A careful reading shows that the detention order does not refer to four occurrences in four different places, but is only mentioning that an offence had taken place in Sobanapuram section, Koppampatti beat, Manamalai forest and at Anaikkal road. Had the High Court applied its mind properly, it would have realised that there were no four occurrences in four different places. In one view there has been total non-application of mind on the part of the High Court. The impugned order of the High Court cannot be sustained and it is hereby set aside. *State of Tamil Nadu* v. *Balasubramaniam*, AIR 2001 SC 1201 : 2001 SCC (Cri) 437 (438, 439) : 2001 CrLJ 1257 : 2001 CrLR (SC) 227 : JT 2001 (3) SC 93.

[12916] ● *Detaining authority different from Additional Chief Secretary.*—Undoubtedly the order of detention shows that the additional Chief Secretary and Principal Secretary to the Government, Home and Transport Department is specially empowered under Section 3(1) of the PITNDPS Act, 1988. However, that by itself does not mean that the order of detention has been passed by him in his capacity as a specially empowered officer. If "specially empowered officer" has exercised his power conferred upon him under Section 3(1) of the PITNDPS Act, he would not have stated that it was by order and in the name of the Governor. The beginning of the order also would not be "Government of Karnataka" but it would be in his name. Further, the grounds of detention also make it clear that the order was passed by the Government of Karnataka. Therefore, it cannot be said that the appellants were not communicated that they were having right of making representation to the State Government. The grounds specifically provide that they have right to make representation to the detaining authority, Central Government and PITNDPS Officers' Board. Ground 31 further clarifies that if any representation is made to the "detaining authority" then it be addressed to the undersigned, namely, "the Additional Chief Secretary and Principal Secretary to the Government". This also makes it clear that the detaining authority is different from the Additional Chief Secretary. *Rajan Worlekar* v. *State of Karnataka*, AIR 2001 SC 2303 : (2001) 5 SCC 295 : 2001 SCC (Cri) 883 (886, 887) : 2001 CrLJ 2589.

[12917] ● *Subjective satisfaction of detaining authority—Not to be interfered with on in depth examination.*—*National Security Act, 1980, Section 3(2).*—Solitary commission of a heinous crime in given circumstances may disturb entire public order and may justify detention order. Subjective satisfaction of the detaining authority in issuing detention order cannot be interfered with on in in-depth examination of the statements of the witnesses recorded under Section 161, CrPC and other particulars. *State of Uttar Pradesh* v. *Saleem*, 2001 (3) Crimes 165 (SC) : (2001) 4 Supreme 437.

[12918] ● *Delay either in passing order or execution thereof not fatal except.*—*COFEPOSA Act, 1974, Section 3.*—Mere delay either in passing the order or execution thereof is not fatal except where the same stands un-explained. In the given circumstances of the case and if there are good reasons for delay in passing the order or in not giving effect to it, the same could be explained and those are not such grounds which could be made the basis for quashing the order of detention at a pre-detention stage. *Union of India* v. *Muneesh Suneja*, AIR 2001 SC 854 : (2001) 3 SCC 92 : 2001 SCC (Cri) 433 (436) : 2001 CrLR (SC) 208 : JT 2001 (2) SC 416 : 2001 (1) Crimes 255.

[12919] ● *Period of detention over—Not a case where detenu made to surrender.*—"The detention order was of 1999. The same had been quashed by the High Court in March 2000. The period of detention is over. In our view it is not a case where the detenue should be made to surrender to undergo the remaining period of detention." *State of Tamil Naidu* v. *Glory*, AIR 2001 SC 1368 : (2001) 3 SCC 748 : 2001 SCC (Cri) 628 (630) : 2001 CrLJ 1684 : 2001 CrLR (SC) 359 : 2001 2 Crimes 105.

[12920] ● *State Govt. to peruse report of Advisory Board alongwith other records while confirming order of detention.*—*COFEPOSA Act, 1974, Section 8 and 11.*—The State Government while confirming the order of detention has to peruse the report of the Advisory Board alongwith other records, if any, in its possession, and cannot determine the legality of the procedure adopted by the Advisory Board. Under Cl. (*f*) of S. 8 of the Act, the Government is not bound by the report of the Advisory Board and in every case where the Advisory Board reports that there is, in its opinion, sufficient cause for the detention of a person, may confirm the detention order. The word "may" used in this clause does not cast duty upon the appropriate Government to necessarily accept the opinion for further detention. However, where the Board reports that there is, in its opinion, no sufficient cause for the detention of the person concerned, the appropriate Government has no option but to revoke the detention order and cause the person to be released forthwith. When the report of the Advisory Board opining that there exists sufficient cause for detention of a person, is not binding upon the appropriate Government, there is no infirmity in its order passed without consideration of the proceedings of the Advisory Board. The obligation of the appropriate Government is restricted to the extent of examining the report conveying the opinion of the Board regarding further detention of the detenu. *R. Keshava* v. *M.B. Prakash*, AIR 2001 SC 301 : (2001) 2 SCC 145 : 2001 SCC (Cri) 289 (290) : 2001 CrLR (SC) 110 : JT 2001 (1) SC 183.

[12921] ● *Subjective satisfaction arrived by detaining authority on consideration of all rele-*

vant materials.—The subjective satisfaction arrived at by the detaining authority in the case is based on consideration of all the relevant materials placed before it by the sponsoring authority. It is not the case of the appellant that the sponsoring authority did not place before the detaining authority any marterial in its possession which is relevant and material for the purpose and such material, if considered by the detaining authority, might have resulted in taking a different view in the matter. All that is contended on behalf of the detenue is that the detaining authority should have taken further steps before being satisfied that a case for detention under the COFEPOSA Act has been made out against the detenu. Whether the detention order suffers from non-application of mind by the detaining authority is not a matter to be examined according to any strait-jacket formula or set principles. It depends on the facts and circumstances of the case, the nature of the activities alleged against the detenue, the materials collected in support of such allegations, the propensity and potentiality of the detenu in indulging in such activities, *etc.* The Act does not lay down any set parameters for arriving at the subjective satisfaction by the detaining authority. Keeping in view the purpose for which the enactment is made and the purpose it is intended to achieve, the Parliament in its wisdom, had not laid down any set standards for the detaining authority to decided whether an order of detention should be passed against a person. The matter is left to he subjective satisfaction of the competent authority. *Gurdev Singh* v. *UOI*, AIR 2002 SC 10 : (2002) 1 SCC 545 : 2002 SCC (Cri) 191 : JT 2001 (9) SC 374 : 2002 (1) Crimes 115 : 2001 (8) Supreme 121.

[12922] ● ***Detention solitary ground—Smuggling—Meaning of.***—The stand of the department is that whether there can be detention on a solitary instance would depend on the facts and circumstances of each case, on the magnitude of the case and other attendant circumstances. In the present case, it is stated that detenu's passport disclosed that he had made several trips abroad and he was not a man of such affluence as to make so many trips out of the country unless they be in the context of his business activities. Therefore, considering the number of trips he had made out of the country, the volume of goods seized now and the *prima facie* misdeclaration of value, an inference can be drawn that the detenu was a part of bigger network in bringing the goods for commercial distribution inside the country by avoiding the payment of duty. In this background, absence of passport will not be a handicap to the detenue for his activities in the present case in which the fact situation is different from the one available in *Rajesh Gulati's* case. Nor can we confine the meaning of the word 'smuggling' only to going out of country and coming back with goods which are contraband or to evade duty but may encourage such activities as well by dealing in such goods. *Sitthi Zuraina Begum* v. *Union of India*, AIR 2003 SC 323 : (2002) 10 SCC 448 : 2003 SCC (Cri) 1463 : (2003) 1 Crimes 163 : (2002) 8 Supreme 403.

[12923] ● ***Delay not inordinate in considering representation of detenu.***—Considering the volume of petitions received in the President's Secretariat and the fact that the petitions received in regional languages have to be translated and thereafter forwarded to the concerned Ministry, and in the present case it took about 20 days to complete the process which in the circumstances of the case cannot be taken to be excessive so as to term the delay as inordinate in considering the representation of the detenu. When the said representation had been received from the President's Secretariat steps were taken to get the comments from the sponsoring authority on 26.6.2002 and the same was disposed of on 28.6.2002 itself. Considering the totality of the circumstances, we are of the view that the Ministry of Finance has explained the delay of 20 days in considering the representation. *Sitthi Zuraina Begum* v. *Union of India*, AIR 2003 SC 323 : (2002) 10 SCC 448 : 2003 SCC (Cri) 1463 (1466) : (2003) 1 Crimes 163 : (2002) 8 Supreme 403.

[12924] ● ***Detention under preventive detention not punitive.***—Detention under the preventive detention laws is not punitive but is essentially a precautionary measure intended to prevent and intercept a person before he commits an infractive act which he had done earlier. A detenu is therefore not entitled to set off as provided under Section 428 of the CrPC, 1973 for the period of detention under the COFE POSA, 1974. *Maliyakkal Abdul Azeez* v. *Assistant Collector, Kerala*, AIR 2003 SC 928 : (2003) 2 SCC 439 : 2003 SCC (Cri) 551 : 2003 CrLJ 1215.

[12925] ● ***Solitary instance of robbery as mentioned in grounds of detention not relevant for sustaining order of—Preventive detention.***—*In Prevention and Dangerous Activities of Bootlegger, Drug Offender, Goondas Immoral Traffic Offenders and Slumgrabbeas Act, Section 3.*—In the present case, the three alleged incidents to which the Commissioner of Police has referred to are thefts arising under Section 379, IPC and, therefore, there is only a solitary instance wherein the detenu is alleged to have robbed in a public place one Kumar. Therefore, there is no material on record to show that the reach and potentiality of the single incident of robbery was so great as to disturb the even tempo or normal life of the community in the locality or disturb general peace and tranquillity or create a sense of alarm and insecurity in the locality. Though in the grounds of detention the detaining authority had stated that by committing this offence in public the detenue created a sense of alarm, scare and a feeling of insecurity in the minds of the public of the area and thereby acted in a manner prejudicial to the maintenance of public order which affected even tempo of life of the community, but citation of these words in the order of detention is more in the nature of a ritual rather than with any significance to the content of the matter. Thus, a solitary instance of robbery as mentioned in the grounds of detention is not relevant for sustaining the order or detention for the purpose of preventing the petitioner from acting in a manner prejudicial to the maintenance of public order. This ground is enough to quash the order of detention made by the respondents. *Darpan Kumar Sharma* v. *State of Tamil Nadu*, AIR 2003 SC 971 : (2003) 2 SCC 313 : 2003 SCC (Cri) 537 : 2003 CrLJ 1222 : (2003) 1 Crimes 446 (SC).

[12926] ● ***Detenu not producing witness for examination.***—The detenu did not produce any witness for examination and even did not state before the Advisory Board that he wanted to examine the witness or that the witness was present. When the detenu did not produce any witness for examination, there was no necessity for the Advisory Board to require the detenu to produce witnesses. *State of Maharashtra* v. *Ramchandra Rammilan Mishra alias Pandey*, (2004) 4 SCC 509 : 2004 SCC (Cri) 1329 (1331-32) : 2004 CrLJ 1823 : JT 2004 (2) (Supp) SC 402 : (2004) 2 Crimes 338.

[12927] ● ***Court cannot substitute its own opinion for that of detaining authority when.***—The Court cannot substitute its own opinions for that of the detaining authority when the grounds of detention are precise, pertinent, proximate and relevant. In this case there is no vagueness and staleness. A.P. Prevention of Dangerous Activities of Bootleggers Dacarts drug offenders land Grabbers Act, 1986. *Commissioner of Police* v. *C. Anita*, AIR 2004 SC 4423 : (2004) 7 SCC 467 : 2004 SCC (Cri) 1944 (1950) : JT 2004 (7) SC 355 : (2004) 5 SLT 279 : (2004) 4 Crimes 1.

[12928] ● ***Writ petition for quashing detention order.***—A writ petition for quashing the detention order is not maintainable before the order of detention was served and the detenu was taken into custody.—*Union of India* v. *Vidya Bagaria*, AIR 2004 SC 2220 : (2004) 5 SCC 577 : 2004 CrLJ 2480 (2481) : 2004 (2) Crimes 362.

[12929] ● ***Preventive detention—Fresh order.***—(J&K Public Safety Act, 1978, S. 13) "Though, in the affidavit filed by the State, it has been stated that the contents of the warrants and grounds of detention were served read over and explained to the detenu and he was informed about his right to make a representation against the detention, if he so desired, there is no material placed on record to substantiate this stand. It is stated in the affidavit that the detenu refused to receive copy of the detention order and also refused to put his signatures on the documents. The least the State could have done is to file an affidavit of the person who wanted to serve the relevant documents and an endorsement to the effect that there was refusal. Even the name of the official has not been indicated in the affidavit. That would have been sufficient to comply with the requirements of Section 13 of the Act.

Though a prayer for extension of time is made to file the details, we find that the currency of the detention order is expiring on 6-11-2004. Therefore, we do not accept the prayer for extension of time. Learned counsel for the State submitted that there is no bar on a fresh order of detention being passed." *State Legal Aid Committee* v. *State of J&K*, 2005 SCC (Cri) 1299 (1309).

[12930] ● ***Detenu evading execution of detention order.***—Where the detenu evades the execution of the detention order, it would not be a case of unexplained delays in execution of detention order.—*Mukesh Tikaji Bora* v. *Union of India*, (2007) 9 SCC 28 : (2007) 3 SCC (Cri) 439 : (2007) 2 Crimes 236.

1. A.P. PREVENTION OF DANGEROUS ACTIVITIES OF BOOT-LEGGERS, DACOITS, DRUG OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS AND LAND GRABBERS ACT, 1986, S. 3

[12931] ● ***A.P. Prevention of Dangerous Activities of Boot-leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, S. 3.***—The grievance of the State Government in the instant appeal was that the High Court erred in quashing the detention order on the ground that some of the instances relied upon by the detaining authority being state, the entire detention order become invalid. The Supreme Court held as under :

> "So far as this grievance of the appellant State is concerned the same is since addressed to by us in our judgment in the case of

Collector & District Magistrate v. *Sangala Kondamma*, (2005) 3 SCC 666 : 2005 SCC (Cri) 885 wherein we have held: (SCC p. 669, para 10)

> "Thus, if the facts placed before the detaining authority are proximate to each other and the last of the facts mentioned is proximate to the order of detention then the earlier incidents cannot be treated as stale and detention order cannot be set aside."

The principle extracted hereinabove from the case *Collector & District Magistrate*, (2005) 3 SCC 666 : 2005 SCC (Cri) 885 applies to the facts of this case also.

In the above case of *Collector & District Magistrate* even though we held that the order of the High Court was unsustainable, we did not interfere with the same for reasons mentioned therein. In the normal course, the very same reasons would have been sufficient to dispose of this appeal also without interfering with the order of the High Court. *District Collector, Ananthapur* v. *V. Laxmanna*, 2005 SCC (Cri) 882 (883).

[12932] ● ***Preventive detention opportunity to make representation.***—If the detention is on the ground that the detenu is indulging in manufacture or transport or sale of arrack then that by itself would not become an activity prejudicial to the maintenance of public order because the same can be effectively dealt with under the provisions of the Excise Act but if the arrack sold by the detenu is dangerous to public health then under the Act, it becomes an activity prejudicial to the maintenance of public order, therefore, it becomes necessary for the detaining authority to be satisfied on material available to it that the arrack dealt with by the detenu is an arrack which is dangerous to public health to attract the provisions of the Act and if the detaining authority is satisfied that such material exists either in the form of report of the Chemical Examiner or otherwise, copy of such material should also be given to the detenu to afford him an opportunity to make an effective representation. *District Collector, Ananthapur* v. *V. Laxmanna*, AIR 2005 SC 2802 : (2005) 3 SCC 663 : 2005 SCC (Cri) 882 (884) : 2005 CrLJ 2150 : (2005) 2 Crimes 31.

[12933] ● ***Preventive detention—Past incidents.***—It is necessary for the authority proposing the detention of a person under the Act to produce such material which shows the continuous previous illegal activities of the proposed detenu which would satisfy the detaining authority of the need for detaining such a person. In other words, the material produced by the authority proposing the detention should form a chain of incidents last of which will have to be proximate to the date of proposed detention while other acts must be proximate to each other. Thus, if the facts placed before the detaining authority are proximate to each other and the last of the facts mentioned is proximate to the order of detention then the early incidents cannot be treated as stale and detention order. *Collector and District Magistrate, W.G. District, Eluru, A.P.*, 2005 SCC (Cri) 885 (888).

[12934] ● ***Preventive detention—Last incident proximate to order of detention.***—In the instant case between the period from 01, 2001 and 25.10.2002 the detenue was involved in five incidents of bootlegging which were reasonably proximate to each other and the last of the incidents being proximate to the order of detention, the Supreme Court held that the High Court was not justified in treating the two incidents of 17.1.2000 and 10.1.2001 as state by taking them in isolation. The Supreme Court further observed as under at pp. 888 and 889 [of SCC (Cri)]:

> "In our opinion, the Court should have considered the proximity of the incidents between themselves which indicates the possibility of the proposed detenu continuing to indulge in the illegal activities which requires his preventive detention. In the present case, as noticed above, the five incidents recorded in the order of detention being proximate enough to each other show the continuity of the acts of the detenu. In such a fact situation, we think the High Court erred in coming to the conclusion that two of the five grounds being not proximate to the order of detention, the order of detention was based on stale grounds. While it can be stated that the incidents of 17-1-2000 and 10-1-2001 could not by themselves have been sufficient grounds to detain the detenu but would certainly become a relevant material along with the other three grounds dated 3-2-2002, 6-10-2002 and 25-10-2002 to come to the conclusion that there is a need for detaining the detenu to prevent him from indulging similar activities in the future.

While we uphold the validity of the order of detention passed by the detaining authority by disagreeing with the finding of the High Court, however, on facts of this case, we notice that the detenu was taken into custody on 15-1-2003 and was released from detention pursuant to the order of the High Court on 28-4-2003 and at this distance of time the appellants have no fresh material to show before us that his further detention is necessary. Therefore, we think there is no need to rearrest the detenu to serve out the balance period of detention." *Collector and District*

Magistrate v. *Sangala Kondamma*, 2005 SCC (Cri) 885.

2. TAMIL NADU PREVENTION OF DANGEROUS ACTIVITIES OF BATTLEGGERS, DRUG OFFENDERS, FOREST OFFENDERS, GOONDAS IMMORAL TRAFFIC OFFENDERS AND SLUM-GRABBERS ACT, 1982

[12935] ● ***Tamil Nadu Prevention of Dangerous Activities of Battleggers, Drug Offenders, Forest Offenders, Goondas Immoral Traffic Offenders and Slum-Grabbers Act, 1982.***—The counter-affidavit filed by the District Magistrate also reveals that there was no confessional statement by the detenu either admitting the guilt or leading to the recovery of incriminating objects used in the crime. If that be the case the statement in the detention order cannot be correct. Making of confession by the detenu is evidently one of the crucial factors that was taken into account by the detaining authority. Once that fact is found to be non-existent, the satisfaction of the District Magistrate under the provisions of the aforesaid Act is vitiated. This ground is sufficient to quash the detention order. Accordingly, the appeal is allowed and the appellant shall be set at liberty forthwith unless required in any other case. *Elasu Glias Elavarasam* v. *District Collector and D.M., T.N.*, 2005 SCC (Cri) 1495 (1496).

3. COFEPOSA, 1974, S. 3(1); FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT, 1992, S. 11(1)

[12936] ● ***COFEPOSA, 1974, S. 3(1); Foreign Trade (Development and Regulation) Act, 1992, S. 11(1).***—The detenu has a right to be supplied with the material documents on which reliance is placed by the detaining authority for passing the detention order but the detention order will not be vitiated, if the document although referred to in the order is not supplied which is not relied upon by the detaining authority for forming of its opinion or was made the basis for passing the order of detention. The crux of the matter lies in whether the detenu's right to make a representation against the order of detention is hampered by non-supply of the particular document. *J. Abdul Hakeem* v. *State of T.N.*, 2005 SCC (Cri) 1601 (1604).

[12937] ● ***Preventive detention—Grounds of detention.***—"In the present case although the detaining authority in the grounds of detention had referred to the passports and the entries made therein for the foreign trips made by the detenu but that cannot be said to have been relied upon by he detaining authority for passing the detention order. The appellant detenu has admitted in his statement dated 17-7-2004 which was in his own handwriting, that he had an old passport under which he travelled 23 times to Sri Lanka out of which 10 visits were made to Hong Kong via Sri Lanka; that he had travelled once to Singapore and under the current passport he had travelled 4 times to Hong Kong via Sri Lanka. It is this statement of the appellant detent made before the Authorities on 17-7-2004 which was the basis for passing of the detention order and reference of the two passports containing entries of the foreign visits by the detenu is only a passing reference. The passport entries are not made the basis of detention order. The basis is admission of the foreign visits made by the detenu in his statement. We fail to understand as to how non-supply of copies of the passports of the appellant detenu prejudicially affect his right to make a proper representation against the order of detention. The non-supply of copies of the passports will not have the effect of vitiating the detention order." *J. Abdul Hakeem* v. *State of T.N.*, 2005 SCC (Cri) 1601 (1604-05).

[12938] ● ***Retracted confession.***—If the confession was retracted and the same was not placed before the detaining authority, that is a valid ground to set aside the detention order. The respondent authority should have placed all documents and relevant facts to the notice of the detaining authority and failure to do so would vitiate the detention order. Hence, we set aside the detention order and the appellant is directed to be released forthwith; if not required in any other matter. *Rakesh Kumar Meglani* v. *Union of India*, 2005 SCC (Cri) 1616 (1617).

DETENUE
§ (See "DETENTION")

DETERRENT PUNISHMENT—PURPOSE

[12939] ● ***Deterrent punishment—Purpose.***—Punishment in criminal cases is both punitive and reformative. The purpose is that the person found guilty of committing the offence is made to realise his fault and is deterred from repeating such acts in future. The reformative aspect is meant to enable the person concerned to relent and repent for his action and make himself acceptable to the society as a useful social being. In determining the question of proper punishment in a criminal case, the Court has to weigh the degree of culpability of the accused, its effect on others and the desirability of showing any leniency in the matter of punishment in the case. An act of balancing is, what is needed in such a case; a balance between the interest of the individual and the concern of the society, weighing the one against the other. Imposing a hard punishment on the accused serves a limited purpose but at the same time, it is to be kept in mind that relevance of deterrent punishment in matters of serious crimes affecting society should not be undermined. Within the parameters of the law, an attempt has to be made to afford an opportunity to the individual to reform himself and lead life of a normal, useful member of society and make his contribution in that regard. Denying such opportunity to a person who had been found to have committed offence in the facts and circumstances placed on record, would only have a hardening attitude towards his fellow beings and towards society at large. Such a situation has to be avoided, again within the permissible limits of law. After giving our anxious consideration to the question of reduction of sentence as urged on behalf of the appellant and objected to on behalf of the respondent, we have come to the conclusion that some consideration should be shown to the appellant in the matter. In coming to this conclusion we have taken into account the facts he has spent long period more than thirteen years in jail, that, he was a young man of 21 years when he fired three shots injuring six person on the birth anniversary of Mahatma Gandhi at Rajghat when President, Prime Minister and other V.I.Ps. were to visit the Samadhi of Mahatma Gandhi, that the situation then prevailing in the State of Punjab was surcharged with acts of terrorism and several misguided young men were drawn into the movement, that in the meantime the movement has subsided and it could be reasonably taken that the State is free from the menace of terrorism. In taking the decision to show some consideration to the appellant in the matter of punishment, we have reposed confidence in goodness of human character which is a part of the personality of every human being. We hope and believe that our confidence will not be belied in the case of the appellant. In the facts and circumstances of the case and the changed social environment which has taken place in the meantime, it is our considered view that the sentence of life imprisonment should be modified to the period already undergone (about 13 years, 7 months). *Karamjit Singh* v. *State (Delhi Admn.)*, AIR 2000 SC 3467 (3468, 3469) : (2000) 9 SCC 161 : 2000 SCC (Cri) 1193 : 2000 CrLR (SC) 435.

DIARY
§ (See "CASE DIARY")

DIET MONEY
§ (SEE "EXPENSES OF WITNESS")

[12940] ● ***Proper diet money to witness.***—The High Court have to be vigilant in the matter of diet money to witnesses. Proper diet money must be paid immediately to the witness not only when he is examined but for every adjourned hearing and even sent to him and should not be left to be harassed by the subordinate staff. *Swaran Singh* v. *State of Punjab*, AIR 2000 SC 2017 : (2000) 5 SCC 668 : 2000 CrLJ 2780 : (2000) 3 Crimes 12.

DIFFERENCE OF OPINION BETWEEN TWO JUDGES

[12941] ● ***Difference of opinion between two judges.***—Where a case is referred to a third Judge under S. 392, CrPC, such Judge is not only entitled to decide on what points he shall hear the arguments, if any, but also his decision will be final and the judgment in the appeal will follow his decision. Precisely for the said reason, it has been held by the Allahabad High Court that if one of the Judges, who had given a different opinion ceases to be Judge, the Judgement may be pronounced by another bench of the High Court, the reason being that the ultimate decision in the appeal is to abide by the decision of the third Judge and pronouncement of the decision in conformity with the decision of the third Judge is only a formality. *Balku* v. *Emperor*, AIR 1948 All 237.

[12942] ● ***Section 429, CrPC 1895—Applicability of.***—The section is not applicable to cases where the difference is as regards the correctness or otherwise of earlier Division bench decision of the same Court. *Parmatha Nath Talukdar* v. *Saroj Ranjan Sarkar*, AIR 1962 SC 876 : 1962 (1) CrLJ 770 : 1962 Supp (2) SCR 297 : (1964) 1 SCJ 455.

[12943] ● ***Third Judge to consider opinion of his two colleagues and then give his own opinion.***—For all practical purposes the third judge must consider the opinions of his two colleagues and then give his own opinion but to equate the requirements with appeals against acquittals is not justified by provisions of Section 392 or by principle or by precedent. *Dharma Singh* v. *State Uttar Pradesh*, 1964 (1) CrLJ 78 : (1965) 2 SCJ 202 : 1962 Supp (3) SCR 769.

[12944] ● ***Third Judge free to decide appeal.***—Where the third judge did not consider it necessary to decide a particular point on which there had been difference of opinion between the two judges, but simply indicated that if at all it was necessary for him to come to decision on the point he agreed with all that had been said about by one of the two judges such decision was in conformity with law. The third judge is free to decide the appeal in the matter he thinks fit. *Babu* v. *State of Uttar Pradesh*, AIR 1965 SC 1467 : (1965) 2 CrLJ 539 : (1965) 2 SCR 771.

[12945] ● ***Criminal law not to be used for wrecking private vengeance.***—"In a Case which had proceeded on a police report a private party has no *locus standi*. No doubt, the terms of Section 435 are very wide and he can even take up the matter *suo motu*. The criminal law is not to be used as an instrument of wrecking private vengeance by an aggrieved party against the person who according to the party, had caused injury to it. Barring a few exceptions in criminal matters the party who is treated as the aggrieved party is the set which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who had acted against the social interests of the community to book." *Thakur Ram* v. *State of Bihar*, AIR 1966 SC 911 : 1966 CrLJ 700 : (1966) 2 SCR 740.

[12946] ● ***Third Judge—Power of.***—The third judge can or will deal with the whole Case. *Hethubha* v. *State of Gujarat*, AIR 1970 SC 1266 : (1970) 1 SCC 720 : 1970 SCC (Cri) 280 : 1970 CrLJ 1138.

[12947] ● ***Third Judge to deal with matter in dispute.***—The third judge to whom the case is referred can deal only matter in dispute and cannot reopen entire case. *Hethubha* v. *State of Gujarat*, AIR 1970 SC 1266 : (1970) 1 SCC 720 : 1970 SCC (Cri) 280. TO THE SAME EFFECT : (1) *Union of India* v. *Ananti Padmanabiah*, AIR 1971 SC 1836 : (1971) 3 SCC 278 : 1971 SCC (Cri) 535; (2) *Bhagat Ram* v. *State of Rajasthan*, AIR 1972 SC 1502 : (1972) 2 SCC 466 : 1972 SCC (Cri) 751.

[12948] ● ***Third Judge to decide on what points to hear arguments.***—This section contemplates that it is for the third judge to decide on what points he shall hear arguments. This postulates that the third Judge is completely free in resolving the difference as he thinks fit. *Union of India* v. *B.N. Ananti Padmanabiah*, AIR 1971 SC 1836 : (1971) 3 SCC 278 : 1971 SCC (Cri) 535 : 971 CrLJ 1287. TO THE SAME EFFECT : (1) *Getgybga* v. *State of Gujarat*, AIR 1970 SC 1266 : (1970) 1 SCC 720 : 1970 SCC (Cri) 280 : 1970 CrLJ 1138; (2) *Babu* v. *State of Uttar Pradesh*, AIR 1965 SC 1467 : 1965 CrLJ 539 : (1965) 2 SCR 771; (3) *State of Andhra Pradesh* v. *P.T. Appaiah*, AIR 1981 SC 365 : (1980) 4 SCC 316 : 1980 SCC (Cri) 960 : 1980 CrLJ 1410.

[12949] ● ***Difference between two Judges composing Court of appeal.***—Even in a case when both the judges has held that the accused was guilty but there was difference of opinion as to the nature of offence committed by the accused, it is often to the third judge to decide appeal by holding that the accused was not guilty by considering the case on merit. *State of AP.* v. *PT. Appaiah*, AIR 1981 SC 365 : (1980) 4 SCC 316 : 1980 SCC (Cri) 960 : 1980 CrLJ 1410.

[12950] ● ***Difference of opinion amongst Judges of Division Bench.***—When there is a difference of opinion amongst Judges of Division bench and their opinions were laid before a third judge, the order of Division bench becomes *non est* and the opinion of third Judge is the final order. *State of Uttar Pradesh* v. *Dan Singh*, AIR 1997 SC 1654 : (1997) 3 SCC 747 : 1997 SCC (Cri) 469 : 1997 CrLJ 1150 : (1997) 1 Crimes 121.

[12951] ● ***On difference of opinion between two Judges matter be referred to third Judge.***—S. 392, CrPC clearly contemplates that on a difference of opinion between the two Judges of the Division Bench, the matter is to be referred to the third Judge for his opinion so that the appeal is finally disposed of on the basis of such opinion of the third Judge. In the scheme of Section 392, CrPC the view that the third judge, as a rule of prudence or on the question of judicial etiquette, will lean in favour of acquittal of the accused cannot be sustained. *Tanviben Pankaj Kumar Divetia* v. *State of Gujarat*, AIR 1997 SC 2193 : (1997) 7 SCC 156 : 1997 SCC (Cri) 1004 (1009) : 1997 CrLJ 2535 : 1997 CrLR (SC) 572 : JT 1997 (5) SC 233.

[12952] ● ***Third Judge to examine independently entire case.***—"Statement of law is now quite explicit. It is the third judge whose opinion matters; against the judgment that follows therefrom that an appeal lies to this Court by way of special leave petition under Article 136 of the Constitution or under Article 134 of the Constitution or under Section 379 of the Code. The third judge is therefor, required to examine whole of the Case independently and it cannot be said that he is bound by that part of the two opinions of the two judges comprising the Division bench where there is no difference. As a matter of fact third judge is not bound by any such opinion of the Division bench. He is not hearing the matter as if he is sitting in a three judge bench where the opinion of majority would prevail." *Sajjan Singh* v. *State of Madhya Pradesh*, AIR 1998 SC 2756 : (1999) 1 SCC 315 : 1999 SCC (Cri) 44 : 1998 CrLJ 4073 (SC).

DIGESTIVE SYSTEM

[12953] ● ***Determination of time of death.***—A mixed diet of animal and vegetable foods, normally taken by Europeans, takes 4 to 5 hours for complete digestion while a vegetable diet, containing mostly farinaceous food usually consumed by Indian does not leave the stomach completely within 6 to 7 hours after its ingestion. Indeed, the stomachic contents cannot determine with precision the time of death "inasmuch as the power of digestibility may remain in abeyance for a long time in states of profound shock and coma". "It must also be remembered that the process of digestion in normal healthy persons may continue for a time after death". The Court must not abandon a scientific attitude to medical science, if it is not to be guilty of judicial superstition. To impute exactitude to a medical statement oblivious to the variables noticed by the experts and changes in dietary habits is to be unfair to the science. *Shivaji Sahebrao Bobade* v. *State of Maharashtra*, AIR 1973 SC 2622 : (1973) 2 SCC 793 : 1973 SCC (Cri) 1033 (1042, 1043) : 1973 CrLJ 1783.

[12954] ● ***Process of digestion varies from individual to individual.***—When doctor, PW-9 stated that digestion begins in 1 or 1½ hours he did not clarify as to what was the extent of the undigested food in the stomach of the deceased. The process of digestion depends upon the digestive power of an individual and varies from an individual to an individual. It also depends upon the type and amount of food taken. The period of digestion is different for different types of food. Some food articles like mutton, chicken *etc.* would take more time for being digested as compared to vegetarian food. *Mani Ram* v. *State of Rajasthan*, AIR 1993 SC 2453 : 1993 SCC (Cri) 853 (857) : 1993 CrLJ 2530 : 1993 (1) Crimes 1144.

[12955] ● ***Medical opinion—Value.***—Medical opinion is merely based on the purported opinion expressed by an author. Hypothetical answers given to hypothetical questions, a mere hypothetical and abstract opinions by test book writers, on accused facts, cannot dilute evidentiary value of ocular evidence if it is credible and cogent. The time taken normally for digesting of food would also depend upon the quality and quantity of food as well, besides others. It is required to be factually proved as to the quantum of food that was taken, atmosphere conditions and such other relevant factors to throw doubt about the correctness of time of occurrence, as stated by the witnesses. Only when the ocular evidence is wholly inconsistent with the medical evidence, the Court has to consider the effect thereof. *Ram Bali* v. *State of Uttar Pradesh*, AIR 2004 SC 2329 : (2004) 10 SCC 598 : 2004 CrLJ 2490 (2492) : 2004 (2) Crimes 493.

[12956] ● ***Medical science not so perfect to determine exact time of death.***—In *Pathipati Venkaiah* v. *State of Andhra Pradesh*, AIR 1985 SC 1715, it has been observed that Medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerized or mathematical fashion so as to be accurate to the last second. The state of the contents of the stomach found at the time of medical examination is not a safeguide for determining the time of occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when exactly the deceased had his last meal and what that meal consisted of. In *Nihal Singh and others* v. *State of Punjab* (AIR 1965 SC 26), it was indicated that the time required for digestion may depend upon the nature of the food. The time also varies according to the digestive capacity. The process of digestion is not uniform and varies from individual to individual and the health of a person at a particular time and so many other varying factors. *Ram Bali* v. *State of Uttar Pradesh*, AIR 2004 SC 2329 : (2004) 10 SCC 598 : 2004 CrLJ 2490 (2492) : 2004 (2) Crimes 493.

[12957] ● ***No direct evidence as to whether deceased had taken food in morning.***—Another contention urged by the appellant's counsel is that the post-mortem showed that the stomach of the deceased was empty. According to the learned counsel, PW-1 and the deceased had left the house in the morning and they must have taken food and that the prosecution story must be false, for the reason that the incident must have taken place somewhere during the night and that is why the postmortem evidence is to the effect that the stomach of the deceased was empty. There is no direct evidence as to whether the deceased had taken any food in the morning. The counsel for the appellants pointed to the statement given by the Investigating Officer during the cross-examination in which he had admitted that the father-in-law had stated to him that the deceased had taken breakfast in the morning and thereafter left the house. The father-in-law of the deceased was not examined as a witness. Therefore, the statement given by the Investigating Officer must have been based on the statement of the father-in-law of the deceased recorded under Section 161 of the Code of Criminal Procedure. The statement given by the Investigating Officer regarding this fact is not directly admissible in law. In the absence of any evidence to the effect as to whether the deceased had taken food or not before leaving the house on 12.10.79, the findings of the doctor to the effect that the stomach of the deceased was empty are of no consequence. *Ram Kishan* v. *State of Uttar Pradesh*, AIR 2004 SC 4678 : 2004 CrLJ 4236 (4238) : 2004 (3) Crimes 397.

[12958] ● ***Time of death can be ascertained to some extent from contents of stomach.***—According to Modi, the time of death can be ascertained to some extent from the contents of the stomach, bladder and the intestines and rate of emptying of stomach varies in healthy persons which is dependent on the consistency of food; motility of the stomach; osmotic pressure of the stomach contents; quantity of food in the duodenum; surroundings in which food is taken, emotional; and residual variations. The learned author opined thus that the time varies in a man from 2.5-6 hours. The aforesaid opinion of the learned author in his famous treatise has been noticed by this Court which approval in the case of *Suresh Chandra Bahri* v. *State of Bihar*, 1995 Suppl (1) SCC 80, at page 131 para 88, wherein it was observed that as the deceased was a young boy of 12 years, his power of digestion must be assumed to be quick and strong, therefore, if the stomach at the time of postmortem was found to be empty, it was but natural.

In the present case, it is the prosecution case and evidence that at 7.30 in the morning when other members of prosecution party were warming up near the fire and milching the cow, three deceased persons were cutting the fodder for being given to the cattle in the morning and the possibility of their taking the breakfast around 5.30 in the morning before starting the work is but natural and as Rakesh alias Chhotey, ages 23 years, was a healthy young boy at the prime of his youth might have digested the food within two hours as his power of digestion must be quick and strong due to which stomach was found empty. Thus, the finding of the doctor in the postmortem report that the stomach of Rakesh alias Chhotey was found empty at the time of postmortem examination was but natural and cannot create any doubt in relation to the veracity of the prosecution case that occurrence had taken place at 7.30 a.m. on 20th December, 1977 and consequently, the High Court was not justified in throwing out the prosecution case and rejecting ocular version of the occurrence disclosed by the witnesses, more so when the medical evidence supports the prosecution case of assault by different weapons. *State of Uttar Pradesh* v. *Sheo Sanchi*, AIR 2004 SC 4974 : (2004) 12 SCC 347 : 2004 CrLJ 4650 (4653) : (2004) 4 Crimes 163.

[12959] ● ***Digested food found in stomach of deceased.***—The very fact that some digested food was found in the stomach of the deceased, the same by itself was sufficient to show that he had taken food only in the morning of that date *i.e.* within four hours from his death. Even if he had taken some food, the same may not be within the knowledge of PW-1. *Mahendra Singh* v. *State of Madhya Pradesh*, (2007) 9 SCC 796 : 2007 (3) SCC (Cri) 583 : 2007 (4) SCR 892.

DIRECTING PROSECUTION
(Ss. 340, 343, 195, CrPC, 1973)
§ (See also "COGNIZANCE")

[12960] ● ***Directing prosecution.***—At the preliminary inquiry the Court should not express its opinion on merit. *M.S. Sheriff* v. *State of Madras*, AIR 1954 SC 397 : 1954 CrLJ 1019 : 1954 SCR 1144.

[12961] ● ***Pronouncement of definitive judgment essential sine qua non of Court.***—The pronouncement of a definitive judgment is considered the essential *sine qua non* of a Court and unless and until a binding or authoritative judgment can be pronounced by a person or a body of persons it cannot be a Court. *Brijanandan Singh* v. *Jyoti Narayan*, AIR 1956 SC66 : 1956 CrLJ 156 : (1955) 2 SCR 955.

[12962] ● ***Subordination—Meaning.***—Subordination has special meaning under Section 195(3). *Kuldip Singh* v. *State of Punjab*, AIR 1956 SC 391 : 1956 CrLJ 781 : 1956 SCJ 387 . 1956 SCR 191.

[12963] ● ***Section 476, CrPC 1898 not preclude officer presiding over Court from himself preferring complaint.***—Any Court can make complaint under this section. This section does not preclude the officer presiding over Court from himself preferring a complaint and the jurisdiction of the Magistrate before whom the complaint is laid is not taken away by that section. *Virendar Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : 1956 SCJ 138 : (1955) 2 SCR 1013.

[12964] ● ***Court not to make complaint covered by Section 476, CrPC 1898 under inherent jurisdiction.***—Court cannot make a complaint in cases not covered by the section under its inherent jurisdiction. *Virender Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : (1955) 2 SCR 1013.

[12965] ● ***Returning officer deciding on validity of nomination paper not Court for purpose***

of Section 195(1)(b), CrPC.—When a question arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act, it possesses all the attributes of a Court. the Returning Officer deciding on the validity of a nomination paper is not a Court for the purpose of Section 195(1)(b), CrPC and the result is that even as regards the charge under Section 193, the order of the Magistrate was not appealable, as the offence was not committed in or in relation to any proceeding in a Court. *Virendar Kumar Satywadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : 1956 SCJ 138 : (1955) 2 SCR 1013.

[12966] ● ***Court can file complaint in respect of offences mentioned in Section 195(1)(b), CrPC.***—A Court can file a complaint in respect of an offence mentioned in clause (b) of Section 195(1) only when it is committed in or in relation to proceedings before a Court. *Virender Kumar Satyawadi* v. *State of Punjab*, AIR 1956 SC 153 : 1956 CrLJ 326 : 1956 SCJ 138 : (1955) 2 SCR 1013.

[12967] ● ***Sales Tax Officers instrumentalities of State.***—Sales Tax Officers are the instrumentalities of the State for the collection of certain taxes. Under the Sales Tax Act and the Rules made thereunder they have duties assigned to them for the imposition and collection of taxes and in the process they have to perform many duties which are administrative duties. Merely because these instrumentalities of the State employed for the purpose of taxation have, in the discharge of their duties, to perform certain *quasi-judicial* functions, they are not converted thereby into Courts. They remain the instrumentalities of the State and are within the definition of "State" in Article 12. No. doubt, they have certain powers which are similar to the powers exercised by Courts, but that would not make them "Court" as understood in Section 195 of the Code. Under the Sales Tax Act, a Sales Tax Officer is only an assessing authority and the scheme of the Act shows that the sales Tax Officer cannot be equated with a Court. In 1923, Section 195(2) was amended and by the amendment the word "includes" was substituted for the word "means". The amendment was no doubt intended to enlarge the definition of "Court" so as to include all Civil, Revenue and Criminal Courts. But it cannot be said that a Sales Tax Officer is a Revenue Court, or that by the said amendment the definition of the words "Revenue Court" was enlarged so as to include officers whose function mainly is assessment and collection of taxes. When a question arises as to whether an authority created under any special Act is a "Court" or a "*quasi-judicial* tribunal", the test for determining that question is whether having regard to all the provisions of the Act that authority is charged with a duty to decide disputes and declare the rights of the parties in a definitive judgment. It is only when the authority is charged with such duty that it could be said that it possesses the attributes of a Court. The mere fact that an administrative authority is vested with what have been called "the trappings of a Court" would not make that authority a Court. merely because a duty is cast on the executive or authority to conform to the norms of judicial procedure in performing some acts in its exercise of its executive power would not make it a "Court". A Sales Tax Officer is not a Court within the meaning of Section 195, CrPC and therefore a complaint by a Sales Tax Officer is not necessary for prosecuting any person for an offence under the Sales Tax Act, or the Penal Code committed in or in relation to a proceeding before such officer. *Jagannath Prasad* v. *State of Uttar Pradesh*, AIR 1963 SC 416 : 1963 (1) CrLJ 330 : (1963) 2 SCJ 120 : (1963) 1 SCA 248 : 1963 SCD 167 : (1963) 2 SCR 850 : 1963 ALJ 1 : ILR (1963) 1 All 147 : 1963 MLJ (Cri) 338 : 1963 AnWR (HC) 152 : 1963ACrR 99 : (1963) 1 ALT 194 : (1963) 14 STC 536.

[12968] ● ***For offence of forgery—Complaint under Section 195(1), CrPC required.***—Under Section 195(1)(c), CrPC 1973 a complaint by the Court is required when the prosecution is for the offence of forgery or using a forged document as genuine, when "such document" is produced or given in evidence in any proceeding in that Court. It is clear that it is only when the forged document itself is produced in Court that a complaint by the Court is required. Where what is produced before the Court is not the forged document itself but only a copy thereof Section 195(1)(c) does not apply and a complaint by the Court is not necessary. Therefore, even if the Settlement Officer under the Act is assumed to be a Court within the meaning of Section 195(1)(c), a complaint by him was not necessary in the present case because what was produced before him was not the forged original verified claim itself, but only a copy therof. *Buphu Ram* v. *State of Rajasthan*, 1963 (2) CrLJ 698 : (1963) 3 SCR 376.

[12969] ● ***Section 340, CrPC general provision.***—Whereas Section 340, CrPC, 1973 is a general provision dealing with the procedure to be followed in respect of variety of offences affecting the administration of justice in so for as certain offences falling under Sections 193 to 195, and Section 471, IPC are concerned. The Court before which the person has appeared as a witness and which disposed of the case can alone make a complaint. *Shabir Hussain Bholu* v. *State of Maharashtra*, AIR 1963 SC 816 : 1963 (1) CrLJ 803 (807) : (1964) 1 SCJ 609 : 1963 Supp (1) SCR 501.

[12970] ● ***Court can act suo motu.***—The Court can act on an application made to it or *suo motu*. *Shabir Hussain Bholu* v. *State of Maharashtra*, AIR 1963 SC 816 : 1963 (1) CrLJ 803 (807) : 1963 Supp (1) SCR 501 : (1964) 1 SCR 609.

[12971] ● ***Proceeding against person using false document.***—For taking proceeding against a person who is found to have used a false document dishonestly or fraudulently in any judicial proceedings resort may only be had to this section. *Babu Lal* v. *State of Uttar Pradesh*, AIR 1964 SC 725 : 1964 (1) CrLJ 555 (558) : (1964) 4 SCR 957 : (1964) 2 SCJ 424.

[12972] ● ***Prosecution of accused under Section 476, CrPC.***—The prosecution of the accused under provisions of Section 476, CrPC by the Magistrate after the conclusion of the trial is legally valid. *Kuppa Govindan* v. *M.S.P. Rajesh,* AIR 1966 SC 1863 : 1966 CrLJ 1503 : (1967) 1 SCJ 454 : (1967) 1 SCA 643 : 1996 Supp SCR 3873.

[12973] ● ***Expert examined in Sessions Trial—His credentials challenged.***—The offences of forgery of a document as described in Section 463, IPC and of using such forged documents if produced or given in evidence by a person other than a party to the proceeding in a Court, do not require a complaint in writing of the Court concerned, but prosecution in respect of offences under Sections 193 to 196, 199 and 200 (among others) committed in a judicial proceeding by a person (whether a party or not) requires a complaint in writing of the Court before which the offence is committed or of some other Court to which such Court is subordinate. It is this difference which has apparently induced the selection of Sections 465/471 rather than Sections 193/196 of the Indian Penal Code. The former sections do not require a complaint by the Court but the latter sections do and this was the main point of controversy before us. The broad distinction between offences under the two groups is this. Sections 465 deals with the offence of forgery by the making of a false document and Section 471 with the offence of using forged document dishonestly or fraudulently. Section 193 deals with the giving or fabricating of false evidence and Section 196 with corruptly using evidence known to be false. The gist of the offence in the first group is the making of a false document and the gist of the offences in the second group is the procuring of false circumstances or the making of a document containing a false statement so that a judicial officer may form a wrong opinion in a judicial proceeding on the faith requires of the false evidence. Another important difference is that whereas Section 471 requires a user to be either fraudulent, dishonest or both, the provision of Section 196 is satisfied if the user is corrupt. The Penal Code defines the expressions fraudulently and dishonestly but not the expressions corruptly.

If Dr. Dutt fabricated the false diploma, he made a document containing a false statement intending that it may appear in evidence and so appearing in evidence may cause any person who is to form an opinion upon it to entertain an erroneous opinion touching on a point material to the result of a judicial proceeding. Dr. Dutt, as alleged, was falsely posing as an expert and was deposing about matters which were material to the result of the trial. He had a document to support his claim, should occasion arise. He produced the document, when asked to do so, intending that the presiding Judge may form an erroneous opinion about Dr. Dutt and the relevancy of his evidence. The case was thus covered by Section 192. When Dr. Dutt deposed let us assume, falsely, about his training, he committed an offence under Section 193. Again when Dr. Dutt used the diploma as genuine his conduct was corrupt, whether or not it was dishonest or fraudulent.

It would thus be seen that the action of Dr. Dutt was covered by sections 192 and 196 of the Penal Code. If Dr. Dutt gave a false evidence in Court or if he fabricated false evidence the offence under Section 193 was clearly committed. If he used fabricated evidence an offence under Section 196 was committed by him. These offences would have required a complaint in writing of the Sessions Judge before cognisance could be taken. The word ‘dishonestly’ is defined by Section 24 of the Penal Code. A person who does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing ‘dishonestly’. Dr. Dutt’s conduct involved neither a gain to any person nor loss to another. He was asked to produce the diploma in Court and he did. It is a matter of some doubt whether he can be said to have used the diploma because he did not voluntarily bring the diploma to Court. There is authority to show that such a user is not contemplated by Section 471 of the Indian Penal Code. (See *Asst. S.J. North Arcot* v. *Ramammul*, ILR 36 Mad 387 and *Ma Ain Lon* v. *Ma on Nu*, AIR 1925 Rang 191). Even if one were to hold that he did use the document as genuine his intention in producing it was to support his statement and not to cause a wrongful gain to himself or to cause a wrongful loss to another, hence this part of the section does not apply to the case. The next question was whether his conduct can be said to be fraudulent. The word "fraudulently" is defined by Section 25 of the Penal Code. A person is said to do a thing fraudulently if he does that thing with an intent to defraud but not otherwise. The last three words "but not otherwise" clearly indicate that the intent must be an "intent to defraud". For the present it is sufficient to say that the words "with intent to defraud" in the section indicate not a bare intent to deceive but an intent to cause a person to act or omit to act, to his disadvantage, as a result of deception played upon him. This is the most extensive meaning that may be given to the expression " with intent do defraud" in our Penal Code and the words "but not otherwise" clearly show that the words "intent to defraud" are not synonymous with the word "intent to deceive" and required some action resulting in some disadvantage which but for the deception, the person deceived would have avoided. We are therefore, satisfied that Dr. Dutt's conduct did not come within Section 471. On the other hand, it falls within purview of Section 196 which casts its net wider in the interest of the purity of administration of justice. It may be noted that an offence under Section 196 of the Penal Code is far more serious offence than the offence under Section 465/471. *S. Dutt (Dr.)* v. *State of Uttar Pradesh*, AIR 1966 SC 523 : 1966 CrLJ 459 : (1966) 1 SCR 493.

[12974] ● ***Order directing filing of complaint.***—An order directing filing of a complaint under this section is a final order. *Mohan Lal, Magan Lal Thakkar* v. *State of Gujarat*, AIR 1968 SC 733 : 1968 CrLJ 876 : (1968) 2 SCR 685 : 1967 CAR 183.

[12975] ● ***Order directing filing of complaint and deciding that prima facie case therefor inquiry.***—An order directing the filing of a complaint and deciding that there is a *prima facie* case for an inquiry into an offence is not a final order. It is merely a preliminary step in the prosecution and therefore, an interlocutory order. *Mohan Lal Magan Lal Thakkar* v. *State of Gujarat*, AIR 1968 SC 733 : 1968 CrLJ 876 (883).

[12976] ● ***Section 35, CrPC applies to all Magistrate.***—Section 559 of the old Code (Section 35 now) applies to all Magistrates and there is no reason why the plain terms of the section should be cut down to limit it to Magistrates whose Courts are permanent. Section 559(2) has not the effect of limiting Section 559(1) and Section 559(2) applies when there is a doubt as to who the successor is and that doubt can be resolved in the manner laid down in that subsection. It does not mean that until a successor is determined under Section 559(2), there is no successor for the purposes of Section 559(1). *Ajaib Singh* v. *Joginder Singh*, AIR 1968 SC 1422 : 1969 CrLJ 4 : (1968) 2 SCJ 948 : 1969 MLJ (Cri) 72 : 1969 ACrR 154 : 1969 AWR (HC) 223 : 70 PunLR 1131 : (1968) 2 UmNP 836.

[12977] ● ***Forged entries by Lekhpals and Ahlmad.***—In this appeal the prosecution case, was that one Nankoo sold his half share of lands to Kamla Prasad Singh and some others. Kamla Prasad Singh filed a complaint that one Harinath Singh in conspiracy with two Lekhpals got certain forged entries made in the Khasra after the sale in favour of Kamla Prasad and applied for the correction of Jamabandi. The ahlmad in conspiracy with Harinath Singh *ante*-dated the said application to make it appear that it was made prior to the sale deed and to shield the Lekhpals. The application was entered in the register of Jamabandis although the case bearing that number was a later one. It was contended in the High Court under Section 561-A, CrPC (Section 482 now), that the offence if any was one under Section 193, IPC, and that Section 195, CrPC, barred the private complaint. The High Court upheld the said objection. Hence this appeal. It would appear that the alleged offence committed by the Ahlmad was clearly in or in relation to a proceeding in Court. In fact he made an incorrect entry about a case actually in Court with the intention that the date of the institution of the proceeding might be taken to be an earlier date. Section 192, IPC, completely covered the case against Ahmad and also Harinath Singh the alleged abettor, and punishable under Section 193, IPC, which was one of the sections mentioned in Section 195(1)(b), CrPC. Hence the private complaint was therefore incompetent. But the case under Section 218, IPC, was not barred under Section 195, CrPC. *Kamla Prasad Singh* v. *Harinath Singh*, AIR 1968 SC 19 : 1968 CrLJ 86 : 1968) 1 SCJ 507 : 1968 SCD 93.

[12978] ● ***Complaint by informant before Magistrate.***—Once a complaint filed by the informant is being proceeded with which is based on the same facts and allegations on which the first information was registered, it is not open to a Magistrate to take cognizance of any offence alleged to have been committed under Section 211, IPC unless there has been proper compliance with the provisions of Section 195(1)(b) of the

CrPC. It will lead to very anomalous results if any other view is accepted, *e.g.*, if the complaint is ultimately dismissed and the Magistrate refused to lodge a complaint under Section 195(1)(b) its provisions will be defeated or circumvented if the police can move the Magistrate to take cognizance on a police report of an offence under Section 211, IPC. As regards an offence under Section 182, IPC, that offence is distinct from the one under Section 211, IPC, though the latter is more serious and may include the offence under the former section. The Magistrate can take cognizance of an offence under Section 182 on a complaint in writing of the police officer by virtue of the provisions contained in Section 195(1)(a), CrPC, but it would virtually lead to the circumvention of the provisions of Section 195(1)(b) if the proceedings under Section 182 can continue where the offence disclosed is covered by Section 211, IPC, and a complaint is pending which has been filed by the informant on the same facts and allegations as were contained in his FIR. On a parity of reasoning with regard to an offence under Section 211 of the Penal Code, no cognizance can be taken by the Magistrate for the alleged offence under Section 193, IPC, which is one of the sections mentioned in Section 195(1)(b). *State of Punjab* v. *Brij Lal*, AIR 1969 SC 355 : 1969 CrLJ 645 : (1969) 1 SCJ 383 : (1969) 1 SCR 853.

[12979] ● ***Prohibition contained in Section 195(1)(b) and (c), CrPC confined to those cases in which offences specified.***—The offences about which the Court alone, to the exclusion of the aggrieved private parties, is clothed with the right to complain, may, be appropriately considered to be only those offences committed by a party to a proceeding in that Court, the commission of which has a reasonably close nexus with the proceedings in that Court so that it can, without embarking upon a completely independent and fresh inquiry, satisfactorily consider by reference principally to its records the expediency of prosecuting the delinquent party. The purpose and object of the Legislature in creating the bar against cognizance of private complaints in regard to the offences mentioned in Section 195(1)(b) and (c) is both to save the accused person from vexatious or baseless prosecution inspired by feelings of vindictiveness on the part of the private complainants to harass their opponents and also to avoid confusion which is likely to arise on account of conflicts between findings of the Court in which forged documents are produced or false evidence is led and the conclusions of the Criminal Courts dealing with the private complaint. It is for this reason that the Legislature has entrusted the Court, whose proceedings had been the target of the offence of perjury, to consider the expediency in the larger public interest, of a criminal trial of the guilty party. *Patel Laljibhai* v. *State of Gujarat*, AIR 1971 SC 1935 : 1971 SCC 376 : 1971 SCC (Cri) 548 : 1971 CrLJ 1437 : 1971 SCD 663 : 1971 Supp SCR 834.

[12980] ● ***Bar on filing complaint.***—Section 195 creates a bar on the filing of a complaint by all and sundry and Section 340 removes the bar by conferring jurisdiction on the Court to file the complaint. It prescribes the procedure to be followed in the case of complaints by Court in respect of offences mentioned in clause (b) of Section 195 sub-section (1). *Govinda Mehta* v. *State of Bihar*, AIR 1971 SC 1708 : (1971) 3 SCC 329 : 1971 SCC (Cri) 608 : 1971 CrLJ 1266 : 1971 Supp SCR 777.

[12981] ● ***Before sanctioning prosecution for perjury Court to be satisfied about prima facie case of deliberate falsehood.***—Though giving of false evidence and filing false affidavits in an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats it very purpose. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be *prima facie* case of deliberate false-hood on a matter of substance and the Court should be satisfied that there is reasonable foundation for the charge. *Chajoo Ram* v. *Radhey Shyam*, AIR 1971 SC 1367 : (1971) 1 SCC 774 : 1971 SCC (Cri) 331 : 1971 CrLJ 1096 : 1971 SCD 1084 : 1971 Supp SCR 172.

[12982] ● ***Document production of in Court when.***—Magistrate ordering investigation on receipt of a report of cognizable offence without himself taking cognizance, and the accused producing a document before police in course of investigation, it cannot be said that the document was produced in Court. *Nirmaljit Singh v. State of West Bengal*, AIR 1972 SC 2639 (1973) 3 SCC 753 : 1973 CrLR (SC) 237 : (1973) 2 SCR 66.

[12983] ● ***Words "to have been committed by party to any proceeding in any Court" in Section 195(1)(c), CrPC—Meaning.***—The words "to have been committed by a party to any proceeding in any Court" in Section 195(1)(c) mean that the offence should be alleged to have been committed by the party to the proceeding in his character as such party, that is, after having become a party to the proceeding. Where the accused put forward an unknown lady to personate one lady and two of the accused identified that lady as the person impersonated before the sub-registrar in the Registration Office knowing that she was not in fact that particular lady, and after thus securing a sale deed the other accused filed an application before the Tahsildar for mutation of revenue entries in his favour and in those proceedings he used the said forged sale deed as genuine knowing it to be forged. On receipt of notice, the lady impersonated resisted the application by denying having ever sold the plot in question or having ever executed and got registered the alleged sale deed. Thereafter she filed a complaint against the appellants under Sections 465, 468 and 471, IPC. They were acquitted by the Sessions Court and upon appeal the High Court convicted them under Section 465, read with Section 109, IPC. It was contended in the Supreme Court that even a prosecution for an offence under Section 465, IPC, required complaint by the Revenue Court concerned as such an offence was covered by Section 195(1)(c), CrPC. The contention was not correct. The prohibition contained in Section 195(1)(c) should be confined only to those cases in which the offences specified therein were committed by a party to the proceeding in the character as such party. Otherwise, documents forged long before the commencement of a proceeding in which they might happen to be actually used or produced in evidence, years later by some other party would also be subject to Sections 195 and 476, CrPC. *Raghunath* v. *State of Uttar Pradesh*, AIR 1973 SC 1100 : (1973) 1 SCC 564 : 1973 SCC (Cri) 448 : 1973 CrLJ 858.

[12984] ● ***Power of Court to direct prosecution for giving false evidence.***—Every incorrect or false statement does not make it incumbent on the Court to order prosecution. The Court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The Court orders prosecution in the larger interest of the administration of justice and not to vindictiveness or to serve the ends of private party. Too frequent prosecutions for such offences tend to defeat its very object. *Santokh Singh* v. *Izhar Hussain*, AIR 1973 SC 2190 : (1973) 2 SCC 406 : 1973 CrLJ 1176 (SC) : 1973 SCD 611.

[12985] ● ***Power to make order of complaint—Exercise of.***—The power to make order of complaint may be exercised either by the trial Court or in case trial fails to exercise this power by the Supreme Court to which the trial Court is subordinate. *Santokh Singh* v. *Izhar Hussain*, AIR 1973 SC 2190 : (1973) 2 SCC 406 : 1975 SCC (Cri) 182 : 1973 CrLJ 1176 : 1973 SCD 611.

[12986] ● ***Complainant forging will.***—The complainant alleged that the appellants forged the will of one Kharturam, produced it before the Patwari and used it as a piece of evidence in support of their title to a land. The Tehsildar directed that entries be made in the Record of Rights in the names of the appellants on the strength of that will. It was difficult on those facts to invoke the application of Section 195(1)(c) of the Code. In order to attract that provision, the offence should be alleged to have been committed by the party to the proceeding in his character as such party, *i.e.*, after having become a party to the proceeding. The forgery was therefore alleged to have been committed by the appellants not after they became parties to the mutation proceedings but prior to the commencement of those proceedings. The section could therefore have no application at least in regard to the offences under Sections 464, 467 and 468, IPC. Different considerations might, perhaps, arise in regard to the offence under Section 471, IPC, for the allegations might reasonably be susceptible of the construction that the offence of using a forged document as genuine punishable under Section 471 was committed by the appellants in their capacity as parties to a mutation proceeding. But the further question would be whether the will was produced or given in evidence in any "Court", within the meaning of clause (c) if the complainant succeeded in proving the other offences, it would be academic to consider whether the Magistrate could take cognizance for the offence under Section 471 because it was hardly likely that a separate sentence would be imposed for that offence, and on the other hand, if the charge with regard to the other offences failed, the one in regard to Section 471 would necessarily fail in the light of facts stated in the complaint. *Mohan Lal* v. *State of Rajasthan*, AIR 1974 SC 299 : (1974) 3 SCC 628 : 1974 SCC (Cri) 118 : 1974 CrLJ 350.

[12987] ● ***Section 195(1)(c), CrPC—Applicability.***—The inhibition in Section 195(1)(c) applies only where a person is being tried for an offence falling under Section 463 or punishable under Sections 471, 475 or 476. Hence so far as the offence under Sections 418 and 477-A are concerned, they are plainly not covered by Section 195(1)(c). The trial of the respondent for those two offences cannot be said to be vitiated on the ground of absence of a complaint in writing by the Company Judge. The words in Section 195(1)(c) clearly mean that the offence should be alleged to have been committed by the party to the proceeding in his character as such party, that is, after having become a party to the proceeding. A reading of Sections 195(1)(c), 476 and 476-A of the Code (Sections 195(1)(b)(ii), 340(ii) & 341(1) of the new Code) together would indicate beyond doubt that the Legislature could not have intended to extend the prohibition contained in Section 195(1)(c) to offences mentioned therein when committed by a party to the proceeding prior to his becoming such party. In that view, since the offence charged against the respondent is one alleged to have been committed by him before he became a party to the proceeding before the Company Judge. Section 195(1)(c) has no application. Further neither of the two forged bills is produced or given in evidence in the proceeding before the Company Judge. They are taken possession of by the Special Officer along with other records and nobody produced them in evidence before the Company Judge. On that ground also the section is not attracted. The High Court is therefore entitled to proceed with the trial of the respondent for an offence under Section 471 without any complaint in writing from the Company Judge. *Legal Rembrr., Government of West Bengal* v. *Haridas*, AIR 1976 SC 2225 : (1976) 1 SCC 555 : 1976 SCC (Cri) 67 : 1976 CrLJ 1732 : 1976 CrLR (SC) 67 : (1976) 1 SCWR 113 : 1976 SCCrR 104 : (1976) 2 SCR 933 : 1976 UJ (SC) 133 : 1976 CrAppR (SC) 114.

[12988] ● ***Complaint in respect of offence under Section 193, IPC—Habeas Corpus petition.***—Complaint in respect of an offence under Section 193, IPC, after making an enquiry under Section 340(1), CrPC, 1973, was filed. The complaint was an offshoot of a *habeas corpus* application filed before the High Court of Kerala. An order of the High Court made under subsection (1) or sub-section (2) of Section 340 is specifically excluded for the purpose of appeal to the superior Court under Section 341(1) of the new CrPC. This, therefore, is a new restriction in the way of the appellant in approaching the Supreme Court under Article 136. Whether *suo motu* or on an application by a party under Section 340(1) of the Code, a Court having been already seized of a matter may be tentatively of opinion that further action against some party or witness may be necessary in the interests of justice. In a proceeding under Section 340(1), The reasons recorded in the principal case, in which a false statement has been made, have a great bearing and indeed action is taken having regard to the over-all opinion formed by the Court in the earlier proceedings. At an inquiry held by the Court under Section 340(1), irrespective of the result of the main case, the only question is whether a *prima facie* case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified offence and whether it is also expedient in the interests of justice to take such action. The party may choose to place all its materials before the Court at that stage, but if it does not, it will not be estopped from doing so later in the trial, in case prosecution is sanctioned by the Court. An enquiry, when made, under Section 340(1), CrPC, is really in the nature of affording a *locus paenitentiae* to a person and if at that stage the Court chooses to take action, it does not mean that he will not have full and adequate opportunity in due course of the process of justice to establish his innocence. It is well settled that the Supreme Court under Article 136 would come to the aid of a party when any gross injustice is manifestly committed by a Court whose order gives rise to the cause for grievance before it. Even when two views are possible in the matter it will not be expedient in the interests of justice to interfere with the order of the High Court unless the Supreme Court is absolutely certain that the two pre-conditions which are necessary for laying a complaint after an enquiry under Section 340 are completely absent. There is no need to interfere with the order of the High Court to scotch the complaint against the appellant at the threshold. *K. Karunakaran* v. *T.V. Eachara Warrier*, AIR 1978 SC 290 : (1978) 1 SCC 18 : 1978 SCC (Cri) 32 : 1978 CrLJ 339 : 1977 CrLR (SC) 521 : (1978) 1 SCWR 1 : 1978 SCCrR 38 : (1978) 1 SCJ 355 : (1978) 2 SCR 209 : 1977 CrAppR (SC) 411 : 1978 CurLJ (Cri) 10 : 1978 MLJ (Cri) 237 : 1978 Chand LR (Cri) (SC) 206 : 1977 KLT 981.

[12989] ● ***Absence of finding—Order filing complaint not to be supported in law.***—In a prosecution for an offence under Section 467/109, IPC, under Section 476, CrPC, it is incumbent on the Court filing the complaint to record a clear finding regarding the exact offence which was committed by the appellants. In the absence of such a finding the order filing the complaint cannot be supported in law. *Har Govind* v. *State of Haryana*, AIR 1979 SC 1760 : (1979) 4 SCC 482 : 1979 CrLJ 1334 : 1979 CrLR (SC) 462 : 1979 UJ (SC) 661.

[12990] ● ***Offence under Section 211, IPC when committed.***—*T* filed a report against *P* and others at the police station. Warrants were issued for the arrest of the accused who surrendered before the Court of the Sub-Divisional Judicial Magistrate and he released them on bail. Police referred the report of T as false and the Magistrate agreeing with the police report passed an order discharging the accused. Thereafter P filed a complaint before the same Magistrate accusing T of the commission of offences under Sections 211 and 182, IPC, by reason of the latter having lodged with the police the false complaint. T appeared in Court in response to a summons issued only in respect of an offence under Section 211. T filed a petition to the High Court of Calcutta praying for quashing of proceedings against him before the SDJM inasmuch as the latter was debarred from taking cognizance of the offence under Section 211 in the absence of a complaint in writing of the SDJM himself in view of the provisions of Section 195(1)(b), CrPC. The complaint against T was in respect of an offence alleged to have been committed in relation to a proceeding in Court and the SDJM acted in contravention of the bar contained in clause (b) of Section 195(1) in taking cognizance of the said complaint, as there was no complaint in writing either of the SDJM or of a superior Court. A Magistrate while passing an order releasing an accused person on bail or discharging him in pursuance of a report submitted by the police to the effect that the evidence was insufficient to sustain the charge, acts judicially and therefore is a Court within the meaning of that term as used in clause (b) of sub-section (1) of Section 195 of the Code. *Kamalapati* v. *State of West Bengal*, AIR 1979 SC 777 : 1979 CrLJ 679 : 1979 CrLR (SC) 128 : 1977 SCCrR 165 : (1979 2 SCR 717 : 1979 CrAppR (SC) 175 : 1979 CurLJ (Cri) 56 : 1979 ACrC 49 : 1979 BBCJ (SC) 25.

[12991] ● ***Offence of criminal conspiracy committed during preparation of paper book for appeal to Supreme Court.***—The appellant entered into a conspiracy and tampered with the evidence of one of the defence witnesses which is a record of the Court. The appellant was a party to a proceeding in the High Court when the appeal was heard but the document complained of as having been tampered with, *i.e.*, the evidence of the defence witness was not produced or given in evidence in the appeal before the High Court. The alleged tampering was after the hearing of the appeal was concluded. No doubt, the tampering was in a proceeding in relation to the preparation of the record. Requirements of Section 195(1)(c) having not been satisfied a complaint by the Court in writing is not necessary. Equally, under Section 195(4) relating to criminal conspiracy to commit offence, a complaint by the Court is not necessary. Therefore, Section 196-A(2) is attracted and a complaint by the State Government or the Chief Presidency Magistrate or a District Magistrate empowered in this behalf by the State Government in writing consenting to the initiation of the proceedings for an offence under Section 120-B, IPC, is necessary. As in this case no such order consenting to the initiation of proceedings was passed, the Magistrate had no jurisdiction to take cognizance of the offence against the appellant. Judgment of the M.P. High Court was reversed and the order of committal passed by the Magistrate was *quashed. S.L. Goswami* v. *Madhya Pradesh High Court*, AIR 1979 SC 437 : (1979 1 SCC 373 : 1979 SCC (Cri) 311 : 1979 CrLJ 193 : 1979 CrLR (SC) 371.

[12992] ● ***Bail proceedings part of subsequent proceeding commencing on presentation of challan.***—Bail proceedings took place before Magistrate *D* and subsequent proceedings before Magistrate *K* commencing with presentation of chalan by Police for prosecution of one *DK*. Both proceedings are parts of or stages of the same integral whole. *DK* was released on a bail application accompanied by an affidavit purported to have been sworn by one *GRT* as a surety. As the accused failed to appear, *NBW* was issued against him and notice to the surety. Surety appeared and filed a reply in writing contending that he never stood as surety, did not make any affidavit or sign on any application, affidavit or bail bond, that he was a literate while those documents bore thumb-impressions of the surety. After enquiry, the respondent and others were committed for trial and two of the accused convicted under Sections 419, 465 and 471, IPC, *etc*. The High Court on appeal held that the complete proceedings before the committing Magistrate were without jurisdiction and quashed the convictions. Bail proceedings and subsequent trial proceedings before the Magistrate were part of entire judicial process and as such the offences relating to the surety bond were committed "in or in relation to" the proceedings before Magistrate *K* for the purpose of taking action under Section 476 of the Code. The High Court erred that the Magistrate was not competent to hold a preliminary enquiry under Section 476, CrPC and /or to make a complaint for prosecution of the respondents in respect of the offences for which they were convicted. Appeal was allowed and case sent back to the High Court for decision afresh. *State of Maharashtra* v. *S.K. Bannu*, AIR 1981 SC 22 : (1980) 4 SCC 286 : 1980 SCC (Cri) 951 : 1980 CrLJ 1280 : 1980 CrLR (SC) 638 : 1980 CrAppR (SC) 385 : 1981 MLJ (Cri) 166 : (1981) 1 SCJ 244 : 1981 SCCrR 173 : (1981) 1 SCR 694.

[12993] ● ***Offence under Section 193, IPC of filing false affidavit.***—Offence under Section 193, IPC, was alleged for filling false affidavit before the Rent Control Officer. Rent Control Officer shall be deemed to be a civil Court within the meaning of Sections 345 & 346, CrPC, 1973 and in view of Section 34(2) of the U.P. Urban

Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 shall be a civil Court for purposes of Section 193, IPC. Complaint by the Court in writing is a pre-condition under Section 195(1)(b)(i) for taking cognizance of such offence by any criminal Court. If the same is not satisfied, the Court has no jurisdiction to take cognizance. 1981 ACrR 98 reversed. *Chandrapal Singh* v. *Maharaj Singh*, AIR 1982 SC 1238 : (1982) 1 SCC 466 : 1982 SCC (Cri) 249 : 1982 CrLJ 1731 : 1982 CrLR (SC) 126 : 1982 ALJ 507 : 1982 AWC 251 : 1982 CrAppR (SC) 65.

[12994] ● ***Section 341(2), CrPC bars revision against appellate decision refusing to file complaint.***—Section 341(2) specifically bars any revision against any appellate decision refusing to file complaint. But the High Court may, in exercise of inherent jurisdiction examine the appellate decision. *Lalit Mohan* v. *Benayendra*, AIR 1982 SC 785 : (1982) 3 SCC 219 : 1982 SCC (Cri) 697 : 1982 CrLJ 625.

[12995] ● ***Commission of Enquiry.***—Commission of Enquiry appointed under Section 3(1), Commission of Enquiry Act in not a Court for the purpose of Section 195, CrPC. *Baliram Waman* v. *Justice B. Lention*, AIR 1988 SC 2267 : (1988) 4 SCC 419 : 1989 CrLJ 306 : 1982 SCC (Cri) 697 : 1988 (3) Crimes 655.

[12996] ● ***Accused not filing original partnership deed but copy of forged deed.***—Where the accused did not file the original partnership deed but filed a copy of the forged deed in the suit in the civil Court and obtained a temporary injunction on the strength of its copy, the defendant filed a police report against the accused alleging that they had committed offences punishable under Sections 465, 468, 471, 474, 120-B and 420, IPC, and a challan was filed before the Magistrate who framed charges against the accused only under Sections 465, 468, 120-B and 420, IPC, but refrained from training any charge under Sections 471 and 474, IPC, holding that he could not take cognizance under those sections in the absence of a complaint from the civil Court. The State preferred a revision against the Magistrate's order but the same was upheld by the Additional Sessions Judge. The *de facto* complainant moved the High Court under Section 482, CrPC, who reversed the decision holding that as the document was not forged during the period it was in Court custody the bar of Section 195(1)(b)(ii) of the Code was not attracted and directing the Magistrate to frame fresh charges. Thereupon the appellants challenged the order before the Supreme Court. The Supreme Court held that Section 195 of the Code was attracted when such offence was alleged to have been committed in respect of "a document produced or given in evidence in a proceeding in any Court", and accordingly held that since the document alleged to have been forged was not in the present case produced in the Court, the provisions of Section 195(1)(b)(ii) had no application and confirmed the High Court's direction, but on a different ground as indicated. *Sushil Kumar* v. *State of Haryana*, AIR 1988 SC 419 : 1987 Supp SCC 654 : 1988 SCC (Cri) 136 : 1988 CrLJ 427 : (1988) 1 SCJ 28.

[12997] ● ***Words "in or in relation to a proceeding in the Court".***—The words "in or in relation to a proceeding in the Court" show that the Court which can take action under this section is only the Court operating within the definition of Section 195(3) before which or in relation to whose proceeding the offence has been committed. There is a word of caution inbuilt in that provision itself that the action to be taken should be expedient in the interest of justice. Therefore, it is incumbent that the power given by this Section 340, CrPC 1973 should be used with utmost care and after due consideration. The mere fact that the deponent has made contradictory statements at two different stages in a judicial proceeding is not by itself always sufficient to justify a prosecution for perjury under Section 193, IPC but it must be established that the deponent has intentionally given a false statement in any stage of the "judicial proceeding" or fabricated false evidence for the purpose of being used in any stage of judicial proceeding further, such a prosecution for perjury should be taken only if it is expedient in the interest of justice. *K.T.M.S. Mohd.* v. *Union of India*, AIR 1992 SC 1831 (1840, 1841) : (1992) 3 SCC 178 : 1992 SCC (Cri) 572 : 1992 CrLJ 2781 : (1992) 2 Crimes 314.

[12998] ● ***Direction issued by District and Sessions Judge to Rent Control officer to file complaint.***—A direction issued by the District and Sessions Judge to the Rent Control Officer to file complaint cannot be treated as a complaint. *Surendra Gupta* v. *Bhagwan Devi*, AIR 1996 SC 509 : (1994) 4 SCC 1318 : 1994 SCC (Cri) 657.

[12999] ● ***Forged document produced in evidence.***—For taking cognizance of an offence, the document, the foundation for forgery, if produced before the Court or given in evidence, the bar of taking, cognizance under Section 195(1)(b)(ii) gets attracted and the criminal Court is prohibited from taking cognizance of offence unless a complaint in writing is filed as per the procedure prescribed under Section 340 of the Code by or on behalf of the Court. The object thereby is to pressure purity of the administration of justice and to allow the parties to adduce evidence in proof of certain documents without being compelled or intimidated to proceed with the judicial process. The bar of Section 195 is to take cognizance of the offence covered thereunder—where the cognizance has already been taken before filing of the document on of the civil Court and the original has not been filed before cognizance was taken, the Magistrate is at liberty to proceed with the trial of the Criminal case. *Surjit Singh* v. *Balbir Singh*, AIR 1996 SC 1992 : (1996) 3 SCC 533 : 1996 SCC (Cri) 521 : 1996 CrLJ 2304.

[13000] ● ***Notice under Section 340, CrPC to Police Officers for prosecution under Section 194, 195, IPC for fabricating record and putting up false case.***—Notice under Section 340, CrPC, 1973 to Police Officers for prosecution under Sections 194, 195, IPC for fabricating record and putting if false case were issued by the Court. The case is based on Section 161 statements recorded during the investigation. Admittedly no evidence has been recorded. The Court should not come to the conclusion on the 161 statements which are not evidence. It can be used at the trial only for contradictions or omissions when the witness was examined. Nor it could be contradicted by looking at the physical feature of the witnesses even before they are examined. It would appear that the learned Sessions Judge had overstepped his jurisdiction in recording a finding, while looking at the physical features of the accused. Under there circumstances it is held that in view of the finding recorded by the Sessions Judge of fabrication of the recorded and the case is false one, issuance of notice under Section 340, CrPC is wholly unjustified. *Omkar Namdeo Jadhao* v. *Second Additional Sessions Judge, Buldana*, AIR 1997 SC 331 : 1997 AIR SCW 88 : (1996) 7 SCC 498 : 1997 CrLJ 369 : (1996) 1 Crimes 20.

[13001] ● ***Complaint for offence under Section 195(1)(b), CrPC without adopting procedural requirement.***—Complaint by Court for offence under Section 195(1)(b) without adopting procedural requirement not maintainable and scope of preliminary enquiry envisaged under Section 340(1), CrPC being that offence should have been committed during time when document was in custody of Court. *Sachida Nand Singh* v. *State of Bihar*, AIR 1998 SC 1121 : (1998) 2 SCC 493 : 1998 CrLJ 1565 : JT 1998 (1) SC 370 : 1998 (3) SLT 90 (SC) : 1998 (1) Crimes 142 (SC) : 1998 (1) CCR 297 (SC) : 1998 (1) Supreme 419.

[13002] ● ***Bar in Section 195(1)(b)(ii), CrPC not applicable to forgery.***—Bar contained in Section 195(1)(b)(ii), CrPC not applicable to case where forgery of document was committed before document was produced in Court. *Sachida Nand Singh* v. *State of Bihar*, AIR 1998 SC 1121 : (1998) 2 SCC 493 : 1998 SCC (Cri) 660 : 1998 CrLJ 1565 : (1998) 1 Crimes 142 : 1998 (3) SLT 90.

[13003] ● ***Need for amendment to clause (b) of Section 340(3), CrPC to eliminate perjury.***—A trial judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint perhaps law needs amendment to clause (b) of Section 340(3), CrPC in this respect as the High Court can direct any officer to file a complaint to get rid of the civil of perjury, the Court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code. *Swarn Singh* v. *State of Punjab*, AIR 2000 SC 2017 : (2000) 5 SCC 668 : 2000 CrLJ 2780 : (2000) 3 Crimes 12.

[13004] ● ***Determination of legislative intent.***—The clear language of Section 195(3) of the Code of CrPC unmistakably depict the restrictive intent of the Legislature and if the intent was otherwise to include arbitral Tribunal within the fold of Section 195(3) of the Code, that is to say if the Legislature wanted to confer such a status there was no difficulty as such in incorporating thereunder a provision as is contained in a Debt Recovery Act (vide Section 22); Income Tax Act (vide Section 136); Moter vehicles Act (*vide* Section 169(2)); Administrative Tribunals Act (*vide* Section 22(3)); Consumers Protection Act; M.R.T. P. Act and Companies Act *etc. etc.* Since there statutes have definitely included and declared the Tribunal being ascribed to be a Court within the meaning of Section 195 of the CrPC. The inclusion of explanatory provision by way of sub-section (3) makes the situation abundantly clear. *Manohar Lal* v. *Vinesh Anand*, AIR 2001 SC 1820 : (2001) 5 SCC 407 : 2001 SCC (Cri) 1322 : 2001 CrLJ 2044 : (2001) 3 Supreme 279 : (2001) 2 Crimes 202.

[13005] ● ***Interpretation of word "Court".***—The body of sub-section (1)(b) of Section 195, CrPC refers to the expression 'Court' and the same stands explained in sub-section (3)—"Court" may be interpreted in a narrow context but with the inclusion of sub-section (3)—Widest possible connotation is to be made available provided, however, the statute declares it to be so The language "if declared by that Act" seems to be very significant. A plain look thus at the provisions depict that inclusion of sub-section (3) under Section 195, CrPC cannot but be taken to be an extraordinary provision. The body of Section 195(1)(b) refers to the expression 'Court' and the same stands thus explained in sub-section (3). The restriction imposed is easily ascertained by reason of the inclusion of the words 'if declared by that Act to be a Court for the purposes of this section'—the user of the words seem to be very significant. By the very inclusion of sub-section (3) and the language, the intent of the Legislature cannot thus, be far to seek. It is connotative of a definite meaning. *Manohar Lal* v. *Vinesh Anand*, AIR 2001 SC 1820 : (2001) 5 SCC 407 : 2001 SCC (Cri) 1322 : 2001 CrLJ 2044 : (2001) 3 Supreme 279 : (2001) 2 Crimes 202.

[13006] ● *Arbitrator not Court within meaning of Section 195, CrPC.*—An arbitrator is not a 'Court' within the meaning of Section 195, CrPC, as such the provisions of Section 340, CrPC 1973 do not apply to proceedings before an arbitrator. *Manohar Lal* v. *Vinesh Anand*, AIR 2001 SC 1820 : (2001) 5 SCC 407 : 2001 SCC (Cri) 1322 : 2001 CrLJ 2044 : 2001 (2) Crimes 202 (212).

[13007] ● *Complaint by Court.*—In view of the language used in Section 340, CrPC the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(*b*), as the section is conditioned by the words "Court is of opinion that it is expedient in the interests of justice." This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(*b*). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (*b*)(*ii*), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remediless. Any interpretation which leads to a situation where a victim of a crime is rendered remediless, has to be discarded. *Iqbal Singh Marwah* v. *Meenakshi Marwah*, 2005 SCC (Cri) 1101 (1116).

[13008] ● *Procedure for complaint by Court.*—The provisions of Sections 340, 341 and 343(2), CrPC show that in reality, the procedure prescribed for filing a complaint by the Court is such that it may not fructify in the actual trial of the offender for an unusually long period. Delay in prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost. This important consideration dissuades us from accepting the broad interpretation sought to be placed upon clause (*b*)(*ii*). *Iqbal Singh Marwah* v. *Meenakshi Marwah*, 2005 SCC (Cri) 1101 (1117).

[13009] ● *Forgery, interpretation of.*—An enlarged interpretation to Section 195(1)(*b*)(*ii*), whereby the bar created by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in Court, is capable of great misuse. As pointed out in *Sachida Nand Singh* v. *State of Bihar*, (1996) 2 SCC 493 : 1996 SCC (Cri) 660 after preparing a forged document or committing an act of forgery, a person may manage to get a proceeding instituted in any civil, criminal or revenue Court, either by himself or through someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at the instance of a private party or the police until the Court, where the document has been filed, itself chooses to file a complaint. The litigation may be a prolonged one due to which the actual trial of such a person may be delayed indefinitely. Such an interpretation would be highly detrimental to the interest of the society at large. *Iqbal Singh Marwah* v. *Meenakshi Marwah*, 2005 SCC (Cri) 1101 (1117).

[13010] ● *Complaint by Court, judicial notice.*—Judicial notice can be taken of the fact that the Courts are normally reluctant to direct filing of a criminal complaint and such a course is rarely adopted. It will not be fair and proper to give an interpretation which leads to a situation where a person alleged to have committed an offence of the type enumerated in clause (*b*)(*ii*) is either not placed for trial on account of non-filing of a complaint or if a complaint is filed, the same does not come to its logical end. Judging from such an angle will be in consonance with the principle that an unworkable or impracticable result should be avoided.

Therefore, in order that a victim of a crime of forgery, namely the person aggrieved is able to exercise his height conferred by law to initiate prosecution of the offender, it is necessary to place a restrictive interpretation on clause (*b*)(*ii*). *Iqbal Singh Marwah* v. *Meenakshi Marwah*, 2005 SCC (Cri) 1101 (1117).

[13011] ● ***Penal statute interpretation.***—That apart, the section which we are required to interpret is not a penal provision but is part of a procedural law, namely, the Code of Criminal Procedure which elaborately gives the procedure for trial of criminal cases. The provision only creates a bar against taking cognizance of an offence in certain specified situations except upon complaint by Court. A penal statute is one upon which an action for penalties can be brought by a public officer or by a person aggrieved and a penal Act in its wider sense includes every statute creating an offence against the State, whatever is the character of the penalty for the offence. The principle that a penal statute should be strictly construed, as projected by the learned counsel for the appellants can, therefore, have no application here. *Iqbal Singh Marwah* v. *Meenakshi Marwah*, 2005 SCC (Cri) 1101 (1119).

[13012] ● ***Section 195, CrPC recognizes administrative discipline.***—Section 195, CrPC does not recognize administrative discipline, it recognizes judicial discipline with regard to the right of the higher authority to exercise appellate powers. The expression "ordinarily" may mean "normally" but the said expression must be understood in the context in which it has been used. "Ordinarily" may not mean "solely" or "in the name" and thus, if under no circumstances an appeal would be to the Principal District Judge, the Court would not be subordinate to it. When in common parlance the expression "ordinarily" is used there may be no option. There may be cases where an exception can be made out. It is never used in reference to a case where there is no exception. It never means "primarily". *State of Andhra Pradesh* v. *Sarma Rao*, AIR 2007 SC 137 : (2007) 2 SCC 159 : 2007 CrLJ 289 : JT 2006 (9) 620 : (2007) 2 Crimes 127.

[13013] ● ***Section 195, (1)(b)(ii)—Scope.***—Clause (1)(b)(ii) of Section 195, CrPC contemplates a situation where offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any Court. *Mahesh Chand Sharma* v. *State of Uttar Pradesh*, AIR 2010 SC 812 : (2009) 15 SCC 519 : 2009 (4) Crimes 22 (SC) : JT 2009 (12) SC 56 : 2009 (3) SCR 922.

[13014] ● ***Section 340, CrPC—Requirement.***—The provisions of Section 340 can be invoked only when it is established that offence of forgery had already been committed. *Mahesh Chand Sharma* v. *State of Uttar Pradesh*, AIR 2010 SC 812 : (2009) 15 SCC 519 : 2009 (3) SCR 922 : 2009 (4) Crimes 22 (SC) : JT 2009 (12) SC 56.

[13015] ● ***Power of Court—When can be exercised.***—The power under Section 390, CrPC read with Section 195, IPC can be exercised only where someone fabricates false evidence on gives a false evidence. By no stretch of imagination, a party giving an answer to a question put under Order 10, Rule 2 of the Code. When not under oath and not being examined as a witness can attract Section 195, IPC and consequently cannot attract Section 195(1)(b) and Section 340 of CrPC. *Kapil Corepacks (Pvt.) Ltd.* v. *Harbans Lal*, AIR 2010 SC 2809 (2818) : (2010) 8 SCC 452.

DISAPPEARANCE OF EVIDENCE (S. 201, IPC)

[13016] ● ***Disappearance of evidence.***—In a case in which the accused is charged only of the offence of murder under Section 302, Penal Code, and no alternative charge under Section 201 for the disposal of the dead body of the murdered person has been framed, if the charge of murder fails, it is permissible under Section 237, CrPC to record a conviction against the accused under Section 201, provided that, on the facts of the case, it is proved that the death of the deceased was brought about by a crime and that the accused was associated in the disposal of the dead body. Similarly, if in such a case the Sessions Court has convicted the accused on the charge of murder under Section 302, and that conviction is set aside on appeal, it is open to the High Court or the Supreme Court to convict the accused under Section 201, if it finds, that an offence under that Section has been established by the evidence in the case, even though there is no charge against him under that section. Section 237, CrPC completely covers such a case. *Kashmira Singh* v. *State of Madhya Pradesh*, AIR 1952 SC 159 : 1952 CrLJ 839 : 1952 SCJ 201 : 1952 SCA 474 : 1952 MWN 402 : 1952 (1) MLJ 754 : 1952 MWN (Cri) 106 : 1952 SCR 526 : 1952 AWR (Sup) 64.

[13017] ● ***Evidence of offence—Circumstantial evidence.***—In order to establish a charge under

Section 201, it is essential to prove all the following facts, namely, (a) that an offence has been committed, (b) that the accused knew or had reason to believe that an offence has been committed, (c) that the accused intended to screen the offender, whether that offender be himself or another person, and (d) that the accused has disposed of or concealed that dead body with such intention. *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 354 : 1953 CrLJ 154 : 1952 SCJ 545 : 1953 SCR 94.

[13018] ● ***Case resting purely upon circumstantial evidence.***—In a case resting purely upon circumstantial evidence, the evidence must establish beyond doubt that the dead man died of an offence and not of natural death. Mere suspicion, however strong, that he died of an offence is not enough, because suspicion, however strong, cannot take the place of proof. It is not open to the Court to build up a theory by taking for granted essential ingredients of an offence which are missing, but which are necessary to make that theory complete. Therefore, if in a case in which the accused is charged under Section 201, the only evidence on record is that he took part in the disposal of the dead body, such evidence in itself is not enough to sustain a conviction, because the other ingredients of the offence have remained unproved, namely that the deceased died of an offence and that the accused knew that he so died. *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 354 : 1953 CrLJ 154 : 1952 SCJ 545 : 1953 SCR 94.

[13019] ● ***Medical evidence failing to establish that deceased died of poison.***—In the present case the accused was the wife of the deceased and the prosecution case was, that deceased was administered potassium cyanide by the accused and one *M* with whom she had a liaison, and that the two disposed of the dead body by putting it in a trunk and throwing it in a well. It is essential for the prosecution to prove affirmatively that the deceased died of poison which was administered to him by some person, and that, the accused took part in the concealment and disposal of the dead body, knowing or having reason to believe, that the death of the deceased was so caused. The medical evidence having failed to establish that the deceased died of any poison, the cause of death remained unproved. That being so, the charge under Section 201 must be held to have failed. *Palvinder Kaur* v. *State of Punjab*, AIR 1952 SC 354 : 1953 CrLJ 154 : 1952 SCJ 545 : 1953 SCR 94.

[13020] ● ***Acquittal of main offence no legal impediment to accused conviction under Section 201, IPC.***—Acquittal of the main offence is no legal impediment to the accused's conviction under Section 201, IPC. *Ranchhod* v. *State*, AIR 1953 SC 131 : 1953 CrLJ 668 : 1953 SCR 546 : 1953 SCJ 144.

[13021] ● ***Section 201, IPC not restricted to case of person—Screening another offender by destroying evidence.***—Section 201 is not restricted to the case of a person who screens *another* offender by destroying the evidence of an offence, and can be applied even to a person who screens the commission of an offence by *himself*. In a case in which the Court considers it prudent to err on the safe side and gives an accused the benefit of doubt as to the principal offence, it is perfectly legal to convict him under Section 201, provided there is clear and satisfactory evidence that an offence was committed and he caused evidence of its commission to disappear. In such a case if an accused is charged with murder under Section 302, and that charge fails, it is perfectly open to the Court to convict him under Section 201, even though no charge under that section had been framed against the accused. Such a conviction is warranted by the provisions of Section 237, CrPC. In the present case the accused *K* was charged with abetment of murder under Section 302/114, Penal Code. The prosecution case was that one night when the accused and the deceased, who was her husband, were sleeping side by side on the open roof of their haveli, the deceased was attacked with a sword and killed by *R* the paramour of the accused, with her assistance. Hearing the shouts of the deceased a servant woman woke up and saw *R* going down the ladder. Other servants came up and when they questioned the accused she said that some dacoits had come and had killed her husband and had robbed her of her ornaments. When told that it was *R* who was seen running away, the accused denied that it was *R*. On this evidence the accused was acquitted in the trial Court of the offence of abetment under Section 302/114, but was convicted under Section 201. On appeal, the Judicial Commissioner convicted her under Section 302/114, after setting aside the conviction under Section 201. The acquittal on the charge under Section 302/114 is not an impediment to a conviction under Section 201, and there is no legal bar to the restoration of the original conviction under that section. There is no doubt, that by rotating out an elaborate story of dacoity and by denying that it was *R* who was seen running away she had given false information respecting the offence, and was guilty under Section 201. Conviction under Section 302/114 is set aside and the original conviction under Section 201 is restored. *Kalawati* v. *State of Himachal*

Pradesh, AIR 1953 SC 131 : 1953 CrLJ 668 : 1953 SCJ 144 : 1953 SCR 546 : 1953 SCA 660 : 1953 MWN 219 : 1953 AWR (Sup) 52.

[13022] ● ***Medical evidence inconclusive that deceased not with his death as a result of violence.***—In the present case, it was established against the accused, that a man had come, to his house at his request and that, after some days his dead body was found buried in his house. The medical evidence was inconclusive and it was not proved that the deceased had met his death as a result of any violence. There was no evidence at all to show the manner in which death had been caused. The accused was charged and convicted under Section 302, though the plea of the accused was that, he and the deceased had been heavily drinking together at his house that night and that the deceased suddenly collapsed, probably as a result of the effect of alcoholism on his lungs, and that he, the accused, became panicky and lost his mind and in fright buried the dead body in a room on the upper storey of his house. On these facts the Court held that the charge under Section 302 had not been proved beyond doubt, and acquitted the accused on the charge. The question then arose, whether he could at least be convicted under Section 201. In view of the fact, that it is not proved beyond doubt, that death of the deceased is result the of an *offence*, and there is a possibility that he died a natural death as a result of heavy drinking of raw alcohol, as pleaded by the accused, and that, the accused has been given the benefit of doubt and had been acquitted on the charge under Section 302, it has to be held, that he cannot be convicted even under Section 201, even though the dead body has been discovered from his house, and he has admitted that it is he who had concealed it after the deceased has died in his presence. *State Government of Madhya Pradesh* v. *Ramkrishna Ganpatrao Limsey*, AIR 1954 SC 20 : 1954 CrLJ 244.

[13023] ● ***Disappearance of evidence of murder.***—The accused in the present case were convicted by the High Court under Section 201 of the Penal Code on the following facts—

1. that a mother and her child, *K* and *M* who were seen in their house in a village on a particular day till the evening, were never seen thereafter by any one and their dead bodies were never found;
2. that the same evening, three gun-shots were heard by persons in the village as coming from the house in which they were residing at that time;
3. that the same night, *R*, the husband of the woman, and his two servants *M* and *U* were seen by several witnesses in different villages passing in a jeep after their sudden departure from the house, and no explanation was offered by any of the three accused for this sudden departure from the house;
4. that the back curtains of the jeep were seen by witnesses to be drawn;
5. that *R* had falsely stated during his examination in the Court, that he had left the village on the previous day, and not on the day in question;
6. that the mother of *R* and one *D* were residing in the same house, but neither of them had made any attempt to search for *K* and *M* who had suddenly disappeared from the house, and had not made any report to the police about their disappearance. Not only that, but when the Chowkidar of the village went to *D* and asked him to give something in writing so that he could make a report at the police station, *D* refused and forbade him to make a report immediately;
7. that on search of the house, the police found blood-stained earth at several places in the room upstairs and other places;
8. that all the accused had absconded, and none of them could be traced by the police for over a fortnight, till they surrendered at distant places;
9. that the jeep in which *R*, *M* and *U* had travelled from the village belonged to *R*, that this jeep could never be traced by the police and when *R* was called upon to produce it, he had not done so, nor was its disappearance explained by *R* at any time.

Relying on these circumstances the trial Court had convicted the accused under Section 201 of the Penal Code for causing disappearance of the evidence of murder, and on appeal the High Court had upheld the conviction. Hence this appeal.

These circumstances are not sufficient to establish that the appellants had removed or concealed the dead bodies of *K* and *M* and it must be held, that the offence under Section 201 has not been established against the appellants. *Raghav Prapanna Tripathi* v. *State of Uttar Pradesh*, AIR 1963 SC 74 : 1963(1) CrLJ 70 (1963) 3 SCR 239.

[13024] ● ***Circumstantial evidence—Accused removed and concealed dead bodies.***—The facts on the present case were as follows : On April 5, 1961, there were in the house of *D*, the following persons, *R*, *R's wife K* and their child *M, D* the owner of the house, *J* the mother of *R*, and two servants of *R, M* and *U*. It was established that *K* and *M* were seen in the house of *D* by the villagers till the evening of April 5 and that thereafter *K* and *M* had not been seen by any one and their dead bodies were never found. The villagers had heard that evening three gun shots as coming from the house in which *K* and *M* were seen some time before that. *R* and the two servants *M* and *U* were seen that night in a jeep belonging to *R* in different villages on the road to Lucknow. But on April 6, both *D* and *R's* mother *J* were in the house but neither of them had made any attempt to search for *K* and *M* who had vanished from the house and had not made any report about it to the police. There was also evidence to show that blood inside and outside the living rooms in the house had been washed, and also several samples of blood stained plaster pieces had been collected by the police. There was also evidence that both *D* and *J* had absconded two days after the incident when the matter was reported to the police. On these facts *D* and *J*, along with *R, M* and *U* were convicted by the trial Court of the offence under Section 201 of the Penal Code, and on appeal the High Court confirmed the conviction. *R* was further convicted under Section 302 for the murders of his wife and child. In the appeals by *D* and *J* the Court unanimously held, that the offence under Section 201 had not been proved. There was no such circumstantial evidence as would establish that the appellants had removed and concealed the dead bodies. The fact *D* and *J* were in the house and must have known of the removal of the dead bodies, if that was of fact, would not by itself establish that they assisted in the removal. Therefore, no offence under Section 201 had been established against them. *Raghav Prapanna Tripathi* v. *State of Uttar Pradesh*, AIR 1963 SC 74 : 1963(1) CrLJ 70 : (1963) 3 SCR 239.

[13025] ● *Interpretation "knowing or having reason to believe" in first para and "knows and believes" is second para.*—Section 201 is somewhat clumsily drafted, but we think that the expression "knowing or having reason to believe" in the first paragraph and the expression "knows or believes" in the second paragraph are used in the same sense. Take the case of an accused who has reason to believe, that an offence has been committed. If the other conditions of the first paragraph are satisfied, he is guilty of an offence under Section 201. If it be supposed that the word "believes" was used in a sense different from the expression "having reason to believe", it would be necessary for the purpose of inflicting punishment upon the accused to prove that he "believes" in addition to "having reason to believe". We cannot impute to the legislature an intention that an accused who is found guilty of the offence under the first paragraph should escape punishment under the succeeding paragraph, unless some additional fact or state of mind is proved. The first paragraph of Section 201 lays down the essential ingredients of the offence under Section 201. It must be proved firstly that an offence has been committed. Secondly, the accused must know or have reason to believe that the offence has been committed. Thirdly, the accused must either cause any evidence of the commission of that offence to disappear or give any information respecting the offence which he knows or believes to be false. Fourthly, the accused must have acted with the intention of screening the offender from legal punishment. By the second, third and fourth paragraphs, the measure of the punishment is made to depend upon the gravity of the offence. The word "offence" wherever used in the first, second, third and fourth paragraphs means some real offence, which, in fact, has been committed and not some offence which the accused imagines has been committed. *Roshan Lal* v. *State of Punjab*, AIR 1965 SC 1413 : 1965 (2) CrLJ 426 : (1965) 2 SCA 447 : (1965) 2 SCR 316.

[13026] ● *Punishment depends on gravity of offence committed.*—The punishment depends upon the gravity of the offence which was committed and which the accused knew or had reason to believe to have been committed. If an accused on seeing blood marks on the ground made as a result of an offence punishable under Section 323, erases the blood marks with the intention of screening the offender whom he erroneously believes to have committed the offence of murder, he could be convicted only on the footing that an offence under Section 323 was committed and that he acted with the intention of screening such an offender believing that such an offence was committed, and he may be punished accordingly under the fourth paragraph with imprisonment extending to three months, but he could not be convicted on the basis of his having screened a murderer merely, because he wrongly imagined, that an offence of murder had been committed. If the contention of the State were to be accepted, the erroneous belief or delusion of the accused would furnish the measure of punishment, and he would be punishable under the second paragraph with imprisonment extending to seven years. It is difficult to impute, such an intention to the legislature, and to hold that the minor offence under Section 201 of screening an offender is punishable more severely than the main offence committed by the main offender. It does not, in our opinion, stand to reason that Section 201 provides for punishing a minor offence more severely than the principal offence. *Roshan Lal* v. *State of Punjab*, AIR 1965 SC 1413 : 1965 (2) CrLJ 426 : (1965) 2 SCA 447 : (1965) 1 SCJ 233 : (1965) 2 SCR 316.

[13027] ● ***Disappearance of evidence in respect of two offences committed by same act.***—It is contended by the respondent that the appellants having caused the evidence of the two offences under Sections 339 and 348 to disappear, committed two separate offences under Section 201 and are punishable accordingly. Taking a strict view of the matter, it must be said that by the same act the appellants committed two offences under Section 201. The case is not covered either by Section 71 of the Indian Penal Code or by Section 26 of the General Clauses Act, and the punishment for the two offences cannot be limited under those sections. But, normally, no Court should award two separate punishments for the same act constituting two offences under Section 201. The appropriate sentence under Section 201 for causing the evidence of the offence under Section 330 to disappear should be passed, and no separate sentence need be passed under Section 201 for causing the evidence of the offence under Section 348 to disappear. The maximum sentence for the offence under Section 330 is imprisonment for seven years, and under Para 4 to Section 201, the appellants are liable to be sentenced to a maximum of one-fourth of seven years imprisonment. The facts of the case call for the maximum sentence. In the result, the appeal is allowed in part, and the sentence passed on the appellants for the offence under Section 201 is reduced to rigorous imprisonment for one year and nine months. In other respects, the judgment under appeal is affirmed. *Roshan Lal* v. *State of Punjab*, AIR 1965 SC 1413 : 1965 (2) CrLJ 426 : (1965) 2 SCA 447 : (1965) 2 SCR 316.

[13028] ● ***What prosecution has to prove.***—To establish the charge under Section 201 the prosecution must first prove that an offence had been committed, not merely a suspicion that it might have been committed, and that the accused knowing or having reason to believe that such an offence had been committed, and with the intent to screen the offender from legal punishment, had caused the evidence thereafter to disappear. The proof of the commission of an offence is an essential requisite for bringing home the offence under Section 201, IPC. *Suleman Rahiman* v. *State of Maharashtra*, AIR 1968 SC 829 : 1968 CrLJ 1013 : (1968) 2 SCR 515 : (1968) 2 SCWR 66 : (1968) 2 SCJ 364 : 1968 SCD 581 : 1968 MahLJ 413 : 1968 MPLJ 361 : 70 BomLR 536 : (1968) 2 ALT 60 : 1968 MLJ (Cri) 556 : 1968 MLW (Cri) 113 : 1968 AWR (HC) 651 : 1968 ACrR 427.

[13029] ● ***No person other than accused anxious to bury body.***—No person other than the accused would be anxious to bury the body. They had been last seen with the deceased by many witnesses. In order to avoid suspicion falling upon them they would be keen to get rid of the body, even if the deceased was not murdered by them. That they buried it in their own field further shows their complicity. Burying in somebody else's field might have been dangerous. Further, the accused denied the whole prosecution story. This again leads some assurance that they were denying the facts in order to conceal their participation in the crime. *Ram Dahin Singh* v. *State of Uttar Pradesh*, AIR 1971 SC 2013 : (1971) 3 SCC 898 : 1972 SCC (Cri) 146 : 1971 CrLJ 1451.

[13030] ● ***False evidence to screen offender—Benefit of doubt.***—In this appeal by special leave, Shamim Rahmani was convicted under Section 302, IPC, by the trial Court and confirmed by the High Court. Her brother was alleged, to have lodged, a false information at the police station, in connection with the said murder with the intention of screening his sister from legal punishment. He was convicted under Section 201, IPC and the same was confirmed by the High Court. The question for consideration is whether the requirements of Section 201 has been fulfilled against him. The evidence available is what Amir Ahmad was told by Kalika. He had not stated, that he had seen Shamim firing at the Doctor. Amir Ahmad could neither know nor could have reason to believe, that Shamim had committed the murder of the doctor. More facts were yet to be known. He did nothing wrong in rushing to the police station and giving the barest information in writing. The facts that his sister Shamim took out the gun, that a shot was fired, that the bullet hit the doctor and that he had fallen and was bleeding were all true. Amir Ahmad might not be sure, whether the doctor was dead or alive. It was not obligatory on his part or necessary for him to probe the matter any further at the spot before rushing to the police station. He might have known or might have reason to believe, that an offence of murder had been committed by his sister Shamim. But the other possibility that he might not have known or might not have reason to believe, he might have only expected that the offence of murder had been committed by Shamim, could not be ruled out. That being so, benefit of doubt should go to the appellant. *Shamim Rahmani* v. *State of Uttar Pradesh*, AIR 1975 SC 1883 : (1975) 4 SCC 652

1975 SCC (Cri) 667 : 1975 CrLJ 1654 : 1975 Supp SCR 315.

[13031] ● ***Possibility of death being as a result of suicide by drowning.***—The facts that the stomach was not filled with water and bloated and no froth was coming out of the mouth of the deceased are important symptoms which go a long way to exclude the possibility of the death being as a result of suicide by drowning. Medical jurists have warned that in the case of a dead body found floating in water, the medical man from a mere observance of the external condition of the body, should not jump to the conclusion that the death was from drowning. Only internal examination of the body can reveal symptoms which may indicate with certainty as to whether the death was from drowning or from unlawful violence before the body was immersed in water. *K. Purnachandra Rao* v. *Public Prosecutor*, *Andhra Pradesh*, AIR 1975 SC 1925 : (1975) 2 SCC 570 : 1975 SCC (Cri) 678 : 1975 CrLJ 1671.

[13032] ● ***Possibility of death being as a result of suicide by drowning—Circumstantial evidence.***—In this appeal, A-1 was convicted under Section 201/34 and A-2 under Section 201, IPC, respectively besides other offences. A-2 was the Sub-Inspector of Police of the particular Station and A-1 was an arrack contractor. They were charged along with another for offences under Sections 120-B, 366, 376, 302/34, 201, 218, 468/34 and 324, IPC. The trial Court acquitted them, but the High Court on appeal convicted A-2 under Section 201 and A-1 under Section 201/34, IPC besides some minor offences. On hearing about the dead body of a girl washed away at the seashore, A-2 went there, but he did not hold any inquest on it or prepared any other record even though he found a bleeding injury on her forehead and a reddish abrasion on the thigh and blood marks on the drawer of the dead body. A-1 was with him at that time. He directed the village servants to bury the dead body forthwith. He did not choose to send the dead body for P.M. examination. Subsequently, the SI got up an inquest report and concluded therein, that the deceased was a different person and a prostitute and that she died due to drowning by committing suicide and mentioned therein that there were no injuries on her body, and falsely noted that the stomach was bloated due to drinking of water. A-2 further fabricated, some time after the burial of the dead body, a false report purporting to have been made on the date of seeing the dead body by one Subba Rao who despite the best efforts of the investigators remained untraced and was believed to be a fictitious person. Another girl, sister of the previous girl, also died and her dead body was found by fishermen floating in the sea. They removed the jewels on her body but allowed it to drift away. They were identified to be that of the sister.

Whether the circumstantial evidence in a particular case is sufficient and safe enough to warrant a finding that an offence has been committed is a question which belongs to the realm of facts and not of law. So is the question, whether the accused knows or had reasons to believe that such an offence has been committed. It further depends upon a state of man's mind. In this case, A-2 was a Police Officer and as such was expected to discharge the duties entrusted to him by law with fidelity and accuracy. He was required to ascertain, the cause of the death and to investigate the circumstances and the manner in which it was brought about. But he flagrantly abused the trust reposed in him by law. He intentionally fabricated false pleas, laid false trails, drew many a red herring across the net, smothered the truth, burked the inquest, falsified official records and short-circuited the procedural safeguards. In short, he did everything against public justice which was penalised by Section 201, IPC. The other circumstantial evidence apart, the serious of these designed acts of omission and commission on the part of A-2, were eloquent enough to indicate that A-2 certainly knew or had reason to believe that *K*'s death was homicidal. A-1 was a friend of A-2. A-1 abetted A-2 and was a guilty partner in the commission of the offence under Section 201, IPC A-1 facilitated and intentionally aided A-2 in the preparation of the false and the forged record. Their conviction under Section 201/34 and 201 respectively is correct. *K. Purnachandra Rao* v. *Public Prosecutor, Andhra Pradesh*, AIR 1975 SC 1925 : (1975) 2 SCC 570 : 1975 SCC (Cri) 678 : 1975 CrLJ 1671.

[13033] ● ***Accused knowing how dead body of deceased carried for disposal.***—Where there was sufficient evidence to show that the accused knew as to how the dead body of the deceased was carried for disposal by other accused and that she refrained from informing the police about the disappearance of the deceased, she was held guilty under Section 201. *Suryamani Dei* v. *State of Orissa*, AIR 1979 SC 1534 : 1980 Supp SCC 767 : 1979 SCC (Cri) 497 : 1979 CrLJ 959 : 1980 UJ 440.

[13034] ● ***Recovery of dead body at instance of accused.***—An offence under Section 201 is established when approver's evidence relating to the offence is coupled with the reliable material in proof of the recovery of the dead body of the deceased at the instance of the accused and the recovery is believed by the Court for good reasons. *Baldev Singh* v. *State of Punjab*, AIR 1979 SC 1280 : (1979) 4 SCC 145 : (1979) SCC (Cri) 929 : 1979 CrLJ 871.

[13035] ● ***Recovery of dead body at instance of accused testified to by two witnesses.***—The appellant was convicted under Sections 302 r/w Sections 34 and 364 and 201 by the trial Court. As the approver was improving his story from time to time in order to give support to the prosecution case and not because it was the truth, his story cannot be accepted as trustworthy even in regard to the appellant who must also be treated at par with his two co-accused who were acquitted by the trial Court. As regards the offence under Section 201, it is established against him by reason of the approver's deposition coupled with the very reliable material in proof of the recovery of the dead body at the instance of the appellant which was testified to by two witnesses who were believed by the two Courts below and for good reasons. *Baldev Singh* v. *State of Punjab*, AIR 1979 SC 1280 : (1979) 4 SCC 145 : 1979 SCC (Cri) 929 : 1979 CrLJ 871.

[13036] ● ***Merely because accused are brothers—Cannot be presumed that they had knowledge of murder of deceased.***—Appellants are stated to have carried the dead body of the deceased lady to the cremation ground for cremation. There is absolutely no direct evidence to show, that either of the appellants was present at the time when the beating was given to her by her husband. There is no circumstantial evidence to show, that she was killed by her husband in the presence of, or to the knowledge of the appellants. They were not even residing in the house of the deceased's husband but they were living in the same village. From that alone, the Sessions Judge drew the inference that the appellants must be presumed to have the knowledge that the deceased did not die a natural death. High Court agreed with the said finding. There is absolutely no evidence to prove that any of the appellants had either any knowledge or reason to believe that any offence was committed in respect of the deceased. Merely because they are brothers, it cannot be presumed as a matter of legal proof that they must be deemed to have the knowledge of the murder of the deceased by her husband. There must be direct and legal evidence to prove the charge under Section 201 which is wholly wanting in the present case. Decision of the Allahabad High Court was reversed. *Nathu* v. *State of Uttar Pradesh*, AIR 1979 SC 1245 : (1979) 3 SCC 574 : 1979 SCC (Cri) 733 : 1979 CrLJ 1066.

[13037] ● ***Offence under Section 201, IPC—Evidence—Proof.***—The appellant's car was used by the other accused to remove the dead body of the deceased murdered by them. The car was brought back to the appellant's bungalow where it was washed. It was not alleged that the appellant was in any manner concerned as an abettor or accomplice in the murder or participated or abetted the removal and disposal of the dead body. Only allegation is that five days after murder, he got his car washed at the petrol bunk. Not an iota of material was placed on the record to furnish the basis even for a grave suspicion that by getting the car washed on the fifth day the appellant caused any blood or other evidence relating to murder to disappear. Presence of blood stains on the car on the fifth day stood by the prosecution's own assertion that the actual murderer had got the blood on the car washed on the day of murder itself. Mere washing of car by the appellant could not, by any stretch of imagination, be *prima facie* evidence of the factual ingredients of an offence under Section 201, IPC. The impugned order of the Sessions Judge being based on no evidential material whatever, was manifestly illegal. Charge framed is quashed. Judgment of Rajasthan High Court dismissing the appellant's application under Section 482, CrPC, was reversed. *Mohan Singh* v. *State of Rajasthan*, AIR 1980 SC 1560 : (1979) 4 SCC 11 : 1979 SCC (Cri) 882 : 1980 CrLJ 1098 : (1980) 1 SCR 148 : 1979 CrAppR (SC) 260 : 1980 Chand CrC 154 (SC).

[13038] ● ***Complaint not mentioning single word as to what existing evidence destroyed.***—In the instant case the complaint did not mention a single word as to what existing evidence was destroyed by the accused individually or conjointly in respect of an offence which was already committed with the intention of screening the offender. Unfortunately, the Chief Judicial Magistrate appeared not even to have read the complaint. Otherwise there was not one word as to what offence which he found appeared to have been committed in respect of which the evidence was destroyed or in respect of which a false information was given. Therefore, on the averments of the complainants himself in the complaint to no Court could have taken cognizance of an offence under Section 201, IPC. The complaint, therefore, in respect of an the offence under Section 201, IPC, was liable to be quashed on ground that there was not even the slightest allegation to constitute an offence except mentioning number of the sections of the IPC. *Chandra Pal Singh* v. *Maharaj Singh*, AIR 1982 SC 1238 : 1982 CrLJ 1731 : 1982 CrLR (SC) 126 : 1982 UJ (SC) 517.

[13039] ● *Certain averments in affidavit before Rent Control Officer false.*—In a complaint under Section 199, IPC, affidavits were filed before the Rent Control Officer. Certain averments therein were alleged to be false though no specific averment is singled out for this purpose in the complaint. Statement alleged to be false has to be set out and its alleged falsity with reference to the truth found in some document has to be referred to pointing out that the two situations cannot co-exist, both being attributable to the same person and, therefore, one to his knowledge must be false. Acceptance or rejection of evidence by itself is not a sufficient yardstick to dub the one rejected as false. Day in and day out in Courts averment made by one set of witnesses are accepted and the counter-averments are rejected if complaints are to be filed in such cases it would be an abuse of process of Court. High Court erred in declining to exercise its power under Section 482, CrPC Complaint ought not to have been taken cognizance of by the Magistrate. Order of the High Courts was set aside. *Chandra Pal Singh* v. *Maharaj Singh*, AIR 1982 SC 1238 : (1982) 1 SCC 466 : 1982 SCC (Cri) 249 : 1982 CrLJ 1731 : 1982 CrLR (SC) 126 : 1982 ALJ 507 : 1982 AWC 251 : 1982 Cr AppR (SC) 65 : 1982 ACrR 170 : 1982 (2) Chand LR (Cri) 46 (SC) : 1982 UJ (SC) 517 : 1982 All Rent Cas 348 : (1982) 2 SCWR 61 : (1982) 14 Lawyer 47 : (1982) 2 APLJ (SC) 34 : (1982) 2 Ren CJ 479.

[13040] ● *Two dead bodies not found—Disposed of by accused.*—Two bodies out of the deceased three persons were not found. It was under shadow of doubt that some of the accused had disposed of their dead bodies. Their conviction is correct. *Fazal Ali* v. *State of Bihar*, (1985) 2 Crimes 456 (SC).

[13041] ● *Dead bodies not found—Disposed of.*—There is no evidence that the two dead bodies were ever found and which seem to have been disposed of by some of the accused and, therefore, Court affirm the conviction of all the appellants under Section 201/149 of the Indian Penal Code and sentence them to five years rigorous imprisonment. Both the sentences, under Section 326/149 and under Section 201/149, IPC shall run concurrently. *Dhanna Chaudhary* v. *State of Bihar*, AIR 1985 SC 1688 : (1985) 3 SCC 680 : 1985 CrLJ 1864 : (1985) 2 Crimes 456.

[13042] ● *Wife axing her husband to death—screening evidence of murder.*—None but the husband and the wife were residing in the house. The husband was found murdered in the bedroom by a blow with an axe resulting the husband being beheaded the wife falsely gave out that her husband had gone away from the village. The wife later made an extra judicial confession about axing her husband to death and her carrying the dead body to a maize field. Latter the dead body was recovered dorm the maize field emitting foul smell. The wife is guilty of murder as also of screening evidence of murder. *Basanti* v. *State of Himachal Pradesh*, AIR 1987 SC 1572 : (1987) 3 SCC 227 : 1987 SCC (Cri) 473 : 1987 CrLJ 1869 : JT 1987 (2) SC 281 : (1987) 1 Supreme 542.

[13043] ● *Cash and ornaments of deceased recovered from possession of accused.*—Cash and ornaments of deceased recovered from possession of accused. Such recovery on its pleading of ornaments to pawn broker not proved. No independent corroboration. *Held,* prosecution failed to prove the charge under Sections 201 and 404 and hence conviction of accused not sustainable. *Mallah Seetharamaiah* v. *State of Andhra Pradesh*, AIR 1989 SC 421 : 1989 SCC (Cri) 177 : 1989 CrLJ 968 (SC) : (1989) 2 SCJ 403.

[13044] ● *Accused causing death of deceased and throwing parts of body at different places.*—There are number of impelling circumstances attending this case leading to an irresistible and inescapable conclusion that it was the appellant and the appellant alone who caused the death of the deceased Ravindra in a very ghastly manner by cutting him into pieces and throwing his various parts of body at different parts of the city, Bhatapara and there cannot be any dispute that this cold-blooded murder is diabolical in conception and extremely cruel in execution. The evaluation of the findings of the High Court does not suffer from any illegality, or manifest error or perversity nor it has overlooked or wrongly discarded any vital piece of evidence. Hence, the findings of facts recorded by the Court below do not call for any interference. *Ashok Kumar Chatterjee* v. *State of Madhya Pradesh*, 1989 SCC (Cri) 565 : (1989) 2 SCJ 454 (464) : (1989) 1 Crimes 905.

[13045] ● *Disappearance of evidence by scrapping out blood stained earth and burning dead body.*—The accused persons were charged for committing murder of the victim and thereafter causing disappearance of evidence by scrapping out the blood stained earth and burning the dead body. But, the serologist failed to give opinion from the recovered bones, as to the age, sex and origin of the victim. The other evidence about the burning of dead body was not reliable. Mere evidence that after murder the accused were travelling in the vehicle which was going towards river was not sufficient to prove the offence. Conviction under Section 201, IPC set aside. *Bhupendra Singh* v. *State of Uttar Pradesh*, AIR 1991 SC 1083 : (1991) 2 SCC 750 : 1991 SCC (Cri) 571 : 1991 CrLJ 1337 (SC) : JT 1991 (1) SC 625 : 1991 (2) Crimes 221.

[13046] ● ***Two death certificates— Issued.***—In this case the accused was alleged to have issued two false death certificates—Ex. P. 7 and Ex. P. 33. A perusal of Ex P-7 would show that the same does not disclose the cause of death and this certificate was given in the presence of PW-11, a Police Officer, the contents of which would show that there was a doubt about the cause of death thereby suggesting that it could be an unnatural death in which case the police had to take action and it was the duty of the husband also to inform the Police. If, as found by both the Courts below, Ex P-7 was given earlier, then we are unable to see as to how the accused gave Ex P-33, giving the cause of death. In any event there is no material whatsoever to show that Ex. P-33, which according to the prosecution was issued to facilitate the cremation, was used. The fact remains that the dead body was sent for regular post-mortem and a case of murder was also registered against the husband of the deceased. In such an event, we fail to see as to how even assuming that Ex P-33 was issued by the appellant, it would amount to an attempt to commit an offence under S. 201, IPC. There is marked difference between preparation and attempt and in this case it is highly doubtful whether the appellant attempted to commit an offence under S. 201, IPC. According to prosecution and as held by both the Courts show, the appellant issued Ex P-7 in the first instance and the contents of Ex P-7 do not in any manner indicate that he intended to facilitate the cremation by issuing such a certificate. On the other hand, the contents of Ex P-7 which was issued in the presence of the Police Officer, had in one sense paved the way for further investigation regarding the cause of death. In such a situation merely because Ex P-33 was seized from the house of husband of deceased the same would not fully incriminate the appellant for an offence under S. 201 read with S. 511, IPC. At any rate, a reasonable doubt arises about the guilt of the appellant particularly in view of the fact that there is absolutely no material to show whether anybody had seen Ex P-33 earlier and whether there was any attempt to put the same to use for facilitating the cremation. The conviction and sentence awarded to the accused are set aside. *Balai Chandra Biswas* v. *State of West Bengal*, AIR 1994 SC 914 (915-916) : (1994) 1 SCC 423 : 1994 SCC (Cri) 536 : 1994 CrLJ 1035.

[13047] ● ***Knowledge of offence and intention of disappearing of evidence essential ingredients.***—Knowledge of offence and intention of disappearing evidence are essential ingredients. Circumstantial evidence relied upon by prosecution not connecting appellants with offence under Section 201. No finding to the effect that deceased had been murdered either by appellants or by one whom appellants know. Even no finding of lower Courts to the effect that all those persons who gave bath to dead body or went with dead body to cremate it, did so to disappear evidence of murder offence. Held, charge under Section 201 not established. *Hanuman* v. *State of Rajasthan*, AIR 1994 SC 1307 : 1994 Supp (2) 39 : 1994 SCC (Cri) 693 : 1994 CrLJ 2092.

[13048] ● ***False evidence not to be basis of conviction.***—Mere false evidence given by the accused cannot be made basis for his conviction. Prosecution has to prove its own case. *Bhalinder Singh* v. *State of Punjab*, (1994) 1 SCC 726 : 1994 SCC (Cri) 462 : (1994) 1 Crimes 294 (SC) : 1994 JIC 153 : (1994) 1 SCR 26.

[13049] ● ***Dead body of deceased buried in house of accused.***—While deceased had illicit relations with wife of accused and also with wife of accused's brother—Present accused being wife of main accused responsible for murder. Though dead body was found buried in house of accused, yet there is no evidence to connect present accused with offence of concealment. Both present accused and main accused were living in same house. Hence, present accused can not be convicted on basis of assumption and thus entitled to benefit of doubt. *Sardar Singh* v. *State (Delhi Admin.)*, 1994 (1) East CrC 101 (SC).

[13050] ● ***Conviction when based on evidence of child.***—When conviction is based on evidence of a child aged 5 years, a daughter of deceased and there are apparent traces of tutoring the child, accused acquitted from charge of murder. *Arbind Singh* v. *State of Bihar*, AIR 1994 SC 1068 : 1994 SCC (Cri) 1418 : 1994 CrLJ 1227 : 1994 (1) East CrC 525 : 1994 (2) East CrC 519.

[13051] ● ***Issuance of false certificate to facilitate cremation.***—Offence of attempt to cause disappearance of evidence was committed by issuing false death certificate to facilitate cremation. Accused being a doctor, issued alleged death certificate. There is no evidence showing that such false certificate was used for facilitating cremation or issued earlier. Where even at this it may be assumed that false certificate had been issued by accused, there is no evidence to show that it was attempted to cause its disappearance. Thus, no offence under Section 201 is made out against the accused person. *Balai Chandra Biswas* v. *State of West Bengal*, AIR 1994 SC 914 : (1994) 1 SCC 423 : 1994 CrLJ 1035 : 1994 SCC (Cri) 536 : (1994) 1 UJ 540.

[13052] ● ***Appellant admitting administering cyanide to children.***—Appellant admitted that he administered cyanide to his children as he was financially crippled. Administering of cyanide corroborated by doctor. His statement very frank and straight-forward, held, conviction sustainable, however sentence of death reduced to imprisonment for life. *Janki Dass* v. *State (Delhi Admn.)*, AIR 1995 SC 1002 : 1994 Supp (3) SCC 143 : 1994 SCC (Cri) 1673 : 1995 CrLJ 1464 : 1994 (3) Crimes 375.

[13053] ● ***Dead body of deceased found burried in house of accused.***—Wife of the accused had illicit relations with deceased. Dead body of the deceased was found from a five feet deep pit in the room of the accused's house. It may be convict that the process of digging a grave and then erasing the traces *etc.* may not have been done by the accused alone but there is not an iota of evidence on the record not even a whisper to the effect that it was the wife of the accused who helped him in concealing a causing the evidence of the commission of the offence to disappear. Simply because she is the wife of the accused and as such supposed to be living in the same house, it cannot be assumed that she was guilty of the offence under Sections 201/34, IPC. *Sardarsingh* v. *State, Delhi Administration*, AIR 1996 SC 1696 : 1993 Supp (2) SCC 393 : 1993 CrLJ 1489 : 1993 (2) Crimes 13 (SC) : (1993) (1) CCR 79 (SC).

[13054] ● ***Accused killing four persons and setting bodies on fire.***—Accused persons firing shots and killing four persons and setting bodies on fire. Recovery of charred skeleton of deceased persons at instance of accused. FIR containing details of incident, testimony of eye-witness natural, truthful and corroborative. No infirmity nor contradiction in material particulars, held conviction upheld. *Vijay Singh* v. *State of Rajasthan*, AIR 1996 SC 3016 : 1996 SCC (Cri) 745 : 1996 CrLJ 1993 (SC) : (1996) 3 Supreme 20 : (1996) 1 Crimes 191.

[13055] ● ***Dowry death—Deceased cremated without waiting for anyone from parents side.***—The deceased was cremated on the land adjoining the house of her in-laws without waiting for anyone from her parents side to come and attend the funeral. In fact : (1) it was ensured that none from her parents family would reach accused hence until after the dead body was cremated. (2) The cremation did not take place at the usual cremation ground but in the field close to in lower house. (3) Deliberate attempt was made to prevent anyone from parents side to reach in-laws house for cremation, and (4) No report of her unnatural death was made at the Police station. As accused was present at the time of cremation and the servants who burnt the body were under his control and can be said to have acted on his instructions, his conviction under Section 201 of the Penal Code was held proper. *Rajeshwari Devi* v. *State of Uttar Pradesh*, (1996) 5 SCC 121 : 1996 SCC (Cri) 887 : (1996) 3 Supreme 586 : (1996) 2 CCR 142.

[13056] ● ***Murder—Accused alongwith main accused carrying dead body towards river and throwing same in river.***—In the instant case to prove the charge under Section 201/34, IPC the prosecution mainly relied upon the evidence of PW-15 who was the resident of another village and was posted as an operator in the irrigation department. He knew accused No. 1 as he used to go to his house very often. In the night of occurrence when he had gone for answering the natures call near the bundh of the river, he saw four persons carrying the dead body on a cot. It was a moon-lit night and on flashing the torch he identified accused No. 1 and his brother. When he asked them whose dead body it was, they told him that it was of some woman. They then threw the dead body into the river. The investigating officer, admittedly did not record his statement under Section 161, CrPC and for that purpose the protest petition was filed by the informant against the investigating agency. After having gone through the judgments of the Courts below as well as his evidence, the evidence as far as the incident of carrying the dead body towards the river and thereafter throwing the same into the river is acceptable and therefore, the conviction of accused No. 1 under Section 201/34, IPC is confirmed. *Mahesh Mahto* v. *State of Bihar*, AIR 1997 SC 3567 : 1997 SCC (Cri) 1134 : 1997 CrLJ 4402 : 1997 (3) Crimes 237 : (1997) 3 CCR 120.

[13057] ● ***Cremation of dead body—No material to indicate that other persons aware that any offence committed.***—It is not uncommon in villages that the villagers come forward and take active steps in cremating a dead person. In the absence of any positive material to show that the other accused persons were aware of any offence having been committed, their act in cremating the dead body cannot amount to an offence under Section 201. *Gati Behura* v. *State of Orissa*, 1997 CrLJ 4331 : 1997 CrLR (SC) 4331.

[13058] ● ***Conspiracy—Evidence of eye-witness—Trustworthy and credible.***—Conspiracy and in pursuance causing disappearance of corpse of murdered deceased. Prosecution has examined three eye witnesses who had been with the investigating party in respect of a theft. Deceased was the alleged accused in that case of theft who had succumbed to injuries inflicted during interrogation. Corpse of deceased could not be recovered but evidence of eye witnesses is consistent in establishing the hatching of conspiracy & throwing of corpse into the river. Court found that evidence of all the three eye witness trustworthy & credible—Conviction of appellant under Sections 201/120B confirmed. *Ram Singh* v. *State of Himachal Pradesh*, 1997 CrLJ 1829 : 1997 (1) Crimes 205 (SC) : JT 1997 (3) SC 9 : (1997) 2 Supreme 479 : (1997) 3 SCJ 128.

[13059] ● ***Disappearance of dead body clandestinely.***—PW-1 & PW-2 testified that they without loss of time contacted the SP Mandi and narrated the incident. They gave all details how the injuries were caused to deceased 'S' and on his death how the dead body came to be disposed of. Lower Courts below accepted their evidence as trustworthy and credible and Court finds no reason to take different view in that behalf. PW-10 testified that appellants & other four co-convicts had talked to each other & had decided to cause disappearance of the dead body in a clandestine manner. In view of the matter Court held that prosecution has established the conspiracy that appellant hatched with the other four accused to cause disappearance of dead body of deceased. *Ram Singh* v. *State of Himachal Pradesh*, (1997) CrLJ 1829 : 1997 (1) Crimes 205 (SC) : JT 1997 (3) SC 9 : (1997) 2 Supreme 479 : (1997) 3 SCJ 128.

[13060] ● ***Causing disappearance of evidence—Proof.***—It is established that when Sapna PW-2 informed that Sanjiv Kumar is in her house with blood stained clothes Kamlesh was perturbed and by the time Chanchal and Sapna proceeded towards the house of Sapna they met Kamlesh on the way who was returning from the direction of the house of Sapna and requested Sapna to come back so that Kamlesh can give clothes for Sanjiv Kumar which he could change in the house of Sapna. It is also established that she handed over a set of clothes for Sanjiv Kumar which PW-2 Sapna carried. The further circumstance which is established from the prosecution evidence is that when the police with other witnesses knocked the door of Kamlesh who was found in a very perturbed condition and initially resisted the entry of police into her house even though the police said her house would be searched. Ultimately the blood stained clothes of accused Sanjiv Kumar were recovered from the bath room of her house which had been soaked with water in a bath tub. These two circumstances fully established the charge under Section 201, IPC, so far as accused Kamlesh is concerned. *Sanjiv Kumar* v. *State of Himachal Pradesh*, AIR 1999 SC 782 (787) : (1999) 2 SCC 288 : 1999 SCC (Cri) 127 : 1999 CrLJ 1138.

[13061] ● ***Ingredients of offence under Section 201, IPC.***—The ingredients of offence under Section 201 are : (*i*) that an offence has been committed, (*ii*) that the accused knew or had reason to believe the commission of such an offence, (*iii*) that with such knowledge or belief he (*a*) caused any evidence of the commission of that offence to disappear, or (*b*) gave any information relating to that offence which he then knew or believed to be false, (*iv*) that he did so as aforesaid with the intention of screening the offender from legal punishment. *Vijaya alias Baby* v. *State of Maharashtra*, AIR 2003 SC 3787 : (2003) 8 SCC 296 : 2003 SCC (Cri) 1999 : 2003 CrLJ 4318 : (2003) Crimes 360.

[13062] ● ***Dead bodies carried in gunny bags.***—For the conviction under Section 201, IPC, it has been established beyond even a shadow of doubt that dead bodies were carried in a gunny bag. It was discovered on the basis of the discovery statement made by accused in terms of Section 27 of the Indian Evidence Act, which is also relevant. *Shankar Narayan Bhadolkar* v. *State of Maharashtra*, AIR 2004 SC 1966 : (2004) 2 JCC 1028 : 2004 CrLJ 1778 : JT 2004 (3) SC 211 : (2004) 1 CCR 412.

[13063] ● ***Ingredients of offence under Section 201, IPC.***—Ingredients to attract the application of provisions of Section 201, IPC.—(1) That an offence has been committed;

(2) that the accused knew or had reason to believe the commission of such offence;

(3) with such knowledge or belief he—

(a) caused any evidence of the commission of that offence to disappear, or

(b) gave any information respecting that offence which he then knew or believed to be false.

(4) that he did as aforesaid, with the intention of screening the offender from legal punishment;

(5) if the charge be of an aggravated form, as in the present case, it must be proved further that the offence in respect of which the accused did as

in (3) and (4) was punishable with death, or with imprisonment for life or imprisonment extending to ten year. *Budhan Singh* v. *State of Bihar*, (2006) 4 SCC 740 : (2006) (2) SCC (Cri) 402 : 2006 CrLJ 2451 (2453, 2454) : 2006 (4) Scale 570 : 2006 (4) Supreme 75 : 2006 (3) SLT 574 : 2006 (5) SCJ 90 : 2006 (2) Crimes 188 (SC).

[13064] ● ***Sentence.***—Having regard to the fact that all the appellants are above 70 years of age and further more in view of the fact that as they were not corrected with the first part of the occurrence, the Supreme Court held that interest of justice would be subserved if they were sentenced to the period already undergone by them. *Budhan Singh* v. *State of Bihar*, AIR 2006 SC 1959 : (2006) 4 SCC 740 : 2006 (2) SCC (Cri) 402 : 2006 CrLJ 2451 (2455) : 2006 (2) Crimes 188.

[13065] ● ***Ingredients of offence under Section 201, IPC.***—Ingredients required to be established for attracting the provisions of Section 201, IPC are: (i) committal of an offence; (ii) person charged with the offence under Section 201 must have the knowledge or reason to believe that an offence has been committed; (iii) person charged with the said offence should have caused disappearance of evidence and (iv) the act should have been done with the intention of screening the offender from legal punishment or with that intention he should have given information respecting the offence, which he knew or believed to be false.

It is plain that the interest to screen the offender committing an offence must be the primary and sole aim of the accused. In order to bring home an offence under Section 201, IPC, a mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that accused had caused the evidence to disappear in order to screen the offender, known or unknown. *Sukhram* v. *State of Maharashtra*, AIR 2007 SC 3050 : 2007 (3) SCC (Cri) 426 : 2007 CrLJ 4327 (4331) : 2007 (3) Crimes 354.

[13066] ● ***Knowledge of offence.***—Mere presence at the place of occurrence, of A-2 who happened to be the father-in-law of M who was alleged to have caused death of deceased along with his son, was held not sufficient to draw presumption as to knowledge of the offence. Except the testimony of PW-12 there was no evidence, or circumstances attributing A-2 the knowledge of commission of offence Prosecution failed to establish that the conduct of the A-2, both at the time of occurrence and immediately thereafter was consistent with the hypothesis of his guilt. The judgment of the High Court convicting A-2 under Sections 201 and 302 was set aside. *Sukhram* v. *State of Maharashtra*, AIR 2007 SC 3050 : 2007 (3) SCC (Cri) 426 : 2007 CrLJ 4327 : 2007 (3) Crimes 354 (SC).

[13067] ● ***Accused allegedly throwing body of deceased to Fire—High Court holding that no offence was established.***—In the instant case, it was alleged that accused had thrown the body of deceased in the fire. The High Court held that no offence had been committed and therefore, Section 201 was not applicable. In view of the High Courts finding that no role was played was by the accused offence, the Supreme Court held that High Courts order was justified and warranted no interference. Section 201, IPC was not applicable. *State of Karnataka* v. *Madesha*, (2007) 7 SCC 35 : 2007 (3) SCC (Cri) 292 : 2007 (3) Crimes 298 (SC).

[13068] ● ***Applicability of Section 201, IPC.***—Even if the main offence is not established, Section 201, IPC would be applicable. Where, 'there is' no evidence on record to attribute knowledge of commission of offence to accused, Section 201, IPC cannot apply. *State of Karnataka* v. *Madesha*, (2007) 7 SCC 35 : 2007 (3) SCC (Cri) 292 : 2007 (3) Crimes 298 (SC).

[13069] ● ***Circumstantial evidence—Causing death of wife by throttling her neck.***—The scene of observation report (Ex. P-9) prepared by the investigating officer show that the house of the accused is located in the middle of other houses. In view of the medical evidence and in conjunction with the other circumstances, particularly the undisputed fact that at or about the time of Vanga Vimala's death, no third person excepting the accused and the deceased, was present in the house, it will inescapably lead to the conclusion that within all human probability, it was the accused-appellant and none else, who had murdered the deceased by strangulating her to death. We have already noted that the accused alone was inside the house along with his wife, namely, the deceased. As rightly pointed out by the prosecution, it is not the case of the accused that any other person was residing with them in the same house particularly on the fateful day. Further, as rightly pointed out, there was no explanation from the accused as to when he left the house and came to know about the hanging of the dead body and it would be right in arriving at a conclusion that he alone was responsible for the commission of the offence. If we consider all the above mentioned material circumstances coupled with the medical evidence, it is safe to conclude that the death of the deceased was on account of strangulation. As rightly pointed out, there was no possibility of any other person committing the offence and the accused alone was responsible for the commission of the offence. In such circumstances, we agree with the contention of the State counsel that the prosecution placed sufficient evidence to establish the guilt of the accused beyond reasonable doubt. As observed by the High Court, the trial Court acquitted the accused only on the simple ground that the doctor, who conducted post-mortem examination, did not offer cause of death in his preliminary report, forgetting that in the final report particularly after receipt of FSI, report, the very same doctor has opined that the death was due to "Asphysixi due to throttling". In the light of the materials available, the conclusion of the trial Judge cannot be accepted and the High Court taking into consideration the totality of the circumstances and the entire materials was right in accepting the case of the prosecution and found the accused guilty. *Vanga Sriniwas* v. *Public Prosecutor, High Court of Andhra Pradesh*, AIR 2008 SC 88 : 2007 (3) SCC (Cri) 627 : 2007 (9) SCR 1028 : 2007 (11) Scale 150 : 2007 (4) Crimes 6 (SC).

[13070] ● ***Murder by poisoning.***—So far as the purchase of rat-killer poison and the gunny bag was concerned there was no evidence to show that either the rat-killer poison the gunny bag was purchased prior to the date of occurrence. The body of the deceased was found in a decomposed state. The Doctor who conducted the post-mortem categorically stated that in view of the decomposed state of dead body, it was not possible to say whether any rat killing poison was used. The only other circumstance was purported discovery of the dead body at the instance of accused respondent. The accused were convicted by the trial Court for offences punishable under Section 302, IPC read with Section 34, IPC. They were also connected under Section 201 read with Section 34, IPC. The High Court found that the discovery of dead body was not proved. The High Courts' judgment acquitting the accused was not interfered with by the Supreme Court. *State of Maharashtra* v. *Arjun*, AIR 2009 SC 733 (734) : (2008) 17 SCC 53 : (2009) 1 Crimes 120 : JT 2009 (12) SC 632.

[13071] ● ***Causing disappearance of evidence.***—In the instant case, it was incumbent upon the accused persons to firstly inform the police about the unnatural death of deceased. They did not do so, on the other hand even after her death, they did not inform either the police or even the relatives like her father *etc*. though they could have done so. Instead they hurriedly conducted the funeral thereby causing destruction of evidence. The conviction recorded under Section 201, IPC was held proper. *Dasrath* v. *State of Madhya Pradesh*, AIR 2010 SC 2592 (2596) : 2010 CrLJ 4382.

DISCHARGE OF ACCUSED (Ss. 227, 239, 245, 249, 255, 398, 401, 442, CrPC, 1973)

[13072] ● ***Discharge of accused.***—Accused *A, B* and *C* were charged before a Magistrate at Mangalore under Section 302, Penal Code, on the ground that they, along with *D,* not then traced, murdered one *X.* The Magistrate committed them to the Sessions Court for trial. *D* was arrested latter at Bombay, his full confession narrating all the facts of the case was duly recorded by a Magistrate at Bombay, and then he was sent to Mangalore. It was decided to make him an approver and on his admitting that his confession was true and voluntary the District Magistrate, Mangalore, granted him pardon and recorded his statement as an approver. But no formal order was passed discharging him as an accused. Thereafter *D* was examined by the committing Magistrate as a supplementary witness under Section 219, Criminal Procedure Code, in the presence of the accused, and thereafter the accused were further examined under Section 342 of the Code. Thereafter at the trial before the Sessions Court *D* resiled from his statement made before the committing Magistrate, and therefore, that statement was brought on record under Section 288 of the Code. The Sessions Judge found that the statement was corroborated by other evidence, and relying upon it convicted the accused. The High Court upheld the conviction. (i) It must be presumed that at the very time when the District Magistrate granted pardon to *D*, he was discharged as an accused, and that thereafter he ceased to be an accused and was eligible as a witness. Therefore his evidence as an approver taken by the committing Magistrate and brought on record as substantive evidence by the Sessions Court was legally admissible. (ii) The contention that after a committal order is made, the only Court which can grant pardon is the Sessions Court, is not acceptable. By Section 338 of the Code power is no doubt given to the Sessions Court to tender pardon. But that Section does not mean that the power conferred on the committing Magistrate or the District Magistrate under Section 337(1) to tender pardon 'at any stage of the inquiry or trial' is taken away by Section 338. The present case was covered by Section 337(1) and the tender of pardon by the District Magistrate was perfectly legal and valid. *Peiris A.J.* v. *State of Madras*, AIR 1954 SC 616 : 1954 CrLJ 1638.

[13073] ● ***Power of Magistrate to discharge person after he has been charged.***—Magistrate cannot order discharge of a person after he has been charged. He must acquit the accused if otherwise justified on the merits of the case. *Harihar* v. *State of W. Bengal*, AIR 1954 SC 266 : 1954 CrLJ 724 (2). **TO THE SAME EFFECT :** (1) *Ratilal Mithani* v. *State of Maharashtra*, AIR 1979 SC 94 : (1979) 2 SCC 179 : 1979 SCC (Cri) 405 : 1979 CrLJ 41 : 1979 Cr App R (SC) 1 : 1979 SCR 99.

[13074] ● ***Discharge under Section 251A(2), CrPC, 1898—Magistrate can still proceed for offence triable as summons case.***—When a Magistrate takes cognizance of a case under Section 190(1)(*b*) on a police report, the cognizance so taken is in respect of every offence disclosed in that report, whether it is triable as a warrant-case or as a summons-case, and only in respect of offences enumerated in the report; in other words, the cognizance taken is of the whole case and not only of a particular part of it. Thereafter when the stage under sub-sections (2) and (3) of Section 251-A has been reached, it is quite clear from the language of these sub-sections that in deciding what action should be taken, the Magistrate has to form an opinion whether or not there is ground for presuming that the accused has committed an offence triable under Chapter XXI (now XIX). Therefore, when an order of discharge is made in the exercise of the powers under Section 251-A(2), the discharge is not in respect of all the offences which the facts mentioned in the police report make out, but only in respect of such of the offences mentioned in the report as are triable under Chapter XXI. In such a case, if the facts mentioned in the charge-sheet constitute, not only one or more offences triable under Chapter XXI as warrant-cases, but also one or more other offences ordinarily triable under Chapter XX as summons-cases, the order of discharge, which is only in respect of the former class of cases, does not affect in any way the position as regards offences triable under Chapter XX as to which also charges are contained in the police report, and the Magistrate has power to proceed with the trial in respect of such other offences. The facts stated in the police report on which cognizance was taken by the Magistrate necessarily constituted only not an offence under Section 332 of which the accused was discharged, but also the minor offence under Section 323; when the Magistrate took cognizance he did so in respect of both these offences, and not only in respect of the offence under Section 332. Consequently, even after the accused was discharged of the offence under Section 332, the minor offence under Section 323 of which also he had taken cognizance remained for trial, and the Magistrate was right in proceeding with the trial in respect of that offence after following the procedure under Chapter XX of the Code. Conviction was upheld and the appeal was dismissed. *Pramatha Nath Mukherjee* v. *State of West Bengal*, AIR 1960 SC 810 : 1960 CrLJ 1165 : 1960 SCJ 926 : (1960) 2 SCA 200.

[13075] ● ***Magistrate can discharge or commit accused on basis of documents reformed to in Section 173, CrPC.***—(1) In a proceeding instituted on a police report, the Magistrate is bound to take evidence of only such eye-witnesses as are actually produced by the prosecution in Court, (2) the Magistrate, if he is of opinion that it is in the interest of justice to take evidence, whether of eye-witnesses or others, has a duty to do so. (3) If the Magistrate is not of that opinion and if the prosecution has not examined any eye-witnesses, he has jurisdiction to discharge or commit the accused to Sessions on the basis of the documents referred to in Section 173 of the Code. (4) The discretion of the Magistrate under sub-section (4) is a judicial discretion and, therefore, in appropriate cases the order of discharge or committal, as the case may be, is liable to be set aside by a superior Court. *Shri Ram* v. *State of Maharashtra*, AIR 1961 SC 674 : 1961 (1) CrLJ 760 : 1961 (2) SCR 890 : (1961) 1 SCJ 677.

[13076] ● ***Expression "groundless" occurring in Section 239, CrPC—Meaning of.***—The expression "groundless" occurring in Section 239 means that no reasonable person can come to the conclusion that there was any ground whatsoever to sustain the charge against the accused. Magistrate cannot disbelieve evidence at the stage of considering whether he should discharge the accused by elaborate and painstaking examination of the evidence. Order of discharge after such elaborate examination is in excess of jurisdiction and is liable to be quashed. *Bapat Gope* v. *State of Bihar*, AIR 1962 SC 1195 : (1962) 2 CrLJ 276 : 1962 Supp (2) SCR 948.

[13077] ● ***Power under Section 437, CrPC—Can be exercised even in absence of express order of discharge.***—Where on a certain state of facts the accused is alleged by the prosecution to have committed an offence exclusively triable by a Court of Session but the Magistrate is of the opinion that the offence disclosed is only an offence which he is himself competent to try and either acquits or convicts him there is an end of the matter in so far as the very set of facts are concerned. The facts may disclose really a very grave offence such as say one under Section 302, IPC, but the Magistrate thinks that the offence falls under Section 304-A which he can try and after trying the accused either convicts or acquits him. In either case the result would be that the appropriate Court will be prevented from trying the accused for the grave offence which those very facts disclose. It is to obviate such a consequence and to prevent inferior Courts from clutching at jurisdiction that the provisions of Section 437, CrPC have been enacted. To say that they can be availed of only where an express order of discharge is made by a Magistrate despite the wide language used in Section 437 would have the result of rendering these provisions inapplicable to the very class of cases for which they were intended. When a case is brought before a Magistrate in respect of an offence exclusively or appropriately triable by a Court of Session what the Magistrate has to be satisfied about is whether the material placed before him makes out an offence which can be tried only by the Court of Session or can be appropriately tried by that Court or whether it makes out an offence which he can try or whether it does not make out any offence at all. There is nothing in the language of Section 437 from which it could be said that this power is not exercisable during the pendency of a trial before a Magistrate or that this power can be exercised only where the Magistrate has made an express order of discharge. Express orders of discharge are not required to be passed by the Court in cases where, upon the same facts, it is possible to say that though no offence exclusively or appropriately triable by a Court of Session is made out, an offence triable by a Magistrate is nevertheless made out. Moreover, even if an express order of discharge is made by a Magistrate in respect of an offence exclusively triable by a Court of Session but a trial on the same facts for a minor offence is proceeded with, the Magistrate has undoubtedly power to order his commitment in respect of the very offence regarding which he has passed an order of discharge provided of course the material before him justifies such a course. There is nothing in Section 347 which precludes him from doing this. It will, therefore, be not right to say that the power conferred by Section 437 is exercisable only in respect of express orders of discharge. *Thakur Ram* v. *State of Bihar*, AIR 1966 SC 911 : 1966 CrLJ 700 : (1966) 1 SCA 679 : (1966) 2 SCR 740 : (1966) 2 SCJ 438.

[13078] ● ***Jurisdiction of Additional Sessions Judge to set aside order of Magistrate and direct commitment of appellant to Session Court.***—There is another consideration to be taken into account. Take for instance, a case where on certain facts the accused is alleged by the prosecution to have committed a grave offence, say under Section 302, IPC exclusively triable by the Court of Session, but the Magistrate thinks that the offence falls under Section 304-A which he can try and after trying the accused either convicts or acquits him. In either case the result would be that the appropriate Court would be prevented from trying the accused for the grave offence which those very facts disclose. It is to obviate such a consequence and to prevent inferior Courts from exercising a jurisdiction which they do not possess that the provisions of Section 437, CrPC have been enacted. To say that these provisions can be availed of only where an express order of discharge is made is made by a Magistrate would be to render those provisions ineffective and inapplicable to the very class of cases for which they were intended. As we have already pointed out the language used in Section 437, CrPC is wide and there is nothing in that section from which it could be gathered that the power can be exercised only when the Magistrate has made an express order of discharge. We accordingly hold that the Additional Sessions Judge had the jurisdiction to set aside the order of the Magistrate and direct the "commitment" of the appellant to Sessions Court on charge under Section 307 of the IPC. *Ram Ekbal Tiwary* v. *Madan Mohan Tiwary*, AIR 1967 SC 1156 : 1967 CrLJ 1076 (1079) : (1967) 2 SCR 368.

[13079] ● ***Express order of discharge when contemplated.***—It is true that in the present case there is no express order of the Magistrate discharging the appellant of the charge under Section 307, IPC, but in his order, the Magistrate has given reasons for holding that no case is made out under Section 307, IPC in order to justify an order of commitment. It is manifest that the order of the Magistrate tantamounts to an implied order of discharge and the Additional Sessions Judge had, therefore, jurisdiction, under Section 437, CrPC, to set aside the order of the Magistrate and to order that the accused should be committed to trial in the Court of Sessions on the major charge under Section 307, IPC. There is nothing in the language of Section 437, CrPC from which it could be said that the power of the Sessions Court under that section can be exercised only when the Magistrate has made an express order of discharge. It is apparent from the language of Section 209(1), CrPC that an express order of discharge is only contemplated in a case where the Magistrate comes to the conclusion that the allegations against the accused do not amount to an offence at all and, therefore no question arises of trying him either by himself or by any other Court. But the section does not contemplate that an express order of discharge should be made in a case where upon the same facts it is possible to say that though no offence exclusively triable by a Court of Session is made out, an offence triable by a Magistrate is nevertheless made out and the Magistrate thereafter proceed with the trial of that offence. *Ram Ekbal Tiwary* v. *Madan Mohan Tiwary*, AIR 1967 SC 1156 : 1967 CrLJ 1076 (1079) : (1967) 2 SCR 368.

[13080] ● ***Test for discharging accused must be in large way be same under both sections.***—No doubt a Magistrate enquiring into a case under Section 209, CrPC (old) is not to act as a mere post office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session; but in arriving at that conclusion, it is not the function of an enquiring Magistrate to weigh the pros and cons of the prosecution and defence evidence and to discharge the accused merely because in his view the defence evidence was better than the prosecution. The introduction of Section 207-A of the Code of Criminal Procedure by a subsequent amendment does not necessarily imply that the principles governing the exercise of jurisdiction by the Magistrate under Section 209 must thereafter be different from the principles which were held to govern his jurisdiction before this amendment. The words of Sections 207 and 209-A, CrPC are not the same and it is possible to say that the force of the two sections is also not the same, and that Section 209 gives a power to enter upon the merits of a case in manner which Section 207A does not warrant. But the test for discharging the accused must, in a large way, be the same under both the sections. *K.P. Raghavan* v. *M.H. Abbas*, AIR 1967 SC 740 : 1967 CrLJ 653 : 1966 Cr App R (SC) 373.

[13081] ● ***Judicial refusal to summon amounts to discharge.***—It is contended, in the instant case that judicial refusal to summon amounts to discharge. There is no force in this contention because there cannot be any question of discharge when the appellant was not sent up upon the charge-sheet submitted by the Police. *Raghubans Dubey* v. *State of Bihar*, AIR 1967 SC 1167 : 1967 CrLJ 1081 (1083) : (1967) 2 SCR 423.

[13082] ● ***Dismissal of complaint on preliminary objection—Discharge not acquittal.***—It is true that it is a summons case and no formal charge is necessary to be framed under Section 242, old CrPC but even so here when the accused appeared, before anything was done the accused filed a preliminary objection and no particulars of the offence of which the accused was charged were ever stated to him. The accused is discharged and not acquitted. *Municipal Council, Raipur* v. *State of Madhya Pradesh*, AIR 1970 SC 1923 : (1969) 2 SCC 582 : 1970 CrLJ 1656 (1657) : (1970) 1 SCR 915.

[13083] ● ***Enquiry preparatory to commitment—Object.***—In terms Section 209, CrPC applies to case which are instituted otherwise than on a Police report. But the principle underlying that section applies to cases which are instituted on a Police report. A Magistrate holding an enquiry is not intended to act merely as a recording machine. He is entitled to shift and weigh the material on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no *prima facie* evidence or the evidence is totally unworthy of credit, it is his duty of Magistrate to discharge the accused; if there is some evidence on which conviction may reasonably be based, he must commit the case. The Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before the Magistrate at that stage is whether there is some credible evidence which would sustain a conviction. *Alamohan Das* v. *State of West Bengal*, AIR 1970 SC 863 : 1970 CrLJ 860 (863) : (1969) 2 SCR 520 : 1970 CAR 223.

[13084] ● ***Trespass—Prima facie case existing—Discharge of accused not proper.***—*Prima facie* case exists against the accused person for committing trespass. Title of property cannot be gone into, at this stage. Discharge of accused is not proper. *Mahant Abhey Dass* v. *S. Gurdial Singh*, AIR 1971 SC 834 : 1971 SCC (Cri) 244 : 1971 CrLJ 691 : (1972) 4 SCC (N) 44.

[13085] ● ***Power of Magistrate to discharge accused.***—The Magistrate has ample power to discharge the accused at any stage of proceedings. *Cricket Association of Bengal* v. *State of West Bengal*, AIR 1971 SC 1925 : (1971) 3 SCC 239 : 1971 SCC (Cri) 446 : 1971 CrLJ 1432 : 1971 Supp SCR 200.

[13086] ● ***Charge to be framed if case made out on Police report.***—If a *prima facie* case is made out on police report, charge is to be framed. *Abhey Dass* v. *Gurdial Singh*, AIR 1971 SC 834 : 1971 SCC (Cri) 244 : 1971 CrLJ 691 : (1971) 1 SCWR 345.

[13087] ● ***Discharge of accused after consideration of Police report.***—No ground for presuming guilt of the accused—he may be discharged after consideration of police report. The order framing charge does substantially affect personal liberty and it cannot be said the Court must automatically frame charge merely because there is a police report. *Century Spinning* v. *State of Maharashtra*, AIR 1972 SC 545 : (1972) 3 SCC 282 : 1972 SCC (Cri) 495 : 1972 CrLJ 329 : 1971 Cr App R 472.

[13088] ● ***Sessions Court discharging some accused and framing charge against rest.***—Where the Sessions Court discharged some accused after perusing the record and hearing the parties, for reasons to be recorded and framed a charge against the rest of the accused, the High Court is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. In the exercise of the wholesome power under Section 482, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice required that the proceeding ought to be quashed. The Sessions Court being seized of the case, has jurisdiction to frame appropriate charge and is not controlled by the specifications contained in the committal order. *State of Karnataka* v. *L. Muniswamy*, AIR 1977 SC 1489 : (1977) 2 SCC 699 : (1977) 3 SCC 337 : 1977 SCC (Cri) 404 : 1977 CrLJ 1125 : 1977 CrLR (SC) 188 : (1977) 2 SCJ 145 : (1977) 3 SCR 113 : (1977) 2 SCWR 327 : ILR (1977) 1 Kant 617 : 1977 PunLJ (Cri) 108 : 1977 MLJ (Cri) 428.

[13089] ● ***At beginning and initial stage of trial truth, veracity and effect of evidence not to be meticulously judged.***—Reading the two provisions together in juxta-position, as they have got to be, it would be clear that at the beginning and the initial stage of the trial, the truth, veracity and the effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or 228 of the Code. At the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against him.

If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

If the scales of a balance as to the guilt or innocence of the accused are something like even at the conclusion of trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227. *State of Bihar* v. *Ramesh Singh*, AIR 1977 SC 2018 : (1977) 4 SCC 39 : 1977 SCC (Cri) 533 : 1977 CrLR (SC) 375 : 1977 BBCJ (SC) 226 : 1977 CrAppR (SC) 267 1977 ChandLR (Cri) SC 274.

[13090] ● ***No power of committing Magistrate to discharge accused.***—Under the new Code in cases where the offence is triable exclusively by the Court of Session, the committing Magistrate has no power to discharge the accused. Nor has he power to take oral evidence save where a specified provision like Section 306 enjoins. It is also not open to the committal Court to launch on a process of satisfying itself that a *prima facie* case has been made out on the merits. The jurisdiction once vested in him under the earlier Code has been eliminated now under the present Code. The narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect. If made-up facts unsupported by any material are reported by the police and a Sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227, CrPC, to discharge the accused. *Sanjay Gandhi* v. *Union of India*, AIR 1978 SC 514 : (1978) 2 SCC 39 : 1978 SCC (Cri) 172 : 1978 CrLJ 642.

[13091] ● ***In warrant case instituted otherwise than on police report—Accused be discharged at enquiry stage.***—In warrant case instituted otherwise than on police report an accused at inquiry stage may be discharged under Section

245, CrPC. But if during trial of other accused persons the Court feels the discharged person might have committed the offence, Court may again frame charge against him and try him. *Mohan Joginder* v. *State of Punjab*, AIR 1979 SC 339 : (1971) 1 SCC 345 : 1979 SCC (Cri) 295 : 1979 CrLJ 333 : 1979 CrLR (SC) 21.

[13092] ● ***Once charged—Framed Magistrate cannot cancel it or discharge accused.***—Once a charge is framed, a Magistrate has no power under Section 227 of the Code (Section 216(1) and (2) of 1973 Code) or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 (Section 245 of the new Code) and discharge the accused. Once a charge is framed, the Magistrate is required to proceed with the trial to a logical end if the accused pleads not guilty. He has no power to discharge the accused after the charge is framed. Excepting where the prosecution must fail due to a fundamental defect, such as want of sanction, an order of acquittal must be based upon a 'finding of not guilty' turning on the merits of the case and the appreciation of evidence at the conclusion of the trial. If after framing charges the Magistrate whimsically, without appraising the evidence and without permitting the prosecution to produce all its evidence, 'discharges' the accused, such an acquittal, without trial, even if clothed as 'discharge', will be illegal. Whereas in this case the Magistrate framed charges and subsequently, when on the disposal of Revision Applications by the High Court the records were received back, he arbitrarily deleted those charges and discharged the accused, without examining the 'remaining witnesses' of the prosecution which he had in the order of framing charges said, "will be examined after the charge", the order is illegal. Assuming *arguendo*, the Magistrate's order of discharge was an order of 'acquittal', then also, it does not alter the fact that this 'acquittal' was manifestly illegal. It was not passed on merits, but without any trial, with consequent failure of justice. The High Court has undoubtedly the power to interfere with such a patently illegal order of acquittal in the exercise of its revisional jurisdiction under Section 439 (Section 401 of the new Code) and direct a re-trial. The High Court's order under appeal directing the Magistrate to take *de novo* proceedings against the accused was not barred by the provisions of Section 403 (Section 300 of the new Code), the earlier proceedings taken by the Magistrate being no trial at all and order passed therein being neither a valid 'discharge' of the accused, nor their acquittal as contemplated by Section 403 (1) (Section 300(1) of the new Code). *Ratilal Bhanji* v. *State of Maharashtra*, AIR 1979 SC 94 : (1979) 2 SCC 179 : 1979 SCC (Cri) 405 : 1979 CrLJ 41 : 1979 SCCr R 99 : (1979) 1 SCR 993 : 1979 CrAppR (SC) 1 : (1979) 3 MahLR 172.

[13093] ● ***Revision—Suo motu exercise of power—Order of discharge found illegal.***—The question whether a discharge order is interlocutory or otherwise need not detain us because it is settled by a decision of this Court that the discharge order terminates the proceedings and, therefore, it is revisable under Section 397(1), CrPC and Section 397(1) in terms confers power of *suo motu* revision on the High Court, and if the High Court exercises *suo motu* revision power, the same cannot be denied on the ground that there is some limitation prescribed for the exercise of the power because none such is prescribed. *Municipal Corporation of Delhi* v. *Girdharilal Sapuru*, AIR 1981 SC 1169 : (1981) 2 SCC 758 : 1981 1 SCC (Cri) 598 (600) : 1981 CrLJ 632 : 1981 CrLR (SC) 275 : 1981 UJ (SC) 217.

[13094] ● ***Discharge of accused—Procedures.***—The CrPC contemplates discharge of the accused by the Court of Session under Section 227 incase triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he considers that there is not sufficient ground for proceeding against the accused. Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be rerecorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction....." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "*prima facie*" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a *prima facie* case is made out, charge has to be framed. *R.S. Nayak* v. *A.R. Antulay*, AIR 1986 SC 2045 : 1986 SCC (Cri) 256 : 1986 CrLJ 1922 : 1986 CAR 181 : 1986 CrLR (SC) 266.

[13095] ● ***Discharge—Order of—Validity.***—Where a Special Judge discharged the accused under Section 239, CrPC, on the same material on which his predecessor had held that a *prima facie* case relating to the various offences had been made out against the accused, the subsequent order is in effect a review of the earlier order which the Special Judge was not entitled to do under the Code. At the time of framing charges, all that is required is to see whether a *prima facie* case regarding the commission of certain offences is made out. the question whether the charges will eventually stand proved or not can be examined only after evidence is recorded in the case. What the Special Judge has done is to decide the case on merits without giving the prosecution an opportunity to adduce evidence against the accused. The order was set aside. *State of Himachal* v. *Kishan Lal Prahar*, AIR 1987 SC 773 : (1987) 2 SCC 17 : 1987 SCC (Cri) 270 : 1987 CrLJ 709 : 1987 CrLR (SC) 571.

[13096] ● ***Withdrawal from prosecution—Application for.***—Application for withdrawal of prosecution may be made at any time ranging between the Court taking cognizance of the case till such time the Court actually pronounces judgment. It follows that even where reliable evidence has been adduced to prove the charges, the Public Prosecutor can seek the consent of the Court to withdraw the prosecution. The section does not lay down that an application for withdrawal of the prosecution should necessarily be made at the earliest stages of the case or only if the evidence is of a weak and infirm nature. (*Per* NATARAJAN, J.)

A cursory glance at Section 321 will satisfy anyone that consent can be given for withdrawal from the prosecution of a case, not only when the charge is not framed, but even after the charge is framed and at any time before the judgment. (*Per* KHALID, J.)

There can be no doubt that the withdrawal from the prosecution could not be permitted on the ground that there was insufficient or no evidence to sustain the prosecution when a charge was already framed. But if on the basis of the material on record no charge could be framed, and the charge should be quashed, the appeal against permission to withdraw the prosecution should be dismissed and instead of permitting the withdrawal of the prosecution under Section 321, the charge framed is quashed. (*Per* OZA, J. for himself and on behalf of P.N. BHAGWATI, C.J.) (Minority view.)

Where the consert given by the trial Court for withdrawal of the prosecution does not suffer from any error of law, patent or latent, the same cannot be questioned. (Per. NATARAJAN, J.)

Where the application for withdrawal was clearly *bona fide* and in furtherance of public justice and it was clearly a false and vexatious criminal prosecution which was sought to be halted, the Court will not interfere with the order of the trial Court permitting the withdrawal and confirmed by the High Court. (*Per* OZA, J. for himself and on behalf of P.N. BHAGWATI, (C.J.) (Minority view.) *Mohd. Mumtaz* v. *Nandini Satpathy*, AIR 1987 SC 863 : (1987) 1 SCC 269 : 1987 SCC (Cri) 63 : 1987 CrLJ 778 : 1987 CrLR (SC) 259.

[13097] ● ***Discharging accused guidelines as to.***—Section 227, itself contains enough guideline as to the scope of inquiry for the purpose of discharging an accused. It provides that "the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused". The 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The Court, therefore, need not undertake an elaborate inquiry in shifting and weighing the materials. Nor is it necessary to delve deep into various aspects. Al that the Court has to consider is whether the evidentiary material on record, if generally accepted, would reasonably connect the accused with the crime. Further it is observed : "Section 227 which confers power to discharge an accused was designed to prevent harassment to an innocent person by the arduous trial or the ordeal of prosecution. The power has been entrusted to the Sessions Judge who brings to bear his knowledge and experience in criminal trials. If the Sessions Judge after hearing the parties frames a charge and also makes an order in support thereof, the law must be allowed to take its own course. Self-restraint on the part of the High Court should be the rule unless there is a glaring injustice staring the Court in the face". *Shree Atyachar Virodhi Parished* v. *Dilip Nathuma Chordia*, (1989) 1 SCC 715 : 1989 SCC (Cri) 285 : 1989 CrLR (SC) 292 : (1989) 1 Crimes 443

[13098] ● *Section 227, CrPC confers special power on Judge to discharge accused—Norms regarding consideration of evidence at time of framing charge.*—Section 227, introduced for the first time in the New Code, confers a special power on the Judge to discharge an accused at the threshold if upon consideration of the record and documents he considers 'that there is not sufficient ground' for proceeding against the accused. In other words his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds for proceeding with the trial against the accused. If he comes to the conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not he will discharge the accused. It must be remembered that this section was introduced in the Code to avoid waste of public time over cases which did not disclose a *prima facie* case and to save the accused from avoidable harassment and expenditure. Various norms regarding the consideration of evidence at the time of framing the charge as under :

(1) That the Judge while considering the question of framing the charges under Section 227, of the Code has the undoubted power to shift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a *prima facie* case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227, of the Code of Judge which (sic) under the present Code is a senior and experienced Judge cannot act merely as a post office or mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. *Niranjan Singh Karam Singh Punjabi* v. *Jitendra Bhimraj*, AIR 1990 SC 1962 : (1997) 4 SCC 393 : 1990 CrLJ 1869 : JT 1997 (4) SC 84.

[13099] ● *Discharge—Prima facie case.*—There is sufficient force in the submission of the learned counsel for the State of Andhra Pradesh that there are number of allegations mentioned in the charge-sheet to the effect that the respondents accused have committed the offences punishable under TADA Act for which they are charge-sheeted and the learned trial Judge grossly erred in holding that there is no *prima facie* case against the accused for the offence under the TADA Act. There are number of allegations which *prima facie* attract the provisions of the TADA Act. It appears that the learned trial Judge inferred that the investigating agency had come to the conclusion that the accused had a personal grudge against the deceased but the allegations are to the effect that the main object underlying the alleged crime was to propagate pro-Khalistan cult among Sikh community and to organize a force threatening the Government with dire consequences under the pretext of championing the cause of Sikh community. We are satisfied that the trial Court at this stage was not justified in discharging the accused of the offences under TADA Act in respect of which the accused are charge-sheeted. It is needless to say that the prosecution has to prove the said offences beyond all reasonable doubt. For these reasons the appeal is set aside and the designated Court is directed to proceed with the trial by framing charges under the provisions of TADA Act also in accordance with law. *State of Andhra Pradesh* v. *S. Eshar Singh*, AIR 1993 SC 1374 : (1993) 1 SCC 440 : 1993 SCC (Cri) 338 (339, 340) : 1993 CrLJ 1028 : 1992 (3) Crimes 875.

[13100] ● *Trial Court when not justified in discharging accused of offences under TADA.*—There are number of allegations which *prima facie* attract the provisions of TADA Act. It appears that the learned trial Judge inferred that the investigating agency had come to the conclusion that the accused had a personal grudge against the deceased but the allegations are to the effect that the main object underlying the alleged crime was to propagate pro-Khalistan cult among Sikh community and to organise a force threatening the Government with dire consequences under the pretext of championing the cause of Sikh community. Therefore, the finding of the trial

Court that *prima facie* the provisions of TADA Act are not attracted is clearly wrong. We are satisfied that the trial Court at this stage was not justified in discharging the accused of the offences under TADA Act in respect of which the accused are charge-sheeted. *State of Andhra Pradesh* v. *S. Eshar*, AIR 1993 SC 1374 : (1993) 1 SCC 440 : 1993 CrLJ 1028 : 1992 CrLR (SC) 809 : 1992 (3) Crimes 875.

[13101] ● ***Ingredients of offence of cheating not brought out for framing charge—Discharge of accused proper.***—The complainant, it was alleged on being promised to be appointed as Director of a few companies, was induced to part with a good sum for purchase of shares of the companies. But no share certificate was received. It further transpired from the initial evidence that the complainant in fact was made a Director of the companies and to continue as such for two and half years. It further transpired that the sum was paid through a broker of share market. It was held that the ingredients of the offence of cheating as defined in Section 415 have not been attracted and the order of discharge of the accused was upheld by the Supreme Court reversing a decision by Calcutta High Court. *Prabhat Kumar Basu* v. *Tarun Kanti Bagchi*, AIR 1994 SC 960 : 1994 CrLJ 1211.

[13102] ● ***Discharge—Refusal of in interest of justice.***—Section 245 occurs in Chapter XIX-B, which prescribes the procedure for trial of warrant cases. A perusal of sub-section (3) would show that it recognises and incorporates the principle of speedy trial implicit in Article 21 of the Constitution. The section applies only to private complaints. According to sub-section (3), if all the evidence referred to in Section 244, is not produced in support of the prosecution within four years from the date of appearance of the accused, the Magistrate shall discharge the accused unless the prosecution satisfies him on the basis of the evidence already recorded and for other special reasons that it will not be in the interest of justice to discharge the accused. If the Magistrate is satisfied that it will not be in the interest of justice to do so, he will not discharge the accused. But the said satisfaction has to be formed on the basis of evidence already recorded and for special reasons which, of course, he may have to record in his order. *Santosh De* v. *Archna Guha*, (1994) 2 SCC 420 : 1994 SCC (Cri) 546 : 1995 CrLJ 2640 : 1994 (1) Crimes 548.

[13103] ● ***Framing of charge—Whether sufficient ground for proceeding against accused.***—The object of providing such an opportunity as is envisaged in Section 227 of the Code is to enable the Court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the Court and also saves much human efforts and cost. If the materials produced by the accused even at that early stage would clinch the issue, why should the Court shut it out saying that such document need be produced only after wasting a lot of more time in the name of trial proceedings. Hence the Sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated in Section 227 of the Code. But when the Judge is fairly certain that there is no prospect of the case ending in conviction the valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. Most of Sessions Courts in India are under heavy pressure of workload. If the Sessions Judge is almost certain that the trial would only be an exercise in futility or a sheer waste of time it is advisable to truncate or snap the proceedings at the stage of Section 227 of the Code itself. *Satish Mehra* v. *Delhi Administration*, (1996) 9 SCC 766 : 1996 SCC (Cri) 1104 : JT 1996 (7) SC 6 : 1996 (3) Crimes 85 : 1996 JCC 507.

[13104] ● ***Discharge of accused—Failure to conclude investigation within statutory period.***—Section 167(5), CrPC as amended in West Bengal providing for discharge of accused if investigation is not completed and charge-sheet not submitted within time frame is not applicable when the charge-sheet had already been submitted but trial is pending. If there is inordinate delay in trial for non fault of accused, the accused may be acquitted for infraction of Article 21, Constitution of India. But that is a different matter altogether. *Durgesh Chandra Saha* v. *Bimal Chandra Saha*, AIR 1996 SC 740 : (1996) 1 SCC 341 : 1996 (1) SCC (Cri) 109 : 1996 CrLJ 1137 (SC) : 1995 (6) Scale 661 : 1996 (1) CCR 49 (SC).

[13105] ● ***Discharge of accused on ground of delay of trial.***—A critical look at sub-section (3) of Section 245, CrPC would show that if all the evidence referred to in Section 244 is not produced in support of the prosecution within four years from the date of the appearance of the accused, the Magistrate shall discharge the accused unless the prosecution satisfies that on the basis of the evidence already recorded and for other special reasons that it will not be in the interest of justice to discharge the accused. The counsel for the appellant on the strength of a decision of this Court in *Satosh De* v. *Archna Gua*, (1994) 2 SCC 420 : 1994 SCC (Cri) 546 contends that the appellant could not be blamed for not producing evidence after the appearance of the accused because of delatory tactics adopted by the accused in raking up a vexatious enquiry under Section 340, CrPC and then to be faulting that no evidence was produced, when there existed preliminary evidence disclosing commission of offence. In the instant case the accused deliberately delayed the matter and would not thus be entitled to the beneficial employment of Section 245(3) of the Code of Criminal Procedure. It shall not be in the interest of justice to discharge the accused for the conduct above exhibited. It is unnecessary to apportion the blame as to the delay in the disposal of the complaint except to state that a substantial part of it was attributable to the accused. *Swarnlata Sarkar* v. *State of West Bengal*, AIR 1996 SC 2158 : 1996 SCC (Cri) 855 (857, 758) : 1996 CrLJ 2885 : JT 1996 (5) SC 537.

[13106] ● ***Unlawful possession of contraband.***—"The evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act. The consequence would be that evidence discovered would be to prove unlawful possession of the contraband under the Act. It is founded in Panchnama to seize the contraband from the possession of the suspect/accused. Though the search may be illegal but the evidence collected, *i.e.,* Panchnama, *etc.*, nonetheless would be admissible at the trial. At the stage of filing charge-sheet it cannot be said that there is no evidence and the Magistrate or the Sessions Judge would be committing illegality to discharge the accused on the ground that Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 or other provisions have not been complied with. At the trial an opportunity would be available to the prosecution to prove that the search was conducted in accordance with law. Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into. Under these circumstances, the learned Sessions Judge was not justified in discharging the accused, after filing of the charge-sheet holding that mandatory requirements of Section 50 had not been complied with. *State of Himachal Pradesh* v. *Prithi Chand*, AIR 1996 SC 977 : (1996) 2 SCC 37 : 1996 SCC (Cri) 210 (218) : 1996 CrLJ 1354 : JT 1995 (9) SC 411.

[13107] ● ***Fabricating record and putting up false case.***—In the instant case this Court is concerned, with the notice issued by the Second Additional Sessions Judge, Buldana on 3.12.1990 to the appellants for prosecution under Section 194 and 195, IPC for alleged fabrication of the record and setting up a case said to be false against two ladies said to be aged about 60 and 80 years. The Additional Sessions Judge had stated that they are infirm persons, unable to walk and stand without the support of others. Consequently it would be difficult to believe the version of the police that they pelted stones and kicked the police officers while the latter were discharging official duty in apprehending Latur Hasan. It is seen that the observation made by the Sessions Judge is based on Section 161 statements recording during the investigation. The Court should not come to the conclusion on the basis of Section 161 statements which are not evidence. It can be used at the trial only for contradictions or omissions when the witness was examined. Nor could it be contradicted by looking at the physical features of the accused even before they are examined. The learned Sessions Judge had overstepped his jurisdiction in recording a finding, while looking at the physical features of the accused, that the police had fabricated the record. Insurance of notice under Section 340, CrPC is wholly unjustified. *Omkar Namdeo Jadhao* v. *Second Addl. Sessions Judge, Buldana*, AIR 1997 SC 331 : 1997 CrLJ 369 : (1996) 7 SCC 498 : 1996 SCC (Cri) 488 (488, 489) : (1996) 1 Crimes 20.

[13108] ● ***Discharge of accused—Court to consider material at stage of framing charge.***—At Sections 227 and 228, CrPC stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, shift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge, the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. *State of Maharashtra* v. *Priya Sharan Maharaj*, AIR 1997 SC 2041 : (1997) 4 SCC 393 : 1997 SCC (Cri) 584 (588) : 1997 CrLJ 2248 : JT 1997 (4) SC 84.

[13109] ● ***High Court not to seek independent corroboration at stage of framing charge—Discharge of accused.***—What the Court has to consider at the stage of framing of the charges is whether the version of the person complaining together with his/her explanation is *prima facie* believable or not. It is, therefore not proper for the High Court to seek independent corroboration at that stage and to quash the charge and discharge the accused in absence thereof. *State of Maharashtra* v. *Priya Sharan Maharaj*, AIR 1997 SC 2041 : (1997) 4 SCC 393 : 1997 CrLJ 2248 (SC) : JT 1997 (4) SC 84.

[13110] ● ***Charge-sheet filed—Discharge when to be considered.***—It is a settled law, that the charge-sheet constitutes *prima facie* evidence constituting the offence for proceeding further in the matter. Necessarily, therefore, the Court has to look into the relevant law and the allegations made in the charge-sheet and then consider whether any offence has been committed to frame charges for trial before discharging the accused. *State of Jammu and Kashmir* v. *Romesh Chander*, AIR 1997 SC 2401 : 1997 SCC (Cri) 44 : 1997 CrLJ 2976 : 1997 CrLR (SC) 435 : 1996 (4) Crimes 270.

[13111] ● ***Discharge of accused—Investigation.***—The order stopping further investigation into the offence and the consequential order of discharge are not intended to be automatic sequel to the failure to complete investigation within the period fixed in the sub-section. The succeeding words in the sub-section confer power on the Court to refrain from stopping such investigation if the Investigating Officer satisfies the Magistrate of the fusion of two premises : (1) that in the interest of justice it is necessary to proceed with the investigation beyond the period shown in the sub-section, and (2) that there are special reasons to do so. A reading of sub-section (6) of Section 167 further shows that even in a case where the order stopping investigation and the consequent discharge of accused has been made that is not the last word on it because the sub-section opens another avenue for moving the Sessions Judge. If the Sessions Judge is satisfied that "further investigation into the offence ought to be made" he has the power to allow the investigation to proceed. *Nirmal Kanti Roy* v. *State of West Bengal*, AIR 1998 SC 2322 : (1998) 4 SCC 590 : 1998 CrLJ 3282 at 3285 (SC) : JT 1998 (3) SC 436 : 1998 (3) Scale 232 : 1998 (4) SLT 782 : 1998 (2) CCR 251 (SC) : 1998 (4) Supreme 209 : 1998 (2) Crimes 267 (SC).

[13112] ● ***Time—Schedule under Section 167(5) not to be treated with rigidity.***—Hence the time schedule shown in Section 167(5) of the CrPC is not to be treated with rigidity and it is not mandatory that on the expiry of the period indicated therein the Magistrate should necessarily pass the order of discharge of the accused. Before ordering stoppage of investigation, the Magistrate shall consider whether, on the facts of that case, further investigation would be necessary to foster interest of criminal justice. Magistrate at that stage must look into the record of investigation to ascertain the progress of investigation thus far registered. If substantial part of investigation was by then over, the Magistrate should seriously ponder over the question whether it would be conducive to the interest of justice to stop further investigation and discharge the accused. *Nirmal Kanti Roy* v. *State of West Bengal*, AIR 1998 SC 2322 : (1998) 4 SCC 590 : 1998 SCC (Cri) 1100 (1104) : 1998 CrLJ 3282 : 1998 (2) Crimes 267 : 1998 CrLR (SC) 573 : JT (1998) 3 SC 436.

[13113] ● ***Failure to hand over possession of flat—Discharge that dispute of civil nature.***—Failure to hand over possession of flat provided to employee of company after expiry of period of appointment, then complaint filed by company under Companies Act and also under IPC along with civil suit, then discharging appellant on the basis that dispute was of civil nature was just and proper. *Jagdish Chandra Nijhawan* v. *S.K. Sarraf*, AIR 1999 SC 217 : (1999) 1 SCC 119 : 1999 SCC (Cri) 20 : (1998) 4 Crimes 123 : 1999 CrLJ 268.

[13114] ● ***Discharging accused at stage of framing charge.***—Section 239 has to be read alongwith Section 240, CrPC. If the Magistrate finds that there is *prima facie* evidence or the material against the accused in support of the charge (allegations), he may frame charge in accordance with Section 240, CrPC. But if he finds that the charge (the allegations or imputations) made against the accused do not make out a *prima facie* case and do not furnish basis for framing the charge, it will be a case of the charge being groundless, so he has no option but to discharge the accused. Where the Magistrate finds that taking cognizance of the offence itself was contrary to any provision of law, like Section 468, CrPC, the complaint being barred by limitation, so he cannot frame the charge, he has to discharge the accused. Indeed in a case where the Magistrate takes cognizance of an offence without taking note of Section 468, CrPC, the most appropriate stage at which the accused can plead for his discharge is the stage of framing the charge. He need not wait till completion of trial. The Magistrate will be committing no illegality in considering the question and discharging the accused at the stage of framing the charge if the facts so justify. *Arun Vyas* v. *Anita Vyas*, AIR 1999 SC 2071 : (1999) 4 SCC 690 : 1999 SCC (Cri) 629 (633) : 1999 CrLJ 3479 : JT 1999 (4) SC 421 : 1999 CrLR (SC) 392.

[13115] ● ***Discharge—Court to see whether prima facie sufficient grounds there for proceeding against accused.***—"It is settled law that at the stage of framing the charge, the Court has to *prima facie* consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a *prima facie* case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it, is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that accused committed the particular offence. In such case, there would be no sufficient ground for proceeding with the trial." *State of Madhya Pradesh* v. *S.B. Johari*, AIR 2000 SC 665 : (2000) 2 SCC 57 : 2000 SCC (Cri) 311 (314) : 2000 CrLJ 944 : 2000 CrLR (SC) 407.

[13116] ● *Reasons to be recorded when accused discharged.*—It is pertinent to note that the Section 240 of the CrPC, required a Magistrate to record his reasons for discharging the accused but there is no such requirement if he forms the opinion that there is ground for presuming that the accused had committed the offence which he is competent to try. In such a situation, he is only required to frame a charge in writing against the accused.

Even in cases instituted otherwise than of Police report, the Magistrate is required to write an order showing the reasons only if he is to discharge the accused. *Kanti Bhadra Shah* v. *State of West Bengal*, AIR 2000 SC 522 : (2000) 1 SCC 722 : 2000 SCC (Cri) 303 (307) : 2000 CrLJ 746 : 2000 CrLR (SC) 173.

[13117] ● *Discharge—Imputation not per se defamatory.*—"The only effect of an imputation being *per se* defamatory is that it would relieve the complaint of the burden to establish that the publication of such imputations has lowered him in the estimation of the right thinking members of the public. However, even if the imputation is not *per se* defamatory, that by itself would not go to the advantage of the publisher, for the complaining person can establish on evidence that the publication has in fact amounted to defamation even in spite of the apparent deficiency. So the appellant cannot contend, at this stage, that he is entitled to discharge on the ground that the imputations in the extracted publication were not *per se* defamatory." *John Thomas* v. *K. Jagadeesan*, AIR 2001 SC 2651 : (2001) 6 SCC 30 : (2001) SCC (Cri) 974 (978) : 2001 CrLJ 3322 : 2001 CrLR (SC) 495 : (2001) 3 Crimes 270.

[13118] ● *"Summon cases instituted otherwise than upon complaint".*—Summons cases are generally of two categories. Those instituted upon complaints and those instituted otherwise than upon complaints. The latter category would include cases based on Police reports. Section 258 of the Code is intended to cover those cases belonging to one category alone, *i.e.,* "summons cases instituted otherwise than upon complaints". The segment separated at the last part of the section by the words "and in any other case" is only a sub-category or division consisting of "summons cases instituted otherwise than upon complaints". That sub-category is not intended to cover all summons cases other than those instituted on Police report. In fact, Section 258 *vivisects* only "summons cases instituted otherwise than on complaints" into two divisions. One division consists of cases in which no evidence of material witness was recorded. The section permits the Court to acquit the accused prematurely only in those summons cases instituted otherwise than on complaints wherein the evidence of material witnesses was recorded. But the power of Court to discharge an accused at midway stage is restricted to those cases instituted otherwise than on complaints wherein no material witness was examined at all. The upshot of the above is that Section 258 of the Code has no application to cases instituted upon complaints. *John Thomas* v. *K. Jagadeesan*, AIR 2001 SC 2651 : (2001) 6 SCC 30 : 2001 SCC (Cri) 974 (977) : 2001 CrLJ 3322 : 2001 CrLR (SC) 495 : (2001) Crimes 270.

[13119] ● *Discharge—Private complaint—Interference in criminal matter.*—It is, no doubt, true that referring to the statements of the complainant and his wife, the learned Additional Sessions Judge has said that their evidence is positive, meaning thereby they gave evidence supporting the complainant. But, on scrutiny and after examination of evidence, both oral and documentary, he did not find any justification to proceed with the criminal case against respondents 1-3. In the impugned order he has pointed out that Ext. PW-2/5 clearly shows the mind of the complainant that the complainant bore some ill-will against the respondent. ... As far as respondent No. 4 is concerned his name was found in Ext. PW-2/4, the memo report given by the complainant and the same was supported by the testimony of the witnesses. In these circumstances, this case does not call for interference at our hands under Article 136 of the Constitution of India. *Surjit Kaur* v. *D.S. Kapoor*, (2001) 9 SCC 468 : (2002) SCC (Cri) 560 (561, 562) : 2001 CrLJ 4699 : (2001) 4 SCR 73 : (2001) 2 JCC 214.

[13120] ● ***Magistrate bond to follow directions given by High Court in earlier revision.***—The main thrust of the argument of the learned counsel for the petitioner was that the learned Magistrate committed a manifest error in appreciating the evidence produced by the prosecution as required for final disposal of the case either to convict or acquit the accused instead of considering only as to whether there was *prima facie* material to constitute a charge for offence under Section 313 of the IPC. The learned counsel for the respondent while bringing to our notice, the previous order passed by the learned Magistrate and the High Court urged that in the facts and circumstances of the case, the learned Magistrate was right in passing the order and as such the impugned order of the High Court confirming the same is justified. Looking to the narration of the facts above it is clear that the order discharging the accused for the offence under Section 313 of the IPC, and the order discharging the remaining accused were not challenged by the petitioner. The order made by the High Court on one earlier occasion in a criminal revision was also not challenged. The learned Magistrate complied with the directions given by the High Court in the said revision petition. No fault can be found with the order of the learned Magistrate when he proceeded to record the evidence of six more witnesses and thereafter passed the order holding that no case was made out to commit the accused for trial under Section 313 of the IPC, by the Sessions Court. The learned Magistrate was bound to follow the directions given by the High Court in the aforementioned revision petition. When the petitioner did not challenge the order of the High Court, she cannot now say that the learned Magistrate should not have taken into account the evidence of 8 witnesses examined in passing the order dated 16-3-2000. *Harjinder Kaur* v. *State of Jharkhand*, AIR 2001 SC 3716 : (2001) 8 SCC 394 : 2002 SCC (Cri) 88 (90) : 2002 CrLJ 78 : (2001) 3 CCR 229 : (2002) ICRJ 418.

[13121] ● ***Order of discharge of accused either collecting evidence when to be passed.***—An order of discharge of the accused after collecting the evidence envisaged in Section 244 of the CrPC, can be passed only when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction." This is the legislative edict of Section 245 of the CrPC. The only other exception to the said precept is that it is open to the Magistrate to discharge the accused at any previous stage of the case "if for reasons to be recorded by such Magistrate, he considers the charge to be groundless." The Magistrate has no reason to discharge the accused at that stage as he felt that there is evidence to frame the charge he could not but dismiss the plea for a discharge. *State of Bihar* v. *Baidnath Prasad*, AIR 2002 SC 64 (66) : (2002) 1 SCC 465 : 2002 SCC (Cri) 148 : 2002 CrLJ 208 : (2002) 1 Crimes 111.

[13122] ● ***Revisional powers of High Court scope.***—The revision power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers, the High Court has no authority to appreciate the evidence in the manner as the trial and the Appellate Courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the FIR even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged. In the instant case, the leaned Judge ignored the basic principle which conferred the jurisdiction upon the High Court for exercise of revisional powers. It was premature for the High Court to say that the material placed before the trial Court was insufficient for framing the charge or that the statement of the prosecutrix herself was not sufficient to proceed further against the accused respondent. *Munna Devi* v. *State of Rajasthan*, AIR 2002 SC 107 (107, 108) : (2001) 9 SCC 631 : 2002 SCC (Cri) 775 : 2002 CrLJ 225 : (2002) 1 Crimes 145.

[13123] ● ***Framing of charge, when.***—In the old Code, there was no provision similar to Section 227. Section 227 was incorporated in the Code with a view to save the accused from prolonged harassment which is a necessary concomitant of a protracted criminal trial. It is calculated to eliminate harassment to accused persons when the evidential materials gathered after investigation fall short of minimum legal requirements. If the evidence even if fully accepted cannot show that the accused committed the offence, the accused deserves to be discharged. In the old Code, the procedure as contained in Sections 207 and 207-A was fairly lengthy. Section 207, *inter alia*, provided that the Magistrate, where the case is exclusively triable by a Court of Session in any proceedings instituted on a police report, shall follow the procedure specified in Section 207-A. Under Section 207-A in any proceeding instituted on a police report the Magistrate was required to hold inquiry in terms provided under sub-section (1), to take evidence as provided in sub-section (4), the accused could cross-examine and the prosecution could re-examine the witnesses as provided in sub-section (5), discharge the accused if in the opinion of the Magistrate the evidence and documents disclosed no grounds for committing him for trial, as provided in sub-section (6) and to commit the accused for trial after framing of charge as provided in sub-section (7), summon the witnesses of the accused to appear before the Court to which he has been committed as provided in sub-section (11) and send the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session as provided in sub-section (14). The aforesaid Sections 207 and 207-A have been omitted from the Code and a new Section 209 enacted on the recommendation of the Law Commission contained n its 41 Report. It was realised that the commitment inquiry under the old Code was resulting in inordinate delay and served no useful purpose. That inquiry has, therefore, been dispensed with in the Code with the object of expeditious disposal of cases. Instead of the committal Magistrate framing the charge, it is now to be framed by the Court of Session under Section 228 in case the accused is not discharged under Section 227. This change brought out in the Code is also required to be kept in view while determining the question. Under the Code, the evidence can be taken only after framing of charge. *State of Orissa* v. *Debendra Nath Padhi*, 2005 SCC (Cri) 415 (421).

[13124] ● ***Word "Record of the case"— Meaning of.***—What is the meaning of the expression "the record of the case" as used in Section 227 of the Code. Though the word "case" is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to the Court of Session when offence is triable exclusively by it, *inter alia*, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit "the case" to the Court of Session and send to that Court "the record of the case" and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209. That is the plain meaning of Section 227 read with Section 209 of the Code. No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial.

The expression "hearing the submissions of the accused" cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police. *State of Orissa* v. *Debendra Nath Padhi*, 2005 SCC (Cri) 415 (420-421, 423).

[13125] ● ***Framing of charge, defence of accused cannot be put forth.***—At the time of framing charge or taking cognizance, the accused has no right to produce any material. *Satish Mehra* v. *Delhi Administration*, (1996) 9 SCC 766 : 1996 SCC (Cri) 1104 holding that the trial Court has power to consider even materials which the accused may produce at the stage of 227, of the Code has not been correctly decided.

It is settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. *State of Orissa* v. *Debendra Nath Padhi*, 2005 SCC (Cri) 415 (425).

[13126] ● ***Summons case—No discharge.***—Once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code which does not contemplate a stage of discharge like Section 239 which provides for a discharge in a warrant case. Therefore, the High Court was correct in coming to the conclusion that once the plea of the accused is recorded under Section 252 of the Code the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion. *Subramaniam Sethuraman* v. *State of Maharashtra*, 2005 SCC (Cri) 242 (247).

[13127] ● ***Discharge of accused—Reasons must be recorded.***—While discharging the accused, the Court must record reasons. But in the case of framing of charge need not record the reasons, the Court is required to form an opinion that there exists a ground for presuming that the accused has committed the offence. *Lalu Prasad* v. *State of Bihar*, (2007) 1 SCC (Cri) 241 : 2006 (4) Crimes 419 (SC).

[13128] ● ***High Court failing to deal with matter elaborately—Case remanded to High Court.***—The stage of analysing the factual materials was yet to be undertaken. But as rightly contended by the appellant if a bare reading of the FIR, it shows that no offence had been made out for proceeding situation would be different. It would have been proper for the High Court as noted above to deal with the matter elaborately. That apparently has not been done. Therefore, without expressing any opinion on the merits of the case, we set aside the order of the High Court and remit the matter to it for fresh consideration. *Pradeep Kumar Verma* v. *State of Bihar*, AIR 2007 SC 3059 SC : 2007 (7) SCC 413 : 2007 (3) SCC (Cri) 407 : 2007 (9) SCR 58 : 2007 (10) Scale 97 : 2007 (5) Supreme 918 : 2007 CrLJ 4333 : 2007 (3) Crimes 346 (SC).

[13129] ● ***No sufficient ground for proceeding against appellant.***—It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out. The test to determine a *prima facie* case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him given rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible. *Yogesh @ Sachin Jagdish Joshi* v. *State of Maharashtra*, AIR 2008 SC 2991 : (2008) 10 SCC 394 : 2008 CrLJ 3872 (3875).

[13130] ● ***No sufficient ground to proceed against appellant.***—In the light of the subsequent events, namely, the orders of the High Court dated 7th July, 2006 in Criminal Writ Petitions Nos. 1283 & 1284 of 2006, discharging appellant's mother, sister and two close associates, accused Nos. 2, 4, 11 and 12 respectively; order dated 30th April, 2007 passed by this Court dismissing the Special Leave Petition preferred by the State against order dated 7th July, 2006 and order dated 14th May, 2007 passed by the Sessions Judge. Satara discharging the father (A-11) of the appellant, stated to be the mastermind behind the entire conspiracy, for offences under Sections 120B and 302, IPC, on same set of circumstances and accusations, no sufficient ground survives to proceed against the appellant for the aforementioned offences. For the aforesaid reasons, the appellants are discharged from the charges levelled against them. *Yogesh @ Sachin Jagdish Joshi* v. *State of Maharashtra*, AIR 2008 SC 2991 : (2008) 10 SCC 394 : 2008 CrLJ 3872 (3877).

[13131] ● ***Interference by High Court—Limited grounds.***—An order of discharge can be interfered with by the High Court on limited grounds. At that stage, it need not be shown that the appellants – accused may not ultimately be conviction. It is enough if strong suspicion exists. *Seema Silk* v. *Sarees* v. *Directorate of Enforcement*, AIR 2008 SC 2564 : (2008) 5 SCC 580 : (2008) 5 SCC 580 (587).

[13132] ● ***Considerations by Court while entertaining application for discharge.***—While considering an application for discharge filed in terms of Section 239 of the Code of Criminal Procedure, it is for the Court to go into the details of the allegations made against each of the accused persons so to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law. *Rhmi Dhar* v. *State of West Bengal*, AIR 2009 SC 2195 (2198) : (2009) 6 SCC 364 : 2009 (5) SCR 553 : JT 2009 (5) SC 321.

[13133] ● ***Trial Court refusing discharge of accused—High Court in revision allowing prayer for discharge without reasons.***—"The order of the High Court is practically unreasoned. It is not certainly the way a revision petition was to be disposed of. There is absolutely no discussion as to why the conclusions of the trial Court in rejecting the prayer made in terms of Section 227 of the Code were unsustainable. No basis has also been indicated as to why High Court of the view that no offence was disclosed in the FIR. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable.

Such ritualistic observations and summary disposal which has the effect of, at times, cannot be said to be a proper and judicial manner of disposing of judiciously the claim before the Courts. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. *Tutul Kumari Sen* v. *State of Jharkhand*, AIR 2009 SC 2547 (2549) : 2009 (7) SCR 321 : JT 2009 (14) 146.

[13134] ● ***Non-recording of reasons—Effect.***—Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. *Tutul Kumari Sen* v. *State of Jharkhand*, AIR 2009 SC 2547 (2549) : JT 2009 (14) SC 146 : 2009 (7) SCR 321.

[13135] ● ***Recording of reasons—Necessity.***—The Court must record reasons while passing an order of discharge under Section 245, CrPC. *Renuka* v. *State of Karnataka*, 2009 CrLJ 2245 : 2009 Crimes 421 (SC) : 2009 (2) SCR 623.

[13136] ● ***Sections 244 (1) and 245 (2)—Difference.***—Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1), CrPC.

The situation under Section 245(2) CrPC is, however, different. There, under sub-section (2), the Magistrate has the power of discharging the accused at any previous stage of the case, *i.e.*, even before such evidence is led. However, for discharging an accused under Section 245(2) CrPC, the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the Court or the evidence is led under Section 244, CrPC. The words appearing in Section 245(2) CrPC "at any previous stage of the case", clearly bring out this position. *Ajoy Kumar Ghose* v. *State of Jharkhand*, AIR 2009 SC 2282 : : (2009) 14 SCC 115 : 2009 CrLJ 2824 : 2009 (4) SCR 515 : JT 2009 (4) 245 : 2009 (4) Scale 267.

[13137] ● ***At any "previous stage of the case" in Section 246, CrPC.***—The words "or at any previous stage of the case" appearing in Section 246 CrPC would include Section 245 also, where the accused has not been discharged under Section 245 CrPC, while the similar term in Section 246(2) can include the stage even before any evidence is recorded. It cannot, therefore, be held that the words "at any previous stage of the case" as appearing in Section 245 CrPC would have to be given the same meaning when those words appear in Section 246 CrPC. *Ajoy Kumar Ghose* v. *State of Jharkhand*, AIR 2009 SC 2282 : : (2009) 14 SCC 115 : 2009 CrLJ 2824 : 2009 (4) SCR 515 : 2009 (4) Scale 267.

[13138] ● ***"Previous stage"—Meaning.***—The previous stage would obviously be before the evidence of the prosecution under Section 244(1), CrPC is completed or any stage prior to that. Such stages would be under Section 200, CrPC to Section 204, CrPC. *Ajay Kumar Ghose* v. *State of Jharkhand*, AIR 2009 SC 2282 : : (2009) 14 SCC 115 : 2009 CrLJ 2824 (2829) : JT 2009 (4) SC 245.

[13139] ● ***Sections 245 (2) and 246—Scope.***—While Section 245(2), CrPC speaks about the discharge of the accused on the ground that the charge is groundless, Section 246(1) operates in entirely different sphere. An order under Section 245(2), CrPC, results in discharge of the accused, whereas, an order under Section 246, CrPC creates a situation for the accused to face a full-fledged trial. Therefore, the two Sections would have to be interpreted in slightly different manner, keeping in mind the different spheres, in which they operate. *Ajay Kumar Ghose* v. *State of Jharkhand*, AIR 2009 SC 2282 : : (2009) 14 SCC 115 : 2009 CrLJ 2824 : 2009 (4) SCR 515 : JT 2009 (4) 245.

[13140] ● ***Discharge of accused—"Sufficient ground for proceeding against the accused".***—The words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere Post Office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which *ex facie* disclose that there are suspicious circumstances against the accused so as to frame a charge against him. *P. Vijayan* v. *State of Kerala*, 2010 CrLJ 1427 (1429) (SC).

[13141] ● ***Discharge of accused, if two views are possible.***—If two views are possible and one of them, gives rise to suspicion, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. *P. Vijayan* v. *State of Kerala*, AIR 2010 SC 663 : (2010) 2 SCC 398 : 2010 CrLJ 1427 (1429) (SC) : (2010) 2 Crimes 1.

[13142] ● ***Discharge of accused.***—If upon considering the police report and the document sent with it under Section 173, and making such examination, if any, of the accused and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing. *K. Neelaveni* v. *State*, AIR 2010 SC 3191 : 2010 CrLJ 2819 : 2010 (2) Crimes 90 (SC).

DISCHARGE OF DUTY

[13143] ● ***Reasonable connection between act and discharge of official duty.***—In the matter of grant of sanction under Section 197 of the Code of Criminal Procedure the offence alleged to have been committed by the accused must have something to do, or must be related in some manner with the discharge of official duty. In other words, there must be a reasonable connection between the act and the discharge of official duty. The act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the cause of performance of his duty. *Matajog Dubey* v. *H.C. Bhari*, AIR 1956 SC 44 : 1956 CrLJ 140 : (1955) 2 SCR 925.

[13144] ● ***Obstruction to officer executing search warrant.***—Where a power is conferred or a duty imposed by statute or otherwise and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution, because it is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command. *Matajog Dubey* v. *H.C. Bhari*, AIR 1956 SC 44 : 1956 CrLJ 140 : (1955) 2 SCR 925.

[13145] ● ***Misconduct by public servant need not be in connection with his own official duty.***—"It is not necessary that the public servant in question, while misconducting himself, should have done so in the discharge of his duty. It would be anomalous to say that a public servant has misconducted himself in the discharge of his duty. 'Duty' and 'Misconduct' go ill together. If a person has misconducted himself as a public servant, it would not ordinarily be in the discharge of his duty, but the reverse, of it. The 'misconduct', which has been made criminal by Section 5 of the Act, does not contain the element-of-discharge of his duty, by public servant, is also made clear by reference to the provisions of clause (c) of Section 5(1). It is well settled that if a public servant dishonestly or fraudulently misappropriates property entrusted to him, he cannot be said to have been doing so in the discharge of his official duty (*Vide*, the case of *Hari Ram Singh* v. *Crown,* 1959 MLJ Cri 589. An application for special leave to appeal from that decision was refused by the Privy Council in *Hari Ram Singh* v. *King Emperor,* 1940 (1) MLJ 706. This Court, therefore, misread the section when it observed that the offence consists in criminal misconduct in the discharge of official duty. The error lies in importing the description of the offence into the definition portion of it. It is not necessary to constitute the offence under clause (d) of the section that the public servant must do something in connection with his own duty and thereby obtain any valuable thing or pecuniary advantage. It is equally wrong to say that if a public servant were to take money from a third person, by corrupt or illegal means or otherwise abusing his official position, in order to corrupt some other public servant without there being any question of his misconducting himself in the discharge of his own duty, he has not committed an offence under Section 3(1)(d). It is also erroneous to hold that the essence of an offence under Section 5(2), read with Section 5(1)(d), is that the public servant should do something in the discharge of his own duty and thereby obtain a valuable thing or pecuniary advantage." *Dhaneshwar Narain Saxena* v. *Delhi Administration*, AIR 1962 SC 195 : (1962) 1 CrLJ 203 : (1962) 3 SCR 259.

[13146] ● ***Act done or intended to be done under provisions of Police Act or any other***

law.—Tamil Nadu District Police Act, 1869, Section 53.—In this case during the course of investigation information was received that one Ramanna had received stolen articles. Ramanna was, therefore, taken into custody and within less than three days thereafter his dead body was found with a number of injuries. The police officers were prosecuted for having caused the injuries to Ramanna for the purpose of extorting from him information which might lead to the detection of an offence and restoration of stolen property. The police officers pleaded that the prosecution was barred by limitation by reason of the provisions of Section 53 of the Act. The protection of Section 53 is not confined only to acts done or intended to be done under the provisions of the Act but extends to acts done or intended to be done under the provisions of any other law conferring powers on the police such as the Code of Criminal Procedure. It becomes the task of the Court, whenever any question whether Section 53 applies or not arises to bestow particular case on its decision. In doing this it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the police officer under which it may be said to have been done or intended to be done. The Court has to remember in this connection that an act is not under a provision of law merely because the point of time at which it is done coincides with the point of time when some act in the exercise of the powers granted by the provision or on performance of duty imposed by it. To be able to say that an act is done under a provision of law, one must discover the existence of a reasonable relationship between the provisions of the Act. In the absence of such a relation the act cannot be said to be done under the particular provision of law. The act of beating or act of confining was alleged to be done at a time when the police officer was engaged in investigation. But it is not possible to see what reasonable relationship these acts had with the process of investigation. Nor can one see how the act of sending away the injured person had any relation to the process of investigation. *State of Andhra Pradesh* v. *N. Venugopal*, AIR 1964 SC 33 : (1964) 1 CrLJ 16 : (1964) 3 SCR 742.

[13147] ● ***Acts complained of need not be in discharge of official duties.***—If it is proved that the appellant had by illegal means or by otherwise abusing their position as public servants obtained for themselves money or other valuable things, then, they can be said to have committed the offence of criminal misconduct in the discharge of their official duties. The contrary view taken by this Court in AIR 1959 SC 847 : 1959 Supp (2) SCR 739 was *overruled* by this Court in *Dhaneshwar Narain Saxena* v. *Delhi Administration*, AIR 1962 SC 195. In that case it was observed that the words "occurring in Section 5 of the Prevention of Corruption Act in the discharge of his duty" do not constitute an essential ingredient of the offence under Section 5(1)(d), the ingredients of that offence being (1) that the accused should be a public servant (2) that he should use some corrupt or illegal means or otherwise abuse his position as a public servant; (3) that he should have obtained a valuable thing or pecuniary advantage and (4) for himself or any other person. *Dalpat Singh* v. *State of Rajasthan*, AIR 1969 SC 17 : 1969 CrLJ 262 (267) : (1968) 3 SCR 189.

[13148] ● ***Disregard of direction to accept food.***—Every aspect of life of a soldier is regulated by discipline. Rejection of food might, under circumstances, amount to an indirect expression of remonstrance and resentment against the higher authority. To say that, a mere refusal to eat food is an innocent, neutral act might be an over-simplification of the matter. Mere inaction need not always necessarily be neutral. Serious acts of calumny could be done in silence. A disregard of a direction to accept food might assume the complexion of disrespect to, and even defiance of authority. But an unduly harsh and cruel reaction to the expression of the injured feelings may be counter-productive and even by itself be subversive of discipline. Appellant was perhaps expressing his anguish at, what he considered, an unjust and disproportionate punishment for airing his grievances before his Superior Officers. *Ranjit Thakur* v. *Union of India*, AIR 1987 SC 2386 : (1987) 4 SCC 611 : 1988 CrLJ 158 : JT 2007 (5) SC 93.

[13149] ● ***Sanction for prosecution Police Officer causing death of victim.***—In the instant case, it is alleged that grievous injuries were inflicted upon the complainant and as a result of injuries one of the alleged accused had died. The question is while investigating and performing his duties as a Police Officer was it necessary for the petitioner to conduct himself in such a manner which would result in such consequences. It is necessary to protect the public servants in the discharge of their duties. They must be made immune from being harassed in criminal proceedings and prosecution, that is the rationale behind Sections 196 and 197, CrPC. But it is equally important to emphasise that rights of the citizens should be protected and no excesses should be permitted. "Encounter death" has become too common. In the facts and circumstances of each case protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. It is true that Section 196 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties then the trial may have to be stayed unless sanction is obtained. But at the same time it has to be emphasised that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence." *Bakhshish Singh Brar* v. *Gurmej Kaur*, AIR 1988 SC 257 : (1987) 4 SCC 663 : 1988 SCC (Cri) 29 (33) : 1988 CrLJ 419 : 1987 CrLR (SC) 649 : JT 1987 (5) SC 190 : (1988) 1 SCR 450 : (1988) 1 UJ (SC) 155.

[13150] ● ***Action of Police Officer—Complaint against.***—*Tamil Nadu District Police Act, 1869.*—The prosecution launched against the respondent is in regard to the ill-treatment meted out to the appellant when the latter visited the former in response to the summons. It was no part of the duty under the Act, or Criminal Procedure Code or any other law for the time being in force conferring power on the Police to beat and torture the appellant when he presented himself before the respondent, in response to the summons. By no stretch of reasoning can it be said that the respondent's action of torturing the appellant was in discharge of any duty or function under the Act or under any other law. It is also difficult to say, if the allegations made are taken at their face value, that the respondent's action was incidental to or in furtherance of his duties and functions under any law. It must be realised that in order to avail of the benefit of Section 53 of the Act the respondent must show that he acted under the Act or under any other law. Merely because the appellant was called through a summons issued under law, the conduct of beating and torturing the appellant on the latter appearing in obedience to the summons cannot establish any nexus between the official act of issuance of summons and the action of the respondent on the appearance of the appellant.

In the present case the allegation in the complaint is that while the appellant was called by service of a summons presumably to enquire into allegations of illicit distillation, the respondent had used it as an excuse to secure his presence but in fact his real intention was to beat him up to prevent him from complaining against those who were paying him "mamool" (illegal gratification) money. Thus according to the appellant, the respondent bore a grudge against him and, therefore, he misused his power, issued a summons, secured his presence and then tortured him. He has charged him for commission of offences under Sections 341, 342, 364, 506 (Part II) and 307, IPC. These do not attract the provisions of Section 53 of the Act. *S.P. Vathianathan* v. *K. Shanmuganathan*, AIR 1994 SC 1771 : (1994) 4 SCC 569 : 1994 SCC (Cri) 1311 (1314, 1315) : 1994 CrLJ 2265 : (1994) 1 Crimes 725.

[13151] ● ***Sanction for prosecution.***—In the instant case when a Magistrate on the basis of a complaint issued process for appearance of the accused on being satisfied that there is sufficient ground for proceeding and the accused appears before the Magistrate and takes the plea that the offence alleged to have been committed by him was in the discharge of his official duty and further that he was not removable from his office save by or with the sanction of the Government and consequently the Court has no power to take cognizance except with the previous sanction of the Government as required under sub-section (1) of Section 197, CrPC. It would be unreasonable to hold that accused even though might have really acted in the discharge of his official duty for which the complaints have been lodged yet he will have to wait till the stage under sub-section (4) of Section 246 of the Code reaches or at least till he will be able to bring in relevant materials while cross-examining the prosecution witnesses. On the other hand it would be logical to hold the matter being one dealing with the jurisdiction of the Court to take cognizance, the accused would be entitled to produce the relevant and material documents which can be admitted into evidence without formal proof, for the limited consideration of the Court whether the necessary ingredients to attract Section 197 of the Code have been established or not. The question of applicability of Section 197 and the consequential ouster of jurisdiction of the Court to take cognizance without a valid sanction is genetically different from the plea of the accused that the averments in the complaint do not make out an offence and as such the order of cognizance and/or the criminal proceedings be quashed. *Suresh Kumar Bhikamchand Jain* v. *Pandey Ajay Bhushan*, AIR 1998 SC 1524 (1533) : AIR 1998 SCW 544 : (1998) 1 SCC 205 : 1998 SCC (Cri) 1 : 1998 CrLJ 1242.

[13152] ● ***Appellant asked to remove encroachment order of opening fine in exercise of official duty.***—The appellant had been directed by the

Sub-Divisional Magistrate to be present with Police force and remove the encroachment in question and in course of discharge of his duty to control the mob, when he had directed for opening of fire, it must be held that the order of opening of fire was in exercise of the power conferred upon him and the duty imposed upon him under the orders of the Magistrate and in that view of the matter the provisions of Section 197(1), CrPC, applies to the facts of the present case, Admittedly, there being no sanction, the cognizance taken by the Magistrate is bad in law and unless the same is quashed *qua* the appellant, it will be an abuse of the process of Court. *Abdul Wahab Ansari* v. *State of Bihar*, AIR 2000 SC 3187 (3191) : (2000) 8 SCC 500 : 2000 CrLJ 4631 : (2000) 4 Crimes 152.

[13153] ● ***Sanction for prosecution of public servant—Conditions precedent.***—In this case, the appellant was present at the place of occurrence in his official capacity as Sub-Divisional Magistrate for the purpose of removal of encroachment from Government land and in exercise of such duty, he is alleged to have committed the acts from which the gravamen of the allegations contained in the complaint lodged by the respondent. In such circumstances, it cannot but be held that the acts complained of by the respondent against the appellant have a reasonable nexus with the official duty of the appellant. It follows, therefore, that the appellant is entitled to the immunity from 'Criminal' proceedings without sanction provided under Section 197, CrPC. *Gauri Shankar Prasad* v. *State of Bihar*, AIR 2000 SCW 3135 : (2000) 5 SCC 15 : 2000 SCC (Cri) 872 : 2000 CrLJ 4031 : (2000) 2 Crimes 176.

DISCOVERY, DISCLOSURE STATEMENT

[13154] ● ***Discovery.***—The three accused were interrogated by the police. They made certain statements which were duly recorded by the police. In these statements it was disclosed that the dead bodies were thrown in a *nala*. Thereafter, the police party with the three accused, went to the *nala* where each of them pointed out the place where the different parts of the dead bodies were discovered. It seems to us that if the evidence adduced by the prosecution is found to be open to suspicions and it appears that the police have deliberately attributed similar confessional statement relating to facts discovered to different accused persons, in order to create evidence against all of them, the case undoubtedly demands a most cautious approach. The discoveries made at the instance of *S*, one of the accused, cannot be ruled out of consideration. It may be that several of the accused gave information to the police that the dead bodies could be recovered in the Sakinala, which is a stream running over several miles. But such an indefinite information could not lead to any discovery unless the accused followed it up by conducting the police to the actual spot where parts of the two bodies were recovered. From the evidence of the head constable as well as that of *B*, one of the witnesses, it was quite clear that *S* led the police *via* Salimpura to a particular spot on Sakinala, and it was at his instance that blood-stained earth was recovered from a place outside the village, and he also pointed out the trunk of the body of *D*, one of the persons murdered. Therefore the statement of *S* is admissible under Section 27. *Lachhiman Singh* v. *State*, AIR 1952 SC 167 : 1952 CrLJ 363 : 1952 SCJ 230 : 1952 ALJ 437 : (1952) 2 MLJ 100 : 65 MLW 429.

[13155] ● ***Doctrine of confirmation by subsequent facts.***—Section 27, Evidence Act is based on the doctrine of confirmation by subsequent facts. That doctrine is that where, in consequence of a confession otherwise inadmissible, search is, made and facts are discovered which confirm it in material points then such discovery is a guarantee that the confession made was true. But only that portion of the information can be proved which relates distinctly or strictly to the facts discovered. *Ram Kishan Mithanlal Sharma* v. *State of Bombay*, AIR 1955 SC 104 : 1955 CrLJ 196 : 1955 SCJ 129 : (1955) 1 SCR 903. **TO THE SAME EFFECT :** (1) *Sanjay* v. *State (N.C.T. of Delhi)*, AIR 2001 SC 979 : (2001) 3 SCC 190 : 2001 SCC (Cri) 449 : 2001 CrLJ 1231 : (2001) 1 Crimes 268.

[13156] ● ***Information admissibility of.***—The information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. *Ramkishan Mithanlal Sharma* v. *State of Bombay*, AIR 1955 SC 104 : 1955 CrLJ 196 : 1955 SCR 418 : 1955 SCJ 129.

[13157] ● ***Police if already knowing facts.***—If the police already knows some facts, their discovery by the accused is inadmissible. *Aher Raja Khima* v. *State of Saurashtra*, AIR 1956 SC 217 : 1956 CrLJ 42 : 1956 SCA 440 : 1956 SCJ 243.

[13158] ● ***Discovery of blood stained clothes at instance of accused persons.***—Discovery of blood-stained clothes at the instance of accused persons indicates guilty knowledge and is consistent only with the guilt of the accused. *Pershadi* v. *State of Uttar Pradesh*, AIR 1957 SC 211 : 1957 CrLJ 328.

[13159] ● *Expression "accused of any offence".*—The expression "accused of any offence" is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by Section 27. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability. *State of Uttar Pradesh* v. *Deoman Upadhya*, AIR 1960 SC 1125 : 1960 CrLJ 1504 : (1960) 5 SCA 371 : 1960 AWR (HC) 568 : 1960 CrLJ 354.

[13160] ● *"When person not in custody approaches Police Officer Investing offence".*—The Supreme Court has also taken the same view and held that "when a person not in the custody approaches a Police Officer investigating an offence and offers to give any information leading to the discovery of a fact having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody; submission to the custody by word or action by a person is sufficient. A person directly giving to a Police Officer by word of mouth information which may be used as evidence against him may be deemed to have submitted himself to the custody of the Police Officer within the meaning of Section 27 of the Indian Evidence Act." *State of Uttar Pradesh* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : 1961 CrLJ 415 : (1960) 2 SCA 371 : 1960 ALJ 733.

[13161] ● *Distinction between persons in custody and person not in custody.*—There is nothing in the Evidence Act which precludes proof of information given by a person not in custody which relates to the facts thereby discovered; it is by virtue of the ban imposed by Section 162 of the CrPC, that a statement made to a police officer in the course of the investigation of an offence under Chapter 14 by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. If Section 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement that rule is not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases. *State of Uttar Pradesh* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : 1960 CrLJ 1504 : 1960 (3) SCR 14.

[13162] ● *Accused making statement in Police custody.*—The mere fact that the accused while making the statement was in police custody would not attract the provisions of Article 20 (3). If there is no evidence to show that the accused was compelled, Article 20 (3) would not be attracted. *State of Bombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 CrLJ 856 : (1962) 3 SCR 10.

[13163] ● *Self-incriminating information given by accused without threat.*—Where the self-incriminatory information has been given by an accused person without any threat that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must therefore be held that the provisions of Section 27 are not within the prohibition aforesaid unless compulsion has been used in obtaining the (self-incriminatory) information. *State of Bombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808 : 1961 (2) CrLJ 856 : 1962 (1) SCA 429 : (1962) 9 SCR 10.

[13164] ● *Statement when distinctly relating to discovery of stolen property.*—If part of the statement distinctly relates to the discovery, the statement will be admissible wholly and the Court cannot exercise a part of it because it is of a confessional nature. Where in a burglary case the accused in police custody made a statement to the police that he would show the place where he had hidden them, namely, the ornaments and that statement led to the discovery of the stolen ornaments, it was held that the whole of the statement distinctly related to the discovery and was admissible under the Section. *K. Chinnaswamy Reddy* v. *State of Andhra Pradesh*, AIR 1962 SC 1788 : (1963) 1 CrLJ 8 : (1963) 3 SCR 412.

[13165] ● *Possession of article by accused when proved.*—The statement of the accused that "he would show the place where he had hidden the articles" or "he would show the person to whom he had pawned article" would prove the possession of the accused. *K. Chinnaswami* v. *State of Andhra Pradesh*, AIR 1962 SC 1788 : (1963) SCR 412.

[13166] ● ***Theft—Admissibility of statement when accused himself produces.***—Section 27 does not nullify the ban imposed by Section 26 in regard to confessions made by persons in police custody but because there is the added guarantee of truthfulness from the fact discovered the statement whether confessional or not is allowed to be given in evidence but only that portion which distinctly relates to the discovery of the fact. A discovery of a fact includes the object found, the place from which it is produced and the knowledge of the accused as to its existence. Thus, Section 27 partially removes the ban placed on the reception of confessional statements under Section 26. But the removal of the ban is not of such an extent as to absolutely undo the object of Section 26. All it says is that so much of the statement made by a person accused of an offence and in custody of a police officer, whether it is confessional or not, as relates distinctly to the fact discovered is provable. Thus, in this case taking the recovery memos the statements in regard to the key was this that the appellant handed over the key and said that he had opened the lock of the shop of the complainant with that key. The handling over of the key is not a confessional statement but the confession lies in the fact that with that key the shop of the complainant was opened and, therefore, that portion will be inadmissible in evidence and only that portion will be admissible which distinctly relates to the fact discovered, *i.e.*, the finding of the key Similarly the recovery of the box is provable because there is no statement of a confessional nature in that memorandum. *Udai Bhan* v. *State of Uttar Pradesh*, AIR 1962 SC 1116 : 1962 (2) CrLJ 251 : 1962 Supp (2) SCR 830.

[13167] ● ***Information leading to discovery of stolen ornaments—Whole statement admissible.***—It is only that part which distinctly relates to the discovery which is admissible; but if any part of the statement distinctly relates to the discovery it will be admissible wholly and the Court cannot say that it will excise one part of the statement because it is of a confessional nature. Section 27 makes that part of the statement which is distinctly related to the discovery admissible as a whole, whether it be in the nature of confession or not. We are therefore of opinion that the entire statement of the appellant (as well as of the other accused who stated that he had given the ornament to Bada Sab and would have it recovered from him) would be admissible in evidence and the Session Judge was wrong in ruling out part of it. *K. Chinnaswamy Reddy* v. *State of Andhra Pradesh*, AIR 1962 SC 1788 : 1963 (1) CrLJ 8 : 1963 (3) SCR 413.

[13168] ● ***Statement of accused—Exclusion of from evidence.***—The statement of the accused to the effect that the article produced by him belongs to him is not relevant. So is the case with the statement of the accused that the blood-stained *shirt* and *dhoti* belongs to him or that the axe has been used to commit murder. *Prabhoo* v. *State of Uttar Pradesh*, AIR 1963 SC 1113 : (1963) 2 CrLJ 182 : (1963) 2 SCR 881.

[13169] ● ***Incriminating statement made by accused to Police Officer.***—They were incriminating statements made to a police officer and were hit by Sections 25 and 26 of the Indian Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of Section 27 of the Evidence Act. Nor was the alleged statement of the appellant that the blood stained shirt and dhoti belonged to him a statement which led to any discovery within the meaning of Section 27. Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. *Prabhoo* v. *State of Uttar Pradesh*, AIR 1963 SC 1113 : 1963 (2) CrLJ 182 : 1963 (2) SCR 182 : 196 MLJ (Cri) 365.

[13170] ● ***Confession or admission.***—A confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted the taint, attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incrimination fact, that is some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime and though each part taken singly may not amount to a confession each of them being part of a confessional statement partakes of the character of a confession. If a statement contains as offence, not only that admission but also every other admission of an incriminating fact, contained in statement is part of the confession. The separability test is misleading and the entire confessional statement is hit by Section 25 and save and except as provided by Section 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence. *Aghnoo Nagesea* v. *State of Bihar*, AIR 1966 SC 119 : 1966 CrLJ 100 : (1966) 1 SCR 134.

[13171] ● ***Discovery of dead body and silver buttons stained with human blood.***—Discovery of dead body at the instance of accused does not lead to conclusion of murder by accused but discovery of silver buttons belonging to deceased stained in blood, recovered at the instance of accused may give rise to presumption of participation of accused in the crime. *Kanbi Karsan Jadav* v. *State of Gujarat*, AIR 1966 SC 821 : 1966 CrLJ 605 : 1962 Supp (2) SCR 726.

[13172] ● ***Police already knowing person who had stolen articles.***—In order that Section 27 may apply the prosecution must establish that information given by the appellant led to the discovery of some fact. The discovery must be of some fact which the police had not previously learnt from other sources and that the knowledge of the fact was first derived from information given by accused. If the police had no information before of the complicity of accused No. 3 with the crime and had no idea as to whether the diamonds would be found with him and the appellant had made a statement to the police that he knew where the diamonds were and would lead them to the person who had them, it can be said that the discovery of the diamonds with the third accused was a fact deposed to by the appellant and admissible in evidence under Section 27. However, if it be shown that the police already knew that accused No. 3 had got the diamonds but did not know where the said accused was to be found, it cannot be said that the information given by the appellant that accused No. 3 had the diamonds and could be pointed out in a large crowd at the waiting hall led to the discovery of fact proving his complicity with any crime within the meaning of Section 27. The fact deposed to by him would at best lead to the discovery of the whereabouts of accused No. 3. Under Section 25 of the Evidence Act no confession made by an accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the section is that the information given by the accrued must led to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled. If an accused charged with a theft of articles or receiving stolen articles, within the meaning of Section 411, IPC states to the police. 'I will show you the articles at the place where I have kept them,' and the articles are actually found there, there can be no doubt that the information given by him led to the discovery of a fact. *i.e.*, keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not discovery of the article but the discovery of the fact that the articles were kept by the accused at a particular place. In principle there is no difference between the above statement and that made by the appellant in this case which in effect is that "I will show you the person to whom I have given the diamonds exceeding 200 in number." The only difference between the two statements is that a 'named person" is substituted for 'the place' where the article is kept. In neither case are the articles or the diamonds the fact discovered. *Jaffer Hussain Dastagir* v. *State of Maharashtra*, AIR 1970 SC 1934 : (1969) 2 SCC 872 : 1970 CrLJ 1659 : 1970 (2) SCR 332.

[13173] ● ***Confessional statements—Admissibility.***—Where the accused produced a *gandasa* from a pond but it was neither blood-stained nor proved to have been connected with the crime, it was held that the confessional statements were not admissible in evidence. *Jaffer Hussain Dastagir* v. *State of Maharashtra*, AIR 1970 SC 1934 : (1969) 2 SCC 872 : 1970 (2) SCR 332 : (1970) 2 SCR 332.

[13174] ● ***Recovery of dead body by police on information given by accused.***—The only incriminating evidence against the appellant is his pointing the place where the dead body of the deceased had been thrown. This, in our opinion, is not a conclusive circumstance though undoubtedly it raises a strong suspicion against the appellant. Even if he was not a party to the murder, the appellant could have come to know the place where the dead body of the deceased had been thrown. Further, as mentioned earlier, at the bank of the river where the dead body was thrown into the river, there were broken teeth and parts of the human body lying. Hence anyone who saw those parts could have inferred that the dead body must have been thrown into the river near about that place. *Bakshish Singh* v. *State of Punjab*, AIR 1971 SC 2016 : (1971) 3 SCC 182 : 1971 SCC (Cri) 251 : 1971 CrLJ 1452.

[13175] ● ***Fact discovered from other sources not to be discovered afresh if relevant information extracted from accused.***—Once a fact is discovered from other sources there can be no fresh discovery even if relevant information is extracted from the accused and Courts have to be watchful against the ingenuity of the investigating officer in this respect so that the protection afforded by the wholesome provisions of Sections 25 and 26 of the Indian Evidence Act is not whittled down by the mere manipulation of the record of case diary. It would, in the circumstances, be some what unsafe to rely on this information for proving the appellant's guilt. *Thimma* v. *State of Mysore*, AIR 1971 SC 1871 : (1970) 2 SCC 105 : 1971 CrLJ 1314 : 1971 (1) SCR 215.

[13176] ● ***Evidence of ex-convict and inimical to accused with regard to disclosure.***—Where the prosecution witness are ex-convict and inimical to the accused, their evidence with regard to disclosure and recoveries cannot be the basis of conviction. *Haza Singh* v. *State of Punjab*, (1971) 1 SCC 259.

[13177] ● ***Expression "fact" as in Section 3 of Evidence Act.***—The expression "fact" as defined in Section 3 includes not only the physical fact but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in Section 27. *Himachal Pradesh Administration* v. *Om Prakash*, AIR 1972 SC 975 : (1972) 1 SCC 249 : 1972 CrLJ 606 : 1972 SCD 128 : (1972) 1 SCJ 691.

[13178] ● ***Information not distinctly connecting with fact discovered.***—What should be discovered is the material fact and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as 'cause and effect.' That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under Section 27 and cannot be proved. Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden or sold or kept and which is unknown to the police can be said to be discovered as a consequence of the information furnished by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused and information which disclosed the identity of the witness will not be admissible. *Himachal Pradesh Administration* v. *Om Prakash*, AIR 1972 SC 975 : (1972) 1 SCC 249 : 1972 CrLJ 606 : 1972 SCD 128 : (1972) 1 SCJ 691.

[13179] ● ***Recovery witnessing of by Panch witnesses.***—Panch witnesses should witness the recovery and they should be examined in the Court and their evidence should be credible. In other words, the fact of recovery has to be proved by the testimony of independent Panch witnesses. *Delhi Administration* v. *Balakrishan*, AIR 1972 SC 3 : (1972) 4 SCC 659 : 1972 CrLJ 1 : 1972 LLJ 103.

[13180] ● ***Statement distinctly relating to fact discovered admissible as evidence against accused.***—Section 27 of the Evidence Act is by way of a proviso to Sections 25 and 26, Evidence Act and a statement, even by way of confession, which distinctly relates to the fact discovered is admissible as evidence against the accused in the circumstances stated in Section 27. Accused Hukam Singh is alleged to have a disclosure statement while in police custody. In consequence of that information the police party and the panchas are supposed to have gone to village Dadri where Hukam Singh pointed a place in the hut of one Babulal which, when, dug up, revealed a bundle containing a piece of gold, necklace, a pair of pajeb, a silver armlet and one gold ring, all of which have been identified as stolen property. So far as the recovery of these articles is concerned, the prosecution examined besides members of the police force, two panchas. The case is that the place from where the bundle was taken out was inside the hut close to the wall. But a member of the party stated in his evidence that the handkerchief with the articles tied in it was recovered form a place two to three feet behind the hut. In this state of the evidence the alleged recovery in consequence of information given by Hukam Singh becomes extremely suspicious and it cannot, therefore, be said that the learned Judge was not justified in rejecting this evidence about the recovery. The two panchas examined for the prosecution turned hostile and the third panch was not examined. In those circumstances inspite of the police witnesses giving evidence with regard to this discovery, the learned Judge was not inclined to act upon that evidence and we cannot say that he was wrong in doing so. *Delhi Administration* v. *Balakrishan*, AIR 1972 SC 3 : (1972) 4 SCC 659 : 1972 CrLJ 1 (3, 4) : 1972 UJ (SC) 103.

[13181] ● *Recovery of blood stained knife at instance of appellant.*—There was also the fact that the blood stained knife (Ext. 5), with which the murder was committed was recovered at the instance of the appellant. We have not been impressed by the argument on behalf of the appellant that this evidence is not admissible under the provisions of Section 27 of the Evidence Act as the police already knew about the place where the knife could be found. This argument is wholly without substance. This was based on the fact that the appellant first told the police that he would show them the knife and then took them to the place where the knife was hidden. *Karan Singh* v. *State of Uttar Pradesh*, AIR 1973 SC 1385 : (1973) 3 SCC 662 : 1973 CrLJ 1136 : 1973 CrLR (SC) 90.

[13182] ● *Discovery of watch—Evidence open to grave doubt.*—It is wrong to say that the watch was seized from the appellant because it was one Dr. Harindra Nath Mondal who produced the watch, handed it over to the appellant in the presence of the police officer and it was thereafter the police went through the formality of seizing it from the appellant. The seizure list in regard to the watch is attested apart from Dr. Mondal, by 3 witnesses. None of these witnesses supported the discovery of the watch though it is not possible to accept their testimony that they only signed a blank piece of paper. The evidence in regard to circumstances in which it was discovered is open to grave doubt. *Naba Kumar Das* v. *State of West Bengal*, AIR 1974 SC 777 : (1974) 3 SCC 582 : 1974 SCC (Cri) 60 (61) : 1974 CrLJ 512 : 1974 CrLR (SC) 3 : 1974 UJ (SC) 20.

[13183] ● *Information limit and scope of provable information.*—The first condition necessary for bringing Section 27, Evidence Act into operation is the discovery of a fact, *albeit* a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. *Mohamed Inayatullah* v. *State of Maharashtra*, AIR 1976 SC 483 : (1976) 1 SCC 828 : 1976 CrLJ 481.

[13184] ● *Word "distinctly"—Meaning of.*—"Only so much of information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded the word "distinctly" means "directly" indoubtedly", "strictly", "unmistakably". The word has been advisably used to limit and define the safe of the provable information. The phrase "distinctly" relates to the fact thereby discovered is the linchpin of the provision. This phrase refers to that of the information supplied by the accused which is the direct and immediate of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police this partial lifting of the ban against confessions and statements made to the police is that if a fact is actually discovered in consequence of information given by the accused it affords some guarantee of truth of that part and that party only, of the information which was clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered. *Mohamed Inayatullah* v. *State of Maharashtra*, AIR 1976 SC 483 : 1976 CrLJ 481 : 1975 CrLR (SC) 567. **TO THE SAME EFFECT :** (1) *Autar Singh* v. *State of Rajasthan*, 2005 SCC (Cri) 597 (603).

[13185] ● *Statement of accused immediate and direct cause of fact discovered—Admissibility of.*—What the accused stated was "I will tell the place of deposit of the three chemical drums which I took out from the Hiji Bunder on first August" only the first part of the statement *viz.* "I will tell the place of deposit of the three chemical drums" was held to be the immediate and direct cause of the fact discovered and therefore admissible under Section 27. *Mohamed Inayatullah* v *State of Maharashtra*, AIR 1976 SC 483 : 1976 CrLJ 481.

[13186] ● ***Word "distinctly"—Meaning.***—The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of provable information. The phrase "distinctly" "relates to the fact thereby discovered". The phrase refers to that part of information supplied by the accused which is most the direct cause of discovery of a fact. The rest of the information is to be excluded. [*Mahmed Inayatullah* v. *The State of Maharashtra*, AIR 1976 SC 483 : (1976) 1 SCC 828 : 1976 CrLJ 481 **referred**] *Geejagande Somaiah* v. *State of Karnataka*, AIR 2007 SC 1355 : (2007) 9 SCC 315 : 2007 (3) SCC (Cri) 135 : 2007 CrLJ 1792 (1798) : JT 2007 (4) SC 380. **To the same effect** : *Amit Singh Bhikam Singh Thakur* v. *State of Maharashtra*, AIR 2007 SC 676 : 2007 (1) SCC (Cri) 582 : 2007 CrLJ 1168 : 2007 (2) Crimes 40 (SC) : JT 2007 (1) SC 390.

[13187] ● ***Discovery statement of accused as to firearms—Admissibility of.***—Where no person other than the accused could have known the place from where the recovery of firearms was made, the disclosure statement is admissible in evidence. *Narpal Singh* v. *State of Haryana*, AIR 1977 SC 1066 : (1977) 2 SCC 131 : 1977 CrLJ 642.

[13188] ● ***Recovery of seven empties deposed by both witnesses.***—The Sessions Judge seems to believe that since these empties were not recovered at night although the Investigating Officer searched for the same in the light of the torch and lantern, their recovery in the day must be deemed to be a fabrication. We are unable to agree with this fallacious process of reasoning. After all night, however lighted it may be, cannot be a good substitute for a day light or for the light of the sun. The emplies were very small articles measuring about 1/2" to I" and it is common experience that there are a number of small articles which one may not, with due diligence, be able to find even with the aid of a torch or electric light, yet they could be easily found in the day. The recovery of these seven empties is mentioned in seizure memo and apart from investigating officer, the recovery has been proved also by PW 19 Gurdial Singh who is an eyewitness and who has also been held by the Courts below to be an independent and disinterested witness. Both these witnesses have deposed on oath regarding the recovery of seven empties from the spot. Merely because other witnesses were not examined would be no ground to reject their evidence. We would, however, like to point out that in future the Investigating Officer should not associate any eye-witness with the recovery memos, because that partakes of an attempt to make the witness omnibus. *Narpal Singh* v. *State of Haryana*, AIR 1977 SC 1066 : (1977) 2 SCC 131 : 1977 CrLJ 642.

[13189] ● ***Recoveries of weapons at instance of accused.***—As regards the recoveries of the weapons at the instance of accused, it is true that they have been attested by the police officers and some independent persons as search witnesses. The police officers have been examined to prove the search but the other witnesses have not been examined. That by itself does not introduce any serious infirmity in the evidence furnished by the recoveries which at best is the corroborative piece of evidence. *Dalbir Kaur* v. *State of Punjab*, AIR 1977 SC 472 : 1976 SCC (Cri) 527 : 1977 CrLJ 273 : 1976 CrLR (SC) 417.

[13190] ● ***Recovery of currency notes, ring and purse on information by accused.***—The actual recovery of the currency notes, the ring and the purse in pursuance of the information given by the accused and at his instances was sufficient guarantee of the truth of that information and could be safely relied on. *Mohan Lal* v. *Ajit Singh*, AIR 1978 SC 1183 : (1978) 3 SCC 279 : 1998 SCC (Cri) 378 : 1978 CrLJ 1107.

[13191] ● ***Recovery of articles of deceased.***—Where there was long delay between the fatal attack and the arrest of certain accused and the recovery of articles of the deceased and it was not clear from the recovery memo that the articles were recovered on the information of the accused and the accused was not charged for retaining stolen property, the recovery could not be relied upon as suggesting participation of the accused in the fatal attack. This would be so even if recovery was believed to be at the instance of the accused in question. *State of Himachal Pradesh* v. *Wazir Chand*, AIR 1978 SC 315 : (1978) 1 SCC 130 : 1978 SCC (Cri) 58 : 1978 CrLJ 347.

[13192] ● ***Evidence of I.O.—Seizure memo.***—Where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. *Madan Singh* v. *State of Rajasthan*, (1978) 4 SCC 435 : 1979 SCC (Cri) 56.

[13193] ● ***Katama recovered from accused.***—Where *katama* was recovered from the accused under the seizure memo which recited that the accused made a statement that he would show the *katama* with which he committed the assault, the fact that the accused committed the assault was not discovered in pursuance of the statement of the accused and the corresponding portion of the memo would be inadmissible. It would be a confessional statement to Police Officer hit by Section 25. *Babboo* v. *State of Madhya Pradesh*, AIR 1979 SC 1042 : (1979) 4 SCC 74 : 1979 SCC (Cri) 743 : 1979 CrLJ 908.

[13194] ● *Recovery of weapon used to assault deceased.*—In the case of recovery of alleged weapon used to assault the deceased the information leading to recovery is admissible but the statement that the weapon was used is inadmissible. *Babboo* v. *State of Madhya Pradesh*, AIR 1979 SC 1042 : 1979 SCC (Cri) 743 : 1979 CrLJ 908 : 1979CrLR (SC) 15.

[13195] ● *Recovery of Katamas on information given by accused.*—The recovery of *Katamas* on the information given by accused Nos. 1, 3 and 5 hardly have an probative value in the facts and circumstances of the case. If there is no substantive evidence worth the name the recovery of *Katamas* would hardly advance the prosecution case against the accused. *Katamas* appear to have been stained with human blood. In seizure memorandum it is recited that accused No. 1 made the statement that he would show the *Katama* with which he assaulted Diwan Singh. The first part on the seizure memo would be inadmissible because the fact that accused No. 1 assaulted Diwan Singh is not discovered in pursuance of the information given by accused No. 1. It would be a confessional statement to police officer but by Section 25 of the Evidence Act. In this background we are not disposed to attach any importance to the recovery of blood-stained *Katamas* on the information given by accused No. 1, 2 and 5. *Babboo* v. *State of Madhya Pradesh*, AIR 1979 SC 1042 (1046) : (1979) 4 SCC 74 : 1979 SCC (Cri) 743 : 1979 CrLJ 908 : 1979 CrLR (SC) 15.

[13196] ● *Statement of accused leading to discovery of murder weapon—Validity.*—The Marathi word "Me" is to be found at the commencement of the statement followed by the wholly inadmissible portion and then there is a reference to the place where the spear was. The Marathi expression 'Thevalela' would more appropriately be translated 'has been kept' and not 'I have kept' because in the case of 'Have kept it,' the Marathi word would be 'Thevala'. It may be that being not conversant with Marathi language our translation may not be appropriate but if this recovery of blood-stained spear is the only important circumstance of an incriminating character established in this case and if the authorship of concealment is not clearly borne out by cogent and incontrovertible evidence but as the High Court observes left to be inferred by implication, we have considerable hesitation in placing implicit reliance upon it. More so when it is a confessional statement which becomes admissible under Section 27 of Evidence Act though made in immediate presence of a Police Officer. The recovery of a bloodstained spear becomes incriminating not because of its recovery at the instance of the accused but the element of criminality tending to connect the accused with the crime lies in the authorship of concealment, namely, that the appellant who gave information leading to its discovery was the person who concealed it. And in this case Bhamta was another co-accused. The appellant may only have the knowledge of the place where it was hidden to make such a circumstance incriminating it must be shown that the appellant himself had concealed the blood-stained spear which was the weapon of offence and on this point the language used in the contemporaneous record Ext. 28 is not free from doubt and when two constructions are possible.

In a criminal trial to make such a circumstance incriminating it must be shown that the appellant himself had concealed the blood-stained spear which was the weapon of offence and on this point the language used in the contemporaneous record Ext. 28 is not free from doubt and when two constructions are possible in a criminal trial, the one beneficial to the accused will have to be adopted. Therefore, this linchpin of the prosecution case ceases to provide any incriminating evidence against the appellant." *Pohalya Motya Valvi* v. *State of Maharashtra*, AIR 1979 SC 1949 : 1980 SCC (Cri) 261 : 1979 CrLJ 1310 : 1980 CrLR (SC) 185.

[13197] ● *Factum of recovery of weapon barred under Section 27 of Evidence Act.*—Where weapon was merely taken out by accused from beneath his cot and handed over to police without any statement, the factum of recovery was held inadmissible under Section 27. *Bahadul* v. *State of Orissa*, AIR 1979 SC 1262 : (1979) 4 SCC 346 : 1979 CrLJ 1075 : (1980) 1 SCJ 39 : 1979 UJ 348.

[13198] ● *Recovery of article on information of accused—Probative value.*—In the absence of any substantive evidence worth the name, the recovery of blood-stained Katarnas on the information given by the accused would hardly advance the case of prosecution under Section 302 of the IPC. *Babboo* v. *State of Madhya Pradesh*, AIR 1979 SC 1042 : (1979) 4 SCC 74 : 1979 SCC (Cri) 743 : 1979 CrLJ 908.

[13199] ● ***Discovery of under-pant.***—The discovery of Sunita's under-pant which is the eighth circumstances, is also enveloped in suspicion. At the time when the under-pant was discovered, the appellant was not in the house. PSI Katke has not stated in his evidence as to whether the appellant's house was open or locked when he and the panchas entered it. It is also difficult to believe that the appellant would keep the under-pant under his pillow while making good his escape from the house after the dead body of Sunita was taken away. *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra*, AIR 1981 SC 765 (769, 770) : (1981) 2 SCC 35 : 1981 SCC (Cri) 315 : 1981 CrLJ 325 : 1981 CrLR (SC) 616 : (1981) 2 SCR 384.

[13200] ● ***Recovery of pistol at instance of accused.***—Recovery of pistol at the instance of accused cannot, by itself, prove that he wielded it in the offence. Where the statement accompanying the discovery is woefully vague to identify the authorship of the concealment, the pointing out of the weapon may at best prove the knowledge of the accused as to where the weapon was kept. *Dudh Nath* v. *State of Uttar Pradesh*, AIR 1981 SC 911 : (1981) 2 SCC 166 : 1981 SCC (Cri) 379 : 1981 CrLJ 618 : 1981 All LJ 228.

[13201] ● ***Mode of recording evidence deprecated.***—The evidence that one accused alongwith all other gave information leading to recovery of robbed articles and the evidence of receiver of robbed property that accused 1 to 3 sold him the ring and that accused 1 to 3 asked him to produce the ring when they came with the police party do not present any incriminating material against accused. Such mode of recording evidence was deprecated. *Mohd. Abdul Hafeez* v. *State of A.P.,* AIR 1983 SC 367 : (1983) 1 SCC 143 : 1983 SCC (Cri) 139 : 1983 CrLJ 689.

[13202] ● ***Recovery statement—Not incriminating accused.***—It is impossible to believe that all spoke simultaneously. This way of recording evidence is most unsatisfactory and we record our disapproval of the same. If evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against the person. *Mohd. Abdul Hafeez* v. *State of Andhra Pradesh*, AIR 1983 SC 367 : 1983 SCC (Cri) 139 : 1983 CrLJ 689 : 1983 CrLR (SC) 26.

[13203] ● ***Section 27 of Evidence Act—Applicability—Information—Preconditions.***—Under Section 27 only so much of the information as distinctly relates to the facts really thereby discovered is admissible. The word 'fact' means some concrete or material fact to which the information directly relates. For the applicability of Section 27 therefore two conditions are prerequisite, namely (1) the information must be such as has caused discovery of the fact; and (2) the information must 'relate distinctly' to the fact discovered. In the present case, there was a suggestion during the trial that PW-26 had prior knowledge from other sources that the incriminating articles were concealed at certain places and that the statement Ex. P-35 was prepared after the recoveries had been made and therefore there was no 'fact discovered' within the meaning of Section 27 of the Evidence Act. *Earabhadrappa* v. *State of Karnataka*, AIR 1983 SC 446 : (1983) 2 SCC 330 : 1983 SCC (Cri) 447 : 1983 CrLJ 846 : 1983 CrLR (SC) 268.

[13204] ● ***Discovery under Section 27 Evidence Act—When relevant and admissible.***—The gun, Exhibit 23, is alleged to have been recovered in pursuance of a statement made by accused Durga. The evidence of the Ballistic expert, Shariq Alvi, shows that the empty shells which were found at the spot of occurrence were fired from that gun. This would be very good evidence to connect an accused with a crime but, the police did not recover the gun from Durga. Nor, indeed, did he make any statement that he had concealed it at a place which he would point out. The discoveries under Section 27 of the Evidence Act are not of guns and daggers used in a crime. Guns and daggers have an ancient origin and one does not have to hunt for an accused to discover them. The discovery, mostly and really, is as regards the authorship of concealment. Conduct and concealment are incriminating circumstances and their discovery becomes relevant and admissible under Section 27 of the Evidence Act. Here, we are left with the position that a gun was recovered from a person called Sunder Ahir and the shells or cartridges found at the scene of offence were fired from that gun. Inexplicably, Sunder has not been examined in the case. His evidence could have shown, what is alleged by the prosecution, that Durga had borrowed his gun at about the material time. Sunder, not having been a witness in the case, there is no legal evidence on the record to connect Durga with the gun. *State of Uttar Pradesh* v. *Jageshwar*, AIR 1983 SC 349 : 1983 SCC (Cri) 427 : 1983 CrLJ 686 : 1983 CrLR (SC) 196.

[13205] ● ***Recoveries of stolen articles at instance of accused in presence of panchas.***—It is proved that the recoveries were undoubtedly made at the instance of the accused and in the presence of the panches who had appended their signatures in proof of the recoveries in the various panchnamas and have been examined in Court. As these witnesses were not meant to identify the accused at whose instance the recoveries were made, the reasoning of the learned Sessions Judge to reject their evidence seems to us to be absolutely fallacious. It is obvious that by the time the witnesses came to give evidence in the Court, they could not have remembered which accused disclosed which article. It was sufficient if these facts were proved by the panchnamas which were signed by the witnesses as representing the true state of affairs. These witnesses have not denied in the Court that they have signed the panchnamas or the recoveries were made in their presence at the instance of the accused. *Lachhman Ram* v. *State of Orissa*, AIR 1985 SC 486 : 1985 SCC (Cri) 263 : 1985 CrLJ 753 : 1985 CrLR (SC) 186.

[13206] ● ***Recovery of papers on search of house by ASI—Not pursuant to case of accused making discovery statement.***—"The Additional Sessions Judge felt that since the house was actually searched by the ASI and the papers were recovered, it would not be a case of the accused making a discovery statement and he was not prepared to believe that the accused had made any statement leading to recovery; but whether it was a recovery during the search carried out by the ASI or a recovery made pursuant to the statement made by the accused. the fact remains that three papers bearing the signatures of the complainant were found with and recovered from the possession of the accused and such finding of these papers with the accused itself lent corroboration to the complainant's story about what transpired on 10th March, 1978." *Chander Kala* v. *Ram Kishan*, AIR 1985 SC 1268 (1271) : (1985) 4 SCC 212 : 1985 SCC (Cri) 491 : 1985 CrLJ 1490 : 1985 CrLR (SC) 365 : (1985) 2 Crimes 642.

[13207] ● ***Recovery of wearing apparel of accused made more than three weeks after occurrence.***—According to the prosecution these two wearing apparel had been removed from the body of the deceased after he had been done to death and to avoid identification, as indicated by the appellant, the pant and the shirt had been removed from the body and hidden there. Recovery is said to have been made more than three weeks after the occurrence. Admittedly, the place from where these two things are said to have been recovered was a public place and appears to have been very much accessible to people of the locality. It is difficult to believe that these two had been so concealed that they were not noticed and were available to be collected from the very place such a long time after. *Abdul Sattar* v. *Union Territory, Chandigarh*, AIR 1986 SC 1438 : 1985 SCC (Cri) 505 : 1986 CrLJ 1072 : 1985 CrLR (SC) 485.

[13208] ● ***Recovery of ornaments worn by deceased at instance of accused.***—As regards the evidence of discovery of ornaments, which were worn by the deceased on her person and which were said to have been recovered from PW-15 at the instance of the respondent-accused, the High Court felt that the ornaments were common place articles like some small gold chain with locket *etc.* which would be commonly available in the market and that the identification of such articles by the father of the deceased woman and other relatives in the absence of any peculiarity or characteristic of these ornaments could not be relied upon. It is not possible to accept this part of the reasoning of the High Court, in the first place the availability of such article in the market would have relevance if those articles had been claimed by respondent-accused or PW-15 as their own and secondly the father's evidence about the identity of these ornaments as having been presented by him to her deceased daughter at the time of her marriage may be difficult to reject. But from the material on record relating to this discovery we find that the same has not been properly proved by the prosecution as discovery of the ornaments at the instance of the accused purely rests upon the evidence of Police Officer. We may mention that the alleged statement of the respondent-accused which is said to have been made by him leading to such discovery as well as the alleged actual recovery are said to have been witnessed by two independent panch witnesses. But, unfortunately neither of the panch witnesses was examined by the prosecution at the trial. In the absence of such independent evidence which could have been made available and which could have been placed before the Court in support of the alleged discovery of the ornaments, it will be difficult to accept such discovery merely relying upon the evidence of the Police Officer. *State of Kerala* v. *Thomas alias Boby*, (1986) 2 SCC 411 : 1986 SCC (Cri) 176 (178, 179).

[13209] ● ***Circumstantial evidence—Weapon of offence recovered from another accused who had grudge against deceased.***—The instrument of the offence was recovered at the instance of one Jitrai Majhi who has been discharged and under these circumstances therefore the evidence about the appellant having been seen in the evening with the deceased also is of no consequence. It is a settled rule of circumstantial evidence that each one of the circumstances has to be established beyond doubt and all the circumstances put together must lead to the only one inference and that is of the guilt of the accused. As discussed above the only circumstance which could be said to have been established is of his being with the deceased in the evening and on that circumstance alone the inference of guilt could not be drawn especially in the circumstances of the case where one another accused person from whom an instrument of offence was recovered, who has a grudge against the deceased has been let off. *Kansa Behera* v. *State of Orissa*, AIR 1987 SC 1507 : 1987 SCC (Cri) 601 : 1987 CrLJ 1857 : 1987 CrLR (SC) 389.

[13210] ● ***Handle of Tractor used to give blows to deceased recovered as per recovery memo.***—It is also very significant to note that the handle of the tractor used to give blows to the deceased was recovered as per the recovery memo (Ex PG) in pursuance of the disclosure statement made by the accused in presence of independent witnesses, Nirmal Singh and Jarnail Singh. It appears from the report, Ex PH, of Serologist and Chemical Examiner that iron handle was stained with human blood. *Jagtar Singh* v. *State of Punjab*, AIR 1988 SC 628 : (1988) 1 SCC 712 : 1988 SCC (Cri) 254 : 1988 CrLJ 866 : 1988 CrLR (SC) 101 : JT 1988 (1) SC 200 : (1988) 2 SCR 794 : (1988) 1 Crimes 822.

[13211] ● ***Evidence under Section 27 Evidence Act not circumstance against accused.***—There is no presumption of exclusive knowledge to accused of bodies being buried and its recovery from open field. So evidence under Section 27 not a circumstance against accused. *Makhan Singh* v. *State of Punjab*, AIR 1988 SC 1705 : (1988) 3 SCJ 362 : 1988 CrLR (SC) 501 : JT 1988 (3) SC 126 : (1988) 2 Crimes 842.

[13212] ● ***Discovery of saw blade not of conclusive nature connecting appellant with crime.***—"The third circumstance relied on in the statement said to have been made by the appellant under Section 27 leading to discovery of the consequential information, namely, saw blade, is not of a conclusive nature connecting the appellant with the crime. The recoveries were long after the arrest of the appellant. The blood stains on all the articles were disintegrated. So it was not possible to find whether it is human blood or not. Moreover, from the prosecution evidence it is clear that the deceased himself was an accused in an earlier murder case and it is obvious that he had enemies at his back. Absolutely no motive to commit crime was attributed to the appellant." *Kishore Chand* v. *State of Himachal Pradesh*, AIR 1990 SC 2140 : 1991 SCC (Cri) 172 : 1990 CrLJ 2289 : 1990 CrLR (SC) 608 : (1990) 3 Crimes 341.

[13213] ● ***Recovery of stolen articles made on subsequent examination.***—In the instant case, the stolen articles were not recovered in the first instance. Recovery was made on subsequent examination. The circumstance of recovery cannot be said to be reliable. *Chandran alias Surendram* v. *State of Kerala*, AIR 1990 SC 2148 : 1991 SCC (Cri) 245 : 1990 CrLJ 2296 : 1990 CrLR (SC) 519.

[13214] ● ***Recovery of dead body at instance of accused not proved.***—"PW-11 stated in his evidence that before going to the paddy field the FIR Ex. P. 10 was drawn up by him. Surprisingly we find a mention about the discovery of the body in the FIR itself. But the same is not found in the inquest. There is not even a reference to the accused in the Column No. 9 of the inquest report where the information of witness as to the cause of death has to be noticed. We are aware that the purpose of inquest report is only to ascertain the cause of death but in a case of this nature there should have been at least a mention in the inquest report as to how the body was discovered. Apart from that usually a panchnama is prepared for such a discovery made under Section 27 of the Evidence Act but strangely in this case there is no such panchnama nor there is any other evidence apart form the evidence of PWs-1 and 11. PW-6 does not say anything about this aspect. We have perused the evidence of PW-4. His evidence does not in any manner incriminate the accused. PW-4 deposed that the dead body of the deceased was found lying in a paddy field and that the police held inquest over the dead body in his presence and that the inquest report is P. 1 in which he put his signature as a witness. Nothing more is stated by him. He does not even refer to the presence of the accused at the place where the dead body was found or at the time of inquest, which was held also there. PW-4 does not in any manner help the prosecution case so far as this circumstance is concerned. If really the body has been discovered at the instance of the accused there should have been a panchnama and a mention about the same in the inquest report. *Jaharlal Das* v. *State of Orissa*, AIR 1991 SC 1388 : 1991 SCC (Cri) 527 : 1991 CrLJ 1809 : 1991 CrLR (SC) 467 : (1991) 2 Crimes 268 : 1991 CAR 217.

[13215] ● ***Statement of accused leading to exhumation of dead body.***—"Even before the respondent gave the information to the police about the place wherefrom the dead body was exhumed, the respondent's husband who stands convicted gave the information to the head constable as to where the dead body was buried. After carefully examining the material placed before us, we are of the opinion that the reasons given by the High Court for discarding the evidence in regard to the recoveries as well the evidence with regard to the exhumation of the dead body do not suffer from any infirmity." *State of Rajasthan* v. *Kamla*, AIR 1991 SC 967 : 1991 CrLJ 602.

[13216] ● ***Evidence insufficient to prove that dead body was placed by accused in trunk.***—The Trial Judge when grappling with the matter took note of the evidence of the witnesses of recovery, namely, Chander Shekhar, PW-5 and Sub-Inspector, Markandey Singh, PW-11 wherefrom it was clear that a dead body was found inside a bag kept in the trunk. That by itself was of no consequence and at best gravely suspicious. Its finding was that a dead body in a bag put inside a trunk was recovered from a room of the house and further the part played by the accused in the placing of the dead body in that trunk was evidently not proved. Their individual statement to PW-11 "I have kept the dead body, could give it", which alone, if at all admissible, but not holding so, does not reveal any disappearance of evidence so as to screen the offender of murder. This state of evidence is insufficient to prove the accused-Kapil Deo and Ramapati to have placed the dead body in the Trunk. *State of Uttar Pradesh* v. *Kapil Deo*, AIR 1991 SC 2257 : 1991 SCC (Cri) 1008 : 1991 CrLJ 3321 : 1991 Supp (2) SCC 170.

[13217] ● ***Recovery of shirt worn by deceased at instance of appellant.***—"So far as the recovery of shirt worn by the deceased at the instance of appellant, we are of the view that this part of the story is highly improbable and difficult to believe. There is no reason whatsoever as to why the murderer of deceased should take the shirt of the deceased along with him. One can imagine the taking away of jewellery, weapon or some other valuable article from the person of deceased but taking away of the shirt of the deceased by the appellant is a circumstance which cannot be believed. *Chandu alias Chandrahas* v. *State of Madhya Pradesh*, AIR 1992 SC 2302 : 1992 CrLJ 3956 : 1993 Supp (1) SCC 358.

[13218] ● ***Fatal injuries inflicted with gupti—Recovery of at instance of accused.***—It appears to us that the fatal injuries had been inflicted by Prakash with the gupti. The gupti was recovered at the instance of the accused and such recovery was not otherwise possible if the accused himself had not assisted for such recovery of the gupti. The said gupti was stained with human blood and no reasonable explanation has been given by accused for such blood stain. The injuries found on the person of the deceased could be inflicted by a gupti and complicity of Prakash in inflicting the fatal injuries by gupti has been corroborated by the eye-witness. There may be some minor discrepancies in the evidence of the eye-witness but so far as the complicity of Prakash is concerned, the depositions of the eye-witnesses were consistent. *Prakash* v. *State of Madhya Pradesh*, AIR 1993 SC 65 : 1992 SCC (Cri) 853 : 1992 CrLJ 3703 : 1992 CrLR (SC) 712 : (1993) 3 Crimes 530.

[13219] ● ***Recovery of dead body at instance of accused.***—In the instant case, the dead body was recovered at the instance of the accused at the place which was not in exclusive possession of accused. Accused himself stated about the dead body to the witness who lodged the missing report. The circumstance is not consistent with the innocence of the accused. *Anant Bhujangrao Kulkarni* v. *State of Maharashtra*, AIR 1993 SC 110 : 1992 CrLJ 4027 : (1993) 2 SCC Supp 267 : 1992 CrLR (SC) 464 : (1992) 2 Crimes 644.

[13220] ● ***Circumstantial evidence—Recovery of ornaments of deceased—Important piece of.***—The disclosure statement and the consequent recovery pursuant thereto of the ornaments belonging to the deceased has been considered one of the most important piece of circumstantial evidence in the case not only by the High Court but is also before us. This circumstance is indeed of such an incriminating nature that if found to have been established by reliable and trustworthy evidence, it would go a long way to furnish proof of the guilt of the appellant and connect him with the crime and on the other hand, if the evidence in support of that circumstance is found to be not reliable, the entire chain of circumstantial evidence will snap so badly as to affect the credibility of the prosecution case as a whole. On our independent appraisal of the evidence, we find that the prosecution evidence relating to the disclosure statement and the recovery of ornaments is not only discrepant and contradictory but also suffers from glaring infirmities and improbabilities rendering it unsafe to rely upon the same.

There is contradiction between the evidence of Kuldip Kaul, PW-1 and the Investigating Officer as to the place where Kuldip Kaul signed the recovery memo. According to the Investigating Officer it was signed at the spot while according to Kuldip Kaul, PW-1, he had returned to the Police Station and there signed the recovery memo. Again, while Kuldip Kaul attempted to show that he had met the Investigating Officer just once and did not know him earlier, the Investigating Officer has given a direct lie to it. After carefully analysing the evidence, we find Kuldip Kaul, PW-1 was a convenient witness and his evidence does not appear, to be trustworthy. Same is our opinion about Harnaik Singh, PW-2 whereas both Harnaik Singh, PW-2 and the Investigating Officer want the Court to believe that they did not meet each other earlier and that Investigating Officer had seen Harnaik Singh for the first time on that day only at the Police Station, there is abundant material on the record to show not only that Harnaik Singh had earlier been cited as witness by the same Investigating Officer while posted as Sub-Inspector at another Police Station, Harnaik Singh, PW-2 was also present outside the house of the appellant alongwith Kuldip Kaul, PW-1 as early as at 6.30 a.m. on that day. Harnaik Singh, PW-2 also exposed his unreliability when he admitted during the cross-examination that the disclosure statement had not been made by the appellant in his presence at the Police Station but that he had signed a statement which had already been prepared, thus, giving a lie not only to Kuldip Kaul, PW-1 but also to the Investigating Officer who have deposed to the contrary. *Surinder Pal Jain* v. *Delhi Administration*, AIR 1993 SC 1723 : 1993 SCC (Cri) 1096 : 1993 CrLJ 1871 : JT 1992 (2) SC 206 : (1993) 1 UJ (SC) 520 : 1993 Cr App R (SC) 254 : (1993) 1 Crimes 987.

[13221] ● ***Recovery of weapon rendered meaningless in absence of disclosure statement.***—As to the disclosure statement which led to the recovery of the axe (MO-9) the only witness examined is Ramu Mellappa, PW-13. He did not depose about witnessing to the disclosure statement which led to the recovery of axe. The only evidence regarding the disclosure is "come with me" and thereafter the accused proceeded towards Harugeri and stopped near the stream situated at a distance of about 2 kms. away and the accused took out the axe from inside the nallah (stream). In the absence of any disclosure statement the recovery of axe itself becomes meaningless. *Bhimappa Jinnappa Naganur* v. *State of Karnataka*, AIR 1993 SC 1469 (1471) : 1993 SCC (Cri) 1053 : 1993 CrLJ 1801 : JT 1993 (2) SC 165 : (1993) 3 Crimes 411.

[13222] ● ***Two essential requirements for application of Section 27 of Evidence Act.***—"The two essential requirements for the application of Section 27 of the Evidence Act are that (1) the person giving information must be an accused of any offence, and (2) he must also be in police custody. ...The provisions of Section 27 of the Evidence act are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false." *Suresh Chandra Bahri* v. *State of Bihar*, AIR 1994 SC 2420 : 1995 SCC (Cri) 60 : 1994 CrLJ 3271 : (1994) 2 Crimes 1027.

[13223] ● ***Prosecution failed to establish that appellant in conscious possession of revolver and cartridge.***—In the present case the statement of the appellant recorded under Section 27, Evidence Act reads : "Revolver is concealed at Dadar. Come on, I will point out the place and revolver". From this statement we are at a loss to understand how the trial Judge could have come to the conclusion that the recovery pursuant to it could clothe the appellant with conscious possession of the revolver and the cartridge. The statement extracted above is capable of an interpretation that the appellant had the knowledge about the concealment of the revolver at the particular place from where it was got recovered and not that he had concealed the same. In this view of the matter, it is not possible to say conclusively and beyond a reasonable doubt that the appellant had conscious possession of the revolver and the cartridge. The evidence of PW01, PW-9 and PW-12 which only relates to the making of the disclosure statement cannot advance the case of prosecution. Since, the prosecution has failed to establish beyond a reasonable doubt that the appellant was in conscious possession of the revolver and the cartridge his conviction for an offence under Section 3 read with Section 25 of the Arms Act, 1959 cannot be sustained. We accordingly accept this appeal and set aside the conviction and sentence of the appellant and acquit him. *Raosaheb Balu Killedar* v. *State of Maharashtra*, 1995 CrLJ 2632.

[13224] ● ***Absence of signature of thumb impression of accused on disclosure statement—Effect.***—The absence of the signatures or the thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act detracts materially from the authenticity and the reliability of the disclosure statement. *Jackaran Singh* v. *State of Punjab*, AIR 1995 SC 2345 : 1995 CrLJ 3992.

[13225] ● ***Recovery of bones on basis of disclosure statement.***—It is true that no disclosure statement of Gurbachan Singh who is said to have given information about the dumping of the dead body under the hillock of Khadgraha dumping ground was recorded but there is positive statement of Rajeshwar Singh, PW-59, Station House Officer of Chutia Police Station, who deposed that during the course of investigation Gurbachan Singh led him to Khadgraha Hillock alongwith Inspector Rangnath Singh and on pointing out the place of Gurbachan Singh he got that place unearthed by labourers where a piece of blanket, pieces of saree and Rassi were found which were seized as per seizure memo Ex 5. ... It true that no public witness was examined by the prosecution in this behalf but the evidence of Rajeshwar Singh, PW-59, does not suffer from any doubt "the last circumstance relied upon by the prosecution is the disclosure statement of the appellant, leading to the recovery of the bones of the deceased. The trial Court ruled out of consideration the disclosure statement and the consequent recovery of the bones and placed no reliance on it. The trial Court opined 'At the outset it may be stated that in this case no importance can be attached to the disclosure statement made by Balwinder Singh accused and in consequence thereof recovery of the bones. Tejinder Kaur, PW, had already visited the place of cremation much before the case was registered. Be that as it may, there is no reason to doubt that the bones were taken into possession from the alleged place of cremation which is admittedly an open place. We agree with the trial Court." *Balwinder Singh* v. *State of Punjab*, AIR 1996 SC 607 (612) : (1996) SCC (Cri) 59 : 1996 CrLJ 883 : (1995) 4 SCC (Supp) 259 : JT 1995 (8) SC 81.

[13226] ● *Accused not in Police custody when he made disclosure statement.*—We find that no offence was registered against appellant when he was taken to Police Station for interrogation nor was any accusation made against the accused. He was not in custody of Police when he made the disclosure statement. S. 27 of Evidence Act was not applicable in this case and recovery should not have been treated as having been made on the basis of the disclosure statement of the appellant. *Manoranjan Singh* v. *State of Delhi*, AIR 1998 SC 2811 : (1998) 3 SCC 523 : 1998 SCC (Cri) 848 : 1998 CrLJ 2062 : 1998 CrLR (SC) 304 : JT 1998 (2) SC 168.

[13227] ● *Accused only found to know place where dead body burried.*—We have read the statement as recorded by the Investigating Officer and also its translation shows, accused had not stated therein that he had buried the dead body. The Investigating Officer was, therefore, not right when he deposed that the accused had stated to him that he had buried the dead body of Babloo. The statement was no made in presence of any independent witness. The explanation of the accused was that he had come to know about that place from the talk among Hemant, Pravin, Rajesh and Sushil who were with him in the lock-up. He also stated that he had not voluntarily taken the Police to that place but he was forcibly taken there. The Investigating Officer has admitted that he had recorded statement of Rajesh. Therefore, it becomes doubtful that the dead body was really recovered as a result of information given by the accused. The High Court was, therefore, right in holding that only conclusion that could be drawn from the statement of the accused was that he knew the place where the dead body was buried and as he had not stated that he had buried it, he could not be connected with the offence on the basis of that circumstance.

Appeal against acquittal was dismissed. *Prem Prakash Mundra* v. *State of Rajasthan*, AIR 1998 SC 1189 (1190) : 1998 SCC (Cri) 896 : 1998 CrLJ 1620 : 1998 CrLR (SC) 135 : JT 1998 (1) SC 659.

[13228] ● *Nothing in Section 27 Evidence Act rendering statement of accused inadmissible if recovery made from place open or accessible to others.*—There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others. *State of Himachal Pradesh* v. *Jeet Singh*, AIR 1999 SC 1293 : 1999 SCC (Cri) 539 : 1999 CrLJ 2025 : (1999) 2 Crimes 31.

[13229] ● *Recovery of blood-stained clothes of accused sufficient to corroborate charge of murder.*—Recovery of blood-stained clothes of accused at his instance is a circumstance suffi cient to corroborate the charge of murder. *Kumar* v. *State of Himachal Pradesh*, AIR 1999 SC 782 : (1999) 2 SCC 288 : 1999 SCC (Cri) 127 : 1999 CrLJ 1138 : 1999 CrLR (SC) 89.

[13230] ● ***Recovery of articles from place open or accessible to other when.***—Recovery of articles made from any place which, is open or accessible to others would not vitiate the evidence under Section 27. The crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not then it is immaterial that the concealed place in accessible to others. *State of Himachal Pradesh* v. *Jeet Singh*, AIR 1999 SC 1293 : (1999) 4 SCC 370 : 1999 SCC (Cri) 539 : 1999 CrLJ 2025 : (1999) 2 Crimes 31 (SC).

[13231] ● ***Information by accused leading to recovery of weapon.***—The information furnished by the accused leading to recovery of weapons is though admissible but Court must be satisfied that it was voluntary and reliable. *Rammi alias Rameshwar* v. *State of Madhya Pradesh*, AIR 1999 SC 3544 : (1999) 8 SCC 649 : 1999 SCC (Cri) 26 : 1999 CrLJ 4561 : (1999) 4 Crimes 32.

[13232] ● ***Investigating Officer not obliged to obtain signature of accused in any statement.***—The resultant position is that Investigating Officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure memo for the recovery of any article covered by Section 27 of the Evidence Act. But, if any signature has been obtained by an Investigating Officer, there is nothing wrong or illegal about it. *State of Rajasthan* v. *Teja Ram*, AIR 1999 (SC) 1776 : (1999) 3 SCC 507 : 1999 SCC (Cri) 436 : 1999 CrLJ 2588.

[13233] ● ***Recovery of charas—Coconut tree standing on open space.***—Where the coconut tree from whose stem charas was found was admittedly standing on an open space accessible to all, it was held that it could not be said that it was the accused who had concealed the charas there and that it was found out only on the basis of the disclosure statement made by the accused. *Krishan Mohan Singh Dugal* v. *State of Goa*, AIR 1999 SC 3842 : (1999) 8 SCC 552 : 2000 CrLJ 18 : (1999) 4 Crimes 225 : (1999) 4 CCR 118.

[13234] ● ***Recovery of dead body from place pointed out by accused.***—There are three possibilities. When an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he would himself have concealed it. Second is that he would have seen somebody else concealing it and the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal Court that his knowledge about the concealment was an account of one of the last two possibilities the criminal Court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the Court as to how else he came to know of it, the Court will be justified in raising the presumption that the concealment was made by himself. *State of Maharashtra* v. *Suresh*, (2000) 1 SCC 471 : 2000 SCC (Cri) 263 : JT 1999 (9) SC 513 : (1999) 1 Crimes 1 (SC) : (1999) 4 CCR 344.

[13235] ● ***Actual words in verbatim leading to recovery where not recorded.***—Where the actual words in verbatim leading to recovery were not recorded by the investigating officer, such a statement by the accused cannot be treated as statement of the accused leading to recovery. *Mujeeb* v. *State of Kerala*, AIR 2000 SC 591 : (2000) 10 SCC 315 : 2000 SCC (Cri) 78 : 2000 CrLJ 742 : JT 1999 (9) SC 299.

[13236] ● ***"Naizas" recovered consequent upon disclosure-statement—Covered with human blood.***—The naizas recovered consequent upon the disclosure statements made from the places indicated by Gurnam Singh and Iqbal Singh were found by the Forensic Science Laboratory to be covered with human blood. No explanation was given by either of these accused as to this telling circumstance which indicated their participation in the crime. *Jaswant Singh* v. *State of Haryana*, AIR 2000 SC 1833 : (2000) 4 SCC 484 : 2000 SCC (Cri) 991 : 2000 CrLJ 2212 : (2000) 2 Crimes 150.

[13237] ● ***"Fact discovered" not comprehend recovery of object.***—The Basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from prisoner such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional a non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is non well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in *Pulukuri Kattayya* v. *Emperor,* AIR 1947 PC 67 : 1947 CrLJ 533 is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it but the information given must relate distinctly to that effect. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information, which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it unsensible or incomprehensible. The extent of information admitted should not be consistent with understandability. *State of Maharashtra* v. *Damu Gopinath Shinde*, AIR 2000 SC 1691 : (2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 CrLJ 2301 : (2000) 3 SCR 41.

[13238] ● ***Presence of human blood on knife recovered at instance of accused.***—During the course of investigation, Santosh (A-1) made a disclosure statement under S. 27 of the Evidence act. He disclosed that he had hidden the clothes in the parchhi (cow shed). He further stated that he would produce Naveen's cycle which he had thrown into septic tank. Molai (A-2) was separately interrogated and he made a disclosure statement under S. 27 of the Evidence Act stating that he had concealed a knife in the heap of cow dung cakes. He then stated that he had concealed a piece of underwear, one bed sheet and one paji in the fodder room near the septic tank and he would produce the same. The Courts below accepted the evidence of PW-7 who has proved recovery of articles pursuant to the disclosure statements and the recovery thereof. The prosecution can be held to have successfully proved this circumstance beyond every reasonable doubt. *Molai* v. *State of Madhya Pradesh*, AIR 2000 SC 177 (182) : (1999) 9 SCC 581 : 2000 SCC (Cri) 438 : 2000 CrLJ 292 : 2000 Cr App R (SC) 95.

[13239] ● ***Confessional statement made in presence of two panch witnesses.***—The appellant who was remanded to the Police custody, during his interrogation on 16th June, 1993 at about 10.30 a.m. expressed his desire to make a voluntary statement regarding the concealment of arms and ammunition. PW-7 who was investigating the crime in question arranged for two Panch witnesses, of which PW-2 is examined. In the presence of the Panch witnesses, the appellant made a statement which came to be recorded *vide* Ex 10 (memorandum) and the free admitted translation thereof as an under :

> "In the last week of January, 1993, I had given one AK-56 Rifle and two loaded magazines and in the first week of February, one pouch containing 3 hand grenades and two detonators to Pravin Gawand at his residence at 50 Tenement Building, 3rd Floor, Ambedkar Road, Parel, Mumbai for keeping with him. I will point out the said place and the said person, accompany me."

The appellant reached the said place and knocked the door and a person by name Pravin Krishna Gawand opened it. The appellant identified him to be the very same person to whom he had handed over one AK-56 rifle, two magazines loaded with cartridges and a pouch containing three hand grenades and two detonators. When the Investigating Officer questioned Pravin Krishna Gawand about these articles, he admitted to have received these articles and explosives from the appellant and thereafter took out one gunny bag which was kept concealed under the cot behind one suitcase. When gunny bag was opened, it was found to have contained one AK-56 assault rifle, two magazines loaded with 11 and 5 live cartridges respectively and were wrapped together with the rifle. One leather multicoloured pouch containing three hand grenades and two detonators. One assault rifle was wrapped in school uniform together with two loaded magazines. The prosecution has examined PW-2 who acted as Panch witness to the memorandum and seizure memo. PW-2, in his evidence, has very succinctly described how the confessional statement of the appellant was recorded and pursuant thereto how various incriminating articles came to be seized *vide* seizure memo. *Prasad Ramakant Khade* v. *State of Maharashtra*, AIR 2000 SC 138 (139, 140) : (1999) 8 SCC 493 : 2000 CrLJ 55 : (1999) 4 Crimes 187.

[13240] ● ***Insufficient evidence.***—There was a long interval between that earlier search and the recovery effected by the Police on the strength of the statement made by Manish Dixit. Very probably Manish Dixit would have chosen such a place to conceal the ornaments on a thinking that the said place is safer than other places as the possibility of a second search at the same place would be too remote. *Manish Dixit* v. *State of Rajasthan*, AIR 2001 SC 93 : (2000) 1 SCC 596 : 2001 SCC (Cri) 235 : 2001 CrLJ 133.

[13241] ● ***Evidence of recovery not vitiated.***—Even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. *Mohd. Aslam* v. *State of Maha* *rashtra*, (2001) 9 SCC 362 : 2002 SCC (Cri) 1024.

[13242] ● ***Discrepancy between oral testimony and documentary evidence.***—Significantly all disclosures, discoveries and even arrests have been made in the presence of three specific persons, namely, Budh Ram, Dholu Ram and Atma Ram—no independent witness could be found in the aforesaid context—is it deliberate or is it sheer coincidence—this is where the relevance of the passage from SARKAR on *Evidence* comes on. The ingenuity devised by the prosecutor knew no bounds—Can it be attributed to be sheer coincidence? Without any further consideration of the matter, one thing can be more or less with certain amount of conclusiveness be stated that these at least create a doubt or suspicion as to whether the same has been tailor-made or not and in the event of there being such a doubt, the benefit must and ought to be transposed to the accused persons. The trial Court addressed itself on scrutiny of evidence and came to a conclusion that the evidence available on record is trustworthy but the High Court acquitted one of the accused persons on the basis of some discrepancy between the oral testimony and the documentary evidence as noticed fully hereinbefore. The oral testimony, thus, stands tainted with suspicion. If that be the case, then there is no other evidence apart from the omni present Budh Ram and Dholu Ram, who, however, are totally interested witnesses. While it is true that legitimacy of interested witnesses cannot be discredited in any way nor termed to be a suspect witness but the evidence before being ascribed to be trustworthy or being capable of creating confidence, the Court has to consider the same upon proper scrutiny. In our view the High Court was wholly in error in not considering the evidence available on record in its proper perspective. *State of Haryana* v. *Ram Singh*, AIR 2002 SC 620 (627, 628) : (2002) 2 SCC 426 : 2002 CrLJ 987 : (2002) 1 Crimes 247.

[13243] ● ***Disclosure statement—Dead body lying buried in Court-yard.***—It is obvious from the facts brought on record that according to the disclosure statements made by the accused the dead body was lying buried in the Court-yard of Gurmit Singh, husband of Bakshish Kaur. On the other hand, the evidence is equally clear that the dead body was actually recovered from the Court-yard of Sucha Singh, husband of Kuldip Kaur. It cannot, therefore, be said that the dead body of Kuldip Kaur was recovered pursuant to the disclosure statements made by the accused. There is also no scope for any confusion because the accused being members of the same family could make no mistake about the Court-yard of one or the other. Moreover, Sucha Singh, PW-6, in his deposition has clearly stated that he had constructed his house with a boundary wall and his brothers also had separate houses with boundary walls. The Court-yard of all the three brothers were, therefore, clearly demarcated and therefore, the recovery cannot be explained by conjecturing that though they mentioned the Court-yard of Gurmit Singh actually they meant the Court-yard of Sucha Singh, Buta Singh, in the course of investigation had informed the Investigating Officer that Bakshish Kaur had invited Kuldip Kaur to her house and she has been killed there. Similarly, Resham Singh, PW-7, in the course of investigation claimed to have seen the murder being committed in the house of Gurmit Singh. The statement made by these witnesses in the course of investigation have been referred only to recapitulate the background in which the disclosure statements were recorded. But as a matter of fact the body was found buried in the Court-yard of Sucha Singh and not in the Court-yard of Gurmit Singh. Under these circumstances, it is not possible to hold that the dead body of Kuldip Kaur was recovered pursuant to the alleged disclosure statements made by the appellants herein. The prosecution has, therefore, failed to establish this incriminating. *Kuldip Singh* v. *State of Punjab*, AIR 2002 SC 3023 : (2002) 6 SCC 757 : 2002 CrLJ 3944.

[13244] ● ***The fact of discovery—Admissibility.***—The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to the post user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Therefore, what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered. The fact that some terrorist organization had given the pistol and other articles to the appellants or its use would not admissible. *Salim Akhtar* v. *State of Uttar Pradesh*, AIR 2003 SC 3469 : (2003) 5 SCC 459 : 2003 CrLJ 2302 : 2003 Crimes 289.

[13245] ● ***Discovery of fact.***—The first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. *Avtar Singh* v. *State of Rajasthan*, 2005 SCC (Cri) 597 (603).

[13246] ● *Discovery of fact—Relevancy.*—The various requirements of the section can be summed up as follows :

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused is custody must be deposed to.

(7) There upon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible. *Avtar Singh* v. *State of Rajasthan*, 2005 SCC (Cri) 597 (603).

[13247] ● *Fact discovered.*—At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this. *Avtar Singh* v. *State of Rajasthan*, 2005 SCC (Cri) 597 (603).

[13248] ● *Recovery of weapon.*—Weapon allegedly used in the crime was recovered at the instance of accused-respondent from the house of one Chandan who though examined did not support the prosecution case. The recovery in fact could not be said to be from a place to which the respondent alone had the exclusive access. The possibility of the said weapon being with the said Chandan always could not be ruled out. In such factual background much importance could not be placed on the recovery of this nature. *State of M.P.* v. *Ghudan,* 2005 SCC (Cri) 801 (805).

[13249] ● *Recovery of blood-stained clothes.*—The prosecution case is that these clothes were bloodstained though washed, still the stains were visible hence were sent to chemical examination which has established the "stains were of blood. Therefore the same was sent to serologist who opined that he could not give an opinion as to the origin of the blood meaning thereby that the bloodstain that was noticed by him on the clothes cannot be said to be that of human origin. In such situation this circumstance of recovery of bloodstained clothes will be of no assistance to the prosecution. *State of M.P.* v. *Kriparam,* 2005 SCC (Cri) 830 (833).

[13250] ● *Recovery of blood-stained axe.*—In regard to recovery of an axe witnesses for the recovery say, they found a small stain of blood on it. The serologist in regard to this blood also states that it is not possible to find out the origin of the same. Therefore, even this recovery would not in any manner help the prosecution in this case. Even otherwise, if the prosecution case in regard to PWs 1 and 3 is not acceptable then these recoveries by themselves would not take the prosecution case any further. *State of M.P.* v. *Kriparam,* 2005 SCC (Cri) 830 (833).

[13251] ● *Recovery of blood-stained towel.*—It is the case of the prosecution that on 18-3-1984 after the arrest of the accused, he led them to a tree just behind the post office building whereunder a bloodstained towel was recovered. The prosecution had earlier alleged that the body of the deceased was found in a septic tank behind the post office on 17-3-1984. The tree under which the bloodstained towel was recovered is also behind the post office, therefore, the septic tank and the tree must be close to each other. If that be so, how the investigating agency missed noticing the bloodstained towel under the tree on the day of inquest is not explained by the prosecution. From the evidence in this regard led by the prosecution, there is nothing to show that this bloodstained towel was concealed in such a manner that the IO could not have noticed it on 17-3-1984 itself. *State of Tamil Nadu* v. *Sundar,* 2005 SCC (Cri) 844 (848-49).

[13252] ● *Recovery of blood-stained shirt.*—It is the case of the prosecution that the respondent-accused made a disclosure statement at the time when he was arrested at Kaveripattinam, and as per the statement, a bloodstained shirt was recovered. According to the prosecution, this is the same shirt which was worn by the accused when he committed the murder but there is no material to show that he had changed this shirt when he came out of the post office. Therefore, if really this bloodstained shirt is the one that was worn by the accused at the time of the murder then PW-3 would not have failed to notice the bloodstains on his shirt when she saw him and also spoke to him on 16-3-1984. This circumstance also, in our opinion, goes against the prosecution. *State of Tamil Nadu* v. *Sundar,* 2005 SCC (Cri) 844 (849).

[13253] ● ***Confession proof of information furnished by accused.***—Section 27, which unusually starts with a proviso, lifts the ban against the admissibility of the confession/ statement made to the police to a limited extent by allowing proof of information of a specified nature furnished by the accused in police custody. In that sense Section 27 is considered to be an exception to the rules embodied in Sections 25 and 26. *State (NCT of Delhi)* v. *Navjot Sandhu*, 2005 SCC (Cri) 1715 (1806).

[13254] ● ***Discovery of fact.***—The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates *distinctly to the fact thereby discovered* that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused.

Lastly, discovery of fact does not comprehend a pure and mental fact or state of mind relating to a physical object dissociated from the recovery of the physical object. *State (NCT of Delhi)* v. *Navjot Sandhu*, 2005 SCC (Cri) 1715 (1807).

[13255] ● ***Discovery of fact—Evidence of I.O..***—Co-accused Gilani was not taken any places such as the hide-outs. Where the incriminating articles were found. He only pointed out the house of Shaukat who was in the same locality, which is an innocuous circumstance. Though there is some dispute on this aspect, we are inclined to believe the evidence of the investigating officers because Afsan Guru, in her statement under Section 313, stated that Gilani was with the police when they came to her house. One more important aspect that deserves mention is that there is nothing to show that the information furnished by Gilani led to the discovery of facts such as identification of the deceased terrorists, recovery of chemicals, police uniforms, *etc.*, at the hideouts. That was all done on the basis of information furnished by the other accused. There is no inextricable link between the alleged informations furnished by Gilani and the facts discovered. None of the investigating officers deposed to the effect that on the basis of information furnished by Gilani, any incriminating articles were recovered or hideouts were discovered. On the other hand, the evidence discloses the supervening information which led the IOs to discover the things. *State (NCT of Delhi)* v. *Navjot Sandhu*, 2005 SCC (Cri) 1715 (1888-89).

[13256] ● ***Disclosure to Police Officer.***—Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the investigating officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the investigating officer will be discovering a fact *viz.* the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section

27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence. *State (NCT of Delhi)* v. *Navjot Sandhu*, 2005 SCC (Cri) 1715 (1816-17).

[13257] ● ***Disclosure statement—Admissibility.***—In fact the disclosure statement is not required to be signed by virtue of the embargo in Section 162(1). The fact that the signature of the accused was obtained on the disclosure statement does not, however detract from its admissibility to the extent it is relevant under Section 27, Evidence Act. *State (NCT of Delhi)* v. *Navjot Sandhu*, 2005 SCC (Cri) 1715 (1845).

[13258] ● ***Joint disclosures.***—"A person accused" need not necessarily be a single person, but it could be plurality of the accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been sad by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody do not go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, herein find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the standpoint of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr. Gopal Subramanium. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence. *State (NCT of Delhi)* v. *Navjot Sandhu*, 2005 SCC (Cri) 1715 (1817).

[13259] ● ***Recovery of weapon of offence confirmed and relied upon.***—The evidence of prosecution witnesses that the accused led to the spot and pointed out the place where weapon of offence "Khukri" was thrown. The fact was confirmed when the "Khukri" was recovered from the said spot with the help of diver. Appeal against conviction was dismissed. *Ghanashyam Das* v. *State of Assam*, (2005) 13 SCC 387 : 2006 (2) SCC (Cri) 331.

[13260] ● ***Recovery of knife without something more—Value.***—A knife was recovered purported to be pursuant to a confession made by the accused. The statement was admissible in evidence but the knife was recovered from the place of incident without something more which would lead to a discovery of fact, it, therefore, may not have much evidentiary value. *Vikramjit Singh* v. *State of Punjab*, (2006) 12 SCC 306 : 2007 (1) SCC (Cri) 732 : 2007 CrLJ 1000 (1006) : 2007 (1) Crimes 181 (SC).

[13261] ● ***Recovery pursuant to disclosure statement—Admissibility.***—Recovery pursuant to disclosure statement made by accused under Section 27, Evidence is admissible in evidence. *Nisar Khan* v. *State of Uttranchal*, (2006) 9 SCC 386 : 2006 (2) SCC (Cri) 568 : 2006 (1) Crimes 201 (SC) : JT 2006 (2) SC 262.

[13262] ● ***Information of accused leading to recovery of fact—Value.***—Information disclosed by the accused leading to discovery of fact is based on the mental state of affair of the accused and is thus admissible in evidence. *Anil* v. *Administration of Daman and Diu*, (2006) 13 SCC 36 : 2007 (2) Crimes 135 (SC) : JT 2006 (10) SC 586.

[13263] ● ***Confession—Admissibility.***—Discovery of the last remains of the deceased was a relevant fact, which was, thus, admissible in evidence. Appellant had pinpointed the exact place which was to be dug up. He marked the exact area. He also made an oral statement that the box was buried beneath the area so marked, location whereof showed that it was a big area, flooring of which had been well plastered with cement having Cuddapah stone slabs. The video showed that the slabs had been laid there much earlier and were not of recent origin.

In his statements before the investigating officer, he made a confession; but what was admissible in evidence is only that part which would come within the purview of Section 27 of the Evidence Act and not the rest. The Court while analyzing the evidence and appreciating the same cannot take none of confession made before the police.

What was therefore, relevant for the purpose of Section 27 of the Evidence Act was that at the instance of the appellant himself a particular place which had been pin pointed by him had been dug and remains of a body and other article were recovered. *Swamy Shraddananda* v. *State of Karnataka*, AIR 2007 SC 2531 (2541, 2542) : (2007) 12 SCC 288.

[13264] ● ***Nature and scope of Section 27, Evidence Act.***—Section 25 of Evidence Act mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Similarly Section 26 of the Evidence Act provides that confession by the accused person while in custody of police cannot be proved against him. However, to the aforesaid rule of Sections 25 to 26 of the Evidence Act, there is an exception carved out by Section 27 of the Evidence Act providing that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 27 is a *proviso* to Sections 25 and 26. Such statements are generally termed as disclosure statements leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.

As the section is alleged to be frequently misused by the police, the Courts are required to be vigilant about its application. The Court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The Court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act. *Geejaganda Somaiah* v. *State of Karnataka*, AIR 2007 SC 1355 : (2007) 9 SCC 315 : 2007 CrLJ 1792 (1796, 1797) : 2007 (3) SCR 899.

[13265] ● ***Conditions necessary to attract application of Section 27, Evidence Act.***—The first condition necessary for bringing Section 27, Evidence Act into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information recovered, from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information, the accused must be in police custody. The last but the most important condition is that only "so much of the information "as relates distinctly to the fact thereby discovered is admissible. *Amit Singh Bhikam Singh Thakur* v. *State of Maharashtra*, AIR 2007 SC 676 : 2007 (1) SCC (Cri) 582 : 2007 CrLJ 1168 (1173) : 2007 (2) Crimes 40 (SC).

[13266] ● ***Chemical Analyst's report—Human blood found on knife and also on butt of knife recovered—Admissibility.***—The Chemical Analyst's Report (Ext. 38) establishes that human blood was found on the knife and also on the butt of the knife having been recovered at the instance of the appellant, is also of some significance. Discovery of the said fact is admissible under Section 27 of the Indian Evidence Act. *Ramkrishna* v. *State of Maharashtra*, (2007) 13 SCC 525 : 2007 CrLJ 3431 (3433).

[13267] ● ***Recovery of weapon at the instance of accused—Admissibility.***—Recovery of weapon at the instance of accused that has no nexus with the commission of crime is not admissible in evidence. *Keshav* v. *State of Maharashtra*, (2007) 13 SCC 284 : 2007 (13) SCR 264 : 2008 (1) Crimes 88 (SC).

[13268] ● ***"Fact discovered".***—"Fact discovered" in the section includes not only the physical object procured, but also the place from which it is produced and the knowledge of the accused as to this. *Inspector of Police, Tamil Nadu* v. *Balaprasanna*, (2008) 11 SCC 645 : 2008 SCC (Cri) 959 : 2008 CrLJ 4332 (4336) : JT 2008 (8) SC 242.

[13269] ● ***Articles recovered from open ground after 10 days—Discovery of no evidence.***—Where the discovery of the relevant articles have been made from the open ground though under the bush, that too after more than 10 days of the incident, such discovery would be without any credence. It does not stand to any reason that the concerned investigating officer did not even bother to look hither and thither when the dead body was found. Such kind of farcical discovery which has been relied by the Court below is unreliable and cannot be accepted.

The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in a serious matter cannot be based upon the discovery. *Mani* v. *State of Tamil Nadu*, AIR 2008 SC 1021 : 2008 CrLJ 1046 (1050) SC : (2008) 1 Crimes 174.

[13270] ● ***Requirement in case of confessional statement leading to discovery.***—The prosecution while relying upon the confessional statement leading to discovery of articles under Section 27, Evidence Act, has to prove through cogent evidence that the evidence has been made voluntarily and leads to the discovery of relevant facts. *Inspector of Police, Tamil Nadu* v. *Balaprasanna*, (2008) 11 SCC 645 : 2008 (3) SCC (Cri) 959 : 2008 CrLJ 4332 (4335) : 2008 (3) Crimes 284 : JT 2008 (8) SC 242.

[13271] ● ***Requirements of Section 27, Evidence Act.***—To attract Section 27 of the Evidence Act, the following are the essential requirements:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be born in mind that the provision his nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescription relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accuseds' own act.

(4) The person giving the information must be accused of any offence.

(5) The must be in the custody of police officer.

(6) The discovery of a fact in conesquence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible. *Inspector of Police, Tamil Nadu* v. *Balaprorsanna*, (2008) 11 SCC 645 : 2008 (3) SCC (Cri) 959 : 2008 CrLJ 4332 : JT 2008 (8) SC 242.

[13272] ● ***Recovery at the instance of accused—Dispute over date of arrest or held illegal custody not fatal.***—It was submitted by the appellants that according to PW-16, the accused Nos. 1 and 6 were seen in the police station on 3.2.2005 and this theory of the accused No. 6 being arrested on 11.2.2005 and on his voluntary information furnished on that day, the motor cycle having been recovered in presence of PW-15, cannot be believed. Of course PW-16 in the cross-examination says that when he went to the police station, he saw the accused Nos. 1 and 6. It was submitted by the State that perhaps it may be a typographical mistake and it may be the accused Nos. 1 and 2 since the records show that it is the accused Nos. 1 and 2, who had been arrested on 3.2.2005. The possibility of typographical mistake is possible. However, even then taking into consideration the contention of the learned counsel for the appellants, at the most it may amount to an illegal custody by the police till 11.2.2005, thereafter recovering the motorcycle on 11.2.2005. That may create some doubt regarding the claim of the police with regard to the recovery. But considering the evidence of PW-15, we find that this suspicion is unfounded. It is quite possible that the police detained, accused No. 6 unnecessarily from 3.2.2005 to 11.2.2005. We find no reason to discard the alleged recovery of motorcycle in furtherance of the information furnished by accused No. 6. *Ningappa Yallappa Hosamani* v. *State of Karnataka*, 2009 (8) SCR 421 : JT 2009 (8) SC 66 : 2009 (3) Crimes 58 (SC).

[13273] ● ***Statement made to police—Use.***—A statement made to police can only be used to a limited extent provided under Section 27, Evidence Act and that too against person making statement. *Lohit Kaushal* v. *State of Haryana*, 2009 (13) Scale 15.

[13274] ● ***Disclosure statement—Admissibility.***—When some facts have been discovered pursuant to statements made by an accused these statements are admissible against person who had made statements in term of Section 27, Evidence Act. *State of Punjab* v. *Gurnam Kaur*, (2009) 11 SCC 225 : JT 2009 (3) SC 373.

[13275] ● ***Murder and robbery discovery statement—Reliability.***—The wrist watches and the camera which was recovered in an after the statement of the accused was recorded, while in custody, would not be faulted with as those items had not only been recovered but duly identified by the owners during investigation as well as the trial. The presence of witnesses during search and seizure of the house of the accused on two occasions was established by the prosecution. No confessional statement made to the police, as alleged, was relied upon by the Courts. It was only the objects recovered, in furtherance to the statement of the accused while in police custody like wrist watches, camera *etc.* that had been relied upon by the Court to complete the of events relating to crime. *Santan Naskar* v. *State of West Bengal*, AIR 2010 SC 3570 : (2010) 8 SCC 249 : 2010 CrLJ 3871 (3874) : (2010) 3 Crimes 201.

[13276] ● ***Disclosure statement—Admissibility.***—The part of disclosure statement, namely, that he was ready to show the place where he had concealed the clothes of the deceased on clearly admissible under Section 127 of the Evidence Act because the same related distinctly to the discovery of the clothes of the deceased from that very place. *Aftab Ahmad Ansari* v. *State of Uttranchal*, AIR 2010 SC 773 : (2010) 2 SCC 583 : 2010 (1) Crimes 97 (SC).

[13277] ● ***Deposition under Section 27—Not voluntary—Hit by Art. 20(3), Constitution of India.***—Section 27 starts with the word "provided". Therefore, there is no proviso by way an exception to Sections 25 and 26 of the Evidence Act. If the facts deposed under Section 27 are not voluntary, then it will not be admissible and will be hit by Article 20(3) of the Constitution of India. *Mushir Khan* v. *State of Madhya Pradesh*, AIR 2010 SC 762 : (2010) SCC 748 : 2010 (1) Crimes 136 (SC).

DISCREPANCIES
§ (See also "CONTRADICTIONS", "INCONSISTENCIES")

[13278] ● ***Discrepancies.***—Where a telegram about murder given almost immediately after the murder was committed does not mention the names of the assailants, the omission is a strong circumstance in favour of accused. *Wilayat Khan* v. *State of Uttar Pradesh*, AIR 1953 SC 122 : 1953 CrLJ 662 (SC).

[13279] ● ***Principle of "falsus in uno falsus in ominibus"—Applicability of to criminal trials of.***—The principle of *falsus in Uno,falsus in omnibus* does not apply to criminal trials and it is the duty of the Court to separate the grain from the chaff instead of rejecting the prosecution on general grounds. *Abdul Gani* v. *State of Madhya Pradesh*, AIR 1954 SC 31 : 1954 CrLJ 323.

[13280] ● ***Recovery of dead body from field of accused.***—It seems that no persons other than the appellants would be anxious to bury the body. They had been seen by many witnesses with the deceased in village Chitbaragaon and village Ballia. They had left village Ballia in the company of the deceased and were last seen in village Sardahi with the deceased. In order to avoid suspicion falling upon them they would be keen to get rid of the body, even if the deceased was not murdered by them. That they buried it in their own filed further shows their complicity. Burying in somebody else's field might have been dangerous. Their field is only about 100 paces from their house. Rabindra Bahadur Singh, appellant, who pointed out the place of burial, was about 13 years old and is Ram Dahin's son. He could not have buried the body alone. Further the appellants denied the whole prosecution story. This again lends some assurance that they were denying the Acts in order to conceal their participation in the crime. *Ram Dahin Singh* v. *State of Uttar Pradesh*, AIR 1971 SC 2013 : (1971) 3 SCC 898 : 1972 SCC (Cri) 146 : 1971 CrLJ 1451.

[13281] ● ***Minor variance in evidence not to dislodge prosecution version.***—Minor variance in evidence cannot dislodge the prosecution version which is proved beyond, reasonable doubt. *Sheo Darshan* v. *State of Uttar Pradesh*, AIR 1971 SC 1794 : (1972) 3 SCC 74 : 1972 SCC (Cri) 394 : 1971 CrLJ 1306.

[13282] ● ***Discrepancies in evidence of all material witnesses.***—Where there were discrepancies in the evidence of all the material witnesses which created confusion firstly on the point whether both appellants 1 and 2 struck, and if so, which of the two injuries was caused by appellant 1 and 2 and secondly, whether both of them were armed with sticks. That being the situation, the Supreme Court disagreed with the High Court's view that it was not possible to make a distinction between the case of appellant 3 and that of appellants 1 and 2. This was so because whereas there was definiteness and unanimity amongst all the witnesses in regard to the part played by appellant 3, there was no such consistency and preciseness in regard to the parts appellants 1 and 2 individually played. *Nagappan* v. *State of Tamil Nadu*, (1972) 4 SCC (N) 27 : 1971 UJ (SC) 880 (885).

[13283] ● ***Discrepancy in evidence.***—According to Dr. Ghosh's evidence none of the three entry wounds showed any blackening or tattooing. Obviously, therefore, the firing did not take place from a very close range but from some distance at least. No doubt, the three eye-witnesses gave different distances ranging from two to six paces. But they could hardly be expected to have marked at the time the precise distance at which the person shooting the fire-arm was. They, therefore, gave an estimate of the distance at which he was from the victim. It is no wonder that the distances they deposed varied. Nothing can, therefore, turn on such variation. *Janak Singh* v. *State of Uttar Pradesh*, AIR 1972 SC 1853 : (1973) 3 SCC 50 : 1973 SCC (Cri) 128 (132) : 1972 CrLJ 1177 : 1973 UJ (SC) 105.

[13284] ● ***Discrepancies having fundamental importance for they tend to falsify evidence of eye-witnesses.***—The discrepancies have a fundamental importance for they tend to falsify the evidence of the eye-witnesses and show that the incident happened under the cover of darkness and was in all probability not witnessed by anyone. When the witness says that an axe or spear is used there is no warrant for supposing what the witness means is that the blunt side of the weapon was used. If that be the implication it is duty of the prosecution to obtain clarification from the witnesses as to whether a sharp-edged or piercing instrument was used or a blunt weapon. *Hallu* v. *State of Madhya Pradesh*, AIR 1974 SC 1936 : (1974) 4 SCC 300 : (1974) SCC (Cri) 462 (466-467) : 1974 CrLJ 1385 : 1974 CrLR (SC) 697 : (1974) 3 SCR 652 : 1974 Cr App R (SC) 172.

[13285] ● ***Discrepancy between evidence of witness given at trial and version given in FIR.***—It would appear that there is a clear discrepancy between the evidence of the witnesses given at the trial and the version given in the FIR regarding the part played by the appellant. The part attributed to the appellant according to the first information report is that he had exhorted the other accused to assault Leyaquat, while according to the evidence adduced at the trial the appellant actually joined in the assault on Leyaquat. It is not safe to base the conviction on the said evidence. *Jainul Haque* v. *State of Bihar*, AIR 1974 SC 45 : (1974) 3 SCC 543 : 1974 SCC (Cri) 1 (3) : 1974 CrLJ 143 : 1973 CrLR (SC) 750 : 1974 UJ (SC) 26 : 1973 Cr App R (SC) 427.

[13286] ● ***Trial Court unduly magnifying minor versions in accounts of witnesses.***—The trial Court has unduly magnified minor versions in the accounts of the witnesses which are often the hallmark of the truth of their testimony. *Ousee Verghese* v. *State of Kerala*, AIR 1974 SC 739 : (1974) 3 SCC 767 : 1974 SCC (Cri) 243 (244) : 1974 CrLJ 624 : 1974 CrLR (SC) 93 : 1974 UJ (SC) 104.

[13287] ● ***Discrepancies pertaining to precise number of blows.***—The discrepancies pertain to the precise number of blows given by the assailant, the standing or lying posture of the victim at the time of the assault, *etc.* Such discrepancies in matters of detail always occur even in the evidence of truthful witnesses. Such variations creep in because there are always natural differences in the faculties of different individuals in the matter of observation, perception and memorization of details. They are hardly a ground for rejecting their evidence when there is consensus as to the substratum of the case. *Sampat Tatyada Shinde* v. *State of Maharashtra*, AIR 1974 SC 791 : (1974) 4 SCC 213 : 1974 SCC (Cri) 382 (386) : 1974 CrLJ 674 : 1974 CrLR (SC) 221 : 1974 UJ (SC) 177.

[13288] ● ***Evidence of actual assault n complainant by appellant not unworthy of credence.***—The fact that the complainant at one place in the course of his deposition stated that he did not know the accused but stated at another place that he knew them for about three years, his evidence as to actual assault on him does not become unworthy of credence for that reason. *Dharam Vir* v. *State of Madhya Pradesh*, AIR 1974 SC 1156 : (1974) 4 SCC 150 : 1974 SCC (Cri) 352 : 1974 CrLJ 812 (813).

[13289] ● ***Minor contradiction bound to appear when ignorant and illiterate woman giving evidence.***—Minor contradictions are bound to appear when ignorant and illiterate women are giving evidence. Even in the case of trained and educated persons, memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence. It would not, therefore, be right to reject the testimony of eye-witnesses merely on the basis of minor contradictions. *Boya Ganganna* v. *State of Andhra Pradesh*, AIR 1976 SC 1541 : (1976) 1 SCC 584 : 1976 SCC (Cri) 102 : 1976 CrLJ 1158.

[13290] ● ***Supreme Court not to interfere with findings or question of fact on minor discrepancies.***—This Court does not interfere with findings or question of fact on the strength of minor discrepancies which only indicate that the witnesses were not tutored. *Faquira* v. *State of*

Uttar Pradesh, AIR 1976 SC 915 : (1976) 1 SCC 662 : 1976 SCC (Cri) 151 (153) : 1976 CrLJ 677 : 1976 CrLR (SC) 23 : 1976 UJ (SC) 86 : 1976 Cr App R (SC) 28.

[13291] ● ***Minor discrepancies and minor improbabilities in evidence not of much consequence.***—Ordinarily, minor discrepancies and minor improbabilities in the evidence of witnesses are not of much consequence. But when the witnesses are manifestly disreputable persons, their testimony before it can be acted upon, must pass the test of severe scrutiny and in the process and in the context of the case even minor infirmities may assume importance. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294 : (1976) 1 SCC 727 : 1976 SCC (Cri) 160 (170) : 1976 CrLJ 295 : 1975 CrLR (SC) 597 : (1976) 2 SCR 11 : 1975 Cr App R (SC) 387.

[13292] ● ***Discrepancy in prosecution evidence.***—The evidence given by Dhanna Lal and Ram Nath in regard to the demand for bribe made by Ram Narain is in conflict with the report made by Dhanna Lal to the Dy. S.P. for the purpose of entrapping the appellant and Ram Narain. The case, as unfolded in the evidence of Dhanna Lal and Ram Nath, was that the demand for bribe was made by Ram Narain on March 29 and 30, and the amount of bribe was settled at Rs. 10 on March 30, while according to the report made by Dhanna Lal to the Deputy Superintendent of Police, the talk about the bribe took place for the first time between Ram Narain and Dhanna Lal on March 31 when he went to take the certified copy. This cannot be regarded as trivial or insignificant discrepancy having no relevance to the veracity of the prosecution case. It is a significant departure made by Dhanna Lal and Ram Nath in their evidence and we do not think that their evidence can be regarded as reliable or trustworthy. *Shantilal Rameshwar* v. *State of Rajasthan*, AIR 1976 SC 739 : (1976) 1 SCC 577 : 1976 SCC (Cri) 95 (99) : 1976 CrLJ 625 : 1975 UJ (SC) 903 : 1975 Cr App R (SC) 431 : 1975 CrLR (SC) 638.

[13293] ● ***Some of prosecution witnesses contradicting earlier statement.***—Where some of the prosecution witnesses have contradicted their earlier statements under Section 164 of the Code of Criminal Procedure, 1973 and the contradictions suggested that the defence version might be true. There were also certain other contradictions on material points in the evidence of some of the prosecution witnesses. The trial Court and the High Court both failed to take note of the serious infirmities in the prosecution case. These infirmities cast a legitimate doubt on the truth of the prosecution story. Accordingly, the accused were acquitted. *Bhajan Singh* v. *State of Punjab*, AIR 1977 SC 674 (677) : (1977) 4 SCC 596 (1) : 1977 CrLJ 439 : 1976 CrLR (SC) 556 : 1977 Punj LJ (Cri) 23.

[13294] ● ***Appreciation of evidence—Infirm testimony of witness as to identity.***—Where the case against the accused hinges to a very large extent on the testimony of a witness and his evidence is neither "wholly unacceptable" nor wholly impeccable, the Court should be on its guard not to rely on his bare word, without some assurance from independent sources, about the identity and connection of the accused with the commission of the serious offence of murder. *Phool Chand* v. *State of Rajasthan*, AIR 1977 SC 315 (319, 320) : (1976) 4 SCC 405 : 1976 SCC (Cri) 682 : 1977 CrLJ 207.

[13295] ● ***Contradiction in evidence of witness.***—Where the story narrated by the witness in his evidence before the Court differed substantially from that set out in his statement before the police and having regard to the large number of contradictions in his evidence—contradictions not on mere matters of detail, but on vital points—it was held unsafe to rely on his evidence and such evidence was excluded from consideration in determining the guilt of accused. *N.D. Dhayagude* v. *State of Maharashtra*, AIR 1977 SC 381 (382) : (1976) 4 SCC 441 : 1977 SCC (Cri) 10 : 1977 CrLJ 238 : 1976 CrLR (SC) 409.

[13296] ● ***Electric bulb burning—Witnesses bound to observe weapon and main parts of body where blows given.***—The witnesses watched the occurrence from a close distance in an electric light. The assault was so dastardly and gruesome that it must have made a definite and lasting impact on the memory of the witnesses that made them remember the assault with its grotesque details. Human memory is like a camera which takes snapshots of striking incidents and then transmits the same through word of mouth faithfully with absolute accuracy and precision. Moreover, it is not a question of giving photographic details at all, but the witnesses have merely described what they actually saw. It is manifest that in view of the electric bulb burning, the witnesses were bound to observe the weapons with which the accused were armed, the main parts of the body where the blows were given and the like. *Dalbir Kaur* v. *State of Punjab*, AIR 1977 SC 472 : (1976) 4 SCC 158 (175) : 1976 SCC (Cri) 527 : 1976 CrLR (SC) 417.

[13297] ● ***Discrepancies not necessarily demolish testimony.***—Discrepancies do not necessarily demolish testimony; delay does not necessarily spell unveracity and tortured technicalities do not necessarily upset conviction when the Court has had a perspicacious, sensitive and correctly oriented view of the evidence and probabilities to reach the conclusion it did, Proof of guilt is sustained despite little infirmities, tossing peccadilloes and peripheral probative shortfalls. The 'sacred cows' of shadowy doubts and marginal mistakes, processual or other, cannot deter the Court from punishing crime where it has been sensibly and substantially brought home." *Narotam Singh* v. *State of Punjab*, AIR 1978 SC 1542 : (1979) 4 SCC 505 : 1980 SCC (Cri) 113 : 1978 CrLJ 1612.

[13298] ● ***Discrepancy in deposition—Effect.***—In the instant case, the discrepancy relates to the names of the person, who were present at the time when his mother was dragged away from their house. In the first information report PW-1 stated that one Pratap Singh was present while the evidence he stated that Kaptan Singh was also present. As the evidence of the Investigating Officer is that Pratap Singh is the same person as Kaptan Singh and they are two different persons. This discrepancy is not of any consequence. *State of Uttar Pradesh* v. *Lalla Singh*, AIR 1978 SC 368 : (1978) 1 SCC 142 : 1978 SCC (Cri) 70 : 1978 CrLJ 359 : 1977 CrLR (SC) 529.

[13299] ● ***Material discrepancies.***—In this case the discrepancies are with regard to as to which accused "pressed the deceased and at which part of the body on the ground and sat on which part of the body, with regard to whether the respondent, Kalki, gave the axe blow to the deceased while the latter was standing or lying on the ground and whether the blow was given from the side of the head or from the side of the legs. In the depositions of witnesses there are always normal discrepancies however honest and truthful they maybe. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental deposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person. *State of Rajasthan* v. *Kalki*, AIR 1981 SC 1390 : (1981) 2 SCC 752 : 1981 SCC (Cri) 593 (595) : 1981 CrLJ 1012 : 1981 CrLR (SC) 350 : (1981) 3 SCR 504.

[13300] ● ***Several discrepancies regarding persons to whom confession made.***—The High Court has noticed several discrepancies regarding the persons to whom the confession was made, the occasions when the confession was made and what precisely was said by the accused. Having regard to these discrepancies we do not think that we would be justified in taking a different view from the view taken by the High Court. *State of Madhya Pradesh* v. *Dayaram*, AIR 1981 SC 2007 : 1981 SCC (Cri) 601 : 1981 CrLJ 1688 : 1981 CrLR (SC) 512.

[13301] ● ***Evidence—Appreciation of—Discrepancies.***—It is no doubt true that the prosecution evidence does suffer from inconsistencies here and discrepancies there but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies, *etc.*, go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. This is a salutary method of appreciation of evidence in criminal cases. *Krishna Pillai Sree Kumar* v. *State of Kerala*, AIR 1981 SC 1237 : 1981 SCC (Cri) 669 (672) : 1981 CrLJ 743 : 1981 CrLR (SC) 252.

[13302] ● ***Discrepancies in statement of witnesses.***—The mere fact that Resham Singh (PW 2) had succeeded in escaping unhurt or that there are discrepancies in the statements of Resham Singh (PW-2) and Bachan Singh (PW-3), as to whether they had gone to Amarkot with Hazara Singh deceased on the very day of occurrence or a day earlier, was no ground for jumping to the conclusion that PW-2 was not in the company of the deceased or near about the scene of occurrence when Hazara Singh and Resham Singh were shot dead. The occurrence took place on August 4, 1973, while Resham Singh (PW-2) and Bachan Singh (PW-3) were examined at the trial on December 27, 1974; that is to say, 17 months after the incident. Such discrepancies in regard to collateral or subsidiary facts or matters of detail occur even in the statements of truthful witnesses, particularly, when they are examined to depose to events which happened long before their examination. Such discrepancies are hardly a ground to reject the evidence of the witnesses when there is general agreement and consistency in regard to the substratum of the prosecution case. *State of Punjab* v. *Wassan Singh*, AIR 1981 SC 697 : (1981) 2 SCC 1 : 1981 SCC (Cri) 292 (298) : 1981 CrLJ 410 : 1981 CrLR (SC) 122 : (1981) 2 SCR 615.

[13303] ● ***Inconsistency between ocular and medical evidence.***—The evidence of eye-witnesses cannot be relied upon. They are in direct conflict with the medical evidence. While both the witnesses categorically stated that the appellants assaulted the deceased with spades with which the earth was being dug out either from the sharp or the blunt side, the Doctor (PW-1) who held the autopsy of the deceased has clearly stated that the injuries could be caused only by a Kassi. No question was put by the prosecution to the Doctor whether any or all of the injuries on the deceased could be caused in the manner alleged by the witnesses, *i.e.,* by a spade. In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to maintain the conviction of the appellants on such evidence. *Mohar Singh* v. *State of Punjab*, AIR 1981 SC 1578 : 1981 SCC (Cri) 638 (639, 640) : 1981 CrLJ 998 : 1981 CrLR (SC) 322 (2).

[13304] ● ***Variation between evidence of witnesses.***—It was urged that both the witnesses in their respective statements in the course of investigation have not referred that they pointed out that the currency notes were kept under the pillow. A further omission was pointed out that while Mahavir Prasad has stated that accused started quarrelling with him which necessitated summoning additional police help, both the witnesses while referring to the quarrel picked up by the appellant so as to support the evidence of Mahavir Prasad have failed to refer to this in their statements in the course of investigation. These are omissions of trivial details and have hardly any bearing on the part of the prosecution case. In our opinion the so-called inner variations between the evidence of these two witnesses and omissions of trivial details would not cause any dent in the testimony of these two witnesses. *Kishan Chand Mangal* v. *State of Rajasthan*, AIR 1982 SC 1511 : (1982) 3 SCC 466 : 1983 SCC (Cri) 92 (101) : 1982 CrLJ 1 : 1982 CrLR (SC) 477 : (1983) 1 SCR 569 : 1982 UJ (SC) 885.

[13305] ● ***Overmuch importance not to be attached to minor discrepancies—Reasons.***—Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties, therefore, cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time and duration of an occurrence, usually, people make their estimates by guessing on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by Counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment." *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*, AIR 1983 SC 753 : (1983) 3 SCC 217 : 1983 SCC (Cri) 728 (733, 734) : (1983) 2 Crimes 232.

[13306] ● ***Discrepancies not going to root of matter.***—Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses. *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*, AIR 1983 SC 753 : (1983) 3 SCC 217 : 1983 SCC (Cri) 728 (733, 734) : 1983 CrLJ 1096 : 1983 CrLR (SC) 396 : (1983) 3 SCR 280 : (1983) 2 Crimes 232.

[13307] ● *Benefit of discrepancy between medical evidence and inquest report be given to appellant.*—Dr. Sati Punjabi had found post-mortem staining marks on the back and both and lower limbs of the dead body. On the authority of *Dr. Modi's Medical Jurisprudence*, 16th Edn. p. 233, Dr. Punjabi opined that the staining marks of post-mortem lividity are sometimes mistaken for bruises caused by violence during life. The Police Officer who prepared the Inquest Panchnama was not an expert on medical jurisprudence. The possibility of his having mistaken the post-mortem staining marks on the waist and shoulder of the deceased, for ante-mortem bruises, could not be ruled out. In any case, in such a situation, as a matter of judicial caution, the benefit of this discrepancy between medical evidence and the inquest report, on this point in issue, ought to have been given to the appellants. *Maula Bux* v. *State of Rajasthan*, (1983) 1 SCC 379 : 1983 SCC (Cri) 199 (201).

[13308] ● *Injured witness—Evidence not to be rejected on account of discrepancies.*—It is not possible to reject the evidence of PW-1 altogether on account of the discrepancies having regard to the fact that he is an injured witness whose presence at the scene of the occurrence when the deceased was attacked was not disputed before us. *Ram Avtar Rai* v. *State of Uttar Pradesh*, AIR 1985 SC 880 (883) : (1985) 2 SCC 61 : 1985 SCC (Cri) 156 : 1985 CrLJ 902 : 1985 CrLR (SC) 180 : 1985 Cr App R (SC) 121 : (1985) 2 Crimes 93.

[13309] ● *Extra-judicial confession—Minor variation in language.*—Some minor variations in the language used by the witness while giving evidence before the committing Magistrate and before the Sessions Court in respect of the extra-judicial confession, if there is a substantial reproduction, could not permit a total rejection of his evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once the impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of evidence is shaken as to render it unworthy of the belief. Minor discrepancies on trivial matters on touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the Investigating Officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Unless there are reasons weighty and formidable, it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer. *State of Uttar Pradesh* v. *M.K. Anthony*, AIR 1985 SC 48 (54, 55) : (1985) 1 SCC 505 : 1985 SCC (Cri) 105 : 1985 CrLJ 493 : 1985 CrLR (SC) 41.

[13310] ● *Variations in evidence of witnesses within reasonable limits.*—It is common human experience that different persons admittedly seeing an event give varying accounts of the same. That is because the perceptiveness varies and a recount of the same incident is usually at variance to a considerable extent. Ordinarily, if several persons given the same account of an event, even with reference to minor details, the evidence is branded as parrot-like and is considered to be the outcome of tutoring. Having read the evidence of these witnesses, we are of the view that the same has the touch of intrinsic truth and the variations are within reasonable limits and the variations instead of providing the grounds for rejection, add to the quality of being near to truth. *State (Delhi Administration)* v. *Laxman Kumar and Indian Federation of Women Lawyers* v. *Shakuntala*, AIR 1986 SC 250 (264) : (1985) 4 SCC 476 : 1986 CrLJ 155 : 1985 CrLR (SC) 501 : (1985) 2 Crimes 758.

[13311] ● *Evidence of eye-witness and other witnesses trustworthy.*—The High Court exercising appellate jurisdiction instead of scrutinizing the evidence of these four eye-witnesses individually, discarded their evidence wholesale, substantially on the ground that the prosecution version as narrated in the FIR at the instance of one of them was in some respects discrepant from the prosecution version as unfolded by these witnesses in the Court. This approach was totally unwarranted and impermissible. The report made in the hand of one Yadunath Prasad which he had written as per the dictation of PW-1 was treated as FIR. At best the evidence of PW-1 could have been tested with reference to the version contained in the FIR and appropriate inference could have been drawn *vis-a-vis* PW-1 on the basis of the alleged discrepancy. The evidence of the other eye-witnesses who had nothing to do with the narration of the FIR could not have been collectively condemned wholesale on the basis of the alleged discrepancies in the context of the previous statement of PW-1 contained in the FIR on the one hand, and their evidence at the trial, on the other hand. *State of Uttar Pradesh* v. *Brahma Das*, AIR 1986 SC 1769 : (1986) 4 SCC 93 : 1986 SCC (Cri) 368 (391) : 1986 CrLJ 1732 : 1986 CrLR (SC) 410 : JT 1986 SC 209 : (1986) 3 Crimes 369.

[13312] ● ***Appellant stranger to witnesses.***—Admittedly, the appellant was a stranger to PWs 1 and 2 and hence they could not have known who he was and what was his occupation. PWs 1 and 2 had not made any inquiries to find out who the appellant was and where he was residing. The strange, version given by PW-1 is that before the appellant began his speech he introduced himself to the demonstrators by giving out his name, address and occupation. Another discrepancy noticed is that while PW-1 has stated that the appellant addressed the gathering from the Chaubara with a microphone in his hand, PW-2 has stated that the appellant stood in the midst of the demonstrators and addressed them and moreover PW-2 makes no reference to the appellant having any microphone. While PW-2 has stated that he did not apprehend any violent reaction from the public on account of the speech made by the appellant, PW-1 would say that from the moment the appellant started introducing himself to the demonstrators he anticipated things and began to take notes of the appellant's speech. The witnesses are not reliable. *Balbir Singh* v. *State of Haryana*, AIR 1987 SC 1053 : (1987) 1 SCC 533 : 1987 SCC (Cri) 193 : 1987 CrLJ 853 : 1987 CrLR (SC) 202 : (1987) 1 SCR 1095 : (1987) 2 Crimes 874.

[13313] ● ***No inconsistency between medical evidence and ocular evidence.***—The medical officer stated the injuries found on the body of the deceased could be the result of either two shots or even more than two shots, but the evidence of eye-witnesses clearly showed that there were two shots. The Supreme Court held that there was no inconsistency between the medical evidence and the ocular evidence and the inconsistency deposed by the medical officer was merely a probability and it was not fatal to the prosecution case. *Maghar Singh* v. *State of Punjab*, (1987) 2 SCC 642 : 1987 SCC (Cri) 403 : 1987 CrLR (SC) 539 : 1987 CAR 342.

[13314] ● ***Material contradiction in statement of three witnesses.***—According to Investigating Officer, first information report was recorded at the scene of occurrence and not at the Police Station. This indicates that Tohid and Rajendra Singh's story regarding their going together to Kotwali is highly suspicious. In view of the material contradiction in the statement of three witnesses Rajendra Singh, PW-14, Chottey Bhaiya, PW-15 and Tohid, PW-16 and further in view of the discrepancy regarding the delay in lodging the first information report, it is apparent that till the first information report was lodged nobody knew who the assailants were and that is why Rajendra Singh could not disclose the names of the assailants to Tohid on his arrival at the scene of occurrence. *Awadhesh* v. *State of Madhya Pradesh*, AIR 1988 SC 1158 : (1988) 2 SCC 557 : 1988 SCC (Cri) 361 (369) : 1988 CrLJ 1154 : 1988 CrLR (SC) 269 : JT 1988 (2) SC 72 : (1988) 3 SCR 513.

[13315] ● ***Discrepancies due to normal errors of perception or observances not to be given importance.***—"The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy." *Appabhai* v. *State of Gujarat*, AIR 1988 SC 696 : 1988 SCC (Cri) 559 (565) : 1988 CrLJ 848 : 1988 CrLR (SC) 178 : JT 1988 (1) SC 249 : (1988) 2 UJ (SC) 27 : (1988) 1 Crimes 606.

[13316] ● ***Witness giving diametrically inconsistent version.***—PW-4 has deposed that A-1 to A-4 assaulted PW-1 and A-1 to A-6 assaulted PW-9. But this witness who was in charge of the Jute Department as on the date of the occurrence did not render any aid to the injured persons nor did he report the matter to the officials, but he immediately left the scene of the occurrence. he gives a diametrically inconsistent version in that whilst he would say in the chief-examination that he saw A-1 snatching away the wrist watch, he in the same breath would deny the same answer in his cross-examination stating "I did not see the snatching of the watch". He admits that he has not told the Secretary of the Mill what he witnesses.

Lalit Kumar Sharma v. *Superintendent and Remembrancer of Legal Affairs, Govt. of West Bengal*, AIR 1989 SC 2134 : 1991 SCC (Cri) 382 (387) : 1989 CrLJ 2297 : 1989 CrLR (SC) 634 : JT 1989 (3) SC 549 : (1989) 3 Crimes 193.

[13317] ● ***Evidence of witnesses nothing but conglomeration of contradiction.***—From PW-10, it is elicited that she during the investigation stated to the Police that her husband with appellant came to her house even at 8 p.m. while the case of the prosecution is that the appellant came to the house of PW-10 only at about 10.30 p.m. or 11 p.m. DW-1 who was then the writer in the Police Station (MHC) states that the appellant was at the station at 10.05 p.m. If it is so, as rightly pointed out by the learned defence Counsel, the appellant could not have accompanied PW-7 at 10.30 or 11.00 p.m. to his house to get the illegal gratification. Thus, a scrutiny of the evidence of PWs-7 and 10 reveals that their version is nothing but a conglomeration of contradiction. *Kewal Krishan* v. *State of Punjab*, AIR 1989 SC 950 : 1989 SCC (Cri) 698 (701) : 1989 CrLJ 1248 : 1989 CrLR (SC) 250 : JT 1989 (1) SC 155 : (1989) 1 Crimes 389.

[13318] ● ***Witness disposing that she saw respondents attacking her husband.***—While PW-8, Safurannessa, has deposed that she saw the respondents attacking her husband and son she has not stated so in her statement under S. 161(3), CrPC. Similarly, while PW-10, Subrat Ali, would say in Court that he had seen the respondents attacking his father and brother, he has told the Investigating Officer during the investigation that he cannot give the names of the assailants of the two victims. *State of Assam* v. *Bhalu Shaikh*, AIR 1989 SC 1097 : 1989 SCC (Cri) 643 (648) : 1989 CrLJ 879 : 1989 CrLR (SC) 335 : (1989) 1 Crimes 689.

[13319] ● ***Minor discrepancies not to render evidence of witness unreliable.***—It is true that this Court has held that where the prosecution rests on the sole testimony of an eye-witness, the same should be wholly reliable. However, that does not mean that each and every type of infirmity or minor discrepancies would render the evidence of such witness unreliable. *Jayaram Shiva Tagore* v. *State of Maharashtra*, AIR 1991 SC 1735 : 1992 SCC (Cri) 62 (64) : (1991) 2 (Supp) SCC 677 : 1991 CrLJ 2192 : 1992 CrLR (SC) 189.

[13320] ● ***Bones recovered sent for chemical analysis.***—It appears that only the bones stated to have been recovered were sent for chemical analysis and the report of the serologist was that it was not possible to give any opinion regarding the origin, sex and age. The report had not even stated that they were human bones. Though PW-10 had stated that there were with him two others at that time and PW-17 had taken PW-10 and the said two others also to the place where the body was stated to have been burnt, they had not been examined. We have read the evidence carefully and the evidence also does not impress us that he is telling the truth. *Bhupendra Singh* v. *State of Uttar Pradesh*, AIR 1991 SC 1083 : 1991 SCC (Cri) 571 : 1991 CrLJ 1337 : 1991 CrLR (SC) 296 : (1991) 2 Crimes 221.

[13321] ● ***Causing disappearance of dead body.***—A case cannot be thrown out merely on the ground that the dead body is not traced when the other evidence clinchingly establishes that the deceased met his death at the hands of the accused. It may be a legitimate right of any Police Officer to interrogate or arrest any suspect on some credible material but it is needless to say that such an arrest must be in accordance with the law and the interrogation does not mean inflicting injuries. It should be in its true sense and purposeful namely to make the investigation effective. Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid.

It is a pity that some of the Police Officers, as it has happened in this case, have not shed such methods even in the modern age. They must adopt some scientific methods than resorting to physical torture. If the custodians of law themselves indulge in committing crimes then no member of the society is safe and secure. If Police Officers who have to provide security and protection to the citizens indulge in such methods they are creating a sense of insecurity in the minds of the citizens. It is more heinous than a game-keeper becoming a poacher.

Under these circumstances the one and the only inference that can be drawn is that the deceased expired because of the injuries caused by the accused and they must have caused the disappearance of his dead body. *Bhagwan Singh* v. *State of Punjab*, AIR 1992 SC 1689 : 1992 SCC (Cri) 629 : 1992 CrLJ 3144 : 1992 CrLR (SC) 454 : (1992) 2 Crimes 329.

[13322] ● ***Discrepancy minor not to render testimony of witness unworthy.***—The High Court fell into patent error in rejecting the testimony PW-26 and PW-27. The High Court rejected the testimony of PW-17 on the ground that the Investigating Officer PW-31 stated PW-17 had six 'Heralikayis' in his hand at the time of recording of his statement, whereas PW-29 stated that after the occurrence when he went to the house of PW-26 he saw two 'Heralikayis' in the hands of PW-17. Ultimately three 'Heralikayis' were produced in the Court. The material part of the testimony of PW-17 is that he was sent to the market to buy 'Heralikayis', whether the 'Heralikayis' were two, three or six was not material. In any case the discrepancy is so minor that it cannot render the testimony of PW-17 unworthy of acceptance. The High Court was not justified in rejecting the evidence of PW-17 on a flimsy ground. *State of Karnataka* v. *Lakshmanaiah*, AIR 1993 SC 100 : (1992) 2 SCC 420 : 1992 SCC (Cri) 755 (758) : 1992 CrLJ 3997 : JT 1992 (4) SC 326 : 1992 (2) Crimes 1130.

[13323] ● ***Witnesses to second dying declaration totally inconsistent about statement made by accused.***—"The witnesses to the second dying declaration are totally inconsistent about the statement allegedly made by the accused to all of them. They differ on material aspects. The variation in their testimony as regards the assault by lathis and the participation of all the accused in the commission of the crime renders it unsafe to rely on them to hold that the dying declaration as alleged by the prosecution had been made by the deceased to these witnesses." *Govind Narain* v. *State of Rajasthan*, AIR 1993 SC 2457 : 1993 SCC (Cri) 1012 (1018) : 1993 CrLJ 2598.

[13324] ● ***Witness lodged complaint but did not tell who stabbed his father—Not serious discrepancy.***—The witness also denied the suggestion that by the time his father spoke the name that Ramku had stabbed him, the other villagers gathered there. In this context, he was confronted with his earlier statement where he is supposed to have stated that his father was stabbed by Ramku. He also admitted that he lodged his complaint but did not tell others who stabbed his father. This is not a serious discrepancy because most of the villagers might have come to know about the incident. *Kathi Ramku Aligbhai* v. *State of Gujarat*, AIR 1993 SC 2472 : 1994 SCC (Cri) 171.

[13325] ● ***No explanation offered concerning contradiction involved in two statement.***—In this case, in the chief examination PW-2 mother of deceased stated that there were domestic quarrels between her daughter, the deceased and the accused and coming to know of the occurrence she and her husband went and questioned the deceased who told them that the accused beat her, poured kerosene and set her on fire. Having stated so in the chief examination, in the cross-examination she introduced a different version that her daughter was conscious and on being questioned by them she told them that she got annoyed with her husband and she herself poured kerosene on her person and that if she survived after the said incident, she would be held responsible for the act and, therefore, she falsely gave the name of her husband as the person who poured kerosene and set fire. Then in the re-examination she was asked as to why she gave two statements for which she gave an evasive answer by stating that she did not want to offer any explanation concerning the contradiction involved in the two statements. This aspect has been considered by the Courts below and it has been rightly held that in view of her evasive answer in the re-examination, the only inference is that certain circumstances like her affection for the grand-children must have compelled her to give such a version. *Ganpat Mahadeo Mane* v. *State of Maharashtra*, AIR 1993 SC 1180 : 1993 SCC (Cri) 491 (495) : 1993 CrLJ 298 : (1993) 1 UJ (SC) 213 : JT 1992 (6) SC 177 : (1992) 3 Crimes 633.

[13326] ● ***Witnesses categorically stating they heard shouts from front side.***—What all the three witnesses have categorically stated is that they heard the shouts from the front side and perhaps they saw the deceased walking that side and knowing that he might have reached that place and thought that they should march from the backyard. However, this is a very minor detail on the basis of which the evidence of PW-10 cannot be rejected. *Kathi Ramku Aligbhai* v. *State of Gujarat*, AIR 1993 SC 2472 : 1994 SCC (Cri) 171.

[13327] ● ***Recovery of arms not supported by reliable evidence.***—On the question whether the recovered arm together with cartridges were kept in parcels or not, there are contrary statements between ASI and the Head Constable, while former would state that they were not kept under seals, the latter would depose that they were kept in sealed parcels. This casts a serious doubt about the version of the prosecution. *Kartar Singh* v. *State of Punjab*, AIR 1993 SC 341 : 1993 SCC (Cri) 785 (787) : 1993 CrLJ 183.

[13328] ● ***Evidence of eye-witnesses supported by FIR medical evidence and other circumstantial evidence.***—The only point raised against the veracity of the eye-witnesses is that they have specifically stated that the accused fired thrice and that the postmortem on the dead body of Deputy Singh showed four gun-shot wounds and Lekhraj had only one gun-shot wound and therefore, there is some discrepancy in their evidence when examined in the light of the medical evidence. This cannot be a discrepancy in the strict sense.

Even if the witnesses have not clearly stated as to how many times each one of the assailants fired that does not affect their veracity. The medical evidence amply establishes that the two deceased persons died of fire-arm injuries. That being the position the details as to the number of shots fired being not exactly given by the witnesses do not affect their veracity. *Prem Chand* v. *State of Uttar Pradesh*, AIR 1994 SC 1534 (1536) : 1994 SCC (Cri) 11 : 1994 CrLJ 1379 : JT 1993 (5) SC 230 : (1993) 3 Crimes 232 : 1993 Cr App R (SC) 334.

[13329] ● ***Interested witnesses—Evidence of.***—PW-3 is in no way related to the deceased or to the PW-2. He gave an explanation for his visit to the tubewell along with PW-2 before the Police Station was to irrigate the land of PW-2 whereas in the present deposition he prevaricated and deposed that he went to the tubewell of the deceased to inform him about the collection of meagre amount of money for presenting the same to the contesting candidate. The High Court noticed that this prevarication shows that he has deliberately improved his version from stage to stage. When interested witnesses are examined it is well settled that the evidence has to be tested in the light of the probabilities and the previous statements and the surrounding circumstances.

In the FIR it is stated that PWs-2 and 3 went to irrigate the field from that tubewell water but while giving statements at the trial they deposed that only PW-2 was to irrigate the field by working the tubewell while PW-3 had accompanied him to the tubewell to meet the deceased as mentioned above. Their presence thus becomes doubtful from the fact that they have not come forward with a proper explanation for giving two versions. *State of Punjab and Gurmej Singh* v. *Jit Singh*, AIR 1994 SC 549 (550) : (1995) 2 SCC (Supp) 365 : 1994 CrLJ 1116.

[13330] ● ***Witnesses not in position because of injuries on them to give consistent and detailed account.***—This is a case where a large number of accused as many as 13 or 14 variously armed went to the house where the deceased as well as PWs-1 and 4 were sitting and in a high-handed manner climbed the roof of the house in which the deceased and the two injured witnesses had taken shelter and made a big hole in the roof and then attacked three persons. In such an occurrence even if the eye-witnesses have improved and have not given consistent version regarding the part played by each of the accused that by itself will not be a ground to acquit the accused. The presence of PWs-1 and 4 has not been in dispute and having regard to the number of injuries on them, it would have been impossible for the witnesses to give a detailed account and in any way if while giving some account they have improved or there are some omissions, that would not be a ground to acquit the accused persons whose names have been consistently mentioned throughout in a case of this nature and S. 149, IPC is applicable here. *Navganbhai Somabhai* v. *State of Gujarat*, AIR 1994 SC 1187 (1189) : 1995 SCC (Cri) 132 : (1994) 3 SCC (Supp) 653 : 1994 CrLJ 1103.

[13331] ● ***Inconsistency between ocular and medical evidence.***—Evidence of eye-witnesses including one who was injured was found credible and convincing. Inconsistency with medical evidence regarding presence of semi-digested food in stomach was insufficient to discard their testimony. Conviction was upheld. *Sardul Singh* v. *State of Punjab*, 1994 CrLJ 626 (SC).

[13332] ● ***Evidence if eye-witness—Not giving many details of occurrence.***—PW-7 admitted that she did not give many details of the occurrence in her statement under S. 161, CrPC and in her statement under S. 164, CrPC. But that by itself is not a ground to reject her evidence. PW-7 witnessed this ghastly occurrence and even if she has failed to mention some details, that by itself is not of much significance. *Govind* v. *State of Madhya Pradesh*, AIR 1994 SC 826 (829) : 1994 SCC (Cri) 707 : 1994 CrLJ 938 : 1994 CrLR (SC) 42 : JT 1993 SCC (Supp) 283 : (1994) 1 UJ (SC) 5.

[13333] ● ***Disappearance of evidence—Attempt to case.***—The accused examined her and he just wrote a certificate Ex. P. 7 and in that certificate he simply mentioned thus : "This is to certify that Smt. Sabita Banerjee aged about 35 years wife of Sri Pronab Banerjee of Jadavpur Police quarter, Calcutta-32 expired on 2-7-76. I found her dead, the cause of which I cannot say." The further case of the prosecution is that during the search of the house of Pronab Banerjee the police recovered another certificate marked as Ex. P. 33 which was in the handwriting of the accused and was written on his letter-head and the same reads as follows :

> "This is to certify that Smt. Sabita Banerjee wife of Pronab Banerjee of Flat No. 1/2/1, Raja S.C. Mullick Road, Calcutta-32, has been suffering from Schizophrania with nutrition deficiency. She expired at 3.15 a.m. on this date due to respiratory failure. Her age was about 37 years."

The fact remains that the dead body was sent for regular post-mortem and a case of murder was also registered against Pronab Banerjee, the husband of the deceased. In such an event, we fail to see as to how, even assuming that Ex. P. 33 was issued by the appellant, it would amount to an attempt to commit an offence under Section 201, IPC. There is marked difference between preparation and attempt and in this case it is highly doubtful whether the appellant attempted to commit an offence under Section 201, IPC. According to the prosecution and as held by both the Courts below, the appellant issued Ex. P. 7 in the first instance and the contents of Ex. P. 7 do not in any manner indicate that he intended to facilitate the cremation by issuing such a certificate. On the other hand, the contents of Ex. P. 7 which was issued in the presence of the Police Officer, had in one sense paved the way for further investigation regarding the cause of death. In such a situation merely because Ex. P. 33 was seized from the house of Pronab Banerjee, the same would not fully incriminate the appellant for an offence under Sections 201 read with 511, IPC. At any rate, a reasonable doubt arises about the guilt of the appellant particularly in view of the fact that there is absolutely no material to show whether anybody had seen Ex. P. 33 earlier and whether there was any attempt to put the same to use for facilitating the cremation. Accordingly the appeal is allowed. The conviction and sentence awarded to the accused are set aside. If he is on bail, his bail bonds shall stand cancelled. *Balai Chandra Biswas* v. *State of West Bengal*, AIR 1994 SC 914 : (1994) 1 SCC 423 : 1994 SCC (Cri) 536 : 1994 CrLJ 1035 : (1994) 1 UJ 540.

[13334] ● ***Discrepancies in deposition of witnesses.***—It may be stated here that about the recovery of the said pistol and cartridges there are discrepancies in the depositions of the witnesses. While PW-2, stated that the pistol was recovered from the right dub of the chadar, PW-3, stated that the said pistol was recovered from the left dub of the chadar. On the question of the number of cartridges stated to have been recovered from the accused, there is also discrepancy. PW-2 stated that two cartridges were recovered from the pocket of the shirt of the accused but PW-3 stated three cartridges were recovered from the accused. After considering the facts and circumstances of the case it appears that there is discrepancy in the depositions of the PWs-2 and 3 and in the absence of any independent corroboration such discrepancy does not inspire confidence about the reliability of the prosecution case. *Megha Singh* v. *State of Haryana*, AIR 1995 SC 2339 (2340, 2341) : (1996) 11 SCC 709 : 1995 CrLJ 3988.

[13335] ● ***No material discrepancies in deposition of eye-witnesses.***—The learned Counsel has also contended that there is material contradiction in the first information report lodged by PW-1 and also the depositions given by PW-2 inasmuch as in the first information report it was stated that A-2, A-6 and A-7 caught hold of the deceased while others assaulted him, but in his deposition PW-1 has stated that A-2, A-6 and A-8 caught hold of the deceased. The learned Counsel has also stated that there is also discrepancy between the depositions of PWs-2 and 3 inasmuch as while PW-2 stated that A-2, A-3 and A-7 caught hold of deceased but PW-3 stated that A-2, A-6 and A-7 caught hold of the deceased. After giving our consideration to the facts and circumstances of this case and considering the depositions and also the FIR and the post-mortem report, it appears to us that there is no material discrepancy in the depositions of the eye-witnesses for which such depositions should not be accepted. The statements made in the FIR have been substantially corroborated by the depositions of the eye-witness. There is force in this contention of the learned counsel for the respondent that after a lapse of time of more than a year, it was not unlikely that one or two eye-witnesses could not clearly remember all the names of the accused who had caught hold of the deceased. *Kavali Bhaskar* v. *State of Andhra Pradesh*, AIR 1995 SC 1961 (1962, 1963) : 1995 CrLJ 3616.

[13336] ● ***Causing disappearance of evidence of murder.***—When the appellants had taken upon themselves to assert that death had occurred on account of brief illness of the deceased, their word in that regard could not be accepted unless it was supported by production of some evidence either of a doctor or a quack who could supposedly have attended on her, or by evidence of co-villagers who would have supported the defence that the deceased was known to have died a natural death. Not only is the defence lacking in this regard but the non-information of the death of the deceased to her parental family further leads to the conclusion that the defence suggestion was pulpably false. This casts a reflection when integrated with the strong motive being the resentment on breaking of the betrothal afore referred to. The fact that there was a marriage in the parental family of the deceased would bring to the fore the hostile attitude of the appellants as the going of the deceased to her parental house could become a source of strife between them and the deceased, which could have prompted them to do away with her. All these circumstances could well be explaned away or correspondingly established had the dead body of the deceased been not cremated surreptitiously in the absence of her family member. The totality of circumstances thus persuade us to conclude that the dead body of the deceased could have revealed commission of offence punishable at least under Section 304/II, IPC and for destruction of that evidence by cremation of the dead body, the appellants had attracted to themselves the third part of Section 201, IPC whereunder they would be liable to suffer imprisonment for a term which may extend to 2½ years. Invoking that part, but reduce the sentence of the appellants to one year's rigorous imprisonment. *Dhura* v. *State of Rajasthan*, AIR 1995 SC 1963 : 1995 Supp (3) SCC 713 : 1995 SCC (Cri) 1154 : 1995 CrLJ 3619.

[13337] ● ***Causing disappearance of evidence.***—PW-15 who is the resident of another village. He has stated that he was posted as an operator in the Irrigation Department from 1982 to 1984 at village Bhore Jairam. He was knowing A-1 as he used to go to his house very often. On 9-9-1984 during night when he had gone for answering the nature's call near the bundh of the river Gandak he saw four persons carrying the dead body on the cot. It was a moonlit night and when he flashed his torch he identified the appellant and his brother Umesh Mahto (A-1), when he asked them whose dead body it was, they told him that it was of some woman and they proceeded towards the river Gandak. They then threw the dead body into the river. Admittedly the Investigating Officer has not recorded his statement under Section 161, CrPC and for that purpose the protest petition was filed by the informant against the investigating agency. Several objections were raised to the credibility of the evidence of this witness but the Courts below for the good reasons accepted the evidence of Chintaman Mahto (PW-15) as trustworthy. At the time of incident he was 18 years' old and was staying with his elder brother Umesh Mahto (A-1). The possibility that he having been pressed by his brother A-1 to carry the dead body of Meera Devi cannot be ruled out. He may not have been able to disobey his brother, younger in age as he was. The conviction and sentence of the appellant under Section 302/34, IPC is set aside and he is acquitted of the said charge. His conviction under Section 201/34, IPC is confirmed but, however, the substantive sentence awarded to him by the Courts below is reduced to the period already undergone. *Mahesh Mahto* v. *State of Bihar*, AIR 1997 SC 3567 : 1997 SCC (Cri) 1134 : 1997 CrLJ 4402 : 1997 CrLR (SC) 647 : (1997) 3 Crimes 237.

[13338] ● ***Accused person assisting persons committing murder in causing disappearance of body clandestinely.***—As regards the charge of conspiracy, PW-10 has testified that the appellants and the other four co-convicts were talking with each other at a short distance and during said discussion, they decided to cause the disappearance of the dead body in a clandestine manner. In pursuance of this conspiracy, they initially tried to burn the dead body and thereafter extinguished the fire, put the dead body into the gunny bag and after carrying it in the police van near the sleeper bridge, they threw it in the Sutlej river. PW-1 and PW-2 also testified to this effect. Each one of them had substantially undergone a substantive sentence. They are the Government employees. Pursuant to the order passed by this Court, they have been released on bail. In view of these circumstances, it was contended that ends of justice would be met if the appellants are sentenced to the period which they have already undergone. After hearing counsel for the parties as regards the quantum of sentence, we are of the opinion that ends of justice would be met if the substantive sentence of each of the accused under Sections 201/120-B, IPC is reduced to the period which they had already undergone. We accordingly do so. *Ram Singh* v. *State of Himachal Pradesh*, 1997 SCC (Cri) 729 : 1997 CrLJ 1829 : 1997 CrLR (SC) 283 : (1997) 1 Crimes 205 (SC).

[13339] ● ***Little discrepancy not enough to discard consistent evidence.***—PW-2 had stated that she had spoken to her husband on the very day Munibai told about the respondent having an 'evil eye' which was about 15 days before the occurrence, whereas the evidence of PW-3 is that his wife had stated to him about this aspect 7-8 days before the occurrence. We do not think of this little discrepancy is enough to discard the otherwise consistent evidence on this point, especially when the statement made by PW-3 that he had asked the respondent to vacate the house was not challenged in cross examination. *State of Madhya Pradesh* v. *Dhirendra Kumar*, AIR 1997 SC 318 (319) : (1997) 1 SCC 93 : (1997) 1 SCC 93 : 1997 SCC (Cri) 54 : JT 1996 (10) SC 93 : (1996) 4 Crimes 195.

[13340] ● ***Causing disappearance of evidence.***—The first paragraph of the section contains the postulates for constituting the offence while the remaining three paragraphs prescribe three different tiers of punishments depending upon the degree of offence in each situation. The two indispensable ingredients for all the three tiers in Section 201 are :

(1) The accused should have had the knowledge that an offence has been committed or at least that he should have had reasons to believe it.

(2) He should then have caused disappearance of evidence of commission of that offence. Prosecution cannot escape from establishing the aforesaid two basic ingredients.

for conviction of the accused under Section 201.

The gravest degree contemplated in Section 201 is punishable with the maximum sentence of imprisonment for seven years. The minimum requirement for the offence to reach the said peak degree is that the offender should have caused disappearance of evidence of another offence which is punishable with death, and that should be established in addition to the above mentioned two basic ingredients. Even if the two basics are established, and the prosecution failed to establish the next requirement the Court cannot convict the accused for the highest tier specified in the section. It is not necessary that the offender himself should have been found guilty of the main offence for the purpose of convicting him of offence under Section 201. Nor is it absolutely necessary that somebody else should have been found guilty of the main offence. Nonetheless, it is imperative that prosecution should have established two premises. First is that an offence has been committed and second is that the accused knew about it or he had reasons to believe the commission of that offence. Then and then alone the prosecution can succeed, provided the remaining postulates of the offence are also established. The cremation was hurried through after physically keeping her kith and kin away from the scene. No doubt, such a culpable hurry enkindles fumes of suspicion which can be regarded as an incriminating circumstance against those who showed such a haste. But that circumstance stands isolated and unconcatenated with any other circumstance. *Ram Saran Mahto* v. *State of Bihar*, AIR 1999 SC 3435 : 2000 SCC (Cri) 254 : 1999 CrLJ 4311 : 1999 CrLR (SC) 593 : 1999 (3) Crimes 125.

[13341] ● ***Discrepancy distinguished from contradiction.***—Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incidence, there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot like statements are disfavoured by the Courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. *State of Himachal Pradesh* v. *Lekh Raj*, AIR 1999 SC 3916 (3921) : (2000) 1 SCC 247 : 2000 SCC (Cri) 147 : 2000 CrLJ 44.

[13342] ● ***Minor embellishment and trivial discrepancies.***—Be it noted that the High Court is within its jurisdiction being the first appellate Court to re-appraise the evidence, but the discrepancies found in the ocular account of two witnesses, unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There is bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradiction are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eye-witnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. *Leela Ram (D) through Duli Chandi* v. *State of Haryana*, AIR 1999 SC 3717 (3720, 3721) : (1999) 9 SCC 525 : 2000 CrLR (SC) 21 : JT 1999 (8) SC 271.

[13343] ● ***Hurdles in believing that—Prosecution witness witnessing occurrence.***—"We have noted some hurdles in the way for believing that PW-1 witnessed the occurrence. The foremost amongst such hurdles is the unambiguous version given by PW-1 in his first written complaint that he saw A4 (Shashiah) who is the father of A-1 to A-3 participating in the occurrence and a specific role (inflicting axe blows on the deceased) has also been ascribed to that accused. But it was latter understood that A-4 was in fact locked up in a Jail during that very night pursuant to a conviction imposed on him by a Criminal Court on the previous day. The jail records as well as the Court proceedings conceived would have proved that fact and, hence, the Police could not array A-4 (Shashiah) as a "*participus criminus.*" That might be the reason why Police allotted a different role to A-4 (Shashiah) as the chief conspirator over the murder of the deceased. When PW-1 gave evidence in Court, he adopted a dubious strategy by saying that A-4 was not present at the scene of occurrence but he saw a person having striking resemblance to A-4 giving axe blows on the deceased . . . .We have no manner of doubt that PW-2's present version, that he identified an assailant having close resemblance with A-4, is nothing but a canard concocted for the purpose of escaping from the charge of a rank perjury." *Malempati Pattabi Narendra* v. *Ghattamaneni Maruthi Prasad*, AIR 2000 SC 2195 : (2000) 5

SCC 226 : 2000 SCC (Cri) 953 (955, 956) : 2000 CrLJ 3449 : 2000 CrLR (SC) 563.

[13344] ● *Inconsistency in evidence regarding time when Panch witnesses called.*—The trial Court found that the prosecution evidence could safely be relied on even though there was some inconsistency in the evidence regarding the time at which the Panch witnesses were called. PSI Chavda and the constable accompanying him had stated before the Court that the Panch witnesses were called before they had stopped the appellants. According to the Panch witnesses they were called thereafter. The panchnama clearly stated that the Panchas were called after PSI Chavda had stopped the appellants while they were proceeding on the scooter on the road near Nursing Takri. This contradiction is of no significance and the trial Court was right in disbelieving the prosecution evidence on this ground. *Sarjudas* v. *State of Gujarat*, AIR 2000 SC 403 (404) : (1999) 8 SCC 508 : 1999 SCC (Cri) 1501 : 2000 CrLJ 509 : (1999) 4 Crimes 185.

[13345] ● *Discrepancies—No explanation from side of prosecution.*—PW-17 was examined as ballistic expert. According to him metallic bullets-Ex EB-1 recovered from the body of Dr. Dubey and Ex EB-2 recovered from the body of deceased-Manorama, were not fired from the pistols recovered from the possession of accused-respondents and Brijendra Kumar. Moreover there were gun shot injuries on accused Brijendra Kumar. PW-2 and Munnu Singh were also injured. No explanation is forthcoming from the side of prosecution for the above discrepancies, therefore we hold that the High Court has rightly acquitted the accused. *State of Uttar Pradesh* v. *Ashok Dixit*, AIR 2000 SC 1066 (1069) : (2000) 3 SCC 70 : 2000 SCC (Cri) 579 : 2000 CrLJ 1436.

[13346] ● *Minor variation in evidence.*—There may be some variation but there exists no major contradiction on record. Modi's house and Rahar field are two places which have been mentioned by the accused but the factum of being surrounded and the firing done sharply uncontradict. Minor variations may be there but if on a perusal of the evidence in it entirety, it appears to be otherwise trustworthy, question of the evidence being non-trustworthy would not arise. The Court can shift the chaff from the grain and find out the truth from the evidence itself. *Sukhdev Yadav* v. *State of Bihar*, AIR 2001 SC 3678 (3683) : (2001) 8 SCC 86 : 2001 SCC (Cri) 1416 : 2002 CrLJ 80 : (2001) 4 Crimes 6.

[13347] ● *Discrepancies in evidence of witnesses.*—True there were discrepancies in the evidence of PWs-8, 10 & 12 but there was no discrepancy worth quoting for consideration as they are immaterial. Such discrepancies are common features in the testimony of any two witnesses. It was too much of a strain for the judicial mind to ferret out some minor discrepancies as between the testimony of those three witnesses. *State Govt. of NCT of Delhi* v. *Sunil*, (2001) 1 SCC 652 : 2001 SCC (Cri) 248 (250) : 2001 CrLJ 504 : (2001) 1 Crimes 176 : 2000 Supp (5) SCR 144.

[13348] ● *Inconsistency about place of occurrence.*—". . . . according to the High Court there was a doubt raised about the place of the incident which was an infirmity in the prosecution story. The room and the lintel are situated close to each other. PW-1 is not an eye-witness to the incident. When she reached home, she found her daughter the victim of rape, lying on the lintel of the house below the cot. A perusal of the site plan shows that the distance between the two places in insignificant. Moreover, such minor inconsistency coming from the mouth of PW-1, who is not an eye-witness, was of no significance and caused no infirmity in the prosecution case when the overall narration of the incident given by her is found to be natural and trustworthy. ....The learned Sessions Judge had rightly noted in his judgment, relying on the evidence adduced and the observations made at the time of spot inspection, that the room and the lintel are situated near to each other and, therefore, the so-called inconsistency was immaterial and insignificant." *State of Himachal Pradesh* v. *Gian Chand*, AIR 2001 SC 2075 : (2001) 6 SCC 71 : 2001 SCC (Cri) 980 (988, 989) : 2001 CrLR (SC) 434 : JT 2001 (5) SC 169 : (2001) 2 Crimes 256.

[13349] ● *Contradiction about lodging of FIR.*—There is no doubt about the fact that there is definitely a contradiction about the lodging of the FIR but the effect of such contradiction or discrepancy may have to be viewed in the light of the facts and circumstances of each. There may be cases where such a discrepancy may prove fatal to the prosecution case whereas in other cases it may not have the same effect. The consequences of such discrepancies or defective or doubtful investigation is not necessarily only one leading to discredit the main prosecution case if the prosecution evidence inspires and circumstances lead to such a conclusion and the prosecution story rings true. No doubt that in that event it would be necessary to evaluate as to what extent such faulty investigation or discrepant statement on certain facts relating thereto, shall cause damage to the prosecution case as a whole. *Dharmendrasinh* v. *State of Gujarat*, AIR 2002 SC 1937 : (2002) 4

SCC 679 : 2002 SCC (Cri) 859 : 2002 CrLJ 2631 : (2002) 2 Crimes 294 (SC).

[13350] ● ***Discrepancy in statement of witness not to be treated as fatal.***—Testimony of an injured witness has its own efficacy and relevancy—Fact that the witness sustained injuries on his body would show that he was present at the place of occurrence and had seen the occurrence by himself—Convincing evidence would be required to discredit an injured witness—Every discrepancy in statement of witness cannot be treated as fatal—Discrepancy which do not affect the prosecution case materially cannot create any infirmity. *Mohar* v. *State of U.P.*, AIR 2002 SC 3279 : (2002) 7 SCC 606 : 2003 SCC (Cri) 121 : 2002 CrLJ 4310 : (2002) 4 Crimes 301.

[13351] ● ***Variations in narrating incident.***—When an incident is narrated by the same person to different persons on different occasions, some difference in the mode of narrating the incident is bound to arise. However such differences do not militate against the trust worthiness of the narration. Unless the variations can be held to be so abnormal or unnatural as would not occur if the witness would have really witnessed. What it was narrating. *Shyam Sundar* v. *State of Chattisgarh*, AIR 2002 SC 3292 : (2002) 8 SCC 39 : 2003 SCC (Cri) 196 : 2002 CrLJ 4312 : JT 2002 (7) SC 317.

[13352] ● ***Discrepancy in medical evidence with regard to nature of injury on deceased.***—A perusal of the evidence of the doctor shows that there is some discrepancy in his evidence in regard to the nature of the injury on the deceased as to whether the edges of the wound were averted or inverted. But this, is not fatal to the case of the prosecution.

Some discrepancy as to the nature of entry and exit on facts of this case would not make the prosecution case any weaker. It is more so because of the fact that the casings of the bullets which were recovered by the Investigating Officer were positively proved by the ballistic expert as of those bullets which discharged from the weapons recovered from the appellants and these casings having been found near the bodies of the deceased on the roof of their house would establish that the deceased died of bullets discharged from the weapons seized from the appellants. In such circumstances, the question of entry or exist of the wounds would lose its significance if the presence of the accused persons with these weapons at that place and time is otherwise established by the prosecution. *Rachhpal Singh* v. *State of Punjab*, AIR 2002 SC 2710 : (2002) 6 SCC 462 : 2002 SCC (Cri) 1362 : 2002 CrLJ 3540 : (2002) 3 Crimes 36 (SC).

[13353] ● ***Minor discrepancies in evidence.***—It is argued that as per the inquest report the main injury on the deceased was shown to have been caused on the back side of the head, whereas the medical evidence showed that injury was caused by a fire-arm from the front side of the deceased. The Investigating Officer could not detect the entry wound possible because the head must have been smeared with blood. The evidence of two eye-witnesses clearly showed that appellant fist shot deceased Dharam Paul and there was a second shot at PW-4 Ram Kishan. It is true that PW-3 deposed that appellant first shot his brother Dharam Paul on the backside of the skull. But the medical evidence shows that this shot hit on eye brows. Based on this, it was contended that it was not the appellant but somebody else hiding on the rear side must have caused this injury. We do not find any force in this contention. The incident happened all of a sudden and when firing took place it would be difficult to state on which part of the body the bullet hit. In the instant case, the evidence of PW-4 shows that he himself sustained an injury at the hands of the appellant. It is clearly proved that it was the appellant and none else who was responsible for the crime. The minor discrepancies in the evidence only lend assurance to the credibility of prosecution case. *Brij Lal* v. *State of Haryana*, AIR 2002 SC 291 (292) : (2002) 1 SCC 700 : 2002 SCC (Cri) 245 : 2002 CrLJ 581 : (2002) 1 Crimes 200.

[13354] ● ***Medical evidence contradicting oral evidence.***—If the eye-witnesses are to be believed that after the deceased struck against the cycle and fell down, a spear-blow was given to him on his chest, then the medical evidence totally contradicts the ocular testimony. Dr. Satish Kumar Gupta, PW-14 admitted in his cross-examination that looking to the nature of the injury, the weapon would have entered from "upward to downward laterally to right side". That could not have been the manner in which the injury would have been received by the deceased if he received it while he was laying down on the ground. On the other hand, the possibility that the deceased received the injury by the knife which he was carrying, keeping in view the dimensions of the injury, after striking against the cycle, as alleged by the defence gets probabilised. An independent analysis of the prosecution evidence has created an impression that the prosecution has not come with clean hands and evidence of the witnesses produced by it does not inspire confidence. Under these circumstances, the High Court was not justified in setting aside an order of acquittal recorded by the Trial Court. The view of the trial Court was a reasonable view. It does not suffer from any perversity either. The High Court should not have lightly interfered with the order of acquittal. This appeal, therefore, succeeds and is allowed. *Chandu* v. *State of Maharashtra*, (2002) 9 SCC 408 : 2003 SCC (Cri) 1213 (1215-16) : (2001) 3 Crimes 483.

[13355] ● ***Contradictions in doctor's opinion as to weapon causing injuries.***—If we believe the oral evidence, then it shows according to the two eye-witnesses the appellant assaulted the deceased on the left ear lobe with the blunt side of the Bankri. If we compare this oral evidence with medical evidence, we find there is no injury on the left ear which could be attribute to a blunt weapon. On the contrary, there is an incised would on the left ear lobe. Therefore, the medical evidence and the oral evidence do not tally. Even in regard to the doctors opinion as to the weapons that could have caused the injuries on the deceased there are considerable contradictions. In the first instance, when the weapons were sent for seeking medical opinion, the doctor opined that all the injuries on the deceased could be caused by weapons like Jaily, Lathi and Kulhari and he even identified the injury on the ear as an injury that could be attributed to a Kulhari. But when the Bankri was sent to him for his opinion, he opined that a lacerated injury found on the head of the deceased could be caused by the said bankri. But according to the eye-witnesses, the injury caused on the deceased by the appellant was not on the head but on the left ear. Therefore, this part of the prosecution evidence cannot be accepted. *Bimla Devi* v. *State of Haryana*, AIR 2003 SC 4138 : (2003) 10 SCC 118 : 2003 CrLJ 2319 : JT 2003 (4) SC 1 : (2003) 2 Crimes 455.

[13356] ● ***Conflict between oral testimony and medical evidence.***—The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference and straightway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony. *Thaman Kumar* v. *State of Union Territory of Chandigarh*, (2003) 6 SCC 380 : 2003 SCC (Cri) 1362 : 2003 CrLJ 3070 : (2003) 3 Crimes 86 (SC).

[13357] ● ***Discrepancy between medical evidence and evidence of eye-witnesses.***—With regard to the alleged discrepancy between medical evidence and evidence of the eye-witnesses, it is to be noted that at least three injuries referred to by the autopsy Surgeon and forming part of the medical evidence and as stated by the eye-witnesses are common. These three injuries are by themselves sufficient to cause death. The Autopsy Surgeon has not mentioned the knife injury on the backside of the buttock and another injury. The mere non-mention of the two injuries by the autopsy Surgeon does not and cannot lead to rejection of the prosecution case. The two injuries might have escaped the notice of the Doctor. Both the Courts below have found the prosecution case to be fully established and proved beyond any doubt whatsoever and there is no reason to take a different view. *Yunis* v. *State of M.P.*, AIR 2003 SC 539 : (2003) 1 SCC 425 : 2003 SCC (Cri) 341 (344) : 2003 CrLJ 817.

[13358] ● ***Discrepancy between medical evidence and ocular evidence.***—Both the post mortem report and the medical evidence adduced by the prosecution clearly show that the entire stomach of the deceased including both the intestines were empty which would indicate that at the time of the murder the deceased had not taken his meals and his murder must have taken place at least 3 to 4 hours after he had his last meal. PW-5 at one place in her evidence states that her husband had his lunch in the afternoon and was resting because he was not feeling well. Therefore, it is possible that the deceased was done to death much after his afternoon meal and much before his night meal. If this be the fact then there is a serious dispute as to the actual time of incident which is a very much important factor in finding out whether the case as presented by the prosecution is true or not. This discrepancy also affects the credibility of evidence of eye-witnesses because if really the incident had occurred much before the dinner time, a doubt is created in our minds whether these eye-witnesses could have noticed the incident at all and if they noticed the incident why they are stating the time of incident as 9.30 in the night. In the instant case, time of death being a material factor to verify the presence of the eyewitnesses it was obligatory for the prosecution to have clarified the discrepancy between the medical evidence and the oral evidence. The prosecution having failed to do so, a serious doubt as to the time of incident and the presence of the eye-witnesses at the time of incident and their narration of the incident also becomes doubtful. Therefore, the prosecution has failed to establish its case against the appellant Moti. *Moti* v. *State of U.P.*, AIR 2003 SC 1897 : (2003) 9 SCC 444 : 2003 SCC (Cri) 1821 : 2003 CrLJ 1694 : (2003) 2 Crimes 62 (SC).

[13359] ● ***Considerable discrepancy.***—PW-1 in his evidence stated: "…..When we went at the shop of the accused persons and the accused Abdul Wahid said to his father that "Pitaji" these are the persons who instigate the tenants and do not allow anybody to pay the rent, shoot them," PW-5 who accompanied the deceased and PW-1 to the shop of the accused in his evidence stated: "xxx Abdul Wahid entered his shop and said to his father Mukhttar Ali that Pitaji these two instigate our tenants, shoot them. In the cross-examination, he clarifies this statement in the following words: "Abdul Wahid said to his father to fire the gun; only this word he used "shoot these two", name of Devendra, Anil or anyone else had not been mentioned." PW-6 another eye-witness in his evidence stated thus: "As soon as Abdul Wahid reached he went inside and said to his father—these instigate the shopkeepers, allow none to pay the rents, shoot them. Saying this having gone inside the shop he stood near the counter. Haji Mukhttar Ali was standing inside the shop holding gun." In his cross-examination, he states that "Abdul Wahid stood and beckoned with his eye and after the beckon Haji fired the shot." PW-7 another witness who spoke about this part of the incident in his evidence stated: "Abdul Wahid while entering his shop said. "Pitaji shoot them, they instigate the tenants, do not let them pay the rent." But in his cross-examination, he stated: "Abdul Wahid had said naming Devendraraj, "Shoot Devendraraj". Abdul Wahid had not taken name of Anil for shooting him." We find a considerable discrepancy in the above statements of PWs-1, 5, 6 and 7 in the language used by the appellant to exhort and the manner and the place where the said exhortation was given. Counsel for the appellant pointed out that the use of the word "Pitaji" by the appellant itself indicates that these witnesses have been tutored to make this statement because it is not the language of a Muslim to address his father as "Pitaji". This thing could only have happened when a witness is wrongly tutored by somebody.

The contention of the counsel was found acceptable and conviction of the accused under Section 302/34 was held proper. *Abdul Wahid* v. *State of Rajasthan*, AIR 2004 SC 3211 : (2004) 11 SCC 241 : 2004 CrLJ 2850 (2852) : 2004 (3) Crimes 75.

[13360] ● ***Minor discrepancies—When can be termed as contradictions.***—Minor discrepancies cannot be termed as contradictions unless it affects the credibility of the evidence tendered by a witness. The word 'contradiction' is of a wide connotation which takes within its ambit all material omissions and under the circumstances of a case a Court can decide whether there is one such omission as to amount to contradiction. *Shashidhar Purandhar Hegde* v. *State of Karnataka*, AIR 2004 SC 5075 : (2004) 12 SCC 492 : 2004 CrLJ 4677 (4682) : 2004 (4) Crimes 202.

[13361] ● ***No evidence or record that blood was found on spot—Eye-witness stating that he had witness armed attack.***—Certain discrepancies were pointed out by learned counsel for the appellant at the time of arguments. The counsel for the State while answering the said submission of the counsel for the appellant submitted that according to PW-2, the duration of attack which he witnessed before he ran away took place at the office and that there is evidence on record that blood was found at the spot where PW-2 states that he had witnessed the armed attack upon the deceased. The presence of blood at the spot where PW-2 states the attack had taken place establishes the correctness of the version of this witness. In such an event, the mere failure to explain the presence of the dead body at an adjoining place does not disprove or contradict the prosecution case and in our opinion is certainly not fatal to the prosecution case. *Yakub Imailbhai Patel* v. *State of Gujarat*, AIR 2004 SC 4209 : (2004) 12 SCC 229 : 2004 CrLJ 4205 (4213).

[13362] ● ***Veracity of evidence when suspected.***—It is only when the medical evidence totally improbabilises the ocular evidence, then that the Court starts suspecting the veracity of the evidence and not otherwise. *Surinder Singh* v. *State of U.P.*, 2004 SCC (Cri) 717 (725).

[13363] ● ***Hypothetical discrepancy regarding height from which gun shot.***—The hypothetical discrepancy regarding the height from which the gun was shot is one aspect which needs to be noted, only to be rejected. If the eye-witnesses' version, even though of the relatives, is found to be truthful and credible after deep scrutiny the opinionative evidence of the doctor can not wipe out the effect of eye-witnesses' evidence. *Main Pal* v. *State of Haryana*, AIR 2004 SC 2158 : 2004 SCC (Cri) 1882 (1887) : 2004 CrLJ 2036 : (2004) 2 Crimes 140.

[13364] ● ***Minor discrepancy not of much significance.***—In the instant case, the only discrepancy which has been pointed out to this Court is that whereas PW-3 had spoken about giving a slap on the cheek of the deceased by one of the accused, no other witness stated so. Such minor discrepancy is of not much significance when his presence in the house at the time when the occurrence took place is beyond any doubt. *State of U.P.* v. *Nawab Singh*, 2005 SCC (Cri) 33 (39).

[13364A] ● ***Discrepancy not affecting prosecution fatally does not create infirmity.***—Every discrepancy in the prosecution witness is not fatal. The discrepancy not affecting the prosecution. Fatally does not create infirmity. *Rama Shish Rai* v. *Jagdish Singh*, AIR 2005 SC 335 : (2005) 10 SCC 498 : 2005 CrLJ 669 (672) : 2004 (4) Crimes 306.

[13365] ● ***Minor discrepancies not affecting credibility of evidence.***—The minor discrepancies do not affect the credibility of evidence and should not have been magnified. *State of M.P.* v. *Dharkale*, 2005 SCC (Cri) 225 (227).

[13366] ● ***Minor discrepancies in testimony of witness.***—Minor discrepancies in the testimony of PWs-3 and 4 were sought to be highlighted. Taking into account the fact that the evidence was recorded in Court after about seven years of the occurrence. There have been rightly held to be of no consequence by both the trial Court and the High Court. *Sri Narayan Saha* v. *State of Tripura*, 2005 SCC (Cri) 410 (413).

[13367] ● ***Discrepancy not contradiction.***—"The testimony of PWs-1, 2 and 3 is consistent. The learned counsel for the respondent pointed out that in the evidence of PWs-1 and 2 there is contradiction that the accused did not state before them that he came seeking protection from them. In our view, this discrepancy cannot be termed as a contradiction which would be fatal to the prosecution case. Every discrepancy in the statement of a witness cannot be treated as fatal to the prosecution case. A discrepancy which is not fatal to the prosecution does not create any infirmity. The incident had taken place on 24.1.1992 and PW-2 was examined on 22.1.1996 after almost four years. Human memories are apt to blur with the passage of time. After lapse of almost four years, it cannot be expected that a witness can depose with mathematical precision." *State of A.P.* v. *Kanda Gopalaudu*, AIR 2005 SC 3616 : (2006) 2 SCC (Cri) 121 (126) : 2005 (4) Crimes 77 : 2005 (7) Scale 677.

[13368] ● ***Minor discrepancies.***—There is no doubt that there are some minor discrepancies in the instant case. But that does not in any way dilute the otherwise cogent evidence of injured witnesses about the role played by two of the accused persons. *Lachman Singh* v. *State of Haryana*, AIR 2006 SC 2763 : (2006) 10 SCC 524 : 2006 CrLJ 4041 (4043) : 2006 (3) Crimes 164.

[13369] ● ***Discrepancy not materially affecting prosecution case—No infirmity.***—Every discrepancy in the witness statement is not fatal to the prosecutions case. The discrepancy which does not materially affect the prosecution case, does not create any infirmities. *State of A.P.* v. *S. Rayappa*, (2006) 4 SCC 512 : (2006) 2 SCC (Cri) 353 (357) : JT 2006 (2) SC 392 : 2006 (1) Crimes 219.

[13370] ● ***Some variations in matters of detail is of no significance.***—Some variation in matters of detail is but natural, and much depends on the capacity of a witness to observe and remember events, particularly in matters of minor details. Moreover, the two witnesses came from two different directions, and they may have observed the incident at different stages, though in quick succession. However, such minor discrepancies do not warrant rejection of their evidence. Their deposition is natural and consistent with the case of the prosecution and we find no reason why they should be disbelieved. *Prabata* v. *State of Rajasthan*, AIR 2006 SC 747 : (2006) 2 SCC (Cri) 252 (255) : 2006 CrLJ 562 : JT 2005 (10) SC 314 : 2006 (1) Crimes 48.

[13371] ● ***Discrepancy not affecting prosecution materially is of no significance.***—The discrepancy which does not affect the prosecution materially does not create infirmity in the prosecution case. *Surinder Singh* v. *State of Haryana*, (2006) 2 SCC (Cri) 444 (447) : 2006 (1) Crimes 153 : JT 2006 (1) SC 645 : 2006 (1) JCC 227.

[13372] ● ***Immaterial discrepancies.***—By making observations in an abstract and general manner it concluded that the discrepancies were immaterial, without even discussing the factors which weighed with the trial Court to hold that the prosecution evidence was not cogent and credible. *V.N. Rathush* v. *State of Kerala*, AIR 2006 SC 2667 : (2006) 10 SCC 617 : 2006 CrLJ 3634 (3636) : 2006 (3) Crimes 37.

[13373] ● ***Minor discrepancies.***—It is true that minor discrepancies will not necessarily lead to the rejection of the prosecution case, but when there are major discrepancies and unexplained injuries on the accused, it is an important factor to be taken into account. *Raj Pal* v. *State of Haryana*, (2006) 9 SCC 678 : 2006 (3) SCC (Cri) 361 : 2007 CrLJ 2926 (2929) : 2006 (2) Crimes 157 (SC).

[13374] ● ***Minor discrepancies in evidence.***—Minor discrepancies and minor defects in the prosecution case cannot afford a ground for rejecting the entire prosecution case. *Major Singh* v. *State of Punjab*, (2006) 10 SCC 499 : 2007 CrLJ 59 : 2006 (4) Crimes 274.

[13375] ● ***Minor discrepancies not affecting prosecution case.***—Minor discrepancies which does not materially affect the prosecution case does not create any infirmity. *State of Andhra Pradesh* v. *S. Rajappa*, (2006) 4 SCC 512 : 2006 CrLJ 219 (SC) : 2006 (1) Crimes 219 (SC).

[13376] ● ***Discrepancy in statement of witness.***—Discrepancy which does not affect the prosecution case materially cannot ignored. *Surender Singh* v. *State of Haryana*, (2006) 9 SCC 247 : 2006 (2) SCC (Cri) 444 : 2006 (1) Crimes 153 (SC).

[13377] ● ***Discrepancies in major part of testimony—Duty of Court.***—Even if a major portion of evidence is found to be deficient in case the residue is sufficient to prove guilt conviction can be maintained. In such a case the Court has a duty to separate grain from chaff. *Syed Ibrahim* v. *State of Andhra Pradesh*, AIR 2006 SC 2908 : 2006 CrLJ 4087 : 2006 (3) Crimes 156 (SC). **TO THE SAME EFFECT** : *Bathula Nagamalleswara Rao* v. *State*, AIR 2008 SC 3227 : 2008 (1) SCC 722 : 2008 (3) SCC (Cri) 898 : 2008 (2) Crimes 188 (SC).

[13378] ● ***Discrepancy in FIR and prosecution case—Fatal to prosecution case.***—Where in the FIR informant stated in clear words that the accused entered in his house in absence of the informant, but in statement before the Court stated that the accused was leaving his house when the informant was entering into the house, held it was major discrepancy in FIR, improvement in the case. The accused was implicated on mere suspicion, he was entitled to benefit of doubt and acquitted of the charge under Section 302. The Supreme Court held—

"It appears to us that the appellant was implicated only on the strong suspicion on the part of the first information against the appellant. It has come in evidence that the appellant, who is a young man, used to visit the daughter of the first informant and this was resented by the first informant and also by some neighbours. In fact, the first informant told the appellant not to meet his daughter. It is quite possible that on the basis of suspicion the first informant has implicated the appellant. However, from the version given in the FIR it is evident that the first informant had not seen the accused leaving the house of the first informant when the latter entered into it. In fact, in the FIR it is mentioned clearly that the appellant entered into the house of the first informant in the absence of the latter. This, it appears to us that he first informant never saw the appellant leaving the house of the first informant when the latter entered into it and the subsequent version is an improvement. A vital link in the chain of circumstances is missing in this case.

No doubt a minor discrepancy in a FIR will not be fatal to the prosecution case. But the discrepancy in the FIR in the present case is not a minor discrepancy, but a major one. Had the first informant seen the accused entering into the house at the time of the incident he would have definitely mentioned the fact in the FIR." The appellant was hold entitled to the benefit of doubt. *Sanjay Sen* v. *State of West Bengal*, (2007) 6 SCC 32 : 2007 (3) SCC (Cri) 47 : 2007 CrLJ 3727 (3728).

[13379] ● ***Discrepancy in FIR and evidence given after five years.***—According to the FIR, A-5 was merely a member of the mob not having any arms in his hands, he neither ran towards the deceased nor caught hold of him nor is said to have assaulted him. Even in his subsequent statement made before the police, the informant [PW-1], had nowhere stated that A-5 caught hold of the deceased but, in Court in the year 1994 after about five years he disclosed, for the first time, that this accused caught hold of the deceased. PW-2 also did not name this accused in his statement made before PW-6 on the basis of which entry was made in the hospital register (Exhibit P-10). Moreover, in his statement made before the police PW-2 had not stated that this accused caught hold of the deceased but in Court he stated for the first time after five years that this accused caught hold of the deceased PW-3 also did not state in his statement made before the police that this accused caught hold of the deceased but made statement in the Sessions Court after five years for the first time that this accused caught hold of the deceased. In view of these facts, we feel that it would not be safe to uphold the conviction of A-5. *Mallanna* v. *State of Karnataka*, (2007) 8 SCC 523 : (2007) 3 SCC (Cri) 731.

[13380] ● ***Minor discrepancies.***—The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. *Radhu* v. *State of Madhya Pradesh*, (2007) 12 SCC 57 : 2007 CrLJ 4704 (4705) : (2007) 4 Crimes 1.

[13381] ● ***Contradictions and omission—If fatal.***—In the instant case, there were minor contradictions and omissions relating to details of the occurrence. It was held that as the eye-witnesses to the occurrence did not stand disapproved in any manner and they were examined two and a half years after the occurrence, the contradictions and omissions in stating the incident in great detail; would not be fatal. *Vikram* v. *State of Maharashtra*, AIR 2007 SC 3193 : (2007) 12 SCC 332 : 2007 CrLJ 3193 : 2007 (6) SCR 185.

[13382] ● ***Minor discrepancies in evidence.***—Minor discrepancies on trivial matter not affecting the case of matter, hyper-technical approach by taking sentence out of context here or there from the evidence attaching importance to some technical error committed by the I.O. without going to the root of the matter would not ordinarily lead to rejection of the evidence as a whole. *State of Maharashtra* v. *Siraj Ahmad Nisar Ahmad*, AIR 2007 SC 1859 : (2007) 5 SCC 161 : 2007 (2) SCC (Cri) 472.

[13383] ● ***Normal discrepancies in evidence—What amount to.***—Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time of occurrence due to mental disposition such as shock and horror at the time of occurrence and those one always there however honest or truthful & witness may be. Material discrepancies are those which are not normal and not expected of a normal person, court have liable the catory to which a discrepancy may be categorised. While normal discrepancies do not erode the credibility of a party's case, material discrepancies do so. *Dalbir Singh* v. *State of Haryana*, AIR 2008 SC 2389 : (2008) 1 SCC 425 : 2008 CrLJ 3061. **To the same effect** : (1) *Dinesh Singh* v. *State of Uttar Pradesh*, (2008) 15 SCC 745 : 2008 (4) Crimes 45 (SC) : JT 2008 (8) SC 684. (2) *Gunnana Pentayya* v. *State of Andhra Pradesh*, 2008 (3) Crimes 325 (SC) : JT 2008 (9) SC 304. (3) *Bir Singh* v. *State of Punjab*, AIR 2009 SC 157 : (2008) 16 SCC 65 : 2008 (4) Crimes 327 (SC) : JT 2008 (11) SC 384. (4) *Kulesh Mondal* v. *State of W.B.*, AIR 2007 SC 3228 : (2007) 8 SCC 578 : 2007 (3) SCC (Cri) 741 : 2008 CrLJ 325 : 2007 (2) Crimes 382.

[13384] ● ***Discrepancies in testimony of witness.***—When statement of witnesses are recorded long after the incident, some discrepancies are bound to occur in the statement of witnesses. *Shankaraya Naik* v. *State of Karnataka*, AIR 2009 SC 818 : (2008) 14 SCC 685 : 2008 (4) Crimes 301 (SC) : JT 2008 (10) SC 524.

[13385] ● ***Minor discrepancies.***—While appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting case of the prosecution case ought not to prompt the Court to reject evidence in its entirety. *State* v. *Saravanan J.R.*, AIR 2008 SC 152 : (2008) 17 SCC 587 : JT 2008 (11) SC 290.

[13386] ● ***Minor discrepancies.***—Minor discrepancies or some improvements would not lead to rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which their statements are recorded in Court. *Shivappa* v. *State of Karnataka*, AIR 2008 SC 1860 : (2008) 11 SCC 337 : 2008 CrLJ 2992.

[13387] ● ***Minor and material discrepancies.***—Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. *Dinesh Singh* v. *State of Uttar Pradesh*, JT 2008 (8) 684 : 2008 (11) Scale 113 : 2005 (5) Supreme 584 : 2008 (4) Crimes 45 (SC). **To the same effect** : (1) *Dalbir Singh* v. *State of Haryana*, AIR 2008 SC 2389 : (2008) 11 SCC 425 : 2008 CrLJ 3061 2008 (2) Crimes 278 (SC). (2) *Gunnana Pentayya*

v. *State of Andhra Pradesh*, (2009) 16 SCC 59 : 2008 (3) Crimes 325 (SC) : JT 2008 (9) SC 304. (3) *Bir Singh* v. *State of Punjab*, AIR 2009 SC 157 : (2008) 16 SCC 65 : 2008 (4) Crimes 327 (SC) : JT 2008 (11) SC 384.

[13388] ● ***Minor discrepancies or improvements in evidence.***—Minor discrepancies or some improvements also, would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in Court. *Shivappa* v. *State of Karnataka*, AIR 2008 SC 1860 : (2008) 1 SCC 337 : 2008 CrLJ 2992 : JT 2008 (4) SC 477.

[13389] ● ***Minor discrepancies, when not fatal.***—The High Court, on reappraisal and reassessment of the entire evidence on record, came to the conclusion that immediately after the occurrence a report came to be lodged to the Police Station against the appellant who has been identified by the PW-Sanjay, an injured eye-witness and non-injured eye-witnesses and further that the appellant had strong motive to commit the murder of Sunita with malice towards PW-Sanjay-her husband, as well as her deceased mother Nirmalabai, therefore, simply because there are some minor discrepancies in the evidence of witnesses which are of no consequence to the true genesis of the case and that some evidence has not been adduced by the prosecution, though might have been available, would not be sufficient grounds to believe that the appellant has been booked in a false case. There is nothing on record brought by the appellant to show that it was quite possible that the witnesses would spare the real culprit and implicate him in a false case. On the basis of the entire evidence elaborately discussed by the High Court, it cannot be held that the appellant, in the present case, has been framed on suspicion. *Mahesh* v. *State of Maharashtra*, 2008 CrLJ 3602 (3617) : 2008 (6) SCR 158 : JT 2008 (6) 11 : 2008 (7) Scale 10 : 2008 (2) Supreme 898 : 2008 (2) Crimes 145 (SC).

[13390] ● ***Contradictions, omissions and discrepancies in evidence.***—If the Court, after separating the grain from chaff, comes to a conclusion that residual evidence is sufficient to convict the accused, undue importance should not be attached to omissions, contradictions and discrepancies which do not touch the case of the matter and shake the basic version of the prosecution. *Prithu* v. *State of Himachal Pradesh*, AIR 2009 SC 2070 : (2009) 11 SCC 588 : 200 (2) SCR 765.

[13391] ● ***Minor contradictions in evidence—Effect.***—Minor contradictions can be rightly disbelieved, if same supports the truthfulness of witness. *Ramesh* v. *State of Uttar Pradesh*, 2009 CrLJ 4432 : 2009 (3) Crimes 411 (SC).

[13392] ● ***Minor discrepancies, Inconsistencies.***—Minor discrepancies on trivial matters not touching the care of the case, hyper-technical approach by taking sentences, turn out of the context here or there from the evidence, attaching importance to some technical error committed by the Investigating Officer not going to the root of the matter, would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a short-coming from which no criminal case is free. In the deposition of witnesses, there are always normal discrepancies, howsoever, honest and truthful they may be. The discrepancies are due to normal errors of observation, of memory due to lapse of time, due to the mental disposition, shock, horror at the time of occurrence and threat to the life. *State of U.P.* v. *Krishna Master*, AIR 2010 SC 3071 : 2010 CrLJ 3889 (3894).

[13393] ● ***Discrepancies in prosecution case—When not fatal.***—Some discrepancies *per se* would not prove fatal to case of prosecution particularly when there is no reason before the Court to doubt statement of eye-witnesses. *Satyavir Singh* v. *State of Uttar Pradesh*, (2010) 3 SCC 174 : 2010 CrLJ 340.

[13394] ● ***Discrepancies not minor in nature—Effect.***—If the Court finds that discrepancies of eye-witnesses in evidence are not minor, in nature they may be a ground for disbelieving and discrediting their evidence. *Sunil Kumar* v. *Sambhudayal Gupta* v. *State of Maharashtra*, JT 2010 (12) SC 287.

[13395] ● ***Discrepancy in regard to part of story—Effect.***—Discrepancy in regard to the part of the story itself does not go to the root of the case but discrepancy in regard to the material facts only has bearing to test the veracity of the prosecution case. In the instant case there is ample evidence on record that for purpose of grant of composite licence the appellant demanded bribe which was paid to him and recovered from his possession. *Billa Nagul Sharief* v. *State of Andhra*

Pradesh, AIR 2010 SC 3549 : 2010 CrLJ 3885 : 2010 (3) Crimes 128 (SC).

DISCRETION

[13396] ● ***Discretion.***—The discretion as to sentence is that of the trial Judge, and if he gives reasons from the sentence imposed by him, and they are such as a judicial mind could properly accept, a Court of appeal should not interfere with the discretion exercised by the trial Judge. The power to enhance a sentence from transportation to death should be very rarely exercised and only for the strongest possible reasons. It is not enough for the appellate Court to say that if left to itself it would have awarded the greater penalty, because the discretion does not belong to the appellate Court but only to the trial Judge. The only ground on which the appellate Court can interfere is when the discretion has been *improperly* exercised. For example, when no reasons at all are given and none could be inferred from the circumstances on the record of the case, or when the facts are so gross (that is, the murder is so heinous or brutal) that no judicial mind would award the lesser penalty. It is a sound exercise of judicial discretion for the trial Judge to refrain from awarding a sentence of death when it is not possible to determine who inflicted which blow or who gave the fatal blows and who took only a lesser part. In such a case the Court can legitimately award the lesser penalty to all the accused, though it is not bound to do so. Each case must depend on its own facts and no hard and fast rule can be laid down. But if a Judge imposes a lesser penalty in such a case in the exercise of his discretion, it is not open for the appellate Court to hold that there has been an improper exercise of judicial discretion. In such a case it is not the proper criterion for the appellate Court to ask itself whether it would have acted differently had it been the trial Court. The appeal was accepted on the question of sentence, and it was reduced, in the case of all the accused, to one of transportation for life. *Dalip Singh* v. *State of Punjab*, AIR 1953 SC 364 : 1953 CrLJ 1465 : 1953 SCJ 535.

[13397] ● ***Word "Case"—Meaning.***—The Supreme Court has general powers of judicial superintendence over all the Courts in the country. It is the ultimate interpreter and guardian of the Constitution, and has the duty to see that its provisions are faithfully observed by every Court. Under Article 134(1)(c), the only condition of the issue of a certificate that the case is a fit one for appeal to the Supreme Court is the discretion of the High Court. But the discretion is a judicial discretion and it must be judicially exercised along the well established lines which govern the matter. Further, the certificate must show on the face of it that the discretion conferred was invoked and exercised. If the discretion has been exercised on proper and well established lines, then, as in all questions where an exercise of discretion is involved, there can be no interference by the Supreme Court except on very strong grounds. But if, on the face of the order, it is apparent that the High Court has misdirected itself, (*a*) either by holding that its discretion is fettered, when it is not, or (*b*) by holding that in a particular circumstance it has none, then in such a case, the Supreme Court will not be bound by the certificate given by the High Court, and it will decide for itself whether to allow the appeal or not. In the present case, out of 24 persons originally tried under Section 302/149 Penal Code, only three were ultimately convicted by the High Court. By a curious mistake, the name of one *N* who was intended to be acquitted was included among the three convicted accused instead of that of one *B*. When this mistake was latter realised, the High Court communicated this fact to the State Government, and the Government remitted the sentence passed on *N* and directed his release. Thereafter, *N* and the two other accused who had been convicted applied to the High Court for a certificate under Article 134(1)(*c*). The High Court granted the certificates to all three of them. As regards *N,* it rightly considered that despite the remission of his sentence, if his conviction on a charge like that of murder stood undisturbed, the stigma might affect him adversely in the future. However, as regards the other two, there was nothing in their cases to warrant the issue of the certificates to them, but what the High Court thought was that by the word 'case' in clause (*c*) of Article 134(1) what was contemplated was the appeal as a whole, and that once a certificate was decided to be given, the High Court was bound to give it to all the accused whose conviction was confirmed in such appeal. The view of the High Court is clearly wrong. The word 'case' as used in Article 134(1)(*c*) means the case of each individual accused, and not the proceeding in appeal as a whole, and for the purpose of the certificate under that Article, the appeal of each accused to the High Court forms a separate 'case'. Therefore, even when a certificate under Article 134(1)(*c*) has been properly granted to any one or more of the several accused who have been convicted, the remaining accused do not acquire a right merely on that account to have their 'cases' also to be considered by the Supreme Court in appeal. In other words, the application for a certificate under this Article made by each accused has to be considered on its own merits, and the grant of a certificate to any accused would be proper only when the High Court is of opinion that his individual 'case' is a fit one for appeal to the Supreme Court. In the present case, the High Court had misdirected itself about the law in this matter, and had not exercised the discretion vested in it under Article 134(1)(*c*) in respect of the two convicted accused other than *N,* therefore, it was a fit case for interference by the Supreme Court in the exercise of its general powers of judicial superintendence. Under the circumstances, their case had to be treated as one under Article 136. *Nar Singh* v. *State of Uttar Pradesh*, AIR 1954 SC 457 : 1954 CrLJ 1167 : 1954 SCA 642 : 1954 SCJ 570 : 1955 SCR 238 : (1954) ALJ 438 : (1954) 2 MLJ 122 : 1954 AWR 457 : 1954 MWN 741.

[13398] ● ***High Court not to interfere with sentence imposed by Trial Court when.***—The High Court should not interfere with the sentence imposed by the trial Court unless when it is manifestly inadequate, and should not exercise its power of enhancement when the sentence passed by the trial Court imposes substantial punishment. It will be a fit case for interference by the Supreme Court if the High Court has enhanced a sentence without keeping this rule in mind. In the present case the Sessions Court had convicted the accused of the offence under Section 304 Part II of the Penal Code and had sentenced him to 3 years' imprisonment. On appeal, the High Court increased it to 10 years, without giving any reason why it considered such enhancement necessary. The accused appealed to the Supreme Court. It is a fit case for interference. The order of the High Court is set aside, and the original sentence of 3 years is restored. *Bed Raj* v. *State of Uttar Pradesh*, AIR 1955 SC 778 : 1955 CrLJ 1642 : (1955) 2 SCR 583 : 1956 SCJ 38 : 1956 SCA 169 : 1956-1 MLJ (SC) 28 : 1956 AWR 70 : 1956 ALJ 79 : 1956 MWN 192 : 1958 PunLR 167 : 1956 BLJR 96 : ILR (1956) 1 All 45.

[13399] ● ***Section 494, CrPC enabling provision—Discretion to withdraw from prosecution of any case vested in Public Prosecutor.***—Section 494 of the Code is an enabling section, and under it the discretion as to whether to withdraw from the prosecution of any case is vested in the Public Prosecutor who represents the State. Primarily the question whether to prosecute a person on behalf of the State or to continue with his prosecution, or whether to put a stop to his prosecution by withdrawing it, is a question for the Public Prosecutor to determine. No doubt, under Section 494 the consent of the Court to such a withdrawal is required and in giving or refusing such consent the Court has to exercise a judicial discretion, but in exercising such discretion all that the Court has to be satisfied about is that the application for withdrawal by the Prosecutor does not involve any abuse of his powers. In other words, the initiative under Section 494 regarding the withdrawal of a prosecution against any person rests with the State as represented by the Public Prosecutor, and unless the Court is of opinion that the application made in that behalf is not *bona fide,* consent to such withdrawal must be given normally as a matter of course. The Court is not required under Section 494 to take evidence for itself as to necessity for such withdrawal and is not required, before it gives its consent to the withdrawal applied for, to arrive at a definite finding that the case for such withdrawal has been satisfactorily made out by the prosecution. Such a course may become necessary only when on the record the Court is satisfied that the application has been made with a view to interfere with the normal course of justice, but not otherwise. *State of Bihar* v. *Ram Naresh Pandey*, AIR 1957 SC 389 : (1957) SCC 282 : 1957 CrLJ 567 : 1957 SCA 350 : 1957 SCJ 336 : 1957 SCR 279 : ILR 36 Pat 513 : 1957 BLJR 406 : 1957 (1) MLJ (Cri) 247 : 1957 AWR (HC) 430 : 1957 ALJ 609.

[13400] ● ***Sentence matter of discretion.***—Sentence is a matter of discretion. The Supreme Court will normally refuse to interfere with the order of sentence, unless it is satisfied that the discretion has been improperly exercised. In the present case, the accused was convicted by the High Court under Section 420, Penal Code, and the sentence imposed was of rigorous imprisonment for six months. In the appeal to the Supreme Court the conviction was confirmed, and then it was urged on behalf of the accused that the sentence of rigorous imprisonment for six months on the accused who was an old man was unduly severe, and it was also stated that he was prepared to pay to the complainant the whole amount received from him. The sentence imposed by the High Court cannot be said to be unduly severe, the considerations urged by the appellant cannot be entertained, and there is no justification for the plea that the sentence of rigorous imprisonment should be set aside. The sentence is confirmed. *Dharamdas Hukamatrai Dorwani* v. *State of Bombay*, AIR 1960 SC 734 : 1960 CrLJ 1148.

[13401] ● ***Article 136 of Constitution confers on Supreme Court wide discretionary power to entertain appeal.***—Article 136 confers on the Supreme Court a wide discretionary power to entertain appeals in suitable cases not otherwise provided for by the Constitution. It is implicit in this reserve power that it cannot be exhaustively defined, but it has always been exercised by the Court on the principle that decided cases would not be interfered with unless, by disregard to the forms of legal process, or some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. Though Article 136 is couched in widest terms the practice of the Supreme Court always is not to interfere on the questions of fact except in exceptional cases where the finding is such, that it shocks the conscience of the Court. Where the High Court has not contravened any of the principles laid down which govern the proper approach in dealing with appeals against acquittal and has given valid reasons for holding that the order of acquittal passed by the trial Court was not justified, the Supreme Court must accept the findings of fact reached by the High Court, and must hold that no case for interference has been made out. *Sanwat Singh* v. *State of Rajasthan*, AIR 1961 SC 715 : (1961) 1 CrLJ 766 : (1961) 2 SCJ 179 : (1961) 2 SCA 342 : 1961 ALJ 238 : 1961 MPC 274 : 1961 BLJR 313 : (1961) AWR (HC) 382 : 1961 ACrR 215 : (1961) 2 KerLR 249 : 1961 MLJ (Cri) 472.

[13402] ● ***Section 154 Evidence Act confers discretionary power on Court to permit person calling witness to put any question to him.***— Section 154 of the Evidence Act confers a discretionary power on the Court to permit a person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. Section 154 does not in terms or by necessary implication confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. The Court can certainly, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The Court, therefore, can permit a person who calls a witness to put question to him which might be put in the cross-examination at any stage of the examination of the witness provided it takes care to give an opportunity to the accused to cross-examine him on the answers which do not find place in the examination-in-chief. *Dalya Bhai Chhagan Bai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563 : (1964) 2 CrLJ 472 (477, 478) : (1964) 7 SCR 86.

[13403] ● ***Section 437, CrPC not make obligatory upon Sessions Judge or District Magistrate to order commitment in every case.***—The provisions of Section 437, however, do not make it obligatory upon a Sessions Judge or a District Magistrate to order commitment in every case where an offence is exclusively triable by a Court of Session. The law gives a discretion to the revising authority and that discretion has to be exercised judicially. One of the factors which has to be considered in this case is whether the intervention of the revising authority was sought by the prosecution at an early stage. It would be seen that an attempt to have the case committed failed right in the beginning and was repeated not earlier than 15 months from that date. The second attempt also failed. Instead of filing an application for revision against the order of the Magistrate refusing to pass an order of commitment the prosecution chose to make a second application upon the same facts. It may be that successive applications for such a purpose are not barred but where a latter application is based on the same facts as the earlier one the Magistrate would be justified in refusing it. Where the Magistrate has acted in this way the revisional Court ought not to interfere with propriety unless there are strong grounds to justify interference. While rejecting the application on January 25, 1962, the ground given by the learned Judge was that the case had already entered the defence stage and the attempt to have the committal was very belated. Matters had advanced still further when a third attempt failed on March 30, 1962. By that date not only had the defence been closed and arguments heard, but the case was actually closed up for judgment. It would be a terrible harassment to the appellants now to be called upon to face a fresh trial right from the beginning which would certainly be the result if the Magistrate were to commit the appellants for trial by a Court of Session. It is further noteworthy that after the last attempt failed it was not the prosecution which went up in revision before the Sessions Judge but the informants and, as pointed out earlier, in the matter concerning the appellants before us it was not even the informant Shyam Lall but one Sagarmal, the informant in another case, who preferred a revision application. In a case which has proceeded on a police report a private party has really no *locus standi.* No doubt the terms of Section 435 under which the jurisdiction of the learned Sessions Judge was invoked are very wide and he could have taken up the matter *suo motu.* It would, however, not be irrelevant to bear in mind the fact that the Court's jurisdiction was invoked by a private party. The criminal law is not to be used as an instrument of wreaking private vengeance by an aggrieved party against the person who, according to that party, had caused injury to it. Barring a few exceptions, in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of social interest of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book. In our opinion it was injudicious for the learned Sessions Judge to order the commitments of the appellants, particularly so without giving any thought to the aspects of the matter to which we have adverted. For all these reasons, we allow the appeals, quash the order of the Sessions Judge as affirmed by the High Court and direct that the trials of each of the appellants shall proceed before the Magistrate according to law from the stages at which they were on the date on which the stay order became operative. *Thakur Ram* v. *State of Bihar*, AIR 1966 SC 911 : 1966 CrLJ 700 : (1966) 2 SCR 740.

[13404] ● ***Discretion to condone delay under proviso to Section 20(2) of—Minimum wages Act—Exercise of with vigilance.***—The discretion to condone delay under second proviso to Section 20(2) of Minimum Wages Act, 1948, in presenting the application on sufficient cause being shown must, like other judicial discretion, be exercised with vigilance and circumspection according to justice, common sense, and sound judgment. *Sarpanch Lonand Grampanchayat* v. *Ramgiri Gosavi*, AIR 1968 SC 222 (223) : 1967 SCD 1172 : (1967) 2 Lab LJ 870 : (1968) 1 SCWR 65 : (1968) 1 SCJ 789 : (1967) 3 SCR 774 : (1968) 2 SCA 475.

[13405] ● ***Exercise of judicial discretion on well recognised principles.***—Any exhaustive enumeration of aggravating or mitigating circumstances is impossible. The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the mater of sentence is liable to be corrected by superior Courts. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguards for the accused. *Jagmohan Singh* v. *State of Uttar Pradesh*, AIR 1973 SC 947 : (1973) 1 SCC 20 : 1973 CrLJ 370 : (1973) 1 SCJ 200.

[13406] ● ***No extenuating circumstances to justify lesser sentence.***—It was urged that the sentence of death passed on the accused might be commuted to life imprisonment in view of the fact that the accused had been convicted and sentenced about a year hereinbefore. That by itself does not appear to be good ground for reducing the sentence passed on the accused. It was a preplanned, cold-blooded and dastardly murder in which as many as seventeen injuries were caused on the deceased most of which were on vital parts of his body. There are no extenuating circumstances to justify the giving of any lesser sentence by this Court. In these circumstances, we are unable to agree that there is any room for awarding a lesser sentence. *Meghar Singh* v. *State of Punjab*, AIR 1975 SC 1320 : (1975) 4 SCC 234 : 1975 CrLJ 1102 (1105).

[13407] ● ***Discretion conferred by Section 154 Evidence Act unqualified and untrammeled.***—The discretion conferred by S. 154, of the Evidence Act, on the Court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the Court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the Court as to the veracity of the witness. *Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294 : (1976) 1 SCC 727 : 1976 SCC (Cri) 160 (174) : 1976 CrLJ 295 : 1975 CrLR (SC) 597 : (1976) 2 SCR 11.

[13408] ● ***Imposition of sentence matter of discretion.***—The imposition of sentence is always a matter of discretion and unless the Supreme Court finds that the discretion has been exercised arbitrarily or capriciously or on unsound principles or that the Sessions Court or the High Court has not taken into account any relevant factors in imposing the sentence, the Supreme Court would not be justified in reducing the sentence, merely because it feels that a lesser sentence might well have been imposed. *Surendra* v. *State of Uttar Pradesh*, AIR 1977 SC 709 : (1976) 4 SCC 232 : 1976 SCC (Cri) 565 : 1977 CrLJ 351 : 1977 CrLR (SC) 56 : 1977 UJ (SC) 60(1).

[13409] ● ***Court possess wider discretion on basis of which conviction possible.***—For the purpose of determining whether there is sufficient ground for proceeding against an accused the Court possess a comparatively wider discretion in the exercise of which it can determine the question whether the material on the record, if unrebutted, is such on the basis of which a conviction can be said reasonably to be possible. *State of Karnataka* v. *L. Muniswamy*, AIR 1977 SC 1489 : (1977) 2 SCC 699 : 1977 SCC (Cri) 404 (409) : 1977 CrLJ 1125 : 1977 CrLR (SC) 188 : (1977) 3 SCR 113.

[13410] ● *Discretion means sound discretion.*—The use of private and independent thought. When anything is left to be done according to one's discretion the law intends it to be done with sound discretion and according to law, and the Court has power to redress things that are otherwise done notwithstanding they are left to the discretion of those that do them. Discretion is discerning between right and wrong; and there has power to act discretion, is bound by the rule of reason fore, whoever and law. And though there be a latitude of discretion given to one, yet he is circumscribed that what he does be necessary and convenient, without which no liberty can defend it. When applied to a Court of Justice, 'discretion' means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular. *Ramji Dayawala & Sons (P) Ltd.* v. *Invest Imports*, AIR 1981 SC 2085 : (1981) 1 SCC 80 at p. 96 : (1981) 1 SCR 899.

[13411] ● *Discretionary power vested in Executive to be exercised in just reasonable and fair way.*—It is not open to the Supreme Court to issue a writ in the nature of *mandamus* directing the Central Government to bring Section 30 of the Act into force. But a writ in the nature of *mandamus* to the Central Government can be issued to consider whether the time for bringing Section 30 of the Act into force has arrived or not. Every discretionary power vested in the Executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. It cannot be allowed to leave the matter to lie over without applying its mind to the said question even though the power under Section 30 of the Act is discretionary, having regard to the fact that more than a quarter of a century has elapsed from the date on which the Act received the assent of the President of India. *Aeltemesh Rein* v. *Union of India*, AIR 1988 SC 1768 : (1988) 4 SCC 54 : 1988 CrLJ 1809 : JT 1988 (3) SC 275 : (1988) 3 SCJ 195 : (1988) 3 Crimes 513 : (1988) 17 Reports 460 : (1988) 2 CrCC 625.

[13412] ● *Death sentence—Awarding of—Discretion lies with Court.*—"In the ultimate analysis it could not be disputed and was seriously disputed that the circumstances in which the extreme penalty should be inflicted cannot be enumerated in view of complex situation in society and the possibilities in which the offence could be committed and in this context in ultimate analysis it is not doubted that the Legislature, therefore, was right in leaving it to the discretion of the judicial decision as to what should be the sentence in particular circumstances of the case. But the Legislature has to put a further rider that when the extreme penalty is inflicted it is necessary for the Court to give special reasons thereof." *Triveniben* v. *State of Gujarat*, AIR 1989 SC 1335 : (1989) 1 SCC 678 : 1989 SCC (Cri) 248 (261, 262) : 1990 CrLJ 1810 : 1989 CrLR (SC) 267 : JT 1989 (1) SC 314 : (1989) 1 SCR 509 : (1989) 2 Crimes 391.

[13413] ● *Arrest not to be made in routine manner on more allegation of commission of offence.*—No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the Constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction is reached after some investigation as to the genuineness and *bona fides* of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the Constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a Police Officer issues notice to person to attend the Station House and not to leave the Station House without permission would do. *Joginder Kumar* v. *State of Uttar Pradesh*, AIR 1994 SC 1349 : (1994) 4 SCC 260 : 1994 SCC (Cri) 1172 (1179) : 1994 CrLJ 1981 : (1994) 2 Crimes 106.

[13414] ● *Awarding sentence upon conviction judicial function.*—Awarding sentence, upon conviction, is concededly a judicial function to be discharged by the Courts of law established in the country. It is always a matter of judicial discretion however, subject to any mandatory minimum sentence prescribed by the law. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under the peculiar circumstances of each case, pending the disposal of the appeal. *Dadu* v. *State of Maharashtra*, AIR 2000 SC 3203 : (2000) 8 SCC 437 : 2000 SCC (Cri) 1528 (1539) : JT 2000 (1) (Supp) SC 449.

[13415] ● *Exercise of discretion on well recognised principles.*—The exercise of judicial discretion on well recognised principles is the safest possible safeguards for the accused which is at the very core of criminal law administered in India

The Legislature cannot, therefore, make law to deprive the Courts of their legitimate jurisdiction conferred under the procedure established by law. *Dadu* v. *State of Maharashtra*, AIR 2000 SC 3203 : (2000) 8 SCC 437 : 2000 SCC (Cri) 1528 : JT 2000 (1) (Supp) SC 449 : 2000 Cr App R (SC) 554.

[13416] ● ***Production of documents "necessary or desirable".***—The powers conferred under Section 191, CrPC, 1973 are enabling in nature aimed at arming the Court or any officer-in-charge of a police station concerned to enforce and ensure the production of any document or other things "necessary or desirable" for the purpose of any investigation, inquiry or trial or other proceeding under the Code, by issuing a summons or a written order to those in possession of such material. The language of Section 191 would, no doubt, indicate the width of the powers to be unlimited but the inbuilt limitation inherent therein takes its colour and shape from the stage of a point of time of its exercise, commensurately with the nature of proceedings as also the compulsion of necessity and desirability, to fulfil the task or achieve the object. The fact that in one case the Court thought fit to exercise such powers is no compelling circumstance to do so in all and every case before it, as a matter of course and for the mere asking. The Court concerned must be allowed a large latitude in the matter of exercise of discretion and unless in a given case the Court was found to have conducted itself in so demonstrably an unreasonable manner unbecoming of a judicial authority, the Court superior to that Court cannot intervene very lightly or in a routine fashion to interpose or impose itself even at that stage. The reason being, at the stage, the question is one of mere proprieties involved in the exercise of judicial discretion by the Court and not of any rights concretised in favour of the accused. *Om Prakash Sharma* v. *Central Bureau of Investigation*, AIR 2000 SC 2335 : (2000) 5 SCC 679 : 2000 SCC (Cri) 1014 (1017, 1018) : 2000 CrLJ 3478 : 2000 CrLR (SC) 443 : JT 2000 (6) SC 554.

[13417] ● ***When Court should proceed against other persons.***—What is conferred on the Court is only a discretion as could be discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other persons. The Court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the Court must seriously consider whether the objects sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the Court should refrain from adopting such of course of action. *Michael Maechedo* v. *Central Bureau of Investigation*, AIR 2000 SC 1127 : (2000) 3 SCC 262 : 2000 SCC (Cri) 609 (614, 615) : 2000 CrLJ 1706 : 2000 CrLR (SC) 265.

[13418] ● ***Law gives absolute discretion to Court to presume existence of facts.***—Law gives absolute discretion to the Court to presume the existence of any fact which it thinks likely to have happened. In that process, the Court may have regard to common course of natural events, human conduct, public or private business *vis-a-vis* the facts of the particular case. This discretion is clearly envisaged in Section 114 of the Evidence Act. *M. Narsinga Rao* v. *State of Andhra Pradesh*, AIR 2001 SC 318 : (2001) 1 SCC 691 : 2001 SCC (Cri) 258 (264) : 2001 CrLJ 515 : 2001 CrLR (SC) 102 : (2001) 1 Crimes 79.

[13419] ● ***Discretion—Meaning.***—"Discretion" when applied to a Court of justice means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful but legal and regular. *Reliance Airport Development (Pvt.) Ltd.* v. *Airport Authority of India*, (2006) 10 SCC 1 : JT 2006 (10) SC 424.

[13420] ● ***Discretion under Art. 136, Constitution—Limitation.***—The Supreme Court's power to exercise discretion under Art. 136 of the Constitution as apparently not subject to any limitation, the Court has itself imposed certain limitations, upon its powers. *Mathai* v. *George*, (2010) 4 SCC 358.

[13421] ● ***Discretion under Art. 136 of the Constitution—When exercised.***—Discretionary jurisdiction under Art. 136 of the Constitution is to be exercised only in suitable cases and very sparingly. *Karam Kapahli* v. *Lal Chand Public Charitable Trust*, AIR 2010 SC 2077 : (2010) 4 SCC 753.

[13422] ● ***Discretionary power under Art. 136, Constitution—Limitation.***—The jurisdiction of the Supreme Court under Article 136 of the Constitution is basically one of conscience. The jurisdiction is primary and residuary in nature. It is unfettered and not confined within definite bounds. Discretion is to be exercised is subject to only one limitation and that is the wisdom and sense of justice of the judges. *Karam Kapahi* v. *Lal Chand Public Charitable Trust*, AIR 2010 SC 2077 : (2010) 4 SCC 753.

DISCRIMINATION—PROCEDURE

[13423] ● ***Discrimination—Procedure.***—A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination. A procedure different from that laid down by the ordinary law can be prescribed for a particular class of persons if the discrimination is based upon a reasonable classification. *Kedar Nath* v. *State of West Bengal*, AIR 1953 SC 404 : 1953 CrLJ 1621 : 1954 SCR 30. **TO THE SAME EFFECT :** (1) *Muthiah* v. *I.T. Commissioner*, AIR 1956 SC 269 : (1955) 2 SCR 1247 : 1956 SCJ 349 : (1956) 29 ITR 390.

DISHONEST INTENTION

[13424] ● ***Theft—Essential ingredients.***—The essential ingredients of the offence of theft lie in the taking of the property of another person out of his possession, without his consent, and the dishonest intention with which the act of taking is done. The combined effect to Sections 23 and 24 of the Penal Code is that a man's intention is said to be 'dishonest' if he takes another man's property out of his possession with the intention either to make a gain to himself or to cause a loss to that other by some unlawful means. Taking with a dishonest intention does not require any intention of permanent acquisition or permanent deprivation of the property taken. It is enough if there is a *temporary* retention or deprivation. In this respect 'theft' under the Penal Code differs from 'larceny' under the English Law which contemplates permanent gain or loss. In the present case, the two accused were cadets in the Indian Air Force and they were charged under Section 379 in respect of the theft of an aeroplane. It was proved that the accused took out from he Jodhpur aerodrome and aircraft which was not meant for training without the authority of the Commandant and flew it away to Pakistan. It was also proved that they persisted in the flight in spite of signals given to them to turn back, as soon as the irregular flight was detected. The proved facts established that the accused took away the aircraft without consent, and that even though the taking may have been for a temporary purpose, it was done with 'dishonest' intention, because the taking was for wrongful and unauthorised use by unlawful means. All the ingredients of the offence of 'theft' were thus clearly established, and the conviction of the accused on the charge under Section 379 was perfectly justified. It was contended that there was a difference between intention to cause a particular result and knowledge, that such result was likely to ensue, and that the legal maxim that every person must be presumed to intend the natural consequences of his acts had no place in criminal jurisprudence. There was no scope on the facts of the present case for raising these contentions, because the conduct of the accused clearly established their intention, to cause a wrongful gain to themselves and to cause a wrongful loss to the Government from the very beginning, when the aircraft was taken out of the aerodrome. The conclusion as to their guilty intention was arrived at as a legitimate inference, from the circumstances of the case, and not by resort to any legal maxim. *Mehra K.N.* v. *State of Rajasthan*, AIR 1957 SC 369 : 1957 SCC 192 : 1957 CrLJ 552 : 1957 SCA 364 : 1957 SCJ 386 : 1957 SCR 623 : 1957 AWR (HC) 480 : 1957 ALJ 669 : 1957-1 MLJ (Cri) 308 : 1957 MPC 566.

[13425] ● ***Element of dishonest intention necessary ingredient of offences under Sections 403 to 409, IPC.***—The element of dishonest intention is a necessary ingredient of offences under Sections 403 to 409 of the Penal Code and Section 5(1)(*c*) of the Prevention of Corruption Act. Offences under these sections are committed, if the accused misappropriates any property, which is entrusted to him or placed under his control with a dishonest intention. The question which arises in such cases is—what is dishonest intention and when can dishonest intention on the part of the accused be said to have been proved? Under Sections 23 and 24 of the Code a person is

said to act "dishonestly" not only when he makes a wrongful gain to himself of property to which he is not legally entitled, but also when he causes wrongful loss to another person of property to which that person is legally entitled, either by keeping him out of that property or by depriving him of that property. Therefore, an offence involving misappropriation with a dishonest intention is committed, whenever it is proved that the accused was placed in possession of some property by another person and that he has so acted in respect of that property as to intentionally deprive the owner of that property. *Krishnan Kumar* v. *Union of India*, AIR 1959 SC 1390 : 1959 CrLJ 1508 : 1959 MLJ (Cri) 974.

[13426] ● ***Burden of proving intention or knowledge lies on prosecution.***—It is the law of this country that the burden of proving the intention or knowledge which is the constituent element of an offence, always lies on the prosecution. Therefore, no doubt, when the accused is charged with an offence involving misappropriation with a dishonest intention, the burden lies on the prosecution to prove, that the accused has so acted as to deprive the owner of the property which was entrusted to him, and that he so acted with a dishonest intention. *Krishnan Kumar* v. *Union of India*, AIR 1959 SC 1390 : 1959 CrLJ 1508 : 1960 SCJ 1 : 1960 AWR (HC) 48 : 1959 MLJ (Cri) 974.

[13427] ● ***Dishonest intention.***—Dishonest intention exists when a person taking the property intends to cause wrongful gains to himself or wrongful loss to the other. *Suvvari Sanyasi Apparao* v. *Boddepalli Lakshminarayana,* AIR 1962 SC 586 : 1962 Supp (1) SCR 8 : 1962 1 CrLJ 512 : (1962) 2 SCJ 542.

[13428] ● ***Words "intent to defraud" not synonymous with words "intent to deceive".***—The words "intent to defraud" as being not synonymous with the words "intent to deceive" it requires some action resulting in a disadvantage which, but for the deception the person defrauded would have avoided. Hereby the delivery of forged letters there is neither any wrongful gain to anyone nor any wrongful loss to another. The act of the appellant could not thus be termed to have been done dishonestly. Likewise the appellant cannot be said to have any intention to defraud because his action resulted in no disadvantage to anyone which but for the deception the person defrauded would have acted otherwise. The basis ingredients of the act done dishonestly or fraudulently being missing the charge under Section 471 read with 466, IPC was totally misplaced. *Jibrail Dewan* v. *State of Maharashtra*, AIR 1997 SC 3424 : 1997 CrLJ 4070 (SC) : (1997) 3 Crimes 128.

[13429] ● ***Owner repossessing vehicle delivered to hirer not amount to theft as vital element of dishonest intention missing.***—The owner repossessing the vehicle delivered to the hirer under the hire purchase agreement will not amount to theft as the vital element of 'dishonest intention' is lacking. The element of "dishonest intention" which is an essential element to constitute the offence of theft cannot be attributed to a person exercising his right under an agreement entered into between the parties as he may not have an intention of causing wrongful gain or to cause wrongful loss to the hirer. *Charanjit Singh Chadha* v. *Sudhir Mehra*, AIR 2001 SC 3721.

[13430] ● ***Dishonest intention—Inducing complainant to deliver Rs. 2000/- as advance as part payment for sale of land.***—The accused dishonestly induced the complainant to deliver him Rs. 2000/- as advance in cash as part payment alleged for sale of or plot of land knowing fully well that he was not the owner of the said plot. It also came in evidence that the accused had similarly deceived several other persons saying that he would allot plots to them and took money in advance but did not give them the plot. *Held*, the issuance of the bogus receipts by the accused given to the complainant that he would be provided a plot by the accused in six months or a year. Since property included money, the offence under Section 420, IPC, was made out. There was definitely dishonest intention on the part of the accused. *N. Devindrappa* v. *State of Karnataka*, AIR 2007 SC 1741 : (2007) 5 SCC 228 : 2007 (2) SCC (Cri) 496 : 2007 CrLJ 2949 (2950) SC.

DISHONESTLY OR DISHONESTY (S. 24, IPC)

[13431] ● ***Acting dishonestly.***—A person acts dishonestly if the temporarily dispossesses another of his property. *Pyare Lal* v. *State of Rajasthan*, AIR 1963 SC 1094 : 1963 Supp (1) SCR 689 : 1963 (2) CrLJ 178.

DISHONOURING OF CHEQUE

[13432] ● ***Dishonouring of cheque.***—Section 118 lays down a special rule of evidence applicable to Negotiable Instruments. The presumption of law and thereunder a Court shall presume *inter alia*, that the negotiable instrument or the endorsement was made or endorsed for consideration in effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The phrase "burden of proof" has two meanings—One, the burden of proof a matter of law and pleading and the other the burden of establishing a case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial whereas the latter is not constant but shifted as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be by direct evidence or admission made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. A plaintiff who says that he had sold certain goods to the defendant and that a promissory note executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and sale was reflected for a particular consideration should produce the said account books. If such a relevant evidence is withheld by the plaintiff, Section 114 Evidence Act enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a Court, can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instruments Act. *Kundan Lal* v. *Custodian Evacuee Property*, AIR 1961 SC 1316.

[13433] ● *Presumption under Section 118(g)—When rebutted.*—When the presumption, as provided under Section 118(g), gets rebutted under the circumstances mentioned therein, the burden of proving that he is a holder in due course lies upon him. In a given case, the Court, while examining these requirements including valid consideration must also go into the question whether there was a contract express or implied, for crediting the proceeds to the account of the bearer before receiving the same. It was held that it is a question of fact in each case, namely, whether there was such a contract express or implied that the customer should be entitled to draw presumption against the amount of cheque before it is clear. The words "without having sufficient cause to believe" have to be understood in this background. In *Indian Bank* v. *Nataraja Pillai*, (1993) 1 SCC 493, another Bench of two Judges was to consider whether for granting a short term loan by the bank, further loan of Rs. 1,00,000/- was sanctioned to cover up the deficiency for which promissory note was executed along with property hypothecated for short term loans. It was contended that the sanction of Rs. 1,00,000/- under the promissory note was towards discharge of the equitable mortgage and not for cash consideration and that, therefore it was not supported by consideration. It was held that the promissory note was fully supported by consideration, and the presumption of passing of the consideration got attracted. *U.P. Ponnappa Morthan Sons Palghat* v. *Cotholic Syrian Bank Ltd.*, AIR 1991 SC 441 : (1991) 1 SCC 113 : JT 1990 (4) SC 94 : (1990) 2 Scale 579.

[13434] ● *Dishonest intention when inferable.*—When a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the Bank with the endorsement like (*i*) in this case, "refer to the drawer"; (*ii*) "instructions for stoppage of payment"; and (*iii*) "sums exceeds arrangement", it amounts to dishonour with the meaning of Section 138 of the Negotiable Instruments Act. On issuance of the notice by the payee or the holder in due course after dishonour, the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied . . . The object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induces the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138. Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted. Under these circumstances, since the accused has not made the payment within 15 days from the date of the receipt of the notice issued by the payee or the holder in due course, the dishonest intention is inferable from those facts. Accordingly, the ingredients as contained in Section 138 have been *prima facie* made out in the complaint. *Elec-*

tronics Trade and Technology Dev. Corp. Ltd., Secunderabad v. *Indian Technologists and Engineers (Electronics) P. Ltd.*, AIR 1996 SC 2339 : (1996) 2 SCC 739 : 1996 CrLJ 1692 (SC) : (1996) 3 Crimes 82 (SC).

[13435] ● *Cheque presented by drawee after drawer's instruction to bank to stop payment.*— After the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or the holder in due course presents the cheque to the bank for payment and when it is returned on instruction, Section 138, N.I. Act does not get attracted. From the facts we are satisfied that in the present case cheques were presented after the appellant had directed its bank as to stop payment. It seems that the first cheque had even been presented after the instruction of "stop payment" issued by the appellant had become known to the respondent. The aforesaid being the position, no case under Section 138, N.I Act is made out. *K.K. Sidharthan* v. *T.P. Praveena Chandran*, (1996) 6 SCC 369 : 1996 SCC (Cri) 1340 (1342) : (1996) 4 Crimes 102 : (1996) 7 Supreme 453.

[13436] ● *Stay of civil suits by High Court pending disposal of criminal cases.*—After issuing notices civil suits were filed for recovery and simultaneously proceedings were initiated under Section 138 of the N.I. Act and also under Section 420, IPC in three complaints. The High Court stayed the proceedings of civil suits pending disposal of the criminal cases. It is settled law that pending of the criminal matters would not be an impediment to proceed with the civil suit. The criminal Court would deal with the offence punishable under the Act. On the other hand, the Courts rarely stay the criminal cases and only when the compelling circumstances require the exercise of their power. We have never come across stay of civil suits by the Courts so far. The High Court of Rajasthan is only an exception to pass such orders. The High Court proceeds on a wrong promise that the accused would be expected to disclose their defence in the criminal case by asking them to proceed with the trial of the suit. It is not a correct principle of law. Even otherwise, it no longer subsists, since many of them have filed their defences in the civil suit. On principle of law, we hold that the approach adopted by the High Court is not correct. But since the defence has already been filed nothing survives in this matter. The order of the High Court is set aside. *State of Rajasthan* v. *Kalyan Sundaram Cement Industries*, (1996) 3 SCC 87 : 1996 SCC (Cri) 466 (467) : JT 1996 (3) SC 162 : (1996) 3 Crimes 92 : (1996) 1 UJ 645.

[13437] ● *Complaint when body corporate, de jure complainant.*—The scheme of the new Code makes it clear that complainant must be a corporeal person who is capable of making physical presence in the Court. Its corollary is that even if a complaint is made in the name of an incorporeal person (like a company or corporation), it is necessary that a natural person represents such juristic person in the Court and it is that natural person who is looked upon, for all practical purposes, to be the complainant in the case. In other words, when the complainant is a body corporate, it is the *de jure* complainant, and it must necessarily associate a human being as *de facto* complainant to represent the former in Court proceedings. *Associated Cement Co. Ltd.* v. *Keshvanand*, AIR 1998 SC 596 : (1998) 1 SCC 687 : 1998 SCC (Cri) 475 : 1998 CrLJ 856 : 1998 CrLR (SC) 176 : JT 1998 (4) SC 268 : (1998) 1 Crimes 88.

[13438] ● *Presumption under Section 139, NI Act in favour of holder followed once.*—Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability, is returned by the bank unpaid, on the ground either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person, draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonored. Once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. On careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, amounts to an offence under Section 138 of the Act. *Modi Cements Ltd.* v. *Kuchil Kumar Nandi*, AIR 1998 SC 1056 : 1998 CrLJ 1397 : 1998 (2) Guj LR 1620 : 1998 (1) Ker LT 582.

[13439] ● ***Notice not served within prescribed period under Section 138 of NI Act.***—Before filing the complaint the appellant did not serve a notice within the period prescribed under Section 138 N.I. Act. Since the above finding is one of fact and based on proper appreciation of the evidence no interference in respect thereof is called for. However the impugned judgment of the High Court so far as it set aside the order of discharge passed in favour of the appellant cannot be sustained for on perusal of the record; this Court finds that the trial Court was fully justified in concluding that the evidence adduced on behalf of the respondent was insufficient to make out a *prima facie* case against the appellant. *Tomy Jacob Kattikkaran* v. *Thomas Manjaly*, AIR 1998 SC 366 : (1977) 11 SCC 24 : 1998 CrLJ 661 (662) : (1997) 3 Crimes 153.

[13440] ● ***Complainant cause of action arises and can arise only once.***—Consequent upon the failure of the drawer to pay the money within the period of 15 days as envisaged under clause (c) of the proviso to Section 138, the liability of the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142 is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(c) arises—and can arise—only once. Besides the language of Sections 138 and 142 which clearly postulates only once cause of action there are other formidable impediments which negates the concept of successive cause of action. One of them is that for dishonour of one cheque there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour the drawer cannot be liable for any offence nor can the first offence be treated as *non est* so as to give the payee a right to file a complaint treating the second offence as the first one. On each presentation of the cheque and its dishonour a fresh right—and not cause of action—accrues in his favor. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But, once he gives a notice under clause (b) of Section 138 he forfeits such right, for, in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer, expires. *Sadanandan Bhadran* v. *Madhavan Sunil Kumar*, AIR 1998 SC 3043 : 1998 SCC (Cri) 1471 : 1998 CrLJ 4066 : (1998) 3 Crimes 217 : 1998 (3) Mah LJ 365.

[13441] ● ***Return of cheque by Bank with endorsement "account closed—Offence by drawer of cheque as envisaged in Section 138 NI Act".***—"The English language is not an instrument of mathematical precision, our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges' trouble if the Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this rock in the texture of it, they would have straightened it out? He must then do so as they would have danced. A Judge must not alter the material of which Act is woven, but he can and should iron out the creases". Even though Section 138 is a penal statute, it is the duty of the Court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheque is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above 'burst away the cobweb varnish, and show the transactions in their true light' (WILMOT C.J.) or (by MAXWELL) "to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, to an indirect or circuitous manner that it has prohibited." Hence, when the cheque is returned by a bank with an endorsement 'account closed', it would amount to returning the cheque unpaid because "the amount of money standing to the credit of the account is insufficient to honour the cheque" as envisaged in Section 138 of the Act. *NEPC Micon Ltd* v. *Magma Leasing Ltd.*, AIR 1999 SC 1952 : 1999 SCC (Cri) 524 : 1999 CrLJ 2883 : 1999 (2) MP LJ 24 : 1999 (2) Mah LR 528 : 1999 (2) Cal HN 1 : 1999 (2) Ker LJ 59.

[13442] ● ***Notice to drawer of cheque demanding payment be sent by Fax.***—The duty cast on the payee on receipt of information regarding the return of the cheque unpaid is mentioned in clause (b) of Section 138. Within 15 days he has to make a demand for payment. The mode of making such demand is also prescribed in the clause, that it should be "by giving notice in writing to the drawer of the cheque". Nowhere it is said that such notice must be sent by registered post or that it should be despatched through a messenger. Chapter XVII of the Act, containing Sections 138 to 142, was inserted in the Act as per Banking Public Finance Institution and Negotiable Instruments Laws (Amendment) Act, 1968. When the Legislature contemplated that notice in writing should be given to the drawer of the cheque, the Legislature must be presumed to have been aware of the modern devices and equipment already in vogue and also in store for future. If the Court were to interpret the words "giving notice in writing" in the section as restricted to the customary mode of sending notice through postal service or even by personal delivery, the interpretative process would fail to cope up with the change of time. Facsimile (of Fax) is a way of sending hand-written or printed or typed materials as well as pictures by wire or radio. In the West such mode of transmission came to wide use even way back in the late 1930s. By 1954 International News Service began to use Facsimile quite extensively. Technological advancement like Facsimile, Internet, E-mail *etc.* were on swift progress even before the Bill for the Amendment Act was discussed by the Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue. "It is presumed that Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law." So if the notice envisaged in clause (b) of the proviso to Section 138 was transmitted by Fax it would be compliance with the legal requirement. The High Court's view is that the sender of the notice must know the date when it was received by the sendee, for otherwise he would not be in a position to count the period in order to ascertain the date when cause of action has arisen. The fallacy of the above reasoning is that it erases the starting date of the period of 15 days envisaged in clause (c). As per the said clause the starting date is the date of "the receipt of the said notice". Once it starts, the offence is completed on the failure to pay the amount within 15 days therefrom. Cause of action would arise if the offence is committed. If a different interpretation is given the absolute interdict incorporated in Section 142 of the Act that, no Court shall take cognizance of any offence unless the complaint is made within one month of the date on which the cause of action arises, would become otiose. *SIL Import, USA* v. *Exim Aides Silk Exporters, Bangalore*, AIR 1999 SC 1609 : 1999 SCC (Cri) 600 : 1999 CrLJ 2276 : 1999 CrLR (SC) 317.

[13443] ● ***Object of notice to give chance to drawer of cheque to rectify omission.***—The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect honest drawer. Service of notice of demand in clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138 of the Act. In the present appeals there is no dispute that notices were in writing and these were sent within fifteen days of receipt of information by the appellant-bank regarding return of cheques as unpaid. Therefore, only question to be examined whether in the notice there was a demand for payment. Under Section 142 of the Act, Court can take cognizance of an offence punishable under Section 138 only on a complaint in writing made by the payee. Therefore, the police could not have started investigation under Section 138 of the Act. But if a cheque is dishonoured drawer may expose himself to prosecution under various sections of the Indian Penal Code which are cognizable and police could take up investigation. What was indicated in the notice was that in addition to the legal action by the appellant-bank under the Act, option was kept open for taking action against the respondents under the provisions of Indian Penal Code by informing the police. *Central Bank of India* v. *Saxons Farms*, AIR 1999 SC 3607 : 1999 CrLJ 4571 : (1999) 3 Crimes 221 : 1999 (3) Ker LT 484 : 2000 (1) MDLJ 149.

[13444] ● ***Complaint against dishonour of cheque—Limitation for.***—Where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of General Clauses Act 1897 which, *inter alia* provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act. Ordinarily in computing the time, the rule observed is to exclude the first day and to include the last. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer, expires. Period of 15 days, in the present case, expired on counting the period of one month. Complaint is filed on 15th November, 1995. The result would be that the complaint filed on 15th November is within time. *Saketh India Ltd.* v. *India Securities Ltd.*, AIR 1999 SC 1090 : (1999) 3 SCC 1 : 1999 SCC (Cri) 329 : 1999 CrLJ 1822 : (1999) 1 Crimes 132.

[13445] ● ***Dishonour of cheque—Complaint regarding.***—Under Section 177 of the Code "every offence shall ordinarily be inquired into and tried in a Court within whose jurisdiction it was committed." The locality where the bank (which dishonourd the cheque) is situated cannot be regarded as the sole criteria to determine the place of offence. It must be remembered that offence under Section 138 would not be completed with the dishonour of the cheque. It attains competition only with the failure of the drawer of the cheque to pay the cheque amount within the expiry of 15 days mentioned in clause (c) of the proviso to Section 138 of the Act. It is normally difficult to fix up a particular locality as the place of failure to pay the amount covered by the cheque. A place, for that purpose, would depend upon a variety of factors. It can either be at the place where the drawer resides or at the place where the payee resides or at the place where either of them carries on business. Hence, it is difficult to fix up any particular locality as the place of occurrence for the offence under Section 138 of the Act. Even otherwise the rule that every offence shall be tried by a Court within whose jurisdiction it was committed is not an unexceptional or unchangeable principle. Section 177 itself has been framed by the legislature thoughtfully by using the precautionary word "ordinarily" to indicate that the rule is not invariable in all cases. Section 178 of the Code suggests that if there is uncertainty as to where, among different localities, the offence would have been committed the trial can be had in a Court having jurisdiction over any of those localities. The provision has further widened the scope by stating that in case where the offence was committed partly in one local area and partly in another local area the Court in either of the localities can exercise jurisdiction to try the case. Further again, Section 179 of the Code stretches its scope to a still wider horizon. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence : (1) Drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning of the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. *K. Bhaskaran* v. *Sankaran Vaidhyan Balan*, AIR 1999 SC 3762 : (1999) 7 SCC 510 : 1999 SCC (Cri) 1284 : 1999 CrLJ 4606 : 2000 (1) Mah LJ 193 : (1999) 4 Crimes 212 : (1999) 3 SCJ 426.

[13446] ● ***Payee to make demand by "giving notice" in writing.***—On the part of the payee he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It is therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer in the correct address. The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that payee has the statutory obligation to "make a demand" by giving notice. The thrust in the clause is on the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and the next depends on what the sendee does. In the connection a reference to Section 27 of the General Clauses Act will be useful. No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 of General Clauses Act profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice. Thus when a notice is returned by the sendee as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in clause (d) of the proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. In the present case the accused did not even attempt to discharge the burden to rebut the aforesaid presumption. *K. Bhaskaran* v. *Sankaran Vaidhyan Balan*, AIR 1999 SC 3762 : 1999 CrLJ 4606 : 2000 (1) Mah LJ 193 : 2000 (1) Pun LR 113 : 1999 (3) Raj LW 470.

[13447] ● ***Company when convicted under Section 138 N.I. Act Court can only impose fine.***—It has been pointed out that when a company is convicted under Section 138 N.I. Act, the Court can only impose a fine as the sentence since a juristic person like the company cannot possibly be sent to prison. On its premise, learned counsel contended that recovery of the fine covered by such sentence would be impracticable on account of the bar envisaged in Section 22(1) of the Sick Industrial Companies (Special Provisions) Act (1 of 1986) against proceedings for execution distress or the likes as against any of the properties of the company. The fallacy of the above contention is two fold. First is that maintainability of a prosecution proceeding is not to be tested on the touchstone any practical hurdle in enforcing the sentence which might be imposed on a company after conviction. Second is there is no unsurmountable hurdle for recovery of the fine covered by the sentence even from a sick industrial company, because the ban contained on Section 22(1) is only conditional as could be discerned from the last limb thereof. *BSI Limited* v. *Gift Holdings Pvt. Ltd.*, AIR 2000 SC 926 (930, 931) : 2000 SCC (Cri) 538 : 2000 SCC (Cri) 737 : 2000 CrLJ 1424 : 2000 CrLR (SC) 247 : JT 2000 (2) SC 127.

[13448] ● ***Words "the drawer of such cheque fails to make payment" different from saying "drawer refuses to make payment".***—The words "the drawer of such cheque fails to make the payment", are ostensibly different from saying "the drawer refuses to make payment". Failure to make payment can be due to the reasons beyond the control of the drawer. It is felt that the Legislature has thoughtfully used the word "fails" instead of other expressions as failure can be due to a variety of reasons including disability to pay. But the offence would be complete when the drawer "fails" to make payment within the stipulated time, whatever be the cause for such failure. The drawer of the cheque can have different explanations for the failure to pay the amount covered by the cheque. But no such explanations would be sufficient to extricate him from the tentacles of the offence contemplated in the section. Perhaps some kind of explanations would be sufficient to alleviate the rigour of the offence which may be useful to mitigate the quantum of sentence to be imposed. But that is no ground for consideration at this stage. *Pankaj Mehra* v. *State of Maharashtra*, AIR 2000 SC 1953 : (2000) 2 SCC 756 : 2000 SCC (Cri) 556 (567) : 2000 CrLJ 1781 : 2000 CrLR (SC) 237 : JT 2000 (2) SC 113.

[13449] ● ***FIR not making out any offence.***—The gravaman of the appellant's case in the FIR is that certain cheques had been given to the respondents more particularly the Commercial Manager with the specific understanding that these cheques can be presented against delivery of future vehicles and not for any past liability or dues, but the respondents presented the same which, of course, could not be enchased in view of the directions given by the appellant-drawer.

However, the appellant had to sustain the loss of Rs. 8982 as commission charges. Necessary ingredients of the offence of cheating or criminal breach of trust have not been made out and on the other hand the attendant circumstances indicate that the FIR was lodged to pre-empt the filing of the criminal complaint against the information under Section 138 of the Negotiable Instruments Act. *Sunil Kumar* v. *Escorts Yamaha Motors Ltd.*, AIR 2000 SC 27 (29) : (1999) 8 SCC 468 : 1999 SCC (Cri) 1466 : 2000 CrLJ 174.

[13450] ● *"Said amount" of money—Refers to cheque amount.*—It is a well settled principle of law that notice has to be read as a whole. In the notice, demand has to be made for the "said amount", *i.e.*, cheque amount. If no such demand is made, the notice no doubt, would fall short of its legal requirement. Where in addition to "said amount", there is also a claim by way of interest cost, *etc.*, whether the notice is bad would depend on the language of the notice. If in a notice while giving up break up of the claim, the cheque amount, interest damages, *etc.* are separately specified, other such claims for interest, cost *etc.* would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, notice might well fail to meet the legal requirement and may be regarded as bad. In the notice in question the said amount *i.e.,* the cheque amount has been clearly stated. Respondent No. 1 had claimed in addition to the cheque amount, incidental and notice charge. These two amounts are severable. In the notice, it was clearly stated that failure to comply with the demand, necessary legal steps will be taken up. If respondent No. 1 had paid the cheque amount, he would have been absolved from the criminal liability under Section 138. Regarding other claims, a civil suit would be necessary. *Suman Sethi* v. *Ajay K. Churiwal*, AIR 2000 SC 828 (830) : (2000) 2 SCC 380 : 2000 SCC (Cri) 414 : 2000 CrLJ 1391 : 2000 CrLR (SC) 180 : JT 2000 (1) SC 493.

[13451] ● *Presumption under Section 139 of NI Act—Be rebutted by any of accused.*—After all a presumption is only for casting the burden of proof as to who should adduce evidence in a case. It is open to any one of the accused to adduce evidence to rebut the said presumption. In a prosecution where both the drawer company and its office-bearers are arrayed as accused, and if the drawer company does not choose to adduce any rebuttal evidence, it is open to the other accused office-bearers to adduce such rebuttal evidence. If that be so, even in a case where the drawer company is not made an accused but the office-bearers of the company alone are made the accused, such office-bearers accused are well within their rights to adduce rebuttal evidence, to establish that the company did not issue the cheque towards any antecedent liability. We are not impressed to the contention that Section 139 of the Negotiable Instruments Act would afford support to the plea that prosecution of the company is *sine qua non* for prosecuting its directors under Section 141 of the Act. *Anil Handa* v. *Indian Acrylic Ltd.*, AIR 2000 SC 145 (148) : (2000) 1 SCC 1 : 2000 CrLJ 373 : (2000) 1 Crimes 26 : (2000) 1 SCJ 217.

[13452] ● *Finding that offence committed by company sine qua non for convicting other persons.*—If the drawer of a cheque happens to be a juristic person like a body corporate, it can be prosecuted for the offence under Section 138 of the Negotiable Instruments Act. Now there is no scope for doubt regarding that aspect in view of the clear language employed in Section 141 of the Act. In the expanded ambit of the word "company" even firms or any other associations of persons are included and as a necessary adjunct thereof a partner of the firm is treated as director of that company. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Negotiable Instruments Act, is a human being or a body corporate or even a firm, prosecution proceedings can be initiated against such drawer. In this context, the phrase "as well as" used in sub-s. (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly, the words "shall also" in sub-s. (2) are capable of bringing the third category of persons additionally within the drangnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque, such company is the principal offender under Section 138 of the Act and the remaining persons one made offenders by virtue of the legal fiction created by the Legislature as per the section. Hence, the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence.

If the offence was committed by a company, it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category, the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution, the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not certain condition that prosecution of the company is *sine qua non* for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt, a finding that the offence was committed by the company is *sine qua non* for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act. *Anil Handa* v. *Indian Acrylic Ltd.*, AIR 2000 SC 145 (148) : (2000) 1 SCC 1 : 2000 CrLJ 374 : (2000) 1 Crimes 26 : (2000) 1 SCJ 217.

[13453] ● *Section 22 SICA not create any legal impediment for instituting and proceeding with criminal case.*—Section 22 SICA does not create any legal impediment for instituting and proceeding with a criminal case or the allegation of an offence under Section 138 N.I. Act against a company or its Directors. The section only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such embargo is to preserve the assets of the company from being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues. *Kusum Ingots and Alloys Ltd.* v. *Pennar Peterson Securities Ltd.*, AIR 2000 SC 954 (960, 961) : (2000) 2 SCC 745 : 2000 SCC (Cri) 546 : 2000 CrLJ 1464 : 2000 CrLR (SC) 319.

[13454] ● *Complaint when not maintainable.*—Complaint is not maintainable, if the fact that notice has been served in the complaint has not been mentioned. *Shakti Travel and Tours* v. *State of Bihar*, JT 2000 (7) SC 563 : (2000) 4 Crimes 150 : (2000) 7 Crimes 90 : (2000) 7 SLT 319.

[13455] ● *Presumption of deemed source of notice matter of course.*—Presumption of deemed service is not a matter of course in all cases. Deemed service is to be accepted in the facts of each case. It the present case, the appellant pleaded that he did not get notice on facts of the case, benefit of doubt should be granted. *Sridhar M.A.* v. *Metalloy N. Steel Corporation*, (2000) 1 SCC 397 : (2000) 3 SLT 675 : (2000) 3 SLT 675 : (2000) 2 CCR 82.

[13456] ● *Appellant paid cheque amount and interest payable thereon.*—The respondent has filed an affidavit on 24-8-2000 submitting that the appellant has been paid a sum of Rs. 3,94,243.33 which includes the cheque amount and the interest payable thereon. In support of his submission, he has filed Annexures R-1 and R-2 alongwith the affidavit. Learned Counsel for the appellant has admitted the payment of the amount. Thus we feel that no useful purpose would be served by sending the respondent back to Jail as the interests of justice would be served by imposing a penalty of fine alone in the circumstances adverted to above. Accordingly, upon conviction under Section 138 of the Act, the sentence of imprisonment awarded to the respondent is substituted with the imposition of fine of Rs. 5,000 to be deposited within two months. *Narsingh Das Tapadia* v. *Goverdhan Das Partani*, AIR 2000 SC 2946 (2949) : (2000) 7 SCC 183 : 2000 SCC (Cri) 1326 : (2000) 4 Crimes 12 : (2000) 3 KLT 605.

[13457] ● *"Taking cognizance of offence"—Meaning of.*—The High Court found that as the notice intimating the dishonourment of cheque was served upon the accused on 26th October, 1994, the complainant/appellant could not file the complaint unless the expiry of 15 days period. It was found on facts that the complaint filed on 8-11-1994 was returned after finding some defect in it. However, when refiled, the Court took the cognizance on 17-11-1994. The High Court that the original complaint having been filed on 8-11-1994, was pre-mature and liable to be dismissed.

"Taking cognizance of an offence" by the Court has to be distinguished from the filing of the complaint by the complainant. Taking cognizance would mean the action taken by the Court for initiating judicial proceedings against the offender in respect of the offence regarding which the complaint is filed. Before it can be said that any Magistrate or Court has taken cognizance of an offence, it must be shown, that he has applied his mind to the facts for the purpose of proceeding further in the matter at the instance of the complainant. If the Magistrate or the Court is shown to have applied the mind not for the purpose of taking action upon the complaint but for taking some other kind of action contemplated under the Code of Criminal Procedure, such as ordering investigation under Section 156(3) or issuing a search warrant, he cannot be said to have taken cognizance of the offence. Mere presentation of the complaint in the Court cannot be said to mean, that its cognizance had been taken by the Magistrate. If the complaint is found to be premature, it can wait maturity or be returned to the complainant for filing latter and its mere presentation at an earlier date need not necessarily render the complainant liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed. Mere presentation of the complaint on 8-11-1994 when it was returned to the complainant/appellant on the ground that the verification was not signed by the counsel, could not be termed to be an action of the Magistrate taking cognizance within the meaning of Section 142 of the N.I. Act. The High Court appears to have committed not only mistake of law but a mistake of fact as well. No cognizance was taken on 8-11-1994, but the Magistrate is shown to have applied his mind and taken cognziance only on 17-11-1994. The conviction of the respondent under Section 138 of the Act is upheld. *Narsingh Das Tapadia* v. *Goverdhan Das Partani*, AIR 2000 SC 2946 (2948, 2949) : (2000) 7 SCC 183 : 2000 SCC (Cri) 1326 : (2000) 4 Crimes 12 : (2000) 3 KLT 605.

[13458] ● ***"Said amount of money" refers to cheque amount.***—In Section 138 of the N.I. Act, Legislature clearly stated that for the dishonoured cheque the drawer shall be liable for conviction if the demand is not made within 15 days of the receipt of notice but this is without prejudice to any other provision of the Act. If the cheque amount is paid within the above period or before the complaint is filed, the legal liability under Section138 will cease and for recovery of other demands as compensation, costs, interest, *etc.,* a civil proceeding will lie. Therefore, if in a notice any other sum is indicated in addition to the "said amount", the notice cannot be faulted, as stated above. *Suman Sethi* v. *Ajay K. Churiwal*, AIR 2000 SC 828 (830) : (2000) 2 SCC 380 : 2000 SCC (Cri) 414 : 2000 CrLJ 1391 : 2000 CrLR (SC) 180 : JT 2000 (1) SC 493.

[13459] ● ***Section 22 of SICA not bar criminal proceedings against company or its directors for dishonour of cheque.***—A contention was raised on behalf of the appellants that if the criminal case is proceeded with and the company and the appellants are convicted and sentenced to fine then it will be necessary to realise the amount of fine from the assets of the company which would be impermissible in view of the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. In the considered view of the Court the contention is premature and farfetched as the occasion to realise fine from the accused company or its directors will arise only in case they are convicted and sentenced or fine is imposed against them. That is not a ground to hold that the criminal proceeding should be foreclosed at the threshold. Take for instance before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR under Section 22-A was passed against the company then it cannot be said that the offence under Section 138, N.I. Act was completed. In such a case, it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances, it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case. *Kusum Ingots and Alloys Ltd.* v. *Pennar Peterson Securities Ltd.*, AIR 2000 SC 954 (961) : (2000) 2 SCC 745 : 2000 SCC (Cri) 546 : 2000 CrLJ 1464 : 2000 CrLR (SC) 319 : JT 2000 (2) SC 390.

[13460] ● ***Subsequent to order of conviction—Appellant depositing amount.***—It appears, subsequent to the said order of conviction, the appellant has deposited a sum of Rs. 5,96,688 in the Court of the XVth Metropolitan Magistrate. The learned counsel for the respondent has stated that if the amount deposited is permitted to be withdrawn by the first respondent, then the first respondent will not press before the Appellate Court for a conviction or for a sentence be it for imprisonment or fine. In such circumstances, the Appellate Court will consider whether the conviction is to be maintained or an order of imposition of fine is to be passed, in the light of the stand taken by the Counsel for the first respondent. *Cranex Ltd.* v. *Nagarjuna Finance Ltd.*, AIR 2000 SC 3145 (3146) : (2000) 7 SCC 388 : 2000 SCC (Cri) 1388 : 2000 CrLJ 4673 : (2004) 4 Crimes 38.

[13461] ● ***Section 138 NI Act penal provision.***—A criminal prosecution is neither for recovery of money nor for enforcement of any security, *etc.* Section 138 of the N.I. Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence under Section 138 is completed, the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability. *BSI Ltd.* v. *Gift Holdings Pvt. Ltd.*, AIR 2000 SC 926 (930, 931) : (2000) 2 SCC 737 : 2000 SCC (Cri) 538 : 2000 CrLJ 1424 : 2000 CrLR (SC) 247 : JT 2000 (2) SC 127.

[13462] ● ***Complaint filed well within period prescribed.***—In the present case, it is apparent from Annexure P-4 that a notice dated 16-7-1996 was given by the appellant to the respondent which was within the time prescribed under cl. (*b*) of the proviso to Section 138 of the Negotiable Instruments Act. The reply of 23-7-1996 given by the respondent makes this position apparent. Under cl. (*c*) of the proviso to Section 138, 15 days time is given to the respondent for making payment after receipt of notice. No such payment was made within 15 days even if we assume that 23-7-1996 was the date on which the respondent has received the notice Section 142(*b*) of the Negotiable Instruments Act, provides that complaint should be made within one month from the date on which the cause of action arises under cl. (*c*) of the proviso to Section 138, of the Act. In the present case, the complaint was filed on 12-8-1996 which is well within the period prescribed after the accrual of the cause of action under cl. (*c*) of the proviso to Section 138. *Jagdish Chand Gupta* v. *Sandeep Arora*, AIR 2000 SC 3639 (3639, 3640).

[13463] ● ***Complainant fully satisfied with payment.***—It has been pointed out that a development took place subsequent to the filing of this appeal. It was that appellant has paid the entire amount covered by the disputed cheques. In fact an affidavit has been sworn to by the deponent which is authenticated by an Advocate. The affidavit shows that complainant is "fully satisfied" with the payment made by the appellant. In view of the said development we alter the sentence to a fine of Rs. 5,000. *P. Mohan Babu* v. *D. Rmaswamy*, AIR 2000 SC 3543 (3544) : (2000) 9 SCC 528 : 2000 CrLJ 4671 : (2000) 4 Crimes 112 : (2000) 6 SLT 806 (1).

[13464] ● ***Supreme Court directing Court concerned to grant exemption from personal appearance on conditions.***—Considering the plight of the petitioner in defending prosecution proceedings instituted at various places in India on the strength of the cheques issued by the company of which he was the director, we permit the petitioner to move the Court concerned (before which the prosecution is pending in any of the cases) for exempting him from personal appearance. This can be done only after making the first appearance in the Court concerned. If any such application is filed by the petitioner we direct the Court concerned to exempt him from personal appearance on the following conditions : A Counsel on his behalf would be present in the particular Court on days when his case is taken up. He will not dispute his identity as the accused in the case. He will be present in Court when such presence is imperatively needed. *V.K. Jain* v. *Union of India*, AIR 2000 SC 3609 : (2000) 1 SCC 709 : 2000 SCC (Cri) 302 : (2000) 5 SLT 329.

[13465] ● ***Writ petition for quashing prosecution—Inability of accused to go to all Courts.***—This writ petition has been filed for quashing various prosecution launched against this petitioner for the offence under Section 138 N.I. Act merely on the ground that the petitioner is unable to go to all the different Courts. He contends that he was not participating in the affairs of the company which issued the cheques. It is a defence which he can adopt in the prosecutions. But merely raising such a contention now is no ground for quashing the prosecutions. *V.K. Jain* v. *Union of India*, AIR 2000 SC 3609 : (2000) 1 SCC 709 : 2000 SCC (Cri) 302 : (2000) 5 SLT 329.

[13466] ● ***Appellant not incharge of and responsible to company for conduct of its business.***—From a perusal of Section 141 it is evident that in a case where a company committed offence under Section 138 of the N.I. Act then not only the company but also every person who at the time when the offence was committed, was incharge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and liable to be proceeded against under those provisions only if that person was in charge of and was responsible to the company for the conduct of its business. The allegations made in the complaint do not, either in express words or with reference to the allegations contained therein, make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. *K.P.G. Nair* v. *Jindal Menthol India Ltd.*, 2000 CrLR (SC) 778 : JT 2000 (Supp 1) SC 519 : (2001) 2 Crimes 132 : (2000) 7 SLT 189.

[13467] ● ***Burden to prove that dishonoured cheque issued to discharge debt or liability.***—Under Section 118 N.I. Act unless the contrary was proved, it is to be presumed that the negotiable instrument (including a cheque) had been made or drawn for consideration. Under Section 139, the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus, in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability on the accused. In the instant case the first respondent had to prove in

the trial, by leading cogent evidence that there was no debt or liability. The 1st respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st respondent having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction. *K.N. Beena* v. *Muniyappan*, AIR 2001 SC 2895 (2896) : (2001) 8 SCC 458 : 2002 SCC (Cri) 14 : (2001) 4 Crimes 376.

[13468] ● ***Limitation period for issuing notice of demand to drawer.***—Section 138(*b*) of N.I. Act *inter alia* provides that the payee has to make demand for the payment of money by giving a notice "to the drawer of the cheque within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid". So fifteen days are to be counted from the receipt of information regarding the return of the cheque as unpaid. *Munoth Investments Ltd.* v. *Puttukola Properties Ltd.*, AIR 2001 SC 2752 (2753) : (2001) 6 SCC 582 : 2001 SCC (Cri) 1184 : 2001 CrLR (SC) 847 : (2001) 4 Crimes 122.

[13469] ● ***Pay order "cheuqe".***—A pay order is a cheque within the meaning of Section 138 of the Negotiable Instruments Act, 1881. *Punjab and Sind Bank* v. *Vinakar Sahakari Bank Ltd.*, AIR 2001 SC 3641 : (2001) 7 SCC 721 : 2001 SCC (Cri) 1395 : 2002 CrLJ 93 : (2001) 4 Crimes 289.

[13470] ● ***Statutory time—Limit for presenting cheque to bank.***—It is mandatory that the cheque is presented to "the bank" within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. It is the cheque drawn which has to be presented to "the bank" within the period specified therein. When a post-dated cheque is written or drawn, it is only a bill of exchange. The post-dated cheque becomes a cheque under the Act on the date which is written on the said cheque and the six months period has to be reckoned, for the purposes of Section 138 of the N.I. Act, from the said date. *Shri Ishar Alloy Steels Ltd.* v. *Jayaswals NECO Limited*, AIR 2001 SC 1161 (1164) : (2001) 3 SCC 609 : 2001 SCC (Cri) 582 : 2000 CrLJ 1250 : JT 2001 (3) SC 114 : (2001) 1 Crimes 284.

[13471] ● ***Expression "Bank" occurring in proviso (a) to Section 138 NI Act—Meaning.***—The payment of the cheque is contemplated by "the bank" meaning thereby where the person issuing the cheque has an account. "The" is the word used before nouns, with a specifying or particularising effect opposed to the indefinite or generalising force of "a" or "an". It determines what particular thing is meant; that is what particular thing we are to assume to be meant. "The" is always mentioned to denote particular thing or a person. "The" would, therefore. refer implicitly to a specified bank and not any bank "The bank" referred to in cl.(a) to the proviso to Section 138 of the N.I. Act would mean the drawee-bank on which the cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued. The payee of the cheque has, no doubt, the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque in drawn within the period of six months from the date on which it is shown to have been issued. The non-presentation of the cheque to the drawee-bank within the period specified in the section would absolve the person issuing the cheque of his criminal liability under Section138 of the Act, who shall otherwise may be liable to pay the cheque amount to the payee in a civil action initiated under the law. A combined reading of Sections 2,72 and 138 of the N.I. Act would leave no doubt in our mind that the law mandates the cheques to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. Such presentation is necessarily to be made within six months at the bank on which the cheque is drawn, whether presented personally or through another bank, namely, the collecting bank of the payee. *Shri Ishar Alloy Steels Ltd.* v. *Jayaswals NECO Limited*, AIR 2001 SC 1161 : (2001) 3 SCC 609 : 2001 SCC (Cri) 582 : 2000 CrLJ 1250 : JT 2001 (3) SC 114 : 2001 Cr App R (SC) 353 : (2001) 1 Crimes 284.

[13472] ● ***Post-dated cheque—Remains Bill of Exchange till date written on face of it.***—For prosecuting a person for an offence under Section 138 of N.I. Act, it is inevitable that the cheque is presented to the banker within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. When a post-dated cheque is written or drawn, it is only a bill of exchange, and so long the same remains a bill of exchange, the provisions of Section 138 of the Act are not applicable to the said instrument. The post-dated cheque becomes a cheque within the meaning of Section 138 of the Act on the date which is written thereon and the 6 months period has to be reckoned for the purposes of proviso (*a*) to

Section 138 of the Act from the said date. In the present case the cheque was prepared and made over by the drawer to the drawee on 10-11-1995 but the date mentioned thereon was 20-1-1996 and it was presented before the banker for encashment on 7-7-1996, *i.e.*, within a period of six months from 20-1-1996. Thus we find no ground to quash prosecution of the appellant as, on the facts alleged, an offence under Section138 of the Act is clearly made out. *Ashok Yashwant Badave* v. *Surendra Madhavrao Nighojakar*, AIR 2001 SC 1315 (1320, 1321) : (2001) 3 SCC 726 : 2001 CrLJ 1674 : 2001 CrLR (SC) 331 : (2001) 2 Crimes 7.

[13473] ● ***Complainant subsequently filing civil suit and attaching all properties of accused no ground to impose lesser sentence.***—The total amount covered by the cheques involved in the present two cases was Rs. 4,50,000. There was no case for the respondent that the said amount had been paid either during the pendency of the cases before the trial Court or revision before the High Court or this Court. If the amounts had been paid to the complainant, there perhaps would have been justification for imposing a fleebite sentence as had been chosen by the trial Court. But in a case where the amount covered by the cheque remained unpaid, it should be the look out of the trial Magistrate that the sentence for the offence under Section 138 should be of such a nature as to give proper effect to the object of the legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light-heartedly. The very object of enactment of provisions like Section138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount atleast during the pendency of the case. The learned counsel contended that the complainant has subsequently filed a civil suit and attached all the properties of the accused. That is not a ground for lessening the gravity of the offence or to impose a minor sentence chosen by the trial Court. We set aside the sentence passed on the respondent and remit the case to the trial Magistrate for passing appropriate sentence on the accused after hearing both sides. *Suganthi Suresh Kumar* v. *Jagdeeshan*, AIR 2002 SC 681 : (2002) 22 SCC 420 : 2002 SCC (Cri) 344 : JT 2002 (1) SC 220 : (2002) 1 Crimes 265.

[13474] ● ***Complaint against guarantor—Maintainability.***—The issue as regards the co-extensive liability of the guarantor and the principal debtor, is totally out of the purview of Section 138 of the act, neither the same calls for any discussion therein. The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act; 'Any cheque' and 'other liability' are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of the legislature. *I.C.D.S. Ltd.* v. *Beena Shabeer*, AIR 2002 3014 : (2002) 6 SCC 426 : 2002 SCC (Cri) 1342 : 2002 CrLJ 3925 : JT 2002 (6) SC 119 : (2002) 4 Crimes 75 (SC).

[13475] ● ***Payment due under cheque received—Sentence reduced to period already undergone.***—It is stated by the learned Counsel that the money due under the cheque has already been received by the respondent. In this view of the matter, the sentence awarded is reduced to the period already undergone. *K.L. Kunjappan* v. *Rafeeque*, (2002) 8 SCC 181 : 2002 SCC (Cri) 1884 : (2001) 124 STC 59.

[13476] ● ***Closure of account—Difference of hand writing and ink on cheque.***—In the revision filed the High Court, taking note of the facts that there is no evidence to show that the cheque has been issued prior to the closure of the account and that no contention was raised that the cheque was issued after closure of the account and also noticing that is Ext P-1 cheque—There is difference in handwritings and in ink, the High Court set aside the order of conviction passed by the Appellate Court confirming the conviction of respondent 1 by the trial Court. Having perused the order of the High Court under challenge we are of the view that the above factors do not rebut the statutory presumptions under Sections 139 and 118 of the Negotiable Instruments Act so as to revise the order, set aside the conviction and sentence. *P.K. Manmadhan Kartha* v. *Sanjeev Raj*, (2002) 7 SCC 150 : 2002 SCC (Cri) 1626 (1672) : JT 2002 (6) SC 31 : (2004) 2 SLT 1071 : (2004) 120 Com Cases 282 : (2002) 2 SLT 82.

[13477] ● ***Dishonour of cheque—Incomplete signature of drawer.***—The only ground on which the cheque appears to have not been honoured is that the drawer's signature was incomplete. In this case the dishonouring of cheque did not attract Section 138 Negotiable Instruments Act, 1981. Hence criminal proceedings initiated under Sections 138 and 142. *Vinod Tanna* v. *Zaher Siddiqui*, (2002) 7 SCC 541 : 2002 SCC (Cri)

1825 (1826) : JT 2001 (10) SC 345 : (2000) 2 SLT 82.

[13478] ● ***Complainant not to allege in complaint about subsisting liability.***—There is no requirement that the Complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on basis of averments in the petitions filed by them, the High Court could not have concluded that there was no existing debt or liability. *M.M.T.C. Ltd.* v. *Medchl Chemicals and Pharma (P). Ltd.*, AIR 2002 SC 182 (186) : (2002) 1 SCC 234 : 2002 SCC (Cri) 121 : 2002 CrLJ 266 : (2002) 1 Crimes 156.

[13479] ● ***Open to drawer to revalidate negotiable instrument including cheque.***—"There is no provision in the Negotiable Instruments Act or in any other law which stipulates that a drawer of a negotiable instrument cannot revalidate it. It is always open to a drawer to voluntarily revalidate a negotiable instrument, including a cheque. . . The first paragraph of Section 87 makes it clear that the party who consents to the alteration as well as the party who made the alteration, are disentitled to complain against such alteration, *e.g.,* if the drawer of the cheque himself altered the cheque for validating or revalidating the same instrument, he cannot take advantage of it latter by saying that the cheque became void as there is material alteration thereto. Further even if the payee or the holder of the cheque made the alteration with the consent of the drawer thereof such alteration also cannot be used as the ground to resist the right of the payee or holder thereof. It in always a question of fact whether the alteration was made by the drawer himself or whether it was made with the consent of the drawer. It quires evidence to prove the question when it is disputed." *Veera Exports* v. *T. Kalavathy*, AIR 2002 SC 38 (39) : (2002) 1 SCC 97 : 2002 SCC (Cri) 85 : 2002 CrLJ 203 : (2002) 1 Crimes 123 : (2002) 1 KLT 58.

[13480] ● ***Cheque when dishonoured by reason of stop payment instructions.***—"Even when the cheque is dishonoured by reason of "stop payment" instructions by virtue of Section139 the Court has to presume that cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course, this is a rebuttable presumption. The accused can, thus, show that the "stop payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus, a Court cannot quash a complaint on this ground." *M.M.T.C. Ltd.* v. *Medchl Chemicals and Pharma (P). Ltd.*, AIR 2002 SC 182 (186) : (2002) 1 SCC 234 : 2002 SCC (Cri) 121 : 2002 CrLJ 266 : (2002) 1 Crimes 156.

[13481] ● ***Partner of firm liable to be convicted when.***—The partner of a firm is liable to be convicted for an offence committed by the firm if he was in charge of and was responsible to the firm for the conduct of the business of the firm or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of the partner concerned. *Katta Sujatha* v. *Fertilizers & Chemicals Travancore Ltd.*, (2002) 7 SCC 655 : 2003 SCC (Cri) 151 : JT 2002 (10) SC 134 : (2004) 2 SLT 873 : (2003) 114 Com Cas 27.

[13482] ● ***Notice containing some amount towards interest and cost not invalid.***—Notice under Section 138 of the Negotiable Instruments Act cannot be held to be invalid merely because the notice contained some amount towards interest and cost separately after indicating the amount covered by the cheque which stood bounced. *United Credit Ltd.* v. *Agro Sales India*, (2001) 10 SCC 763 : 2003 SCC (Cri) 1055 : (2000) 4 SCR 50 (1) : (2000) 6 SLT 799.

[13483] ● ***Complaint by company.***—A company can file a complaint only through a human agency. The person who presented the complaint on behalf of the company claimed that he is the authorised representative of the company. *Prima facie*, the trial Court should have accepted it at the time when a complaint was presented. If it is a matter of evidence when the accused disputed the authority of the said individual to present the complaint, opportunity should have been given to the complainant to prove the same, but the opportunity need be given only when the trial commences. The dismissal of the complaint at the threshold on the premise that the individual had not produced certificate copy of the resolution, appears to be too hasty an action. The impugned orders are set aside and the trial Court is directed to proceed with the trial and dispose of it in accordance with law. *Samrat Shipping Co. Pvt Ltd.* v. *Dolly George*, (2002) 9 SCC 455 : 2003

SCC (Cri) 1224 (1225) : JT 1999 (10) SC 381 : (2000) 1 JCC 25.

[13484] ● ***No formal notice prescribed.***—Though no formal notice is prescribed in the provision, the statutory provision indicates in unmistakable terms as to what should be clearly indicated in the notice and what manner of demand it should make. In a given case, if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, mere fact that it was a consolidated notice, and/or that further demands in addition to the statutorily envisaged demand was also found to have been made may not invalidate the same. *K.R. Indira* v. *G. Adhinarayana*, (2003) 8 SCC 300 : 2002 SCC (Cri) 2003 : 2004 CrLJ 5 : (2003) 4 Crimes 425.

[13485] ● ***Post dated cheque—Applicability of Section 138 and nature of presumption under Section 139 NI Act.***—In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For purpose of considering the issue, it is relevant to see Section 139 of the act which creates a presumption in favour of the holder of a cheque. It has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from, the penal provision of Section 138 of the act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong.

Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the act by the drawee or the holder of the cheque in due course. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date. *Goaplast Pvt. Ltd.* v. *Chico Ursula D'Souza*, AIR 2003 SC 2035 : (2003) 3 SCC 232 : 2003 SCC (Cri) 603 : 2003 CrLJ 1723 : (2003) 2 Crimes 55 (SC).

[13486] ● ***Vicarious liability of partners—Burden of proof.***—Section 141 does not make all partners liable for the offence. The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the accused to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. *Monaben Ketanbhai Shah* v. *State of Gujarat*, AIR 2004 SC 4247 : (2004) 7 SCC 15 : 2004 SCC (Cri) 1857 (1861) : 2004 CrLJ 4249 : JT 2004 (6) SC 309 : (2004) 3 Crimes 231 : (2004) 3 KAJ 570.

[13487] ● ***Cheque presumed to be issued in discharge of debt or other liability.***—It has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against adept or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. *Goa Plast (P) Ltd.* v. *Chico Insula D' Souza*, 2004 SCC (Cri) 499 (510).

[13488] ● ***Object and enactment of NI Act.***—The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee. *Goa Plast (P) Ltd.* v. *Chico Ursula D' Souza*, 2004 SCC (Cri) 499 (510).

[13489] ● ***Quashing of proceedings by High Court when.***—The High Court can be justified in quashing the proceedings only if it comes to the conclusion that even the statements taken on face value do not make out any offence. *S.A. Nanjundeswara* v. *Varlak Agroteck (P) Ltd.*, 2004 SCC (Cri) 527 (528).

[13490] ● ***Parties amicably resolving dispute.***—In the present case since the parties have amicably resolved the dispute and the payment has already been made, sentence already undergone would be sufficient punishment for the offender. *Nambiram Veetil Pocker* v. *State of Kerala*, 2004 SCC (Cri) 1207 (1207).

[13491] ● ***Compounding of offence.***—In the instant case, the parties have filed a compromise petition bringing to the nature of this Court that dispute between them has since been settled and the amount due to the respondent—Complainant has been paid and praying for setting aside the conviction and sentence be allowed. In view of the fact that Section 147, Negotiable Instruments Act, 1881 allows compounding of offence, the conviction and sentence of the defaulter is set aside. *Anil Kumar Hasitwal* v. *Alka Gupta*, AIR 2004 SC 3978 : (2004) 4 SCC 366 : 2004 SCC (Cri) 1084 (1085) : 2004 CrLJ 3853.

[13492] ● ***Complaint to be read as a whole.***—It is not necessary to reproduce the language of Section 141 of the Negotiable Instruments Act *verbatim* in the complainant since the complainant is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried with. *Manaben Ratan Bhai Shah* v. *State of Gujarat*, 2004 SCC (Cri) 1857 (1859).

[13493] ● ***"Notice"—Letter for demand of money, of if notice.***—The letter sent by complainant to the respondent required the respondent to immediately, manage the payment of the amount of cheque dishonoured failing which he threatened to take legal action, in the matter qualified itself as notice within the meaning of Clause (C) of *proviso* appended to Section 138, Negotiable Instrument Act. *Krishna Exports* v. *Raju Das*, (2004) 13 SCC 498 : 2006 (1) SCC (Cri) 350.

[13494] ● ***Service of notice on person whose cheque dishonoured mandatory.***—Complaint was filed by Respondent 1 alleging commission of offence punishable under Section 138 read with Section 142 of the Act. It was alleged that cheque dated. 30.6.1997 bearing No. SB/A/31 839579 for an amount of Rs. 80,000 issued by the accused in discharge of the advance amount paid by the complainant in respect of the sale consideration was dishonoured by the drawee bank on account of insufficiency of funds. The complainant received this intimation on 2.8.1997. He got issued legal notice on 9.8.1997 through his advocate to the correct address of the accused. In the complainant, it is stated that the said legal notice was returned with an endorsement that the door of the house of the accused was locked. Subsequently, the amount was not paid by the accused. Hence, he filed the complaint. The trial Court opined that under Section 138 of the act, the service of notice on the person, whose cheque was dishonoured is mandatory and in the instant case the notice was not served on the accused and mere sending of notice by the complainant to the accused cannot be taken into consideration. Holding thus, he dismissed the complaint. The said order was assailed before the High Court. No doubt Section 138 of the act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 can profitable be imported in a case where the sender has dispatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice. Burden is on the complainant to show that the accused has managed to get an incorrect postal endorsement made. What is the effect of it has to be considered during trial, as the statutory scheme unmistakably shows the burden is on the complainant to show the service of notice. Therefore, where material is brought to show that there was false endorsement about the non-availability of notice, the inference that is to be drawn has to be judged on the background facts of each case. In view of the aforesaid, the inevitable conclusion is that the High Court was justified in its view and no interference is called for in this case. *V. Raja Kumari* v. *P. Subbarama Naidu*, 2005 SCC (Cri) 393 (395, 397, 398).

[13495] ● *Successive presentation of cheque.*— Clause (*a*) of the proviso to Section 138. N.I. Act does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, the cause of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encashed. The primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice on each presentation of the cheque and its dishonour, a fresh right—And not a cause of action—Accrues in his favour. He may, therefore, without taking preemptory action in exercise of his such right under clause (*b*) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque.

But once he gives a notice under clause (*b*) of Section 138, he forfeits such right as in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise. *Prem Chand Vijay Kumar* v. *Yashpal Singh*, 2005 SCC (Cri) 1153 (1157-58).

[13496] ● *Cause of action.*—In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908 (in short "CPC") "cause of action" means every fact which it is necessary to establish to support a right or obtain a judgment. Viewed in that context, the following facts are required to be proved to successfully prosecute the drawer for an offence under Section 138 of the Act :

(*a*) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;

(*b*) that the cheque was presented within the prescribed period;

(*c*) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and

(*d*) that the drawer failed to make the payment within 15 days of the receipt of the notice.

Proceeding on the basis of the generic meaning of the term "cause of action", certainly each of the above facts would constitute a part of the cause of action but clause (*b*) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. A combined reading of Sections 138 and 142 makes it clear that cause of action is to be reckoned accordingly. The combined reading of the above two sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(*b*) arises—And can arise—Only once.

One of the indispensable factors to form the cause of action envisaged in Section 138 of the Act is contained in clause (*b*) of the proviso to that section. It involves the making of a demand by giving a notice in writing to the drawer of the cheque "within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid". If no such notice is given within the said period of 15 days, no cause of action could have been created at all.

Thus, it is well settled that if dishonour of a cheque has once snowballed into a cause of action it is not permissible for a payee to create another cause of action with the same cheque.

The period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days form the date of the receipt of the notice by the drawer expires. *Prem Chand Vijay Kumar* v. *Yashpal Singh*, 2005 SCC (Cri) 1153 (1158).

[13497] ● ***Compounding of offence.***—Where a joint application is field by the parties for compounding the offence under Section 147, stating that the amount due has been paid, necessary figures are disclosed in the application, the application is supported by the affidavits of the accused as well as the complainant, parties should be permitted to compound the offence since the parties have stated that nothing is outstanding from the accused since the amount due has been paid. Permission to compound the offence granted. *K. Gyan Sagar* v. *Ganesh*, (2005) 7 SCC 54.

[13498] ● ***Vicarious liability of person connected with a company.***—There is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial. *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*, 2005 SCC (Cri) 1975 (1987).

[13499] ● ***Person connected with company.***—What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*, 2005 SCC (Cri) 1975 (1984).

[13500] ● ***Person accused was incharge of and responsible for conduct of business of company.***—It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied. *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*, 2005 SCC (Cri) 1975 (1987, 1988).

[13501] ● ***Officer responsible for conducting affairs of company.***—The officers responsible for conducting the affairs of companies are generally referred to as directors, managers, secretaries, managing directors, *etc.* What is required to be considered is. Is it sufficient to simply state in a complaint that a particular person was a director of the company at the time the offence was committed and nothing more is required to be said. For this, it may be worthwhile to notice the role of a director in a company. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company.

The role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company.

Merely being a director of a company is not sufficient to make the person liable under Section

141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases. *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*, 2005 SCC (Cri) 1975 (1988).

[13502] ● ***Position of Managing Director or Joint Managing Director.***—The position of a managing director or a joint managing director in a company may be different. These persons as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence. *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*, 2005 SCC (Cri) 1975 (1983-84).

[13503] ● ***Accused taking plea that they were not in charge / responsible to company for conduct of business.***—Where in prosecution for offence under Negotiable Instrument Act, Section 138, the accused persons take the plea that they were not in-charge/responsible, to the company for the conduct of the business, the plea would be adjudicated on the basis of the material evidence adduced by the parties during the trial, prosecution would not be quashed on that ground on petition under Section 482, CrPC. *S.V. Mazumdar* v. *Gujarat State Fertilizer Co. Ltd.*, AIR 2005 SC 2436 : (2005) 4 SCC 173 : 2005 CrLJ 2566 (2568) : 2005 (2) Crimes 141.

[13504] ● ***In the instant case the complaint was as under.***—"We are unable to sustain the impugned order of the High Court. It is contrary to the averments made in the complaint as also to what was stated by the complainant in his pre-summoning statement. It would be useful to reproduce para 7 of the complaint:

"The complainant further stated that as per the instruction of the accused he had deposited the two cheques for collection through Indian Overseas Bank. Chengalpattu Branch on 18.4.2001. The complainant states that both the cheques were returned to the complainant without payment 'stating that payment stopped by the drawer' and the same was informed to the complainant on 24.4.2001 by his banker. The complainant stated that for the same he had issued a legal notice to the accused regarding the same dated 2.5.2001. The complainant further stated that a reply notice from the accused lawyer Mr. A. Devakumar, Advocate, Tindivanam dated 5.5.2001 received on 10.5.2001, with false allegation".

Held, in the pre-summoning evidence, statement to the aforesaid effect was made by the complainant appellant. In this view, there was no basis for the conclusion that the complainant had not complied with the provisions of Section 138 of the Negotiable Instrument Act, 1881. The exercise of power of quashing was unwarranted on the facts of the case. At this stage we are not concerned with the defence of the accused. It would, of cause, be open to the accused to take such defence as may be available to him in accordance with law. *T.K. Kaya* v. *K. Devaraj*, (2005) 13 SCC 705 : 2006 (2) SCC (Cri) 294.

[13505] ● ***Object of Section 138.***—It is now well known that the object of the provision of Section 138 of the Act is that for proper and smooth functioning of business transaction in particular, use of cheques as negotiable instruments would primarily depend upon the integrity and honesty of the parties. It was noticed that cheques used to be issued as a device *inter alia* for defrauding the creditors and stalling the payments. It was also noticed in a number of decisions of this Court that dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. It was also found that the remedy available in a civil Court is a long-drawn process and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee. *Musaraf Hossain Khan* v. *Bhagheeratha Engg. Ltd.*, AIR 2006 SC 1288 : 2006 (3) SCC 658 : 2006 (2) SCC (Cri) 98 : 2006 CrLJ 1683 : 2006 (2) Scale 592 : 2006 (2) Supreme 681.

[13506] ● ***Limitation for filing complaint—Computation of period.*** The day on which cause of action had accused has to be excluded for reckoning the period of limitation for filing a complaint under Section 138, Negotiable Instrument Act. *Jindal Steel and Power Ltd.* v. *Ashoka Alloy Steel Ltd.*, (2006) 9 SCC 340 : 2006 SCC (Cri) 540.

[13507] ● ***Presumption of service of notice.***—We cannot also lose sight of the fact that the drawer may be dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be premature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure. *D. Vinod Shivappa* v. *Nanda Belliappa*, AIR 2006 SC 2179 : (2006) 6 SCC 456 : 2006 (3) SCC (Cri) 114 : 2006 CrLJ 2897 (2900, 2901) : (2006) 7 Crimes 282 (SC).

[13508] ● ***Cause of action to file a complaint—When arises.***—If a notice is issued and served upon the drawer of the cheque, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc. If in each such case the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. There is good authority to support the proposition that once the complainant, the payee of the cheque, issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under clause (c) of the *proviso* to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non-availability can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the legal notice which may be returned with an endorsement that the addressee is not available on the given address. *D. Vinod Shivappa* v. *Nanda Belliappa*, AIR 2006 SC 2179 : (2006) 6 SCC 456 : 2006 (3) SCC (Cri) 114 : 2006 CrLJ 2897 (2900, 2901) : (2006) 7 Crimes 282 (SC).

[13509] ● ***Postal endorsement that notice could not be serves due to non-availability of addressee—Demand service.***—The question is whether in a case of this nature, where the postal endorsement shows that the notice could not be served on account of the non-availability of the addressee, a cause of action may still arise for prosecution of the drawer of the cheque on the basis of deemed service of notice under clause (c) of *proviso* to Section 138 of the Act. This question has to be answered by reference to the facts of each case and no rule of universal application can be laid down that in all cases where notice is not served on account of non-availability of the addressee, the Court must presume service of notice. *D. Vinod Shivappa* v. *Nanda Belliappa*, AIR 2006 SC 2179 : (2006) 6 SCC 456 : 2006 (3) SCC (Cri) 114 : 2006 CrLJ 2897 (2900, 2901) : (2006) 7 Crimes 282 (SC).

[13510] ● ***Section 138, Proviso (c), Negotiable Instruments Act—Object of Proviso (c).***—Section 138 of the Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. Apart from civil liability, a criminal liability was imposed on such unscrupulous drawers of cheques. The prosecution, however, was made subject to certain conditions. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the *proviso* to Section 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. The drawer is given 15 days time from date of receipt of notice to make the payment, and only if he fails to make the payment he may be prosecuted. The object which the *proviso* seeks to achieve is quite obvious. It may be that on account of mistake of the bank, a cheque may be returned despite the fact that there is sufficient balance in the account from which the amount is to be paid. In such a case if the drawer of the cheque is prosecuted without notice, it would result in great injustice and hardship to an honest drawer. One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses inducted by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of the *proviso* to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the *proviso* is meant to protect honest drawers whose cheques may have been dishonored for the fault of others, or who may have genuinely wanted a fulfil their promise but on account inadvertence or negligence failed to make necessary arrangements for the payment of the cheuqe. The *proviso* is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons. *D. Vinod Shivappa* v. *Nanda Belliappa*, AIR 2006 SC 2179 : (2006) 6 SCC 456 : 2006 (3) SCC (Cri) 114 : 2006 CrLJ 2897 (2900, 2901) : (2006) 7 Crimes 282 (SC).

[13511] ● ***No proof that cheque was issued in discharge of debt.***—We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that large portion of the amount claimed to be a part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The appellant clearly said that nothing is due and the cheque was issued by *way of security*. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefore cannot be held to have been issued in discharge of the debt as, for example, if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act. *M.S. Narayana Menon* v. *State of Kerala*, AIR 2006 SC 3336 : (2006) 6 SCC 39 : 2006 CrLJ 4607 (4617) : 2006 (3) Crimes 117 (SC).

[13512] ● ***Limitation for filing complaint.***—Section 142 of the Negotiable Instruments Act enacts a bar against taking cognizance of an offence under Section 138 unless such a complaint is made within one month of the date on which the cause of action arises under clause (c) of the *proviso* to Section 138. Clause (c) of the *proviso* to Section 138 contemplates a situation when the drawer of such cheque fails to make the payment of the money to the payee or as the case may be to the holder in due course of the cheque within 15 days of the receipt of the said notice. Though the cause of action for the purposes of Section 142(b) arises on the failure of the drawer of the cheque to make the payment in compliance with the demand made in the notice, it is the contention of the learned counsel for the appellant that the accrual of cause of action under Section 142(b) read with Clause (c) of the *proviso* to Section 138 is relatable to the first notice and on the expiry of the period of 15 days, the complaint ought to have been filed within one month thereafter. However, the contention of the learned counsel for the respondent is that one-month period as contemplated by Section 142(b) should be reckoned with reference to the expiry of the period of 15 days after the second notice was issued on 29.6.1995. It is submitted that there is no bar to re-present the cheque so long as the cheque is valid and it was therefore open to the respondent to file a complaint after the issuance of the second notice. *Krishna Exports* v. *Raju Das*, (2006) 13 SCC 498 : 2006 (1) SCC Cr 350.

[13513] ● ***Territorial jurisdiction.***—In this case, the averments made in the writ petition filed by the respondent herein even if given face value and taken to be correct in their entirety would not confer any jurisdiction upon the Kerala High Court. The agreement was entered into within the jurisdiction of the Calcutta High Court. The project for which the supply of stone chips and transportation was being carried out was also within the State of West Bengal, Payments were obviously required to be made within the jurisdiction of the said Court where either the contract had been entered into or where payment was to be made. For the purpose of proving the aforementioned ingredients of the offence under Section 138 of the Act, the complainant appellant was required to prove the facts constituting the cause of action therefore none of which arose within the jurisdiction of the Kerala High Court. It is, apt to mention that in Prem Chand Vijay Kumar (*supra*) this Court held that cause of action within the meaning of Section 142 (b) of the Act can arise only once. For the reasons aforementioned, we are of the opinion that the Kerala High Court had no jurisdiction to entertain the writ petition as no part of cause of action arose within its jurisdiction. *Musaraf Hossain Khan* v. *Bhagheeratha Engineering Ltd.*, AIR 2006 SC 1288 : (2006) 3 SCC 658 : 2006 (2) SCC (Cri) 98 : 2006 CrLJ 1683 (1691).

[13514] ● ***Premature complaint.***—Proviso appended to Section 138 contains a non-obstante clause. It provides that nothing contained in the main provision shall apply unless the requirements prescribed therein are complied with. Service of notice is one of the statutory requirements for initiation of a criminal proceeding. Such notice is required to be given within 30 days of the receipt of the information by the complainant from the bank regarding the cheque as unpaid. Clause (c) provides that the holder of the cheque must be given an opportunity to pay the amount in question within 15 days of the receipt of the said notice. Complaint Petition, thus, can be filed for commission of an offence by a drawee of a cheque only 15 days after service of the notice. What are the requirements of service of a notice is no longer *res-integra* in view of the recent decision of this Court in. *C.C. Alavi Haji* v. *Palapetty Muhammed*, JT 2007 (7) SC 498; *Sarav Investment & Financial Consultants Pvt. Ltd.* v. *Lloyds Register of Shipping Indian Office Staff Provident Fund*, 2007 (10) SCR 1110 : 2007 (12) Scale 123 : 2007 (4) Crimes 244 (SC).

[13515] ● ***Cheque whether issued towards discharge of debt.***—If, upon analysis of the evidence brought on records by the parties, in a fact situation obtaining in the instant case, a finding of fact has been arrived at by the High Court that the cheques had not been issued by the respondent in discharge of any debt, the view of the High Court cannot be said to be perverse warranting interference by us in exercise of our discretionary jurisdiction under Article 136 of the Constitution of India. The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the Court with clean hands. His conduct was not that of prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay installments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. It in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken. *John. K. John* v. *Tom Varghese*, 2007 (11) SCR 287 : JT 2007 (13) SC 222 : 2007 (12) Scale 333 : 2007 (4) Crimes 155 (SC).

[13516] ● ***Complainant not a man of means to advance huge amounts on various dates—No commercial transactions between parties.***—The complainant has been found to be not a man of means. He had allegedly advanced a sum of Rs. 1 lakh on 13.01.1994. He although had himself been taking advances either from his father or brother or third parties, without making any attempt to realize the amount, is said to have advanced sums of Rs. 86,000/- on 8.06.1994. Likewise he continued to advance diverse sums of Rs. 28,000/-, Rs. 50,000/-, Rs. 40,000/- and Rs. 12,000/- on subsequent dates. It is not a case where the appellant paid any amount to the respondent towards repayment of loan. He even did not charge any interest. He had also not proved that there had been any commercial or business transactions between himself and the appellant. Why the appellant required so much amount and why he alone had been making payments of such large sums of money to the appellant has not been disclosed. According to him, he had been maintaining a diary. A contemporaneous document which was in existence as per the admission of the complainant, therefore, was required to be brought on records. He failed to do so. He also did not examine his father and brothers to show that they were men of means and in fact advanced a huge sum to him only for the purpose of grant of loan by him to the appellant. *Held,* "High Court furthermore has not met the reasons of the learned Trial Judge. It proceeded on the premise that the appellant had not been able to discharge his burden of proof in terms of Section 139 of the Act without posing to itself a further question as to how the said burden of proof can be discharged. It furthermore did not take into consideration the legal principle that the standard of proof upon a prosecution and upon an accused is different. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed". *K. Prakashan* v. *P.K. Surenderan*, 2007 (10) SCR 1010 : JT 2007 (11) SC 573 : 2007 (12) Scale 96 : 2007 (4) Crimes 217 (SC).

[13517] ● ***Notice to drawer of cheque.***—Under Clause (b) of the *proviso*, the payee or the holder of the cheque in Notice Negotiable Instrument Act, Section 138, *Proviso* (b) due course is required to give a written notice to the drawer of the cheque within a period of thirty days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. Under Clause (c), the drawer is given fifteen days time from the date of receipt of the notice to make the payment, a complaint may be filed against him. The object of the *proviso* is to avoid unnecessary hardship to an honest drawer. Therefore, the observance of stipulations in quoted Clause (b) and its aftermath in Clause (c) being a pre-condition for invoking Section 138 of the Act, giving a notice to the drawer before filing complaint under Section 138 of the Act is a mandatory requirement. *C.C. Alvi Haji* v. *Palapetty Muhammed*, (2007) 6 SCC 555 : 2007 (3) SCC (Cri) 236 : 2007 CrLJ 3214 (3216) (SC) : 2007 (3) Crimes 120 (SC).

[13518] ● ***Receipt of Notice.***—When the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of *proviso* to Section 138 of the Act stands complied with. The complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be *prima facie* satisfied that a case under the said Section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. *C.C. Alvi Haji* v. *Palapetty Muhammed*, (2007) 6 SCC 555 : 2007 (3) SCC (Cri) 236 : 2007 CrLJ 3214 (3219) (SC) : 2007 (3) Crimes 120 (SC).

[13519] ● ***Presumption under Section 27, General Clauses Act.***—In view of the presumption available under Section 127 of the General Clauses Act, it is not necessary to aver in the complaint under Section 138 of the Negotiable Instrument Act that the service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved. *C.C. Alvi Haji* v. *Palapetty Muhammed*, (2007) 6 SCC 555 : 2007 (3) SCC (Cri) 236 : 2007 CrLJ 3214 (3219) : 2007 (3) Crimes 120 (SC).

[13520] ● ***Notice without specifying as to what was amount due under dishonoured cheque does not subserve requirement of law.***—Operation of Section 138 of the Act is limited by the *proviso*. When the *proviso* applies, the main Section would not. Unless a notice is served in conformity with *Proviso (b)* appended to Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". Such a notice has to be issued within a period of 30 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. *Rahul Builders* v. *Arihant Fertilizers and Chemicals*, 2008 CrLJ 452 : 2007 (4) Crimes 235 (SC) : JT 2007 (12) SCC 495.

[13521] ● ***Period must be specified in notice.***—When the statute prescribes for service of notice specifying a particular period, it should be expressly stated. In absence of any such stipulation, it is difficult to hold that 15 days' notice was thereby contemplated. The High Court, therefore, was not correct in arriving at the aforementioned finding. *Rahul Builders* v. *Arihant fertilizers and Chemical*, 2008 CrLJ 452 : JT 2007 (12) SC 495 : 2007 (12) Scale 662 : 2007 (4) Crimes 235 (SC).

[13522] ● ***Service of notice—Non-compliance of Section 138 (c), Negotiation Instruments Act.***—Service of notice in this case was not sought to be effected under registered cover with acknowledgment due. It was sought to be done by the agent of the complainant itself. The agent of the complainant sought to serve the said notice through their own employees.

The notice, was only required to be dispatched. Its contents were required to be communicated. Communication to the appellant about the fact of dishonouring of the cheques and calling upon him to pay the amount within 15 days is imperative in character. It is not a case, where, actual communication was not necessary. Service of notice is a part of cause of action for lodging the complaint.

We may consider the effect of the nature of service of notice effective by the employees of the Law Firm. Pragraph 2 of the affidavit affirmed by Ramchandra Damaji Khadpe does not disclose as to when he had gone to serve notice upon the appellant at 34, Adarsh Nagar, Worli, Mumbai. It was stated that he having been told by the neighbour of the appellant. Arvind Naik that he had shifted to Bhatachi Chawl in Worli, went there also. He did not disclose as to what was the new address. He did not furthermore state when did he visit that place.

The learned Magistrate proceeded on the basis that the service of notice upon the company at its registered office would subserve the requirements of law. But, in this case, point taken by the appellant is a different one.

Conduct of the appellant, in our opinion, is not material for determining the issue. Even no presumption can be raised in regard to the service of notice as the same has not been effected in terms of the statute. *Sarav Investment & Financial Consultants Pvt. Ltd.* v. *Lloyds Register of Shipping Indian Office Staff Provident Fund*, (2007) 4 SCC 753 : 2007 (10) SCR 1110 : 2007 (12) Scale 123 : 2007 (4) Crimes 244 (SC).

[13523] ● ***Dishonouring of cheque by company.***—While Section 138 made a person criminally liable on dishonour of a cheque for insufficiency of funds or the circumstances referred to in the Section and on the conditions mentioned therein, Section 141 laid down a special provision in respect of issuance of cheques by companies and commission of offences by companies under Section 138 of the Negotiable Instruments Act. Therein, it was provided that if the person committing an offence under Section 138 of the Act was a company, every person who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Prosecution be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Subsection (2) of Section 141 also roped in Directors, Managers, Secretaries or other officers of the company, if it was proved that the offence was committed with their consent or connivance. *N. Rangachari* v. *Bharat Sanchar Nigam Ltd.*, AIR 2007 SC 1682 : (2007) 5 SCC 108 : 2007 (2) SCC (Cri) 460 : 2007 CrLJ 2448 : 2007 (5) Scale 821 : 2007 (5) SCR 329 : 2007 (2) Crimes 455 (SC).

[13524] ● ***Prosecution under Section 138, Negotiable Instrument Act—Object.***—Prosecution under the Act never meant to be a prosecution but is a measure of deterrence. *Dilip S. Dhanukar* v. *Kotak Mahindra Co. Ltd.*, (2007) 6 SCC 528 : 2007 (3) SCC (Cri) 209 : 2007 (2) Crimes 435 (SC).

[13525] ● ***Standard of proof.***—The standard of proof for the accused is mere preponderance of probability. *K. Prakashan* v. *P.K. Surendersam*, 2007 (4) Crimes 217 (SC) : JT 2007 (11) (SC) 573.

[13526] ● ***Compensation instead of substantive sentence.***—"It appears from a plain reading of the complaint petition that the respondent had admitted his liability to the extent of Rs. 7,00,000/-. It was found as of fact to be so by the Courts below. The said findings do not warrant any interference. The defence raised by the respondent to the effect that the parties had entered into a compromise in the police station and he had to sign a cheque under some threat or coercion had not been accepted by the Courts below. There cannot be any doubt whatsoever that had the respondent been able to show that the cheque had been issued not in discharge of a debt but by way of a security pending determination of his liability by an auditor, the matter would have been different. In such an event, the Court could have arrived at a finding that the cheque having been issued on the basis of an anticipated profit which by itself did not create any liability in *praesenti* and the result of the audit might have gone either way, no case under Section 138 of the Act was made out. But, the same is not the case here.

The question which now arises for consideration is as to whether any case for awarding a substantial sentence has been made out. We do not think so. Grant of compensation, in our opinion, would subserve the purpose.

Respondent has not been charged with any fraudulent action. He had a probable defence. Appellant furthermore had not preferred any appeal against the judgment of the learned Trial Judge for enhancement of the sentence. It may be that quantum of compensation has been altered to that of the fine but in effect and substance the same did not matter.

In our opinion, therefore, interest of justice would be subserved, if the respondent is hereby directed to pay a compensation of Rs. 7,00,000/- instead and place of a fine of Rs. 5,000/- as has been directed by the High Court. Thus, the appellant would be entitled to get the aforementioned sum of Rs. 7,00,000/- by way of compensation. *Suresh Kumar* v. *R. Shankar*, AIR 2007 SC 1774 : (2007) 4 SCC 752 : 2007 (2) SCC (Cri) 696 : 2007 CrLJ 2951 (2954-55).

[13527] ● ***Vicarious liability.***—A Chairman of a large Company may or may not be aware of the actual transaction. If in a given situation, cheques are issued in ordinary course of business. The Managing Director or a Deputy Managing Director, would be deemed to be aware thereof. A Chairman or a Director of a Company need not be. But, without going into the finer question raised by Mr. Tulsi, we may notice that allegations have not only been made in terms of the wordings of section but also at more than one place, it has categorically been averred that the payments were made after the meetings held by and between the representative of the Company and Accused Nos. 1 to 5 which would include Respondent Nos. 2 and 3.

It is, therefore, not a case where having regard to the position held by the said respondents in the Company, they could plead ignorance of the entire transaction.

Not only cheques were issued having regard to the huge amount payable by Accused No. 6 to the Company but also as a result of fall out of non-payment thereof, negotiations were held between the parties wherein Respondent Nos. 2 and 3, the Chairman and Managing Director of the Company took part, and, thus, in our opinion, there cannot be any doubt that the ingredients of the provisions of Section 141 of the Act stand satisfied. *Everest Advertising Pvt. Ltd.* v. *State Government of NCT of Delhi*, AIR 2007 SC 1650 : 2007 (2) SCC (Cri) 444 : 2007 CrLJ 2442 (2447) : 2007 (2) Crimes 247 (SC).

[13528] ● ***Ingredients of offence.***—To bring the case within the purview of Section 138, N.I. Act, the Complaint most show: (i) That a cheque was issued; (ii) The same was presented but dishonoured; (iii) A notice in terms of section was served on person sought to be made liable; (iv) Despite service of notice, neither payments were made nor other obligations, if any were complied with within 15 days of receipt of notice. *Saroj Kumar Poddar* v. *State (NCT of Delhi)*, AIR 2007 SC 912 : (2007) 3 SCC 693 : 2007 (2) SCC (Cri) 135 : 2007 CrLJ 1419 : 2007 (1) SCR 907 : 2007 (1) Crimes 274 (SC). **TO THE SAME EFFECT** : (1) *N.K. Wahi* v. *Shekhar Singh*, AIR 2007 SC 1454 : (2007) 9 SCC 481 : 2007 SCC (Cri) 203 : 2007 (2) Crimes 352 (SC). (2) *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*, (2007) 4 SCC 70 : 2007 (2) SCC (Cri) 192 : 2007 (2) Crimes 183. (3) *Subodh Salaokar* v. *Jayaprakash M. Shah*, AIR 2008 SC 3086 : 2008 CrLJ 3953. (4) *D.C.M. Financial Services Ltd.* v. *J.N. Sareen*, AIR 2008 SC 2255 : 2008 (3) SCC (Cri) 401 : 2008 CrLJ 3178.

[13529] ● ***Quashing of proceedings on ground that company is sick.***—"According to the High Court, admittedly the purchase orders in question were entered into and the purchases were made by the appellants with full knowledge of the proceedings that the company was declared sick under the SICA, the appellants clearly all through gave the impression to the respondent company that the outstanding amount towards the purchase of the goods would be shortly cleared. The fact that the purchases were made with the clear promise to repay could not be disputed by the appellants. The Directors had in fact issued the cheques for discharging their liability with the full knowledge, would not only clearly show that there was an undisputed debt, but would also show that, right from the inception, the appellants in fact had no intention of paying the amount for the purchases made by them. The intention of the appellants can be gathered by their subsequent acts, conduct and behaviour of taking a shelter under the provisions of SICA. Hence, the appellants are not entitled to any indulgence of this Court under its extraordinary jurisdiction under Article 136 of the Constitution. The appellants had lost their total credibility because of their conduct. When the appellant company was declared sick, then without disclosing this fact the appellants ought not to have made huge purchases from the respondent company. Ultimately, the appellant company did not pay for the purchases. This clearly indicates that the appellants had no intention of making payment of the purchases made by it.

The High Court, in the impugned order, has directed the trial Court to dispose of the cases of the appellants as early as possible, but not later than six months from the date of its order. The appellants by approaching this Court have caused avoidable delay in disposal of these cases before the trial Court.

In the facts and circumstances of the case, we deem it appropriate to request the trial Court now to conclude the trial of these cases as expeditiously as possible and, in any event within six months from the date of this judgment". *Southern Steel Ltd.* v. *Jindal Vijayanagar Steel*, AIR 2008 SC 3143 : (2008) 5 SCC 762 : 2008 (3) SCC (Cri) 75 : 2008 CrLJ 3960.

[13530] ● ***Object of Section 138, Negotiation Instruments Act.***—Section 138 of the Act was inserted by the Banking, Public financial Institutions and Negotiable Instrument Law (Amendment) Act, 1988 (Act 66 of 1988) to regulate financial promises in growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters. The incorporation of the provision is designed to safeguard the faith of the creditor in the drawer of the cheque, which is essential to the economic life of a developing country like India. The provision has been introduced with a view to curb cases of issuing cheques indiscriminately by making stringent provisions and safeguarding interest of creditors. *Vinay Devanna Nayak* v. *Ryot Seva Sahakari Bank Ltd.*, AIR 2008 (SC) 716 : (2008) 2 SCC 305 : 2008 (1) SCC (Cri) 351 : 2008 CrLJ 805 : 2007 (12) SCR 1134 : JT 2007 (13) 382 : 2007 (13) Scale 705 : 2007 (7) Supreme 245 : 2007 (4) Crimes 352 (SC).

[13531] ● ***Ingredients.***—To attract the provisions of Section 138, Negotiation Instrument Act, it must be proved (i) that there is a legally enforceable debt; (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability, which presupposes or legally enforceable debt; (iii) that the cheque so issued had been returned due to insufficiency of funds. *Lalit Kumar Sharma* v. *State of Uttar Pradesh*, (2008) 5 SCC 638 : 2008 (2) SCC (Cri) 682 : 2008 (2) Crimes 397 (SC); TO THE SAME EFFECT : *Krishna Janardhan* v. *Dattatraya G. Hegde*, AIR 2008 SC 1325 : (2008) 4 SCC 54 : 2008 SCC (Cri) 166 : 2008 CrLJ 1172 : 2008 (1) Crimes 227 (SC).

[13532] ● ***Civil suit and petition under Section 138, Negotiation Instrument Act on the same cause of action.***—A suit for recovery of money due from a borrower indisputably is maintainable at the instance of the creditor. It is furthermore beyond any doubt or dispute that for the same cause of action a complaint petition under terms of Section 138 of Negotiation Instrument Act would also be maintainable. *D. Purushotama Reddy* v. *K. Sateesh*, AIR 2008 SC 3202 (3203) : (2008) 8 SCC 505.

[13533] ● ***No embargo on successive presentation of cheque during period of its validity.***—Clause (a) of the *proviso* to Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after sometime, on his own volition or at the request of the drawer, in expectation that it would be encashed. The primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice. On each presentation of the cheque and its dishonour, a fresh right-and not a cause of action-accrues in his favour. He may, therefore, without taking preemptory action in exercise of his such right under Clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. *Anil Kumar Goel* v. *Kishan Chand Kaura*, AIR 2008 SC 899 : (2007) 13 SCC 492 : 2008 CrLJ 1386 : 2001 (13) SCR 313 : 2007 (14) Scale 179.

[13534] ● ***Proper complaints—Condition.***—For a proper complaint under Section 138 of the Act, the cheque must have been drawn by a person and secondly the account must be maintained by "such person" and it should have been given for payment of amount of money to another person from out of that account for the discharge of any debt or other liability and when such cheque is returned by the bank unpaid because of the insufficient funds to honour the cheque. Then such person would be liable under Section 138 of the Act.

In the present case, the account was being maintained by "Intel Travels" and the appellant had the authority to sign the cheque of that account. Therefore, there will be a clear liability if the appellant used the cheque which she had the authority to use and that too for discharging the debt. It must be pointed out at this juncture that the words in Section 138 of the Act are "any debt" or "other liability". In this case since M/s Intel Travels was maintaining the account and the appellant had the authority to operate the same, the conditions will be satisfied even if it was given for the discharge of the liability of the appellant. *Aneeta Hada* v. *Godfather Travel and Tours Pvt. Ltd.*, (2008) 13 SCC 703 : 2008 (7) SCR 1054 : 2008 (8) Scale 25.

[13535] ● ***Complaint under Section 138, Negotiation Instrument Act.***—In proceedings under Section 138, Negotiation Instrument Act, the appellant can raise a defence that the cheques were not meant to be used towards discharge of a lawful liability or a debt, but the same by itself would not mean that in an appropriate case a complaint petition cannot be allowed to be filed. *Surya Lakshmi Cotton Mills Ltd.* v. *Rajvir Industries Ltd.*, AIR 2008 SC 1683 (1688) : 2008 (1) Crimes 165 (SC) : JT 2008 (1) SC 340.

[13536] ● ***Whether cheque dishonoured issued in discharge of liability of debt—Determination.***—Single Judge has not addressed himself on the legal question raised before him that the criminal liability of appellant under the provisions of Section 138 are attracted only on account of the dishonour of the cheques issued in discharge of liability or debt, but not on account of issuance of security cheques. The Single Judge has also not given cogent, satisfactory and convincing reasons for disbelieving and discarding the pre-charge evidence of the appellant corroborated by the evidence of the expert opinion in regard to the interpolation in and fabrication of the cheques by adding one more figure '0' to make Rs. 30,000/- to Rs. 3,00,000/- and similarly adding one more figure '0' to make Rs. 40,000/- to Rs. 4,00,000/-. In the backdrop of the facts of these cases, we are of the opinion that the judgments and orders of the High Court cannot be sustained on the premise that the High Court has not addressed itself on the above-said two legal questions raised by the appellant and, therefore, the impugned judgments and orders dated 25.01.2007 and 19.02.2007 are set aside. The interest of justice should be sub-served if the matters are remitted to the High Court to decide the appeals filed by the respondent against the appellant and criminal miscellaneous petitions seeking for quashing the first information reports registered against the respondent and his wife by the police of commission of the offences stated in FIR Nos. 93 and 94 of 1998. Needless to say that any observation made by us in this judgment shall not be construed as an expression of opinion on the merits of the cases, which shall be decided by the High Court on their own merits in accordance with law. *Sudhir Kumar Bhalla* v. *Jagdish Chand*, AIR 2008 SC 2407 : (2008) 7 SCC 137 : 2008 (7) SCR 459 : JT 2008 (6) 549 : 2008 (6) Scale 626.

[13537] ● ***Rebuttal of presumption—Object of Section 139, Negotiation Instrument Act.***—The provision of Section 139, Negotiation Instrument Act has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the Courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same. *Krishna Janardhan Bhatt* v. *Duttaraya*, AIR 2008 SC 1325 : 2008 (2) SCC (Cri) 166 : 2008 CrLJ 1172 (1179-1180) : 2008 (1) Crimes 227 (SC).

[13538] ● ***Presumption under Section 139, Negotiation Instrument Act.***—Section 139 of the Negotiation Instrument Act merely raises a presumption in favour of the holder of the cheque that same has been issued for discharging of any debt or other liability. Existence of legally recoverable debt is not a matter of presumption under Section 139, Negotiable Instrument Act. *Krishna Janardhan Bhat* v. *Duttaraya G. Hegde*, AIR 2008 SC 1325 : (2008) 4 SCC 54 : 2008 (2) SCC (Cri) 166 : 2008 CrLJ 1172 (1177) : 2008 (1) Crimes 227 (SC).

[13539] ● ***Compounding of offence.***—In the instant case, since the matter has been compromised between the parties and the amount of Rs. 45,000/- has been paid by the appellant towards full and final settlement to the respondent-bank towards its dues, the appellant is entitled to acquittal.. The order of conviction and sentence recorded by all Courts is set aside and he is acquitted of the charge levelled against him. *Vinay Devanna Nayak* v. *Ryot Seva Sabakari Bank Ltd.*, AIR 2008 SC 716 : (2008) 2 SCC 305 : 2008 (1) SCC (Cri) 351 : 2008 CrLJ 805 : 2007 (12) SCR 1134 : JT 2007 (13) 382 : 2007 (13) Scale 705 : 2007 (8) Supreme 245 : 2007 (4) Crimes 352 (SC).

[13540] ● ***Person resigning with knowledge of complainant in 1996—Cannot be incharge of company in 1996 when cheque was dishonoured.***—A person, who had resigned with the knowledge of the complainant in 1996 could not be a person incharge of the company in 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. *DCM Financial Services Ltd.* v. *Jal Sareen*, AIR 2008 SC 2255 : (2008) 8 SCC 1 : 2008 (3) SCC (Cri) 401 : 2008 CrLJ 3178.

[13541] ● *Belated complaint.*—The provisions of the Act being special in nature, in terms thereof the jurisdiction of the Court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the *proviso* appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted *proviso* to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the Court to condone the delay. It is, therefore, a substantive provision and not a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable. In any event, no such application for condonation of delay was filed. If the *proviso* appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well-settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation. *Subodh S. Salaskar* v. *Jayaprakash M. Shah*, AIR 2008 SC 3086 : 2008 CrLJ 3953 (3958) : JT 2008 (8) SC 637.

[13542] ● *Presumption of service.*—Presumption of service under the statute would arise only when it is sent by registered post in times of Section 27 of the General Clauses Act but such a presumption may be raised also under Section 114 of the Evidence Act. Even when a notice is received back with an endorsement that the party has refused the accept, still then the presumption can be raised as regards the valid service of notice. *Subodh Salaskar* v. *Jayaprakash M. Shah*, AIR 2008 SC 3086 : 2008 CrLJ 3953 (3957) : JT 2008 (8) (SC) 637.

[13543] ● *Liability of Directors and partners of firm—Legal fiction.*—Section 41, Negotiation Instrument Act raises a legal fiction in terms whereof, the Directors of a company which would include the partners of a firm would be deemed to have committed an offence, if they are in-charge of the affairs of the company and responsible to it. *Green Earth Asphalt and Power (P) Ltd.* v. *State of Maharashtra*, (2008) 8 SCC 278 (279) : 2008 (3) SCC (Cri) 481.

[13544] ● *Service of notice.*—Where the service of notice upon the accused director of the company, through the employee of the advocate of the complainant was not proved, the complainant for offence under Section 138, N.I. Act was not entertained. *S.I. and F.C. (P) Ltd.* v. *Lloyds Register of SIO Staff Provident Fund*, 2008 CrLJ 377 (382) : (2007) 4 Crimes 244 : (2007) 14 SCC 753.

[13545] ● *Notice ambiguously stating amount.*—Where the notice served ambiguously stated the entire amount and not the amount of the cheque dishonoured Criminal Proceedings under Section 138 N.I. Act were quashed. *Rahul Builders* v. *Arihant Fertilizers and Chemical*, (2008) 2 SCC 321 : 2008 CrLJ 452 : (2007) 4 Crimes 235.

[13546] ● *Who can file complaint.*—Where the payee is a proprietary concern, the complaint can be filed: (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the 'payee'; (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and (iii) the proprietor or the proprietary concern represented by the attorney-holder under a power of attorney executed by the sole proprietor. *Shankar Finance and Investments* v. *State of Andhra Pradesh*, AIR 2009 SC 422 : (2008) 8 SCC 536 : 2008 (10) SCR 905 : 2008 (10) Scale 654.

[13547] ● *Service of Notice.*—When the notice is sent by registered post and under certificate of posting correctly addressed, it must be presumed that the service of notice has been made effective. *Indo Automobiles* v. *Jai Durga Enterprises*, AIR 2009 SC 386 : (2008) 8 SCC 529 : 2008 (3) Crimes 158.

[13548] ● *Notice sent by registered post with A/D—Presumption.*—Once notice has been sent by registered post with A/D on a correct address, is must be presumed that the service had been made effective. *Indo Automobiles* v. *Jai Durga Enterprises*, AIR 2009 SC 386 : (2008) 8 SCC 529 : 2008 (3) Crimes 158.

[13549] ● *First notice not received by accused—Presentation of cheque for second time—Second notice not invalid.*—The first notice purported to have been issued by the complainant-respondent on 8.7.2003 is not on record. Admittedly appellants have not received the same

As regards notice dated 9.9.2003 which is said to be the second notice, it is evident that the same had not been served upon the appellants having been returned. If that be so, the presentation of the cheque for the second time and issuance of the second notice in our opinion would not be invalid. *S.L. Construction* v. *Alapati Srivasa Rao*, AIR 2009 SC 1538 : (2009) 1 SCC 500 : 2008 (15) SCR 51 : JT 2008 (13) 472 : 2008 (15) Scale 308.

[13550] ● ***Scope of Section 138, Negotiation Instrument Act.***—Section 138 of Negotiation Instrument Act provides for a final provision. Such a penal provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is retuned by the bank unpaid. Such non-payment may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with the bank.

Before a proceeding thereunder is initiated, all the legal requirements therefor must be complied with. The Court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.

The parameters for invoking the provisions of Section 138 of the Act, thus, being limited, we are of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of Section 138 of the Act.

The Court while exercising its jurisdiction for taking cognizance of an offence under Section 138 of the Act was required to consider only the allegations made in the complaint petition and the evidence of the complainant and his witnesses, if any. It could not have taken into consideration the result of the complaint petition filed by the respondent No. 2 or the closer report filed by the Superintendent of Police in the First Information Report lodged by the appellant against him. *Raj Kumar Khurana* v. *State of (NCT of Delhi)*, (2009) 6 SCC 72 : 2009 CrLJ 3454 : 2009 (7) SCR 434 : JT 2009 (7) 351 : 2009 (7) Scale 55.

[13551] ● ***Ingredients.***—In order to attract Section 138, Negotiable Instruments Act to complaint must show: That cheque was issued, the same was presented; it was dishonoured on presentation; a notice in terms of the provisions was served on the person sought to be made liable and despite service of notice, neither any payment was made, nor other obligations, if any, were made were complied with within fifteen days, from the date of receipt of the notice. *Ramraj Singh* v. *State of Madhya Pradesh*, (2009) 6 SCC 729 : JT 2009 (5) SC 649 : 2009 (5) SCR 1130.

[13552] ● ***High Court failing to examine probative value of documents produced by complainant—Case remitted.***—It is noticed that the evidence of PW-1 was to the effect that the accused was liable to pay Rs. 1,81,256.75 and the cash discount and the sales tax. It is also seen that the appellants had produced the relevant documents to substantiate the contention that the cheque in question was issued to discharge the liability. The documents produced included the invoices, ledger and bills.

It is noticed that the High Court has not examined the matter in proper perspective. The probative value of the documents produced and the acceptability of the evidence of PW-1 has not been examined. That being so, we set aside the impugned order of the High Court and remit the matter to it to consider the matter afresh taking into account the various aspects highlighted above. *V.G. Saraf and Sons* v. *H. Ranjith*, (2009) 5 SCC 141 : 2009 CrLJ 2788, 2789 : 2009 (4) SCR 387 : JT 2009 (4) 107 : 2009 (3) Scale 784 (2) : 2009 (2) Supreme 491.

[13553] ● ***Presumption of service of notice.***—Presumption raised in support of service of notice would depend upon the facts and circumstances of each case. It application is on the question of law or the fact obtaining. Presumption has to be raised on the hypothesis or surmises but if the foundational facts are laid down therefor, only because presumption of service of notice is possible to be raised at the trial, the same by itself may not be a ground to hold that the distinction between giving of notice and service of notices ceases to exist. *Harman Electronics (P) Ltd.* v. *National Panasonic India Ltd.*, AIR 2009 SC 1168 : (2009) 1 SCC 720 : 2009 CrLJ 1109 (1115).

[13554] ● ***Demand notice—Service of such notice.***—While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative only on a service of such notice and failure on the part of the accused to pay the demanded amount within a period of fifteen days thereafter, commission of an offence completes. Giving of notice, ‘therefore, cannot have any precedence over the service. *Harman Electronics (P) Ltd.* v. *National Panasonic India (Pvt.) Ltd.*, AIR 2009 SC 1168 : (2009) 1 SCC 720 : 2009 CrLJ 1109 (1115).

[13555] ● ***Ingredients of offence under Section 138, Negotiation Instruments Act.***—To constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:

(i) A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account; (ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability, (iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier, (iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank; (v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; (vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice. *Jugesh Sehgal* v. *Shamsher Singh Gogi*, (2009) 14 SCC 683 : 2009 (10) SCR 857 : JT 2009 (9) SC 292 : 2009 (9) Scale 455 : 2009 (5) Supreme 320.

[13556] ● ***Failure to prove existence of debt or liability.***—It is the specific case of the respondent that he had sold woolen carpets to the appellant on 6-8-1994 and in discharge of the said liability the appellant had issued two cheques, which were ultimately dishonoured. In support of his case the respondent produced the carbon copy of the bill. A perusal of the bill makes it evident that there is no endorsement made by the respondent accepting the correctness of the contents of the bill. The bill is neither signed by the appellant. On the contrary, the appellant examined one official from the Sales Tax Department, who positively asserted before the Court that the respondent had filed sales tax return for the Assessment Year 1994-95 indicating that no sale of woolen carpets had taken place during the said Assessment Year and, therefore, sales tax was not paid.

Once the testimony of the official of the Sales Tax Department is accepted, it becomes evident that no transaction of sale of woolen carpets had taken place between the respondent and the appellant, as alleged by the respondent. When sale of woolen carpets had not taken place, there was no existing debt in discharge of which, the appellant was expected to issue cheques to the respondent. Thus the accused has discharged the onus of proving that the cheques were not received by the holder for discharge of a debt or liability. Under the circumstances the defence of the appellant that blank cheques were obtained by the respondent as advance payment also becomes probable and the onus of burden would shift on the complainant. The complainant did not produce any books of account or stock register maintained by him in the course of his regular business or any acknowledgement for delivery of goods, to establish that as a matter of fact woolen carpets were sold by him to the appellant on August 6, 1994 for a sum of Rs. 1,90, 348.39. Having regard to the materials on record, this Court is of the opinion that the respondent failed to establish his case under Section 138 of the Act as required by law and, therefore, the impugned judgment of the High Court is liable to be set aside. *Kumar Exports* v. *Sharma Carpets*, AIR 2009 SC 1518 : (2009) 2 SCC 513 : 2008 (17) SCR 572 : 2008 (16) Scale 372.

[13557] ● ***Object of Section 138, Negotiable Instruments Act.***—Chapter XVII of the Act provides for penalties in case of dishonour of cheques for insufficiency of funds in the accounts of the drawer thereof.

Indisputably, Chapter XVII, which was inserted by the Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988) and came into force on 1.4.1989, was incorporated to "enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers." *S.L. Construction* v. *Alapati Srinivasa Rao*, AIR 2009 SC 1538 : (2009) 1 SCC 500 : 2008 (15) SCR 51 : JT 2008 (13) 472 : 2008 (15) Scale 308.

[13558] ● ***Territorial Jurisdiction.***—The complaint petition does not show that the cheque was presented at Delhi. It is absolutely silent in that regard. The facility for collection of the cheque admittedly was available at Chandigarh and the said facility was a1vailed of. The certificate dated 24.6.2003, which was not produced before the learned Court taking cognizance, even if taken into consideration does not show that the cheque was presented at the Delhi Branch of the Citi Bank. We, therefore, have no other option but to presume that the cheque was presented at Chandigarh. Indisputably, the dishonour of the cheque also took place at Chandigarh. The only question, therefore, which arises for consideration is that as to whether sending of notice from Delhi itself would give rise to a cause of action for taking cognizance under the Negotiable Instruments Act.

It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice the accused at his own peril may refuse to pay the amount.

Therefore, the place where an offence has been committed plays an important role. It is one thing to say that a presumption is raised that notice is served but it is another thing to say that service of notice may not be held to be of any significance or may be held to be wholly unnecessary.

We cannot, an things stand today, be oblivious of the fact that a banking institution holding several cheques signed by the same borrower cannot only present the cheque for its encashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-a-vis the provisions of the Code of Criminal Procedure.

For the views we have taken it must be held that Delhi High Court has no jurisdiction to try the case. We, however, while exercising our jurisdiction under Article 142 of the Constitution of India direct that Complaint Case No. 1549 pending in the Court of Shri N.K. Kaushik, Additional Sessions Judge, New Delhi, be transferred to the Court of the District and Sessions Judge, Chandigarh who shall assign the same to a Court of competent jurisdiction. The transferee Court shall fix a specific date of hearing and shall not grant any adjournment on the date on which the complainant and its witnesses are present. The transferee Court is furthermore directed to dispose of the matter within a period of six months from the date of receipt of the records of the case on assignment by the learned District and Sessions Judge, Chandigarh. *Harman Electronics (P) Ltd.* v. *National Panasonic India Pvt. Ltd.*, AIR 2009 SC 1168 : (2009) 1 SCC 720 : 2009 CrLJ 1109 : 2008 (17) SCR 487 : JT 2008 (13) 671.

[13558A] ● ***Presentation of cheque for third time and issuance of third notice—Not invalid.***—In this case, the first notice having not been served and the second notice having been withdrawn in terms of the reply issued by the learned advocate for the appellants themselves, the complainant cannot be said to have committed any illegality in presenting the cheque for the third time and issuing the third notice upon the defaulter. *S.L. Construction* v. *Alapati Srinivasa Rao*, AIR 2009 SC 1538 : (2009) 1 SCC 500 : 2008 (15) SCR 51.

[13559] ● ***Ingredients of Section 138, N.I. Act.***—In order to bring application of Section 138 the complaint must show. That Cheque was issued, the same was presented; it was dishonored on presentation; a notice in terms of the provisions was served on the person sought to be made liable and despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice. *Ramraj Singh* v. *State of Madhya Pradesh*, (2009) 6 SCC 729 : 2009 (5) SCR 1130 : JT 2009 (5) 649 : 2009 (5) Scale 670.

[13560] ● ***Dishonour of cheque—Power of attorney holder can file complaint.***—Filing of complaint by payee though power of attorney-holder is justified and cannot be quashed. *Praveen* v. *Mohd. Tajuddin*, (2009) 12 SCC 706.

[13561] ● ***Dishonouring of cheque—Offence by company.***—In this case, save and except for the statement that the Respondents, Mr. Rajiv Jain and Sarla Jain and some of the other accused, were Directors of the accused Companies and were responsible and liable for the acts of the said Companies, no specific allegation has been made against any of them. The question of proving a fact which had not been mentioned to the complaint did not, therefore, arise in the facts of this case. This has prompted the High Court to observe that the Bank had relied on the mistaken presumption that as Directors, Rajiv Jain, Sarla Jain and the other Directors were vicariously liable for the acts of the Company. Admittedly, except for the aforesaid statement, no other material has been disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the Company and were responsible for its action. The High Court, therefore, rightly held that in the absence of any specific charge against the Respondents, the complaint was liable to be quashed and the respondents were liable to be discharged.

As to the submission made on behalf of the Bank that they were holders in due course of the four cheque issued by the Respondent No. 3 Company and that by presenting them to the Petitioner Bank for encashment, the Respondent No. 1 Company had become liable for dishonour thereof, has been adequately dealt with and negated by the High Court and does not require any further elaboration.

The Special Leave Petitions filed by the Central Bank of India, therefore, fail and are dismissed. *Central Bank of India* v. *Assam Global Ltd.*, AIR 2010 SC 2835 : JT 2010 (7) SC 88.

[13562] ● ***Dishonour of cheque—Complaint, maintainable only against drawer of cheque.***—A complaint under Section 138 of the N.I. Act would not be maintainable against a person who was not the drawer, of the cheque from an account maintained by him which ultimately came to be dishonoured on presentation. *P.J. Agro Tech. Ltd.* v. *Water Base Ltd.*, 2010 CrLJ 4386 (4388) (SC).

[13563] ● ***"Stop-payment" instructions to bank.***—Section 138 of N.I. Act can indeed be attracted when a cheque is dishonoured on account of "stop payment" instructions sent by the accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of finds in the account. *Rangappa* v. *Mohan*, AIR 2010 SC 1898 : 2010 CrLJ 2871 (2875) (SC) : (2010) 3 Crimes 40.

[13564] ● ***Legally recoverable debt or liability.***—Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own. *Rangappa* v. *Mohan*, AIR 2010 SC 1898 : 2010 CrLJ 2871 (2875) : (2010) 3 Crimes 40. [observations to contrary in *Krishna Janardhan Bhat* v. *Dattatraya G. Hegde*, AIR 2010 SC 1325 : (2010) 3 SCC 786 **overruled**].

[13565] ● ***Presumption as to existence of legally enforceable debt.***—In the instant case the defence of the loss of or blank cheque was taken up belatedly and the accused had mentioned a different date in the "stop payment" instructions to his bank. Furthermore, the instructions to "stop payment" had not even mentioned that the cheque had been lost. A perusal of the trial record showed that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act led to the inference that there was merit in the complainants version. Apart from not raising a probable defence, the appellant accused was not able to contest the existence of a legally enforceable debt or liability. The fact that accused had made regular payments to the complainant in relation to the construction of his house did not preclude the possibility of the complainant having spent his own money for the same purpose. There was a slight discrepancy in the complainant's version, so far as was not clear whether the accused had asked for a hand loan to meet the construction, related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way the complainant disclosed the *prima facie* existence of a legally enforceable debt or liability since the complainant had maintained that his money was used for the construction expenses. Since the accused did admit that the signatures on the cheque was his, the statutory presumption came into play and the same had not been rebutted with regard to the materials submitted by the complainant. *Ranga-*

ppa v. *Mohan*, AIR 2010 SC 1898 : 2010 CrLJ 2871 (2879) (SC).

[13566] ● *Dishonour of cheque—No multiple complaint in respect of same transaction.*—The Supreme Court made it mandatory for the complainant to disclose that no other complaint has been filed in any other Court in respect of the same transaction, and directed that such a disclosure should be made on sworn affidavit which should accompany the complaint filed under Section 200 of the CrPC and if it is found that such multiple complaints have been filed, orders for transfer of the complaint to the first Court should be given, generally speaking, by the High Court after imposing hearing costs on the complainant for resorting to such a practice. These directions were directed to be given effect prospectively. *Damodar S. Prabhu* v. *Syed Babalal H.*, AIR 2010 SC 1907 : (2010) 5 SCC 663 : 2010 CrLJ 2860 (2866).

[13567] ● *Dishonour of cheque—Nature of offence.*—Dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the liability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions. *Damodar S. Prabhu* v. *Syed Babalal H.*, AIR 2010 SC 1907 : (2010) 5 SCC 663 : 2010 CrLJ 2860 (2861, 2862).

[13568] ● *Compounding of offences under N.I. Act not governed by Section 320, IPC.*—In view of the non-obstinate clause, the compounding of offences under the N.I. Act, 1881 is controlled by Section 147 of the Act and the scheme contemplated by Section 320, CrPC will not be applicable in the strict sense since the latter is meant for the specified offences under the Indian Penal Code. *Damodar S. Prabhu* v. *Syed Babalal H.*, AIR 2010 SC 1907 : (2010) 5 SCC 663 : 2010 CrLJ 2860 (2863).

[13569] ● *Dishonour of cheque—Liability of Directors.*—In this case, save and except for the statement that respondents were Directors of the accused companies, no specific allegation was made against any one of them. The question of proving the fact which had not been mentioned on the complaint, did not, therefore, arise in the facts of the case. Admittedly except for the aforesaid statement, no other material was disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the company and were responsible for its action. *Held*, in the absence of any specific charge against the respondents, the complaint was liable to be quashed. *Central Bank of India* v. *Asian Global Ltd.*, AIR 2010 SC 2835 : 2010 CrLJ 4420 (4422, 4423).

[13570] ● *Dishonour of cheque—Compounding of offence—Sections 138, 147, N.I. Act, 1881.*—With regard to the progression in cheque bouncing cases, the Attorney-General urged the Supreme Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposits of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the case for years. An application for compounding made alter several years not only result in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, the Supreme Court has directed to follow the guidelines given in this judgment. The Supreme Court made it clear that even though the imposition of costs by the competent Court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance. *Bona fide* litigants should of course contest the proceedings to their logical end. *Damodar S. Prabhu* v. *Syed Babalal H.*, AIR 2010 SC 1907 : (2010) 5 SCC 663 : 2010 CrLJ 2860 (2865, 2866, 2867).

[13571] ● *Occasion to summon prosecution witnesses by prosecution.*—In so far as the prosecution is concerned the occasion to summon any of its witnesses who has given his evidence on affidavit may arise in two ways. The prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for "re-examination". The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that event the witness may be summoned to appear before the Court to cure the defect and to have the document(s) properly proved by following the correct legal mode. This appears to us as the simple answer to the above question and the correct legal position. Any other meaning given to sub-section (2) of the Section 145, as suggested by Mr. Ranjit Kumar would make the provision of Section 145(1) nugatory and would completely defeat the very scheme of trial as designed under Sections 143 to 147. *Mandvi Co-op. Bank Ltd.* v. *Nimesh B.*

Thakore, AIR 2010 SC 1402 : (2010) 3 SCC 83 : JT 2010 (1) 259 : 2010 (1) Scale 188.

[13572] ● *Sections 138, 142(b)—Dishonour of cheque—Limitation for filing complaint.*—In the instant case, the first notices were received by the accused-appellant on 14.6.2006, whereas the complaints were filed beyond the period of limitation and the Magistrate erred on taking cognizance of the complaints filed on the basis of the second notices issued on 7.6.2006. Similarly the High Court was also wrong in affirming the order of the Magistrate. *Tameeshwar Vaishnav* v. *Ramvishal Gupta*, AIR 2010 SC 1209 : (2010) 2 SCC 329 : 2010 CrLJ 1237 (1240).

[13573] ● *Dishonour of cheque—Sentence.*—The appellant had been facing criminal prosecution for the last 7 years. He was petty businessman. He had paid the hefty amount of compensation as a penalty for dishonour of the cheque issued by him. No material had been placed on record to indicate that the appellant had earlier committed any such or similar offence. In view of the above the conviction under Section was maintained. The substantive sentence of imprisonment was set aside. However, a sentence of a fine of Rs. 1000/- was maintained and imposition of composition in the sum of Rs. 35,000/- was also maintained. *Basavaraj* v. *Dhanlaxmi Finance Co. (R) Terdal*, AIR 2010 SC 382 : (2010) 1 SCC 602 : 2010 CrLJ 838 (839) (SC).

[13574] ● *Respondent Director no more Director when the cheques alleged in complaint were signed—Liability.*—Where the respondent Director was no more a Director of the Company when the cheques were signed, no responsibility can be fastened on him. *National Small Industries Corporation Ltd.* v. *Harmeet Singh Paintal*, (2010) 3 SCC 330 : 2010 CrLJ 1907 (1916, 1917).

[13575] ● *Sections 143 to 147, N.I. Act—Retrospective operation.*—The provisions of Sections 143 to 147 of the N.I. Act do not take away any substantive rights of the accused. These provisions are not substantive but procedural in nature and would therefore, undoubtedly, apply to the cases that were pending on the date the provisions came into force. *Mandvi Co-operative Bank Ltd.* v. *Nimesh B. Thakore*, AIR 2010 SC 1402 (1415) : (2010) 3 SCC 83.

[13576] ● *Right of accused to give evidence on affidavit.*—On a bare reading of Section 143, N.I. Act, it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. The case of the complainant in a complaint under Section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well. *Mandvi Co-op. Bank Ltd.* v. *Nimesh B. Thakore (11-01-2010)*, AIR 2010 SC 1402 : (2010) 3 SCC 83 : JT 2010 (1) 259 : 2010 (1) Scale 188.

[13577] ● *Dishonour of cheque—Offence by company responsibility of complainant—Prosecution of Directors—Principles.*—The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company alongwith averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

Vicarious liability on the part of a person must be pleaded and proved and not inferred.

If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

If accused is a director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

The person sought to be made liable should be in-charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases. *National Small Industries Corporation Ltd.* v. *Harmeet Singh Paintal*, 2010 CrLJ 1907 (1916) (SC).

[13578] ● ***Section 145—Evidence on affidavit.***—If affidavit in terms of the provisions of section 145 of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the Court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. He may be cross-examined and upon completion of his evidence, he may be re-examined. Thus, the words "examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the Court in terms of sub-section (2) of Section 145 of the Act, would mean for the purpose of cross-examination. The provision seeks to attend a salutary purpose.

The object of enactment of the said provision is for the purpose of expedition of the trial. A criminal trial even otherwise is required to be expeditiously held. There is no justification for arriving at a finding that a witness can again be summoned for his examination in chief in the Court despite affirming affidavit in that behalf. *Radhey Shyam Garg* v. *Naresh Kumar Gupta*, AIR 2010 SC 3210 (2009) 13 SCC 201 : 2010 CrLJ 2810 (2814) (SC).

[13579] ● ***Dishonour of cheque—Compounding of offence.***—The N.I. Act, 1881 being a special statute, the provisions of Section 147, will have an overriding effect over the provisions of the Code relating to compounding of offences. *K.M. Ibrahim* v. *K.P. Mohammed*, AIR 2010 SC 276 : (2010) 1 SCC 798 : 2010 CrLJ 525 (527, 528).

[13580] ● ***Right of accused to examine complainant or his witness.***—Once it is realized that Sections 143 to 147 were designed especially to lay down a much simplified procedure for the trial of dishonoured cheque cases with the sole object that the trial of those cases should follow a course even swifter than a summary trial and once it is seen that even the special procedure failed to effectively and expeditiously handle the vast multitude of cases coming to the Court, the claim of the accused that on being summoned under Section 145(2), the complainant or any of his witnesses whose evidence is given on affidavit must be made to depose in examination-in-chief all over again plainly appears to be a demand for meaningless duplication, apparently aimed at delaying the trial.

In the event an application is made by the accused, the Court would be obliged to summon the person giving evidence on affidavit in terms of Section 145(1) without having any discretion in the matter. There can be no disagreement with this part of the submission but the question is when the person who has given his evidence on affidavit appears in Court, whether it is also open to the accused to insist that before cross-examining him as to the facts stated in the affidavit he must first depose in examination-in-chief and be required to verbally state what is already said in the affidavit. Mr. Ranjit Kumar referred to Section 137 of the Indian Evidence Act, the defines "examination-in-chief", "cross-examination" and "re-examination" and on that basis sought to argue that the word "examine" occurring in Section 145(2) must be construed to mean all the three kinds of examination of a witness. This, according to him, coupled with the use of the word "shall" with reference to the application made by the accused made it quite clear that a person giving his evidence on affidavit, on being summoned under Section 145(2) at the instance of the accused must begin his deposition with examination-in-chief, before he may be cross-examined by the accused. In this regard he submitted that Section 145 did not override the Evidence Act or the Negotiable Instruments Act or any other law except the Code of Criminal Procedure. He further submitted that the plain language of Section 145(2) was clear and unambiguous and was capable of only one meaning and, therefore, the provision must be understood in its literal sense and the High Court was in error in resorting to purposive interpretation of the provision. . .

We find nothing in Section 145(2) to suggest that. We may also make it clear that Section 137 of the Evidence Act does not define "examine" to mean and include the three kinds of examination of a witness; it simply defines "examination-in-chief", "cross-examination" and "re-examination". What Section 145(2) of the Act says is simply this. The Court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused the Court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of Section 145(1) and having regard to the object and purpose of the entire scheme of Sections 143 to 146. The scheme of Sections 143 to 146 does not in any way affect the judge's powers under Section 165 of the Evidence Act. As a matter of fact, Section 145(2) expressly provides that the Court may, if it thinks fit, summon and examine any person giving evidence on affidavit. But how would the person giving evidence on affidavit be examined, on being summoned to appear before the Court on the application made by the prosecution or the accused? The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit. *Mandvi Co-op. Bank Ltd.* v. *Nimesh B. Thakore (11-01-2010)*, AIR 2010 SC 1402 : (2010) 3 SCC 83 : JT 2010 (1) 259 : 2010 (1) Scale 188 : 2010 (1) Supreme 360.

[13581] ● ***Insertion of Sections 142 to 147, N.I. Act—Object.***—Sections 142 to 147 of N.I. Act lay down a kind of special Code for trial of offences under Chapter XVII of the N.I. Act and Sections 143 to 147 were inserted in the Act by the N.I. (Amendment and Miscellaneous Provisions Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial. *Mandvi Co-op. Bank Ltd.* v. *Nimesh B. Thakore*, AIR 2010 SC 1402 (1411) : (2010) 3 SCC 83.

[13582] ● ***Subject to all 'just exceptions'***—The evidence given on affidavit, by the complainant is "subject to all just exceptions'. This simply means that the evidence on affidavit must be admissible and it must not include inadmissible materials such as facts not relevant to the issue or any hearsay statements. In case the affidavits of the complainant contain statements that are admissible in evidence, it is always open to the accused to point those out to the Court and the Court would then surely deal with the objections in accordance with law. *Mandavi Co-op. Bank Ltd.* v. *Nimesh B. Thakore*, AIR 2010 SC 1402 : (2010) 3 SCC 83.

[13583] ● ***Object and scope of Section 147, N.I. Act.***—Section 147 of the N.I. Act is in the nature of an enabling provision which provides for the compounding of offences prescribed under the same Act, thereby saving as an exception to the general rule incorporated in sub-section (9) of the Section 320, CrPC which states that no offences shall be compounded except as provided by this section. A bare reading of this provision would lead to the inference that offences punishable under laws other than the Indian Penal Code also cannot be compounded. However, since Section 147 was inserted by way an amendment to a special law, the same will override the effect of Section 320(9) of the CrPC, especially keeping in mind that Section 147 carries a non-obstante clause. *Damodar* v. *S. Prabhu* v. *Syed Babalal H.*, AIR 2010 SC 1907 : (2010) 5 SCC 663 : 2010 CrLJ 2860 : 2010 (2) Crimes 233 (SC).

[13584] ● ***Dishonour of cheque—Compounding can be allowed at the appellate state.***—Section 147 of N.I. Act does not bar the parties from compounding an offence under section 138 even at the appellate stage of the proceedings. Accordingly, there is no reason to reject the application under Section 147 of the Act even a proceeding under Article 136 of the Constitution. *K.M. Ibrahim* v. *K.P. Mohammed*, AIR 2010 SC 276 : (2010) 1 SCC 798 : 2010 CrLJ 525 (528).

[13585] ● ***Dishonour of cheque—Compounding of offence—Power of Supreme Court.***—The Supreme Court is empowered under Article 142 of the Constitution to pass appropriate orders in line with sub-section (8) of section 320, CrPC in an application under section 147 of the Act in order to do justice to the parties. *K.M. Ibrahim* v. *K.P. Mohammed*, AIR 2010 SC 276 : (2010) 1 SCC 798 : 2010 CrLJ 525 (527).

DISOBEDIENCE OF ORDER

[13586] ● ***Disobedience of order.***—It is a commonplace that where the superior Court's order staying proceedings is disobeyed by the inferior Court to whom it is addressed, the latter Court commits contempt of Court, for it acts in disobedience to the authority of the former Court. Just as the disobedience to a specific order of the Court undermines the authority and dignity of the Court in a particular case, similarly any deliberate and *mala fide* conduct of not following the law laid down in the previous decision undermines the Constitutional authority and respect of the High Court. *Baradakanta Mishra* v. *Bhimsen Dixit*. AIR 1972 SC 2466 : (1973) 1 SCC 446 : 1973 SCC (Cri) 360 (364) : 1973 CrLJ 19 : 1973 CrLR (SC) 415 : (1973) 2 SCR 495.

[13587] ● ***Existence of public nuisance—Offence aggravated if disobedience cause dan-***

ger to human health or safety.—Section 133, Cr PC is categoric, although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the Sub-divisional Magistrate, Ratlam has before him information and evidence, which disclose the existence of a public nuisance and on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. Magistrate's responsibility under Section 133, CrPC is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by Section 188, IPC. Therefore, the Municipal Commissioner or other executive authority bound by the order under Section 133, CrPC shall obey the direction because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone under Section 133, CrPC read with the punitive temper of Section 188, IPC makes the prohibitory act as a mandatory duty. *Municipal Council, Ratlam* v. *Vardhichand*, AIR 1980 SC 1622 : (1980) 4 SCC 162 : 1980 SCC (Cri) 933 : 1980 CrLJ 1075 : 1980 CrLR (SC) 543 : 1980 Cr App R (SC) 267 : (1981) 1 SCR 97.

[13588] ● ***Failure of power supply to flour mill.***—Offence under Section 42(b) of the Electricity Act will be made out if contravention of the provisions of this Act or rules made thereunder is proved and further if it is established that without reasonable supply of energy is discontinued. A perusal of the complaint shows that what was mentioned was that the power supply has been interrupted on a number of occasions because of wilful failure and so far as the duties which are made the basis of offence, the allegation was that electricity was not being supplied knowingly and intentionally to cause wrongful loss and damage to the concern. It is therefore, clear that no facts have been specifically stated to constitute an offence under Section 42(b) of the aforesaid Act. To make out an offence under Section 166 of the IPC it has to be stated that the public servant knowingly disobeyed any particular direction of the law which he was bound to obey and further that such disobedience would cause injury to any person to the knowledge of the public servant. A perusal of the complaint does not disclose any particular act or omission of any of the Officers of the Board because it is not disputed that the Officers of the Board will be public servant within the meaning of definition of the term in the Indian Penal Code. *Bihar State Electricity Board* v. *Nand Kishore Tamakhuwala*, AIR 1986 SC 1653 : (1986) 2 SCC 414 : 1986 SCC (Cri) 179 (181, 182) : 1986 CrLJ 1246 : 1986 CrLR (SC) 178.

[13589] ● ***Discriminatory order of—Commission of Inquiry.***—Discriminatory order of Commission of Inquiry regarding presence of police officials as witnesses for the purposes of cross-examination in the beginning of inquiry are liable to be quashed. *Karan Bedi* v. *Committee of Enquiry*, AIR 1988 SC 2252 : 1988 SCC (Cri) 895 : 1989 CrLJ 303 : 1988 CrLR (SC) 796.

[13590] ● ***Commissioner/Secretary of State Government not shown to have wilfully or deliberately or contemptuously floated or disobeyed orders.***—In the instant case, it cannot conclusively be said that the respondents have wilfully or deliberately or contemptuously flouted or disobeyed the orders of this Court dated 7-2-1991. It appears to be a case of misinterpretation of the executive directions and orders of this Court dated 7-2-1991 and is, therefore, not a fit case in which contempt proceedings need to proceed any further. Accordingly contempt proceedings are dropped and discharged, the rule issued against the respondents. *Ashok Kumar Singh* v. *State of Bihar*, AIR 1992 SC 407 : 1992 SCC (Cri) 84 : 1992 SCC CrLR (SC) 174 : 1992 CrLJ 284.

DISPARAGING REMARK

[13591] ● ***Disparaging remarks.***—It cannot be overlooked that judicial restraints and discipline are necessary to orderly administration of justice. One must always keep in view golden advice given by S.K. DAS, J. in *State of Uttar Pradesh* v. *Mohd. Naim*, AIR 1964 SC 703 : (1964) 2 SCR 363.

[13592] ● ***Disparaging remarks—Courts' privilege—Scope.***—While with a case on hand, a Court of law may comment on the conduct of parties or witnesses and may also make necessary observations, keeping in view the evidence adduced by then. It is also time that the Judges are flash, and blood mortals with likes and dislike and normal human trails. *State of Rajasthan* v. *Netrapal*, (2007) 4 SCC 45 : 2007 (2) SCC (Cri)

187 : 2007 CrLJ 1783 : 2007 (2) Crimes 325 (SC).

[13593] ● ***Rights and duties of Courts.***— "If there is one principle of cardinal importance in the administration of justice, it is this : the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, given by this Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair-play and restraint. It is not infrequent that sweeping generalizations defeat the very purpose for which they are made. It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before Courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognized that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve." *State of Rajasthan* v. *Netrapal*, (2007) 4 SCC 45 : 2007 CrLJ 1783 (1785, 1786).

DISPOSAL OF PROPERTY
(Ss. 451 to 459, CrPC, 1973)

[13594] ● ***Disposal of property.***—When a Magistrate has acquitted an accused charged of an offence against property, and in the exercise of his powers under Section 517 of the Code has made an order returning to the accused the money seized from him, the High Court has no jurisdiction, in the exercise of its powers of revision, to reverse the order and direct the money to be returned to the complainant, unless, after considering the evidence on record, it comes to the conclusion that the accused is guilty and having set aside the order of acquittal, it convicts the accused under procedure according to law. If in such a case the High Court affirms the order of acquittal and yet directs the money or property seized from the accused to be returned to the complainant, it is an improper exercise of the powers of revision, and the order has to be set aside. In the present case, the accused was charged under Section 379, Penal Code, in respect of a sum of money. The Magistrate acquitted the accused after coming to a clear finding that the prosecution had failed to establish beyond doubt that the money found from the accused was stolen property. He passed an order under Section 517 of the Code returning the money to the accused. The complainant applied in revision to the High Court against the order of acquittal and the order under Section 517. The High Court refused to interfere with the order of acquittal but set aside the order under Section 517 and directed that the money found from the accused be returned to the complainant. The order made by the High Court cannot be sustained. When a Magistrate has made an order acquitting an accused, and then, in the exercise of his power under Section 517 of the Code, has made an order returning to the accused the money seized from him, the High Court has no jurisdiction in appeal or revision to reverse that order unless the order of acquittal is first set aside and is converted into one of conviction. The order of the High Court is set aside and the original order of the trial Magistrate returning the money seized to the accused is restored. *Pushkar Singh* v. *State of Madhya Pradesh*, AIR 1953 SC 508 : 1954 CrLJ 153.

[13595] ● ***Trial Court to make appropriate order on conclusion of trial for disposal of property.***—Under Section 517 of the Code, power is conferred upon a trial Court to make an appropriate order at the conclusion of the trial for disposal of the property in respect of which an offence has been committed. This power can be exercised not only in respect of property as to which an offence has been committed, but also in respect of any property produced before it or in its custody, and further, the power of such disposal includes disposal by confiscation. No doubt, under Section 517 the Court is entitled to make an order of confiscation even in respect of property as to which no offence is proved to have been committed, provided the property is in the custody of the Court, but the exercise of this power is the exercise of a judicial discretion, and the order so made can be justified only when it could be said that in consideration of all circumstances of the case, such an order is appropriate. In the present case, the accused was found to have possessed gold worth about three lakhs of rupees, and though there was strong suspicion that it was smuggled gold, no charge under the Sea Customs Act could be levelled against him. He was prosecuted and convicted under Section 61-E of the Bombay District Police Act, 1890 (now, Section 124 of the Bombay Police Act, 1951), which made it an offence to possess any property as to which "there was reason to believe" that it was stolen property or property fraudulently obtained.

and was sentenced to pay a fine of Rs. 100. After convicting the accused, the trial Magistrate made an order under Section 517 of the Code confiscating the gold seized from him and from persons with whom he had deposited it. Order of confiscation of gold worth about three lakhs of rupees is singularly inappropriate in a case in which the prosecution case that the gold was smuggled gold brought into India from Africa is not accepted by the Court, and the conviction is only for an offence based upon belief that the property is smuggled goods, and not for any offence which requires proof of the property being stolen property or property in respect of which any offence under any Special Act has been committed. The Court also took it into consideration that the Police Act did not contain any provision regarding confiscation such as is found in the Sea Customs Act. The order of confiscation is set aside, and the gold is directed to be returned to the accused. *Suleman Issa* v. *State of Bombay*, AIR 1954 SC 312 : 1954 CrLJ 881 : 1954 SCA 403 : 1954 SCJ 387 : 1954 SCR 976 : 56 PunLR 239 : 1954 MWN 814 : 56 Bom LR 1180.

[13596] ● *Power of High Court to confirm or to set aside order of trial Court under Section 517, CrPC regarding confiscation of property seized.* —In the exercise of its powers of revision, the High Court undoubtedly possesses the power to confirm or to set aside an order made by the trial Court under Section 517 regarding confiscation of the property seized from the accused. However, when an accused is charged with an offence in respect of any property which has been seized or recovered from him, an order of confiscation regarding the property as to which an offence is alleged to have been committed can validly follow only upon the conviction of the accused of such an offence. In such a case, if on appeal or revision the High Court sets aside the order of conviction and acquits the accused it has no power to confirm the order of confiscation. The only appropriate order as to the property seized which can be made in such a case is to set aside the order of confiscation made by the trial Court and direct the property to be returned to the accused or the person from whom it was seized. In the present case, the case against the accused who was arrested when crossing into Indian territory from Pondicherry was that he was carrying two blocks of gold which were dutiable goods. He as charged under Section 7 of the Land Customs Act. The trial Magistrate convicted him and made an order confiscating the gold. On appeal the High Court acquitted the accused, but curiously enough allowed the order of confiscation to stand. Under the circumstances, the order of confiscation is illegal. The order was set aside. *Krishna Pillai* v. *State of Madras*, AIR 1954 SC 335 : 1954 CrLJ 1051 : 1954 SCJ 236 : 1954 (1) MLJ 389 : 1954 MWN 37.

[13597] ● *Order of return of seized property—Opportunity of being heard be given before passing of order.* —In this appeal, it was contended that the High Court violated the principle of natural justice in reversing the order of the Sessions Judge directing the return of the currency notes without giving notice or opportunity of being heard to the appellant. The police seized currency notes worth rupees 21,000/- from the State Bank of India Branch in the course of an investigation of a case under Sections 120-B, 420 and 406, IPC, registered against K.G. (R-3). He came into possession of Rs. 1,50,000/- in Government currency notes by cheating R-1 and R-2, and the amount seized from the appellant was part of it. The appellant contended that he had come into possession of the said currency notes in usual course of its business without any knowledge that they had been the subject-matter of an offence. The accused including R-3 were acquitted by the Sessions Judge and the appellant's application under Section 517(1) of the old Code for delivery of the currency notes of Rs. 21,000/- on the ground that he was an innocent third party without any knowledge or suspicion of their having been involved in the commission of an offence was allowed. Subsequently an appeal was filed to the High Court by the State and the appeal was allowed and the High Court set aside the order of acquittal of R-3 and convicted him under Sections 420, 406 and 120-B, IPC R-1 made an application to the High Court asking for delivery of the currency notes as they belonged to him and R-2 and as they had been deprived of the said property by R-3 by committing the aforesaid offences. The High Court allowed the application directing handing over of the currency notes to R-1 and R-2. The contention of the appellant herein was that the High Court had reversed the order of the Sessions Judge directing the return of the currency notes to him without giving a notice and without giving him an opportunity of being heard. It was contended on behalf of the respondents that there is no provision in Section 520 of the old Code for giving notice to the affected parties and the order of the High Court could not be challenged on the ground and there was no question of a violation of the principle of natural justice. There is no warrant or justification for the argument advanced on behalf of the respondents though it is true that the statute is silent regarding issue of any notice. Even so, there is in the eye of law a necessary implication that the parties adversely affected should be heard before the Court makes an order for return of the seized property. Applying that principle to the present case, the order of the High Court is vitiated in law. The appellant asserted that it has obtained the currency notes in the normal course of its business and without any knowledge or suspicion of their having been involved in the commission of any offence. The respondents do not allege fraud or lack of good faith on the part of the appellant. The order of the High Court is erroneous, the reason being that the property in coins and currency notes passes by mere delivery and it is that clearest exception to the rule *Nemo dat quod non habet*. In the circumstances the High Court should have directed the return of the said currency notes to the appellant who has the "right to possess" the currency notes within the language of Section 517 of the old Code. *State Bank of India* v. *Rajendra Kumar*, AIR 1969 SC 401 : 1969 CrLJ 659 : (1968) 2 SCWR 461 : (1969) 2 SCA 236 : (1968) 1 SCJ 822 : 1969 ALJ 389 : 1969 Jab LJ 479 : 1969 BLJR 388 : 1969 MPLJ 465 : 1969 Mah LJ 527 : 1969 MPWR 358.

[13598] ● ***Sessions Judge directing District Judge to deliver sale proceeds of subject matter of offence.***—Where the Sessions Judge directed the Magistrate by his order that the sale proceeds of the subject-matter of the offence lying in Court deposit be delivered to the accused on his furnishing the bond of the amount covered by the sale proceeds to the satisfaction of the District Magistrate, the Additional District Magistrate could accept the bond and when no particular form was prescribed for the bond, a bond given by the accused in the name of the Government of West Bengal substantially (if not wholly) complied with the order and such a bond could be enforced against the accused without any trouble. *Debabrata* v. *State of West Bengal*, AIR 1969 SC 189 : 1969 CrLJ 401 : (1969) 1 SCJ 533 : (1969) 1 SCWR 377.

[13599] ● ***Property lost or destroyed during pendency of trial—Power of Court to order payment of value of property.***—The short point of law that was raised in this appeal was as regards the powers of the Court in indemnifying the owner of the property which is destroyed or lost whilst in the custody of the Court. In this case a large number of ornaments and cash, *etc.*, were stolen from the house of the complainant. The number of stolen articles were recovered from the accused. When they were produced before the Magistrate, he directed the police officer concerned to retain the articles in his custody until the same were verified and their value was determined by a goldsmith. The SI kept the articles in the Guard Room of his police station in a trunk with a list of the articles and a corresponding entry in the concerned register as the Court was waiting to obtain sanction of the necessary funds from the higher authorities for payment of the fees of the goldsmith. When the Court subsequently directed the SI after his return from leave to produce the articles in the Court, the SI opened the trunk and to his utter dismay found that the trunk contained only stones and no articles all of which had disappeared. Before going on leave, the SI found the articles in the trunk intact. The SI immediately filed a complaint of theft of the ornaments. As the accused were not traced, that case was referred. The original charge-sheet in respect of the theft of the articles in the complainant's house ended in conviction of the accused from whom they were recovered. Their appeal to the Sessions Judge was unsuccessful but the High Court acquitted them on technical grounds. After the conclusion of the trial, the complainant filed an application before the trial Magistrate to return the stolen articles or their value. The Magistrate rejected the application on the ground that as the articles did not reach the Court, the complainant was not entitled to their restoration. The Sessions Court as well as the High Court also dismissed his applications. Hence this appeal. A production before the Court did not mean physical custody or possession by the Court but included even control exercised by the Court by passing an order regarding the custody of the articles. In the instant case when once the Magistrate, after having been informed that the articles were produced before the Court, directed the SI to keep them with him in safe custody, to get them verified and valued by a goldsmith, the articles were undoubtedly produced before the Court and became *custodia legis*. The articles were the subject-matter of an offence of theft. That fact was sufficient to clothe the Magistrate with the power to pass an order for return of the property. Where the property was stolen, lost or destroyed and there was no *prima facie* defence made out that the State or its officers had taken due case and caution to protect the property, the Magistrate might order payment of the value of the property in an appropriate case where the ends of the justice so required. The view of the High Court that once the articles were not available with the Court, the Court had no power to do anything in the matter and was utterly helpless was not correct. The Court ordered the State to pay the cash equivalent of the property lost to the complainant. Decision of the High Court reported in 1971 CrLJ 566 (Mys) was reversed. *Basava* v. *State of Mysore*, AIR 1977 SC 1749 : (1977) 4 SCC 358 : 1977 SCC (Cri)

598 : (1977) 1 SCWR 613 : 1977 CrLJ 1141 : 1977 CrLR (SC) 257 : 1977 SCCrR 391 : (1977) 1 SCWR 613 : (1977) 2 SCJ 289 : 1977 CrAppR (SC) 314 : ILR (1977) 2 Kant 925 : 1977 BBCJ (SC) 168 : 1977 AWC 467 : 1977 ACrR 337 : 1977 ACrC 220 : 1977 Cur LJ (Cri) 162 : 1977 MLJ (Cri) 486.

[13600] ● ***Seizure of foreign currency.***—In a case where the foreign currency seized from the accused was not produced before the Magistrate and was not in the custody or control of the Court, the order of confiscation passed by the Magistrate is liable to be set aside. The Magistrate ordered the goods to be confiscated if not already confiscated and it clearly showed that he was not aware as to what had happened to them which were in the control of the Customs Authority. *Remo Paul Altoe* v. *Union of India*, AIR 1977 SC 2255 : (1977) 4 SCC 437 : 1977 SCC (Cri) 629 : 1977 CrLJ 1933 : 1977 CrLR (SC) 482 : 1977 UJ (SC) 730 : 1977 CrAppR (SC) 377.

[13601] ● ***Release of property seized by Police—Not produced before Court.***—A considerable sum of money was recovered by the police from appellant and the money is stated to be seized in connection with an offence registered against an accused person by name Bansi Lal. Whether the appellant himself can be a witness or an accused is not possible to state at that moment according to the counsel for the State. The situation is squarely covered by Section 457, CrPC. However, the Special Judge has to be circumspect in such a situation before releasing the property. The fact that the Court has power to dispose of property in such a situation does not mean that the Court should always release such property to the person from whom the property has been recovered, especially when the stage of the case is in suspicion, the investigation is not over and charge-sheet has not yet been filed. The question of release has to be decided on its own merits in each case and the discretion of the Court has to be exercised after due consideration of the interests of justice including the prospective necessity of the production of those seized articles at the time of trial. If the release of the property seized, will, in any manner, affect or prejudice the course of justice at the time of trial, it will be a wise discretion to reject the claim for return. If the Judge is of the opinion that the property seized is required to be retained with the police in the Court for future use at the time of the inquiry or trial, the property should not be released. If, on the other hand, the property is not needed in any manner in the latter stages of the inquiry or trial, it will be proper for the Court to release the property on the claimant furnishing adequate security. The Special Judge is ordered to dispose of the matter expeditiously. *Ram Prakash* v. *State of Haryana*, AIR 1978 SC 1282 : (1978) 2 SCC 491 : 1978 SCC (Cri) 309 : 1978 CrLJ 1120 : 1978 CrLR (SC) 267 : 1978 SCCrR 299 : (1978) 2 SCJ 552 : (1978) 2 SCWR 200 : 1978 CrAppR (SC) 303 : 1978 BBCJ (SC) 84 : 1978 Chand LR (Cri) 179 (SC) : 1978 ACrR 380 : 1978 ACrC 209 : 1978 MLJ (Cri) 655 : 1978 MLW (Cri) 120.

[13602] ● ***Restoration of possession within reasonable time of disposal of appeal—Reference or revision.***—In other words, the appellate or revisional Court acting under Section 456(2) will have jurisdiction or power to pass the order or restoration of possession at any time but it has to be exercised with discretion within a reasonable time of the disposal of the appeal, reference or revision. *H.P. Gupta* v. *Manohar Lal*, AIR 1979 SC 433 : (1979) 2 SCC 486 : 1979 SCC (Cri) 530 : 1979 CrLJ 199 : 1979 CrLR (SC) 5 : (1979) 1 SCWR 71 : (1979) 1 SCJ 383 : (1979) 1 SCCrR 127 : 1979 UJ (SC) 100 : 1978 ACrC 427 : 1979 CrAppR (SC) 52 : 1979 CrAppR (SC) 52 : 1979 MLW (Cri) 79 : 1979 MLJ (Cri) 322 : (1979) 3 Mah LR 110 : 1979 Chand LR (Cri) (SC) 158.

[13603] ● ***Disposal of property—Discretion as to.***—In disposal of property discretion given to the Court under the section is inherently a judicial function. The choice of the mode or manner of disposal is not to be made arbitrarily, but judicially in accordance with sound principles founded on reason and justice, keeping in view the class and nature of the property and the material before it. One of such well-recognised principles is that when after an inquiry or trial the accused is discharged or acquitted, the Court should normally restore the property of class (a) (which is produced before the Court) or (b) (which is in the custody of the Court) to the person from whose custody it was taken. Departure from this salutary rule of practice is not to be lightly made, when there is no dispute or doubt—as in the instant case—that the property in question was seized from the custody of such accused and belonged to him. The accused was acquitted of the offence of murder on the ground that this gun was used in causing the fatal injury to the deceased, only in self-defence, which necessarily involved a finding that the gun was not used in the commission of any offence for which the accused was tried. In the circumstances the impugned order of confiscation of the gun being arbitrary and unjust, cannot be sustained. *N. Mahadavan* v. *State of Kerala*, AIR 1979 SC 1829 : (1979) 4 SCC 1 : 1979 SCC (Cri) 883 : 1979 CrLJ 1197 : 1979 CrLR (SC) 606 : 1979 UJ (SC) 793 : 1979 CrAppR (SC) 291 : 1979 ACrR 432.

[13604] ● *Disposal of property—Magistrate entrusting seized property to Official Receiver.*— The Magistrate entrusted three buses to the custody of an interim receiver in a case of theft. That receiver was succeeded by another Official Receiver. The appellant obtained a decree of civil Court declaring him to be entitled to the buses. The appellant approached the Magistrate for release and delivery of his vehicles. Both the receivers pleaded they were not liable to restore possession of the vehicles. The Magistrate made an order to that effect which was confirmed by the High Court. The appellant then filed another petition for delivery of the vehicles, one claiming to have handed over possession to his successor and latter pleading that he was never given possession. The appellant's counsel was unable to give information about the whereabouts of the vehicles. The Magistrate dismissed the application referring the appellant to a civil Court. The Sessions Judge and High Court confirmed the said order. On appeal the Supreme Court held that the Magistrate could not simply shrug his shoulders and direct the appellant to go to a civil Court. In such situation it was the duty of the Court to probe into the matter, make a full enquiry and trace the whereabouts of the buses. If they could not be so traced or delivered to the owner for any reason, the Court should direct the culpable party to pay the value of the vehicles to the appellant. Act of Court harms no one. Matter was remitted to the Magistrate to dispose of the same in accordance with law after making full enquiry as suggested above. Orders of the subordinate Courts were set aside. *Inter Continental Agencies* v. *Amin Chand*, AIR 1980 SC 951 : (1980) 3 SCC 103 : 1980 SCC (Cri) 544 : 1980 CrLJ 689 : 1980 CrLR (SC) 175 : 1980 SC CrR 266 : (1980) 2 SCJ 152 : 1980 JU (SC) 303 : 1980 CrAppR (SC) 188 : 1980 MLJ (Cri) 583 : 1980 ACrR 275 : 1980 Sim LC 277.

[13605] ● *Confiscation of property for being in possession disproportionate to known source of income.*—None of the provisions of the Prevention of Corruption Act provides for confiscation or prescribe the mode by which an order of confiscation may be passed. The Prevention of Corruption Act being totally silent on the question of confiscation, the provisions of the Code of Criminal Procedure would apply in their full force, with the result that the Court trying an offence under the Prevention of Corruption Act would have the power to pass an order of confiscation by reason of the provisions contained in Section 452 of the CrPC. The order of confiscation cannot, therefore, be held to be without jurisdiction. If a person is convicted for taking a bribe under the Prevention of Corruption Act, forms and the money which from the subject-matter of the bribe belongs to him, no order of confiscation of that amount can be passed. A person who is found guilty of accepting the bribe is not only liable to be convicted and sentenced for the offence of bribery but the amount which he has taken by way of bribe is liable to be confiscated by reason of the powers of confiscation conferred by Section 452 of the Code of Criminal Procedure to the extent that the said provisions apply. The appellant has been convicted under Section 5(1)(*e*) precisely for the reason that he was in possession of the two receipts and the aforesaid cash sum. It cannot then be said that the order of confiscation in regard to these amounts has not been properly passed or has been passed without any application of mind. *Mirza Iqbal Hussain* v. *State of Uttar Pradesh*, AIR 1983 SC 60 : (1982) 3 SCC 516 : 1983 SCC (Cri) 111 : 1983 CrLJ 154 : 1982 CrLR (SC) 515 : 1983 JU (SC) 41.

[13606] ● *Magistrate imposing fine and also directing non-applicant to vacate premises.*—In this case under Section 448, IPC, the Magistrate while convicting the present appellant and sentencing her to pay a fine of Rs. 100/- also passed an order directing her to vacate the premises within two months of the passing of the order, purporting to be one under Section 456, CrPC. Aggrieved by the said order, the appellant went up in appeal and the Sessions Judge set aside the said order and acquitted her. Against that order, the complainant preferred an appeal to the High Court against the acquittal. The High Court allowed the same holding that no appeal lay to the Sessions Judge. The present appellant feeling aggrieved by the judgment of the High Court filed the present appeal with special leave. The conviction of the appellant is incorrect as no offence under Section 448, IPC has been made out. The part of the order of the Magistrate presumably passed under Section 456, CrPC, made the order appealable and the High Court has gone wrong in holding that appeal filed by the appellant before the Sessions Judge is not maintainable. The appeal is accordingly allowed and the judgment of the High Court is set aside and that of the Court of Session restored. *Kanwal Sood* v. *Nawal Kishore*, AIR 1983 SC 159 : (1983) 2 SCC 25.

[13607] ● *Sentence of fine.*—With great respect to the Supreme Court Judge, it has to be pointed out that no appeal lay against the judgment of a Magistrate of the 1st class if the punishment awarded by him was only one of a fine of Rs. 100/- as in the above case. Even if an order under Section 456, CrPC, was passed alongwith the said sentence of fine, the judgment would not become appealable. Hence the observations of the High Court were correct while those of the Supreme Court are not correct. However, an appeal lies under Section 456(3) independently of the conviction for the offence being appealable or otherwise. The Supreme Court is perfectly justified in setting aside the order of the Magistrate purporting to be passed under Section 456, CrPC though the reasoning given, with due respect, is not correct.] *Kanwal Sood* v. *Nawal Kishore*, AIR 1983 SC 159 : (1983) 2 SCC 25 : 1983 SCC (Cri) 555 : 1983 CrLJ 173 : 1983 ALJ 814 : 1983 CrLR (SC) 16 : (1983) 1 East LR 13 : 1983 UJ (SC) 118 : 1983 AWC 123 : (1983) 1 Chand LR (CrI) 135 : 1983 ACIR 73 : 1983 CrAppR (SC) 14 : 1983 Chand CrC (SC) 8 : (1983) 1 Crimes 244 : (1983) 1 SCWR 262 : 1983 SCCrR 196 : (1983) 2 Cr LC 75 : (1983) 1 SCR 871.

[13608] ● ***Confiscation proceeding under Section 44(1A) of A.P. Forest Act.***—Where any property is produced by an officer before a Criminal Court in an inquiry or trial, the Court may, under Section 451, CrPC, 1973 make any direction, as it thinks fit, for the proper custody of such property pending the conclusion of the inquiry or trial. At the conclusion of the inquiry or trial, the Court may also under Section 452 of the Code make an order for the disposal of the property produced before it and make such other directions as it may think necessary. Where the property is not produced before a criminal Court in an inquiry or trial, the Magistrate is empowered under Section 459 of the Code to make such order as he thinks fit respecting the disposal of the property. The general provision of Section 452 of the CrPC with regard to disposal of property by a criminal Court such as by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof, and that of Section 457 investing a Magistrate to make an order for disposal of property seized by a Police Officer and not produced before a Criminal Court during an inquiry or trial, must necessarily yield where a statute makes a special provision with regard to forfeiture of any property and its disposal. In the instant case, admittedly, the illicitly felled teak trees seized by the Forest Range Officer, Adilabad were produced by him before the Divisional Forest Officer, Hyderabad who is the Authorised Officer under sub-s. (2-A) of Section 44 of the A.P. Forest Act, 1967, alongwith a report by him under sub-s. (2) thereof that he had reason to believe that a forest offence had been committed by the respondents. Merely because the Forest Range Officer also latter lodged a complaint before the learned Metropolitan Magistrate for trial of the respondents for commission of offences under Sections 20(1)(*c*)(*iv*) and (*x*) and 20(1)(*d*) read with Section 29(4)(*a*)(*ii*) of the Act, did not imply that the Authorised Officer was bereft of his power and authority to direct confiscation of the seized timber and the implements, *etc.* under sub-s. (2-A) of Section 44 of the Act if he was satisfied that a forest offence had been committed. *Divisional Forest Officer* v. *G.V. Sudhakar Rao*, AIR 1986 SC 328 : (1985) 4 SCC 573 : 1986 SCC (Cri) 34 (44) : 1986 CrLJ 357 : 1986 CrLR (SC) 12 : (1986) 1 Crimes 313.

[13609] ● ***Power and authority of—Authorised officer to direct confiscation of seized— Timber.***—Merely because the Forest Range Officer, also latter lodged a complaint before the, Metropolitan Magistrate for trial of the respondents for commission of offences under Section 20(1)(*c*)(*iv*) and (*x*) and 20(1)(*d*) read with Section 29(4)(*a*)(*ii*) of the Act, did not imply that the authorised officer was bereft of his power and authority to direct confiscation of the seized timber and the implements *etc.* under sub-section (2-A) of Section 44 of the Act if he was satisfied that a forest offence has been committed. *Divisional Forest Officer* v. *G.V. Sudhakar Rao*, AIR 1986 SC 328 : (1985) 4 SCC 573 : 1986 SCC (Cri) 34 (44) : 1986 CrLJ 357 : (1986) 1 Crimes 313.

[13610] ● ***Disposal of seized property—Properties ordered to be taken possession of in insolvency proceedings.***—In these special leave petitions it is contended that the High Court exceeded its powers under Section 451, CrPC in passing an order for the handing over of the negatives of the film to M.C. Punnose of M/s. Navadoya instead of the Sajan K. Varghese or M/s. Super Film. It is no doubt true that the semi-processed films and the negatives were seized by the police during the investigation of the criminal case registered against Sajan K. Varghese. However, it has to be noted that the semi-processed films and the negatives are not themselves items of properties regarding which offences were committed. On the other hand, the gravamen of the accusation made against Sajan K. Varghese is that he had induced thousands of investors to deposit crores of rupees in the Finance Company on the assurance that he would pay them high rates of interest and thereafter defrauded them and secondly he had committed breach of trust by utilising the deposit amount for the production of the film in question. That apart, this is not a case where the creditors have stopped with preferring a report to the police of the commission of offences by Sajan K. Varghese. About 3,500 creditors have formed themselves into an association and filed an insolvency petition and in that the unfinished film has been shown as an item of asset of the respondents to be secured by the Insolvency Court. That Court has appointed an interim receiver and ordered him to take possession of the assets of Sajan K. Varghese and the Finance Company. Consequently, by reason of the insolvency proceedings which are pending, the unprocessed films and negatives cannot be strictly said to be properties over which an order of disposal could be made out under Section 451 of the Code. *Sajan K. Varghese* v. *State of Kerala*, AIR 1989 SC 1058 : (1989) 2 SCC 208 : 1989 SCC (Cri) 339 : 1989 CrLJ 897 : (1989) 2 Crimes 305.

[13611] ● ***Seizure of sandalwood by appellant—Writ petition.***—The High Court committed error in adjudicating the question, whether the sandalwood was legally or illegally seized or was not in wrongful possession or whether the seized sandalwood is or is not the subject-matter of criminal cases. There did not exist any evidence on record to decide or conclude any such above findings. As this Court has observed the High Court committed error in going into the questions and recording findings which it should not have done in exercise of its power under Art. 226 of the Constitution of India. Not only High Court had decided disputed questions of fact but through its order has taken the property outside the reach of the Criminal Court. Accordingly, the said impugned orders are unsustainable in law. In fact the proper course open to the respondent was to move the Criminal Court under Section 451 of the CrPC in respect of the custody of the seized sandalwood. Admitted position is, the seized goods have been produced before the Criminal Court concerned, then for the custody of the same Section 451 of the CrPC is the proper course. This section empowers the Criminal Court to order for custody and disposal of property pending trial. Even if there be a dispute, as in the present case, whether the seized goods is the property in the pending criminal case, it is that Criminal Court alone which would be competent to adjudicate and decide the issue but not the High Court under its writ jurisdiction. In view of this, the High Court committed error in issuing the writ and granting the said relief to the respondent. Accordingly, the order of the learned Single Judge and the impugned judgment in writ appeal are hereby quashed. *S.P. Forest Cell* v. *Kannans Co.*, (2001) 9 SCC 209 : 2002 SCC (Cri) 789 (790) : JT 2000 (10) SC 302 : (2000) 7 Supreme 696 : (2000) 7 SLT 453.

[13612] ● ***Disposal of property pending trial.***—Whatever be the situation, it is of no use to keep seized valuable articles, vehicles, narcotic drugs liquor at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicle, if required at any point of time. This can be done pending hearing of applications for return of such vehicles. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If insurance company fails to take possession the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchanama should be prepared. For articles such as seized liquor also, prompt action should be taken in disposing it of after preparing necessary panchnama. If sample is required to be taken, sample may kept properly after sending it to the chemical analyser, if required. But in no case, large quantity of liquor should be stored at the police station. No purpose is served by such storing. Similarly for the Narcotic drugs also, for its identification, procedure under section 451, CrPC should be followed of recording evidence and disposal. Its identity could be on the basis of evidence recorded by the Magistrate. Samples also should be sent immediately to the Chemical Analyser to that subsequently, a contention may not be raised that the article which was seized was not the same. However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451, CrPC are properly and promptly exercised and articles are not kept for a long time at the police station, in any case for not more than fifteen days to one month. This object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly. *Sunderbhai Ambalal Desai* v. *State of Gujarat*, AIR 2003 SC 638 : (2002) 10 SCC 283 : 2003 SCC (Cri) 1943 : JT 2002 (10) SC 80.

[13613] ● ***Release of vehicle on certain conditions.***—Indisputably, in the Registration Certificate the name of the financier has been indicated and the factum that the vehicle was subject to such an agreement was also noted. In the agreement, appellant is described as owner, but respondent No. 2 as hirer. It is noticed that respondent No. 2 had applied for release of vehicle and High Court had directed for, but those condition have not been fulfilled and vehicle lying with seizure authorities for nearly eight years now. In view of said factual position, direction for release of vehicle in favour of appellant subject to fulfillment of conditions stipulated for respondent No. 2 was issued. *Bharath Metha* v. *State*, AIR 2008 SC 1970 : (2008) 5 SCC 752 : 2008 (3) SCC (Cri) 72 : 2008 CrLJ 2245 : 2008 (5) SCR 478 : 2008 (4) Scale 186 : 2008 (2) Supreme 596 : 2008 (2) Crimes 105 (SC).

[13614] ● ***Disposal of property during trial.***—"Looking to the facts of the case and the controversy involved, we in the interest of both the parties order that the peddy/rice presently lying in the Court custody at Guruharsahai, District Firozpur shall be put to public auction. Additional Chief Judicial Magistrate, Firozpur shall conduct the public auction with the help of the Collector of the District or any other officer authorised by the Collector, after giving due publicity to the prospective auction purchasers as per the procedure adopted by the concerned Executive Officer. The sale proceeds received from such auction, initially shall be paid to the appellant-M/s Satnam Agro Industries subject to the condition that the appellant-Firm shall furnish bank guarantee for the said amount before the Additional Chief Judicial Magistrate, Firozpur. The process of auction shall be finalised within six weeks from this order. All rights and contentions raised by the parties before us are left for the decision of the appropriate authority in appropriate proceedings. We hope that the civil suit and the criminal proceedings pending in the respective Courts shall be expeditiously decided.

"The Criminal Appeals are accordingly disposed of". *Satnam Agro Industries* v. *State of Punjab*, AIR 2009 SC 249 : (2008) 15 SCC 784 : 2009 CrLJ 387 : 2008 (13) Scale 371 : 2008 (4) Crimes 243 (SC).

[13615] ● ***Release of vehicle seized by Abkari Officer under Kerala Abkari Act, 1967—Conditions.***—"Section 67E of the Act deals with the appeal in respect of an order passed under Section 67B of the Act while Section 67F refers to the power of revision in respect of an order under Sections 67B and 67E and can be exercised on his own motion by the Commissioner Admittedly, the statutory remedies have not been availed. The High Court ought not to have interfered in a matter when statutory remedies are provided. In the instant case it is submitted by the respondent that pursuant to the High Court's order dated 26th October, 2006 the vehicle has been released.

However, the direction for release or executing a bond seems to be without any justification when Assistant Excise Commissioner had directed furnishing of the bank guarantee equal to the value of the vehicle. The High Court had not indicated any reason as to why that part of the order was interfered with.

We dispose of the appeal with the direction that in addition to the personal bond executed for securing release of the vehicle, the respondent shall within a period of six weeks from today furnish bank guarantee for the sum of Rs. 25,000/- in the satisfaction of the Assistant Excise Commissioner concerned. If the bank guarantee is not furnished, the concerned official shall be free to cancel the bond and to take possession of the vehicle in question". *State of Kerala* v. *C.A. Jabbar*, (2009) 15 SCC 92 : 2009 (7) SCR 300 : JT 2009 (14) SC 81.

[13616] ● ***Interim custody of vehicle.***—It is not in dispute that the appellant on the basis of loan advanced by the bank had purchased the truck and was the registered owner. Respondent 2 and his wife were merely guarantors. The truck was seized by the police for the alleged offence under the provisions of the Motor Vehicles Act; The dispute concerning civil liability of the registered owner towards the loan obtained from the bank on guarantee bank bond furnished jointly by Respondent 2 and his wife was wholly irrelevant in the criminal case pending for trial before the Magistrate for alleged offence under the provisions, if any. The impugned order of the Sessions Court and of the High Court confirming the same by order to the extent of imposing condition on the appellant to get the guarantors exonerated towards loan obtained from the bank on the vehicle was set aside and it was directed that the seized truck in question be released to the appellant registered owner on his furnishing security in the sum of Rs. four lakhs to the satisfaction of the trial Magistrate. *Ramesh Chand Jain* v. *State of Haryana*, (2007) 15 SCC 126.

[13617] ● ***Legality of search and seizure of truck carrying goats and sheep by place—State Government directed to take appropriate departmental action.***—In the order passed by the learned Additional Chief Judicial Magistrate no officer has been named at all. Whether search and seizure of the goats and sheep is illegal or not can be effectively gone into only at the stage of final disposal of the trial and not at interim stage when the Court hears an application under Section 451 read with Section 457 of the Code of criminal Procedure, 1973 for interim custody of the muddammal. Direction to the State Government to initiate appropriate departmental action for illegal or unauthorized actions at the interim stage is harsh as well as not called for on the facts of the case. Therefore, the said direction, which is contained in Clause (5) of paragraph 14 of the impugned judgment, also deserves to be set aside. *Bharat Amratlal Kothari* v. *Dosukhan Samadkhan Sindhi*, AIR 2010 SC 475 : (2010) 1 SCC 234 : (2009) (15) SCR) 662 : JT 2009 (14) 102 : 2009 (8) Supreme 385 : 2010 (1) Crimes 38.

[13618] ● ***Interim custody of goats and sheep.***—Undisputably, respondents Nos. 1 to 6 are owners of the goats and sheep seized. Admittedly the respondent Nos. 1 to 6 by vocation trade in goats and sheep. Probably a period of more that one and half years has elapsed by this time and by production of goats and sheep seized before the Court, the prosecution cannot prove that they were subjected to cruelty by the accused because no marks of cruelty would be found by this time. The trade in which respondent Nos. 1 to 6 are engaged, is not prohibited by any law. On the facts and in the circumstances of the case this Court is of the opinion that respondent: Nos. 1 to 6 would be entitled to interim custody of goats and sheep seized in the case during the pendency of the trial, of course, subject to certain conditions. *Bharat Amratlal Kothari* v. *Dosukhan Samadkhan Sindhe*, AIR 2010 SC 475 : (2010) 1 SCC 234 : 2010 (1) Crimes 38 (SC) : 2009 (1) SCR 662.

DISPROPORTIONATE ASSETS

[13619] ● ***Disproportionate assets.***—During the course of gathering of the material, it does happen that the officer concerned or other person may be questioned or other queries made. For the formation of a *prima facie* opinion that an officer may be guilty of criminal misconduct leading to the filing of the first information report, there is no provision in law or otherwise which makes it obligatory of an opportunity of being heard to be given to a person against whom the report is to be lodged. That such satisfactory account had to be rendered before a Court is also borne out from the judgment of this Court in Veeraswamis' case ((1991) 3 SCC 655) where referring to Section 5(1)(e) of the Prevention of Corruption Act, 1974 at page 713 of the said judgment. It was observed as follows :

Clause (e) creates a statutory offence which must be proved by the prosecution. It is for the prosecution to prove that the accused or any person on his behalf has been in possession of pecuniary resources or property disproportionate to his known sources of income. When teat onus is discharged by the prosecution, it is for the accused to account satisfactorily for the disproportionality of the properties possessed by him. The Section makes available statutory defence which must be proved by the accused. It is a restricted defence that is accorded to the accused to account for the disproportionality of the assets over the income. But the legal burden of proof placed on the accused is not so onerous as that of the prosecution. However, it is just not throwing some doubt on the prosecution version. The legislature has advisedly used the expression "satisfactorily account". The emphasis must be on the word "satisfactorily". That means the accused has to satisfy the Court that his explanation is worthy of acceptance. The burden of proof placed on the accused is an evidential burden though not a persuasive burden. The accused, however, could discharge that burden of proof "on the balance of probabilities" either from the evidence of the prosecution and/or evidence from the defence." *State of Maharashtra* v. *Ishwar Piraji Kalpatri*, AIR 1996 SC 722 : 1996 SCC (Cri) 150 : 1996 CrLJ 1127 : 1995 (4) Crimes 769.

DISPUTE AS TO IMMOVABLE PROPERTY (Ss. 145, 146, CrPC, 1973)

[13620] ● ***Dispute as to immovable property.***—Section 145 of the Code limits the jurisdiction of a Magistrate only to one question, namely, whether a dispute likely to cause a breach of the peace exists concerning any land, and then for the purpose of preventing any such breach, to issue an order that the party in possession of the land at the date of the order shall retain that possession undisturbed until ejected therefrom under any order of a civil Court. Therefore, the Magistrate has first to determine the question as to which of the disputing parties was in possession of the land in question at the date of the preliminary order under Section 145(1) requiring the parties to produce their evidence regarding such possession. The combined effect of the various sub-sections of Section 145 is that the Magistrate has to determine who actually was in possession of the land in dispute and to pass orders which help the person proved to have been in possession to retain his possession by forbidding all disturbances of such possession. *Bhinka* v. *Charan Singh*, AIR

1959 SC 960 : 1959 CrLJ 1223 : 1959 ALJ 557 : 1959 AWR (HC) 440 : 1959 ACrR 337.

[13621] ● ***No power of Magistrate under Section 145, CrPC to direct possession of land.***—The Magistrate has no power under Section 145 to direct any party in actual possession of land to deliver its possession to anyone who was not in possession of it at the date of the preliminary order under Section 145(1) or to authories anyone not in possession to take such possession. In other words, no one can claim that he was *given* possession or that he took possession by virtue of an order under Section 145. *Bhinka* v. *Charan Singh*, AIR 1959 SC 960 : 1959 CrLJ 1223 : 1959 ALJ 557 : 1959 AWR (HC) 440.

[13622] ● ***Legal effect of order made by Magistrate under Section 145(6), CrPC.***—The legal effect of an order made by a Magistrate under Section 145(6) of the Code is as under. The order declares only which party was in fact in possession at the date of the preliminary order under sub-section (1) and then declares that party to be entitled to retain that possession undistrubed until he is ejected in due course of law. The Magistrate has no jurisdiction to decide a party's title or right to possession, and the question of title to possession is expressly reserved to be decided by a civil Court. The foundation of jurisdiction under Section 145 being only an apprehension of a breach of peace, the power conferred on the Magistrate is a limited one, namely, to make a temporary order regarding retention of possession on the basis of proved prior possession, irrespective of legal rights and titles to possession. The life of the order is co-terminus with the passing of a decree of a civil Court, and the moment a civil Court makes an order in relation to that property, that order displaces the order made under Section 145. *Bhinka* v. *Charan Singh*, AIR 1959 SC 960 : 1959 CrLJ 1223 : 1959 ALJ 557 : 1959 AWR (HC) 440 : 1959 ACrR 337.

[13623] ● ***Order of Magistrate under Section 145, CrPC provisional Police order.***—The order of a Magistrate under Section 145 is merely a provisional police order based upon the fact of previous possession. It is made only for the purpose of preventing a breach of the peace, and being made irrespective of the rights of the parties, it cannot enable the person in whose favour it is made to resist a suit based on title. *Bhinka* v. *Charan Singh*, AIR 1959 SC 960 : 1959 CrLJ 1223 : 1959 ALJ 557 : 1959 AWR (HC) 440 : 1959 ACrR 337.

[13624] ● ***Final order under Section 145, CrPC not effect rights of parties.***—A final order under this section does not in any manner effect the rights of the parties. *Bhinka* v. *Charan Singh*, AIR 1959 SC 960 : 1959 CrLJ 1223 : 1959 Supp (2) SCR 789 : 1960 SCJ 892.

[13625] ● ***Principle of res judicata—Applicability.***—The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court whether the trial Court or a High Court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings. *Satyadhyan Ghosal* v. *Deorajin Debi*, AIR 1960 SC 941 (943) : (1960) 3 SCR 590 : (1962) 1 SCJ 268.

[13626] ● ***Property in custodia legis.***—The property being in *custodia legis* no party is under any obligation to bring a suit for recovery of possession. *Deo Kuer*, AIR 1966 SC 359 : (1965) 3 SCR 655.

[13627] ● ***Magistrate to arrive at his satisfaction both from Police report or from other information.***—The language of Section 145(1) of the Code is clear and unambiguous that the Magistrate can arrive at his satisfaction both from the police report or "from other information" which must include an application by the party dispossessed. The High Court would not go into the sufficiency or otherwise of the material which has satisfied the Magistrate. The proposition that the Magistrate before proceeding under Section 145(1) must, as a rule, call for a police report where he is moved by a private party or that the absence of a police report is a sure indication of the absence of possibility of breach of peace, is not warranted by the clear language of section. Once the Magistrate, having examined the applicant on oath, is satisfied that his application disclosed the existence of the dispute and the likelihood of breach of peace, there is no bar against his acting under Section 145(1) of the Code. *R.H. Bhutani* v. *Mani J. Desai*, AIR 1968 SC 1444 : 1969 CrLJ 13 : (1969) 1 SCJ 510 : (1968) 2 SCWR 637 : 1968 SCD 1135 : (1969) 1 SCA 90 : 1970 Mah LJ 148 : 1970 MP LJ 137 : 1969 KLJ 932 : 1969 MLJ (Cri) 321 : 1969 AWR (HC) 59 : 1969 ACrR 49 : 71 Bom LR 83 : 1968 Cur LJ 980 : (1968) 2 UmnP 763.

[13628] ● ***Magistrate not barred from deciding question of actual possession.***—Proviso to subsection (4) merely recites the circumstances under which a presumption of possession may be made in favour of the dispossessed party and a Magistrate is not barred from deciding the question of actual possession on other grounds also. *R.H.*

Bhutani v. *Mani*, AIR 1968 SC 1444 : 1969 CrLJ 13(1969) 1 SCR 80 : 1968 CAR 222.

[13629] ● *Use of word "then" at beginning of sub-section (4) of Section 145, CrPC.*—The use of the word "then" at the beginning of sub-section (4) indicates that the question of determination of the factum of possession under sub-section (4) arises only after the requirements of sub-sections (1) and (3) have been complied with. The section contemplates a determination of the question of possession without reference to the merits of the respective Claims of the disputing parties to a right to possess the subject of the dispute. *R.H. Bhutani* v. *Mani J. Desai*, AIR 1968 SC 1444 : (1969) 1 SCR 80 : 1968 CAR 222.

[13630] ● *Party if dispossessed within two months of date of Police report.*—If a party is found to have been dispossessed within two months of the date of receipt of the police report or other information on the basis of which proceedings were started under this section, the Magistrate may treat such party to be in possession on such date restore possession to him and prohibit the dispossessor from interfering with the possession until eviction of that person in due course of law. *R.H. Bhutani* v. *Mani*, AIR 1968 SC 1444 : 1969 CrLJ 13 (14) : (1969) 1 SCR 80 : 1968 CAR 222. TO THE SAME EFFECT : (1) *R.C. Patuck* v. *Fatima A. Kundasa*, 1997 CrLJ 2576 (SC).

[13631] ● *Revisional Court not to go into question of sufficiency of material.*—The revisional Court in the exercise of its revisional jurisdiction would not go into the question of sufficiency of material which has satisfied the Magistrate. *R.H. Bhutani* v. *Mani*, AIR 1968 SC 1444 : 1969 CrLJ 13 : (1968) 71 Bom LR 83 (SC) : (1969) 1 SCR 80 : 1968 CAR 222.

[13632] ● *Magistrate to decide first who is in actual possession.*—The Magistrate has first to decide who is in actual possession at the date of his preliminary order, if, however, the party in *de facto* possession is found to have obtained possession by forcibly and wrongfully dispossessing the other party within two months next preceding the date of his order, the Magistrate can treat the dispossessed party as if he was in possession on such date, restore possession to him and prohibit the dispossessor from interfering with that possession until eviction of that person in due course of law. The proviso is founded on the principle that forcible and wrongful dispossession is not to be recognised under the criminal law, so that it is not possible to say that such an act of dispossession was completed before the date of the order. The word "dispossessed" in the second proviso (old Code) means to be out of possession, removed from the premises, ousted, ejected or excluded. Even where a person has a right to possession but taking the law into his hands makes a forcible entry otherwise then in due course of law, it would be a case of both forcible and wrongful dispossession. The second proviso to sub-section (4) and sub-section (6) contemplate not a fugitive act of trespass or interference with the possession of the applicant, the dispossession there referred to is one that amounts to a completed act of forcible and wrongful driving out a party from his possession. The fact that dispossession of the applicant was a completed act and the applicant had filed a criminal complaint and the police had taken action thereunder do not mean that the Magistrate could not proceed under Section 145 and give directions permissible under sub-section (6). *R.H. Bhutani* v. *Mani J. Desai*, AIR 1968 SC 1444 : 1969 CrLJ 13 : (1969) 1 SCJ 510 : (1968) 2 SCWR 637 : 1968 SCD 1135 : (1969) 1 SCA 90 : 1970 Mah LJ 148 : 1970 MP LJ 137 : 1969 KLJ 932 : (1969 MLJ (Cri) 321 : 1969 AWR (HC) 59 : 1969 ACrR 49 : 71 Bom LR 83 : 1968 Cur LJ 980 : (1968) 2 UmNP 763.

[13633] ● *Continuation of apprehension of breach of peace not necessary for final order.*—Continuation of apprehension of breach of the peace is not necessary for final order. *R.H. Bhutani* v. *Mani J. Desai*, AIR 1968 SC 1444 : (1969) 1 SCR 80 : 1968 CAR 222.

[13634] ● *Discretion of Magistrate sound judicial discretion.*—The discretion of the Magistrate must be a sound judicial discretion. *R.H. Bhutani* v. *Mani*, AIR 1968 SC 1444 : (1969) 1 SCR 80 : 1968 CAR 222.

[13635] ● *Magistrate to base his action on statement of complainant on oath.*—The Magistrate can base his action on the statements of the complainant on oath in the application. *R.H. Bhutani* v. *Mani J. Desai*, AIR 1968 SC 1444 : 1969 CrLJ 13 : (1969) 1 SCR 80 : 1968 CAR 222.

[13636] ● *Initiation of proceedings—Conditions.*—All that the section requires is that the Magistrate must be satisfied before initiating the proceedings tnat a dispute regarding an immovable property exists and that such dispute is likely to cause breach of the peace. Once he is satisfied in respect of these two conditions, he had to pass the preliminary order under sub-section (1) and thereafter to make an enquiry under sub-section (4) and pass a final order under sub-section (6). A view has been taken that it is not necessary that at the time of passing the final order, the apprehension of breach of the peace should continue or should have continued to exist. *R.H. Bhutani* v. *Mani J. Desai*, AIR 1968 SC 1444 : (1969) 1 SCR 80 : 1968 CAR 222.

[13637] ● ***Power of High Court under Article 227 of Constitution.***—The power of High Court under Art. 227, Constitution of India cannot be contained under Section 146, CrPC. *Chandrasekhar Singh* v. *Siya Ram Singh*, AIR 1977 SC 1 : (1976) 4 SCC 691 : 1977 CrLJ 13 (17) : (1977) 2 SCR 1 : 1976 UJ 960.

[13638] ● ***Undertaking to handover possession if suits dismissed.***—When a party to proceedings under this section gives an undertaking that they would handover possession if their suits are dismissed to Nazir who in turn shall handover it to the opposite party, the proceedings under Section 145, CrPC shall be treated as closed on disposal of civil suit. *Jala Bano* v. *State of J&K*, AIR 1977 SC 2220 : (1977) 4 SC 607 (3) : 1977 SCC (Cri) 672 (1) : 1977 CrLJ 1919.

[13639] ● ***Affidavits sworn or affirmed before Magistrate not of formal character.***—Affidavits under Section 145 is not of formal character because it is means to prove or disprove the competing claims of the parties as respects the fact of actual possession of the subject of dispute. There is thus no provision in the Code specifying the Courts or persons before whom the affidavits referred to in this section has to be sworn and affirmed. This has 'therefore' to be done according to the general provisions relating to affidavits. *Chhotan Prasad* v. *Hari Dusadh*, AIR 1977 SC 407 : (1977) 1 SCC 102 : 1977 SCC (Cri) 35 : 1977 CrLJ 249 : 1977 UJ 46.

[13640] ● ***Affidavits sworn or affirmed before Magistrate not in seisin of case.***—Affidavits sworn or affirmed before Magistrates not in seisin of the case under Section 145, CrPC are inadmissible and cannot be read in evidence. *Chhotan Prasad* v. *Hari Dusadh*, AIR 1977 SC 407 : (1977) 1 SCC 102 : 1977 SCC (Cri) 35 : 1977 CrLJ 249 : 1977 UJ 46.

[13641] ● ***Affidavits under Section 145, CrPC evidence for purposes of proceedings before Magistrate.***—Affidavits contemplated under Section 145, CrPC are evidence for the purpose of proceedings before the Magistrate concerned even though the Evidence Act does not apply to them. *Chhotan Prasad* v. *Hari Dusadh*, AIR 1977 SC 407 : (1977) 1 SCC 102 : 1977 SCC (Cri) 35 : 1977 CrLJ 249 : 1977 UJ 46.

[13642] ● ***Proceeding under Section 145, CrPC—Bar of Section 8 of Maharashtra Vacant Lands (Prohibition of Unauthorised Occupational Summary Eviction) Act not attracted.***—*Maharashtra Vacant Lands (Prohibition of Unauthorised Occupation and Summary Eviction) Act, 1975, Section 8.*—In the context of the Act, the bar in Section 8 is not attracted to any suit or proceedings in respect of the eviction of any person from any vacant land started in relation to a dispute of possession between two private persons. It is attracted if the suit or proceeding concerns the eviction of any person if he is in unauthorised occupation of any vacant land by the Competent Authority. In substance and in effect a proceeding under Section 145 of the Code is not for the purpose of evicting any person from any land but is primarily concerned with the prevention of the breach of the peace by declaring the party found in possession to be entitled to remain in possession until evicted therefrom in due course of law. Therefore, the proceeding pending under Section 145, CrPC, does not abate on account of the bar in Section 8 of the Act and it has to be disposed of by the Magistrate in accordance with the provisions of law contained in Sections 145 and 146 of the Code. *Chandu Naik* v. *Sitaram B. Naik*, AIR 1978 SC 333 : (1978) 1 SCC 210 : 1978 SCC (Cri) 100 : 1978 CrLJ 356 : 1978 CrLR (SC) 30 : 1978 SCCrR 60 : (1978) 2 SCR 353 : 1978 UJ (SC) 27 : 1978 CrAppR (SC) 33 : 1978 Chand LR (Cri) 188 (SC) : 1978 MLJ (Cri) 126 : 1978 Sim LC 217.

[13643] ● ***Jurisdiction of Magistrate not ends with attachment.***—Sections 145 & 146 together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace because of a dispute concerning any land or water or their boundaries. If Section 146 is torn out of its setting and read independently of Section 145, it is capable of being construed to mean that once an attachment is effected in any of the three situations mentioned therein, the dispute can only be resolved by a competent Court and not by the Magistrate effecting the attachment.

Except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), a proceeding initiated by a preliminary order under Section 145(1) must run its full course. There is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. The Magistrate need not wait for determination of rights of parties by a competent Court as per the procedure introduced by the 1955 amendment but should proceed to determine as to which of the parties was in possession on the date of the preliminary order as provided in Section 145(6) and withdraw the attachment as provided in

Section 146(1) since there can be no dispute likely to cause a breach of the peace once an order in terms of Section 145(6) is made. *Mathuralal* v. *Banwarlal*, AIR 1980 SC 242 : (1979) 4 SCC 665 : 1980 SCC (Cri) 9 : 1980 CrLJ 1 : 1979 CrLR (SC) 673 : 1979 All CrC 325 : 1979 CrAppR (SC) 367 : 1980 Chand CrC 6 (SC) : 1980 Rajdhani LR 238 : (1980) 1 SCR 620 : (1980) 1 SCJ 521 : 1980 MLJ (Cri) 454.

[13644] ● ***Existence of breach of peace not necessary when final order passed.***—Once a preliminary order was drawn up by the Magistrate setting out the reasons for holding that a breach of peace existed, it is not necessary that breach of peace should continue at every stage of the proceeding unless there is clear evidence to show that the dispute has ceased to exist so as to bring the case within the ambit of Section 145(5). Unless such a contingency arose, proceedings have to be carried to their logical end culminating to the final order under Section 145(6). *Rajpati* v. *Bachan*, AIR 1981 SC 18 : (1980) 4 SCC 116 : 1980 SCC (Cri) 927 : 1980 CrLJ 1276 : 1980 CrLR (SC) 549 : (1981) 1 SCR 92 : 1980 CrAppR (SC) 265 : 1981 UP CrC 17 : 1980 ACrC 274 : 1980 Cur LJ (Cri) 191 : 1980 UJ (SC) 918 : 1980 SCCrR 443 : 1981 Bihar CrC (SC) 17 : (1981) 1 SCJ 228 : 1981 Chand LR (Cri) 257 (SC) : 1980 MLW (Cri) 209 : 1980 ACrR 444 : 1980 AWC 642 : (1980) 3 Mah LR 308 : 1980 TLNJ (SC) 1 : 1981 MLJ (Cri) 163.

[13645] ● ***Magistrate to be satisfied regarding existence of breach of face.***—It is well settled that under Section 145, CrPC it is for the Magistrate to be satisfied regarding the existence of a breach of the peace and once he records his satisfaction in the preliminary order the High Court in revision cannot go into the sufficiency or otherwise of the materials on the basis of which the satisfaction of the Magistrate is based. *Rajpati* v. *Bachan*, AIR 1981 SC 18 : (1980) 4 SCC 116 : 1980 SCC (Cri) 927 : 1980 CrLJ 1276 : 1980 UJ 918.

[13646] ● ***Omission of Magistrate to mention breach of peace in final order.***—Assuming however, that there was an omission on the part of the Magistrate to mention in his final order that there was breach of the peace, that being an error of procedure would clearly fall within the domain of a curable irregularity which is not sufficient to vitiate the order passed by the Magistrate, particularly when there is nothing to show in the instant case that any prejudice was caused to any of the parties who had the full opportunity to produce their evidence before the Court. *Rajpati* v. *Bachan*, AIR 1981 SC 18 : (1980) 4 SCC 116 : 1980 SCC (Cri) 927 : 1980 CrLJ 1276 : 1980 UJ 918.

[13647] ● ***Title of parties not affected when.***—An order passed under Section 145, CrPC during the pendency of the proceedings does not in any way affect the title of the parties to disputed premises though it reflects the factum of possession. *Sadhuram Bansal* v. *Publin Bihari Sarkar*, AIR 1984 SC 1471 (1489) : (1984) 3 SCC 410 : (1984) 3 SCR 582 : (1984) 1 Scale 999.

[13648] ● ***Property when in custody of receiver appointed by Court.***—When the property is in custody of a receiver appointed by the Court, the property is in the custody of the Court. No party can acquire any titles or right by coming in or over the property which is in the possession of the receiver without the leave or consent of the receiver or sanction of Court. *Sadhuram Bansal* v. *Publin Bihari Sarkar*, AIR 1984 SC 1471 (1490) : (1984) 3 SCC 410 : (1984) 3 SCR 582 : (1984) 1 Scale 999.

[13649] ● ***Parallel proceedings.***—When possession is being examined by the civil Court and parties are in a position to obtain interim orders therein, jurisdiction of criminal Court should not be allowed to be invoked. Multiplicity of litigation and parallel proceedings are not in the interest of parties nor should public time be allowed to be wasted over meaningless litigation. Order under Section 145 was quashed. *Ram Sumer Puri* v. *State of Uttar Pradesh*, AIR 1985 SC 472 : (1985) 1 SCC 427 : 1985 CrLJ 752 : 1985 CrLR (SC) 1 : 1985 AWC 128 : 1985 ACrR 108 : (1985) 1 ACrLR 382 : (1985) 1 RecCrR 278.

[13650] ● ***Dispute regarding immovable property.***—The ratio of the decision in *Ram Sumer Puri Mahant* v. *State of U.P.*, AIR 1985 SC 472 : (1985) 1 SCC 427 : 1985 CrLJ 752, is that a party should not be permitted to litigate before the Criminal Court when the civil suit is pending in respect of the same subject-matter. That does not mean that a concluded order under Section 145, CrPC, made by the Magistrate of competent jurisdiction should be set at naught merely because the unsuccessful party has approached the civil Court. An order made under Section 145 deals only with the factum of possession of the party as on a particular day. It confers no title to remain in possession of the disputed property. The order is subject to the decision of the civil Court. The unsuccessful party, therefore, must get relief only in the civil Court. He may move the civil Court with a properly constituted suit. He may file a suit for declaration and prove a better right to possession. The civil Court has jurisdiction to give a finding different from that which the Magistrate has reached. The order of the High Court was set aside and the order of the Magistrate directing the appellant to be put in possession of the disputed shop was restored. The parties may work out their rights as per law. *Jhunamal alias Devandas* v. *State of Madhya Pradesh*, AIR 1988 SC 1973 : (1988) 4 SCC 452 : 1989 CrLJ 82 : (1988) 3 SCJ 401 : (1988) 3 Crimes 282 : (1988) BBCJ (SC) 134 : (1988) 2 LS (SC) 18 : 1988 ACrC 401 : 1988 ACrR 573 : 1988 AWC 1163 : 1988 BLJR 674 : 1988 UPCrR 288 : (1988) 2 APLJ (SC) 45 : 1988 APLJ (Cri) 286 : 1988 Jab LJ 584 : (1988) 2 KLT 355.

[13651] ● ***Institution of civil suit during pendency of proceedings.***—The institution of civil suit during the pendency of proceedings is no ground to stay or quash the proceedings under Section 145, CrPC. *Bharat Bhusan* v. *Vivek Joshi, SDM*, (1993) 3 All CrLR 430 (431) (SC).

[13652] ● ***Attachment of property—Withdrawal of.***—It is obvious from sub-section (1) of Section 146, that the Magistrate is given power to attach the subject of dispute "until the competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof." The determination by a competent Court of the rights of the parties spoken of there has not necessarily to be a final determination. The determination may be even tentative at the interim stage when the competent Court passes an order of interim injunction or appoints a receiver in respect of the subject-matter of the dispute pending the final decision in the suit. The moment the competent Court does so, even at the interim stage, the order of attachment passed by the Magistrate has to come to an end. Otherwise, there will be inconsistency between the order passed by the civil Court and the order of attachment passed by the Magistrate. The proviso to sub-section (1) of Section 146 itself takes cognizance of such a situation when it states that "Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of any breach of peace with regard to the subject of dispute." When a civil Court passes an order of injunction or receiver, it is the civil Court which is seized of the matter and any breach of its order can be punished by it according to law. Hence on the passing of the interlocutory order by the civil Court, it can legitimately be said that there is no longer any likelihood of the breach of the peace with regard to the subject of dispute. The fact that the Magistrate can withdraw the order of attachment passed by him even during the pendency of the dispute in the Civil Court is made further clear by the provisions of sub-section (2) of Section 146. When the civil Court appoints a receiver, the order of attachment passed by the Magistrate necessarily gives way to the order of the civil Court appointing the receiver. It is only when the civil Court does not appoint the receiver that the Magistrate may make arrangements for looking after the property or even appoint a receiver himself. However, even when such a receiver is appointed and the civil Court subsequently appoints a receiver of its own, the Magistrate has to order the receiver appointed by him to hand over the possession of the subject in dispute to the receiver appointed by the civil Court and discharge the receiver appointed by him. He has also to pass such other incidental or consequential orders as he thinks just. Such order may include an order of withdrawal of the attachment in view of the seizure of the matter by the civil Court and the consequent want of apprehension of breach of the peace. It is, therefore, not correct to say as held by the High Court that the property continues to remain under attachment of the Magisterial order till the rights of the parties are decided finally by the competent Court of law. *Dharampal* v. *Ramshri*, AIR 1993 SC 1361 : 1993 CrLJ 1049 : 1993 CrLR (SC) 189 : (1993) 1 Crimes 304 : 1993 (1) CCr 47 (SC).

[13653] ● ***Applicability of Sections 145 and 107, CrPC.***—True, a suit or remedy in civil Court for possession or injunction normally prevents a person from invoking jurisdiction of the criminal Court, particularly when possession is being examined by the civil Court and parties are in a position to approach the civil Court for interim orders such as injunction or appointment of receiver for adequate protection of the property during pendency of the dispute. Multiplicity of litigation is not in the interest of parties nor should public time be allowed to be wasted over meaningless litigation. When claim or title are not in dispute and the parties on their own showing are co-owners and there is no partition one cannot be permitted to act forcibly and unlawfully and ask the other to act in accordance with law. Where the dispute is not on the right to possession but on the question of possession the Magistrate is empowered to take cognizance under Section 145, CrPC. *Prakash Chand Sachdev* v. *State*, AIR 1994 SC 1436 : (1994) 1 SCC 471 : 1994 SCC (Cri) 438 : 1994 CrLJ 2117 : 1993 CrLR (SC) 758 : (1994) 1 UJ 158.

[13654] ● ***Proceedings under Section 107, CrPC for public peace and tranquillity.***—The proceedings under Section 107, CrPC are for public peace and tranquility whereas those under Section 145 relate to disputes regarding posse-

ssion between parties concerning any land or water or boundaries thereof. *Prakash Chand Sachdev* v. *State*, AIR 1994 SC 1436 : (1994) 1 SCC 471 : 1994 SCC (Cri) 438 : 1994 CrLJ 2117 : 1993 CrLR (SC) 758 : (1994) 1 UJ 158.

[13655] ● ***Dropping of proceedings under Section 107, CrPC.***—Dropping of proceedings under Section 107 could not furnish foundation for dropping the proceedings under Section 145, CrPC. *Prakash Chand Sachdev* v. *State*, AIR 1994 SC 1436 : (1994) 1 SCC 471 : 1994 SCC (Cri) 438 : 1994 CrLJ 2117 : 1993 CrLR (SC) 758 : (1994) 1 UJ 158.

[13656] ● ***Apprehension of breach of peace.***—Where there is apprehension of breach of peace merely because the matter is pending before the consolidation authorities, is no ground for dropping the proceedings under this section. *Rajendra Pratap Singh* v. *District and Sessions Judge Gonda*, 1996 CrLJ 698 (SC).

[13657] ● ***Conditions mentioned in proviso to sub-section (4) of Section 145 CrPc if satisfied.***—If the conditions mentioned in the proviso to sub-section (4) are satisfied, the Magistrate can deem a person to be in possession as on the date of the order under Section 145(1) notwithstanding the fact that he was not in fact in possession on date but also in possession earlier within two months next before the order. *R.C. Pathak* v. *Fatima A. Kundara*, AIR 1997 SC 2320 : (1997) 5 SCC 334 : (1997) 2 Crimes 162 (SC).

[13658] ● ***Civil Court competent to decide question of little as well as possession.***—When civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by civil Court that proceedings should not be allowed to continue. Civil Court is competent to decide the question of title as well as possession between the parties and orders of civil Courts would be binding on Magistrate. *Amresh Tiwari* v. *L.P. Dubey*, AIR 2000 SC 1504 : (2000) 4 SCC 440 : 2000 SCC (Cri) 806 : 2000 CrLJ 2226 : 2000 (5) SRJ 199 (SC) : (2000) 3 Crimes 37.

[13659] ● ***Civil suit for possession or for declaration of title.***—It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of property concerned can be applied for and granted by the civil Court that proceedings under Section 145 should not be allowed to continue. *Amresh Tiwari* v. *Lalta Prasad Dubey*, AIR 2000 SC 1504 : (2000) 4 SCC 440 : 2000 SCC (Cri) 806 : 2000 CrLJ 2226 (SC) : (2000) 3 Crimes 37.

[13660] ● ***Petitioner not in possession of disputed property.***—Where the petitioner was not in possession of disputed property on the date of passing preliminary order, the proceedings are liable to be quashed. The proviso to sub-section (4) cannot be applied to entangle dispute of further date. *Lophinoris Shangpling* v. *Hombay Shullal*, 2001 CrLJ 2943 (2944) (SC).

[13661] ● ***Words "competent Court"—Meaning of.***—The words "competent Court" as used in sub-section (1) Section 146 of the Code do not necessarily mean a civil Court only. A competent Court is one which has the jurisdictional competence to determine the question of title or the rights of the parties with regard to the entitlement as to possession over the property forming the subject-matter of proceedings before the Executive Magistrate. *Shanti Kumar Panda* v. *Shakuntala Devi*, AIR 2004 SC 115 : (2004) 1 SCC 438 : 2004 SCC (Cri) 320 (332) : 2004 CrLJ 1249.

[13662] ● ***Party unsuccessful in order under Section 145(1) to initiate proceedings in competent Court.***—A party unsuccessful in an order under Section 145(1) would initiate proceedings in a competent Court to establish its entitlement to possession over the disputed property against the successful party. Ordinarily, a relief of recovery of possession would be appropriate to be sought for. In legal proceedings initiated before a competent Court consequent upon attachment under Section 146(1) of the Code it is not necessary to seek relief of recovery of possession. As the property is held *custodia legis* by the Magistrate for and on behalf of the party who would ultimately succeed from the Court, it would suffice if only determination of the rights with regard to the entitlement to the possession is sought for. Such a suit shall not be bad for not asking for the relief of possession. *Shanti Kumar Panda* v. *Shakuntala Devi*, AIR 2004 SC 115 : (2004) 1 SCC 438 : 2004 SCC (Cri) 320 (332) : 2004 CrLJ 1249.

[13663] ● ***Decision by Criminal Court does not bind Civil Court.***—A decision by a criminal Court does not bind the civil Court while a decision by the civil Court binds the criminal Court. An order passed by the Executive Magistrate in proceedings under Sections 145/146 of the Code is an order by a criminal Court and that too based on a summary enquiry. The order is entitled to respect and wait before the competent Court at the interlocutory stage. At the stage of final adjudication of rights, which would be on the evidence adduced before the Court, the order of the Magistrate is only one out of several process of evidence. *Shanti Kumar Panda* v. *Shakuntala Devi*, AIR 2004 SC 115 : (2004) 1 SCC 438 : 2004 SCC (Cri) 320 (332) : 2004 CrLJ 1249.

[13664] ● ***Final or interlocutory order of Court—Effect.***—The Court will be loath to issue an order of interim injunction or to order an interim arrangement inconsistent with the one made by the Executive Magistrate. However, to say so is merely stating a rule of caution or restraint, on exercise of discretion by Court, dictated by prudence and regard for the urgent/ emergent executive orders made within jurisdiction by their makers; and certainly not a tab on the power of Court. The Court does have jurisdiction to make an interim order including an order of *ad interim* injunction inconsistent with the order of the Executive Magistrate. The jurisdiction is there but the same shall be exercised not as a rule but as an exception. Even at the stage of passing an *ad interim* order the party unsuccessful before the Executive Magistrate may on material placed before the Court succeed in making out a strong *prima facie* case demonstrating the findings of the Executive Magistrate to be without jurisdiction, palpably wrong or self-inconsistent in which or the like cases the Court may, after recording its reasons and satisfaction, make an order inconsistent with, or in departure from, the one made by the Executive Magistrate. The order of the Court—Final or interlocutory, would have the effect of declaring one of the parties entitled to possession and evicting therefrom the party successful before the Executive Magistrate within the meaning of sub-section (6) of Section 145. *Shanti Kumar Panda* v. *Shakuntala Devi*, AIR 2004 SC 115 : (2004) 1 SCC 438 : 2004 SCC (Cri) 320 (332) : 2004 CrLJ 1249.

[13665] ● ***Question as to possession over property or entitlement to possession to be determined by Civil Court.***—The question as to possession over the property or entitlement to possession would be determined by the civil Court. The criminal proceedings have remained pending for about a decade. We do not find any propriety behind allowing these proceedings to continue in view of the parties having already approached the civil Court. Whichever way proceedings under Section 145, CrPC may terminate, the order of the criminal Court would always be subject to decision by the civil Court. Inasmuch as the parties are already before the civil Court, we deem it proper to let the civil suit be decided and therein appropriate interim order be passed taking care of the grievances of the parties by making such arrangement as may remain in operation during the hearing of the civil suit.

We direct the criminal proceedings initiated under Section 145, CrPC to be quashed. *Mahar Jahan* v. *State of Delhi*, 2004 (13) SCC 421 : 2006 (1) SCC (Cri) 320.

[13666] ● ***Compromise between parties attaining finality—Proceedings under Section 145, CrPC—Abuse of process.***—Where the parties settled the dispute as to property and obtained a compromise decree in civil proceedings which attained finality, the proceedings under Section 145 was held an abuse of process of Court. The order of High Court was set aside and proceedings under Section 145, CrPC were directed to be dropped. *Kanjbihari* v. *Balram*, (2006) 11 SCC 66 : 2007 (1) SCC (Cri) 376.

[13667] ● ***Passing order of injunction by civil Court against Magistrates' order handing over property to respondents—SDM not party in civil suit—Effect.***—In the suit, the Sub-Divisional Magistrate was not a party. No order of injunction could have been passed against him but them that would not mean that the Civil Court could not pass an order of injunction against the defendant-respondent. If an order of injunction was passed against the defendant-respondent from obtaining possession, the question of SDM's executing his own order dated 9.10.1997 would not arise. Even where a Court or a statutory authority may not be subjected to an order of injunction, a party can be injuncted from proceeding in the matter. *M.P. Peter* v. *State of Kerala*, (2009) 12 SCC 785 : 2009 (8) SCR 576.

[13668] ● ***Order passed by SDM directing appellant to hand over property to respondent attaining finality—Effect.***—The proceeding under Section 145 of the Code indisputably remained pending for a long time. It was initiated on or about 9.01.1996 when a complaint was filed by the respondent No. 3. As noticed hereinbefore, the Sub Divisional Magistrate directed the appellant to handover the property to the respondent No. 3. However, the order of the Sub Divisional Magistrate was reversed by the learned Sessions Judge, which in turn was set aside by the High Court by an order dated 25.09.2007.

The correctness or otherwise of the said order of the learned Sub Divisional Magistrate attained finality as the Special Leave Petition filed against the order of the High Court dated 25.09.2007 was dismissed by this Court by an order dated

11.02.2008. *M.P. Peter* v. *State of Kerala*, (2009) 12 SCC 785 : 2009 (8) SCR 576.

[13669] ● *Specific Relief Act—Not applicable to proceedings under Section 145, CrPC.*—"It is true that while making such declaration under Section 145(4) of the Code, the Magistrate could have also directed that the appellants be put in possession of the same. The question which is now required to be considered is whether the High Court was right in quashing the order passed by the Magistrate, which was confirmed by the Sessions Judge, on the ground that the application made by the appellants under Section 145(6) of the Code was barred firstly by limitation under Article 137 of the Limitation Act and also by virtue of Section 6 of the Specific Relied Act, 1963. We are in agreement with Mr. Sanyal that the provisions of the Specific Relief Act had been misapplied by the High Court in holding that the appellants should have come for an order under Section 145(6) of the Code within six months from the date of dispossession, as provided in Section 6 of the said Act, as the Specific Relief Act has no application to a proceeding under Section 145, CrPC." *Shakuntala Devi* v. *Chamru Mahto*, AIR 2009 SC 2075 : (2009) 3 SCC 310 : 2009 CrLJ 1770 : 2009 (3) SCR 85 : JT 2009 (3) 502 : 2009 (1) Crimes 443.

[13670] ● *Order passed by Executive Magistrate—Whether Civil Court can pass order of injunction.*—Despite an order passed under Section 145, CrPC, the Civil Court may, in a suit, pass an order of injunction. *M.P. Peter* v. *State of Kerala*, (2009) 12 SCC 785 : 2009 (8) SCR 576.

[13671] ● *Limitation for filing application for implementation of order.*—There is no doubt that the High Court erred in applying the provisions of the Specific Relief Act to a proceeding under Section 145, Cr.P.C., but as far as making an application for implementation of the order passed under Section 145(4), Cr.P.C. is concerned, since no period of limitation is prescribed, the same ought to have been filed within a period of three years from the date of the order. While the final order in the proceedings under Section 145, Cr.P.C. was passed on 7th October, 1994, the application for implementation of the same was made on 12th November, 1997, which was beyond the period of limitation prescribed under the provisions of Article 137 of the Limitation Act.

There is no confusion on the point that an application under Section 145(6) may be made to be put in possession of a property in respect of which the party has been declared to be entitled to possession. Such an application cannot be made as and when the person dispossessed chooses to do so. It is for such purpose that Article 137 has been pressed into service since no limitation has been prescribed in Section 145 itself to indicate as to within which time a party found to be entitled to possession could be put back in possession. There is also no explanation forthcoming as to the cause of such delay. Accordingly, even if the High Court was wrong in applying the provisions of the Specific Relief Act to the facts of the case, the bar under Article 137 of the Limitation Act cannot be avoided and the application made by the appellants for being restored to possession in terms of a declaration made more than three years before the making of the application has to be rejected". *Shakuntala Devi* v. *Chamru Mahto*, AIR 2009 SC 2075 : (2009) 3 SCC 310 : 2009 CrLJ 1770 : 2009 (3) SCR 85 : JT 2009 (3) 502 : 2009 (1) Crimes 443.

DISQUALIFICATION OF JUDGE AND MAGISTRATE
(S. 479, CrPC, 1973)

[13672] ● *Disqualification of judge and magistrate.*—The expression "personal interest" in Section 556 does not mean only private interest; it means and includes official interest also. The Explanation and the Illustration to Section 556 clearly indicate the intention of the Legislature as to the extent of the interest in, and the nature of the connection with, a case which will attract the disability under Section 556. These provisions show that a distinction must be made between an active and a passive interest, and that the disability under Section 556 arises only when the interest of the Judge or Magistrate in any case is only active. The dividing line between an active and a passive interest is thin, but it is sufficiently definite and tangible and depends upon the facts and circumstances of each particular case. If the interest in question consists merely of a grant of a formal sanction given for the purpose of fulfilling some legal requirement, the bar under Section 556 does not operate. On the other hand, if it consists of a direction to initiate criminal proceedings, the bar operates since the interest taken is active. The mere fact that the officer had to apply his mind to the facts of the case is not the test, because an application of the mind is involved in both cases; the distinction lies in this that in the case of formal sanction all that he has to be satisfied about is the existence of a *prima facie* case, whereas in the case of a direction to prosecute he has further to apply his mind as to whether the accused deserves to be prosecuted. *Rameshwar*

Bhartia v. *State of Assam*, AIR 1952 SC 405 : 1953 CrLJ 163 : 1952 SCJ 559 : 1953 SCA 42.

[13673] ● *Personally interested—Meaning of.*—A mere formal grant of sanction which is necessary only for the purpose of fulfilling a technical statutory requirement may not amount to "personal interest" within the meaning of Section 556 (Now Section 479) in may cases in which such sanction is given or refused for considerations which are extraneous to the merits of the case; whereas a direction authorising prosecution necessarily requires in each case that the officer must apply him mind to the very merits of the case and the truth or otherwise of the allegations made against the offender. The difference between the two lies in the nature of action required of the officer; in the former case it is only a permission while in the latter case, it is a direction or order. *Rameshwar Bhartia* v. *State of Assam*, AIR 1952 SC 405 : 1953 CrLJ 163 : 1952 SCJ 559 : 1953 SCA 42.

[13674] ● *Same individual holding two capacities.*—In the present case, the same individual held two capacities, one of a Director of Procurement under the Essential Supplies (Temporary Powers) Act, 1946, and the other of a First Class Magistrate. In the former capacity he granted a sanction for the prosecution of a person for an offence arising from a breach of a Food Grains Control Order and then in the latter capacity he presided over the trial of that person for the offence. The conviction was challenged on the ground that the officer had no competence to preside over that trial by reason of the disability arising from the application of Section 556 of the Code. No infringement of Section 556 has occurred in the present case because only a formal sanction has been given which does not amount to "personal interest" within the meaning of that section. The trial has not been vitiated by any illegality, and there is no reason to interfere with the conviction. *Rameshwar Bhartia* v. *State of Assam*, AIR 1952 SC 405 : 1953 CrLJ 163 : 1952 SCJ 559 : 1953 SCA 42.

[13675] ● *Distinction to be drawn between pecuniary interest and prejudice.*—A distinction must be drawn between pecuniary interest and 'prejudice'. The smallest pecuniary interest is a bar to the Magistrate acting in the case; but where the interest is not pecuniary, the question arises whether the interest is of such 'substantial character' as to make it likely that he has a real 'bias' in the matter. If such a bias is shown to be existing that will form a good ground for the transfer of the case under Section 407. *Rameshwar Bhartia* v. *State of Assam*, AIR 1952 SC 405 : 1953 CrLJ 163 : 1952 SCJ 559 : 1953 SCA 42.

[13676] ● *Object of Section 479, CrPC.*—One important object of Section 479, CrPC, 1973 is to clear away everything which might endanger suspicion and distrust of the tribunal and so to promote feeling of confidence in the administration of justice. *Manaklal* v. *Prem Chand*, AIR 1957 SC 425 : 1957 SCR 575 : 1957 SCJ 359.

[13677] ● *General principles embodied under Section 479, CrPC—Applicability of.*—The general principle embodied under Section 479, CrPC, 1973 applies not only to Judges and Magistrates under this Code but also to all persons acting in judicial capacity. *Manaklal* v. *Prem Chand*, AIR 1957 SC 425 : 1957 SCR 575 : 1957 SCJ 345.

[13678] ● *Judge or Magistrate when disqualified from trying case.*—Where a Judge or a Magistrate who is himself a witness in the case and his examination shows that he is personally interested to any extent, he will be disqualified from trying the case. *State of Uttar Pradesh* v. *Mohd. Nooh*, AIR 1958 SC 86 (90, 91) : 1958 SCR 595 : 1958 SCJ 242.

DISRUPTIVE ACTIVITY

[13679] ● *Disruptive activity.*—The killing of a public servant or killing of another person bound by oath would be an offence under the Indian Penal Code. But it must be noted that such killing, as such is not a disruptive activity. Certain type of actions which preceded such killings alone is regarded as a disruptive activity through the legal fiction created by Section 4(3) of TADA Act. Such actions include advocating, advising, suggesting, inciting, predicting, prophesying, pronouncing or prompting the killing of such persons. In other words all the preceding actions directed positively towards killing of such persons would amount to disruptive activity, but not the final result, namely the act of killing of such persons. If there is any evidence in this case to show that any such preceding act was perpetrated by any of the appellants towards killing of a police officer who was killed at the place of occurrence, it would, no doubt, amount to disruptive activity. But there is no such evidence that any such activity was done for the purpose of killing any police personnel. However, there is a plethora of evidence for establishing that all such preceding activities were done by many among the accused arrayed for killing Rajiv Gandhi. But unfortunately Rajiv Gandhi was not then "a person bound by oath under the Constitution to uphold the sovereignty and integrity of India". Even the Lok Sabha stood dissolved months prior to this incident and hence it cannot be found that he was under an oath as a Member of Parliament. The inevitable fall out of the above situation is that none of the conspirators can be caught in the dragnet of sub-Section (3) of Section 4 of TADA. *State of Tamil Nadu* v. *Nalini*, AIR 1999 SC 2640 : 1999 SCC (Cri) 691 (736) : 1999 CrLJ 3124 : 1999 CrLR (SC) 424.

[13680] ● ***No evidence that accused either committed or conspired or attempted to commit advocated or advised or knowing facilitated commission of any disruptive activity.***—To attract S. 4 of TADA Act, it is obligatory for the prosecution to establish that the accused committed or conspired or attempted to commit or abetted, advocated, or advised or knowingly facilitated the commission of any disruptive activity or any act preparatory to a disruptive activity. The expression "disruptive activity" has been defined in sub-s. (2) of S. 4 of TADA Act. From the entire prosecution evidence established in this case we really fail to appreciate how it can be said that the prosecution has been able to establish the charge under sub-s. (1) to S. 4 of TADA Act. There is not an iota of evidence to indicate that the accused appellants either committed or conspired or attempted to commit or abetted or advocated or advised or knowingly facilitated the commission of any disruptive activity. In the aforesaid circumstances, the offence under S. 4(1) of TADA Act cannot be said to have been established beyond reasonable doubt to convict the appellants under S. 4(1) of TADA Act. Similarly we are also satisfied that no offence can be said to have been committed either under S. 124-A or S. 153-A of the IPC. We, therefore set aside the conviction and sentence passed against the appellants and acquit them. *Balbir Singh* v. *State of U.P.*, AIR 2000 SC 464 : (1999) 5 SCC 682 : 1999 SCC (Cri) 1030 : 2000 CrLJ 590.

[13681] ● ***No weapon much less any lethal weapon specified in Section 3(1) of TADA found in possession of accused.***—It is admitted by the prosecution that none of the appellants was in possession of any weapon, much less lethal weapon specified in Section 3(1) of TADA. All the articles which the appellants were alleged to have possessed were wall posters and other materials needed for pasting them on the walls. The expression 'disruptive activity" has been defined in Section 4(2) of TADA. Such activity should involve questioning or disrupting the sovereignty and territorial integrity of India or an activity intended towards the cession or secession of any part of India from the Union. Unfortunately the prosecution has not led any evidence to show what is meant by word "khalistan" used in the wall posters could it have been a State within the Indian Union, or just a movement for that purpose or something more than that. Due to total paucity of evidence in that regard it is not possible to assume that the word is aimed unmistakably at creation of a separate country. The prosecution did not succeed in proving that any of the appellants has committed any act falling within the purview of TADA. *Sukhchain Singh* v. *State of Rajasthan*, (2000) 2 SCC 183 : 2000 SCC (Cri) 341 (342, 343) : JT 1999 (10) SC 533.

DISTINCT OFFENCES
(S. 218, CrPC, 1973)
§ (See sub-topic "JOINDER OF CHARGES" UNDER TOPIC "CHARGE")

"DISTINCTLY"
§ (See "DISCOVERY")

[13682] ● ***"Distinctly".***—The word "Distinctly" in Section 27, Evidence Act means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "Distinctly related to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. *Mohammed Inayatullah* v. *State of Maharashtra*, AIR 1976 SC 483 : (1976) 11 SCC 828 (832) : 1976 SCC (Cri) 199.

DISTRICT MAGISTRATE

[13683] ● ***Power of detention—No officer below rank of District Magistrate exercise.***—Besides there is only one District Magistrate in a district and all other Magistrates whether they be Magistrate first class or even Additional District Magistrates must obviously be below him in rank. as Section 3(2)(15) of the Defence of India Act 1962 provides that the power of detention cannot be exercised by any officer below the rank of the District Magistrate, such power cannot be exercised by an Additional District Magistrate. who is an officer below the rank of a District Magistrate. *Ajaib Singh* v. *State of Punjab*, AIR 1965 SC 1619 : 1965 (2) CrLJ 553 (557) : (1965) 2 SCR 845.

[13684] ● ***Order of State Govt. appointing officer—District Magistrate of District—Suffi-***

cient.—In the instant case, Shri Bhalla who was the District Magistrate on the instructions issued by the Governor of Punjab handed over the current charge of the office of the Deputy Commissioner, Amritsar. Even though Shri Bhalla may have gone after handing over charge on the afternoon of May 15, 1964, Shri Lall Singh could not and did not become the District Magistrate of Amritsar in the absence of a notification under Section 10(1) of the CrPC by the State Government. The instructions of the Governor cannot take the place of a notification under Section 10(1) of the Code. But it does not mean that a notification appointing a District Magistrate must necessarily recite in terms that it was being made under Section 10 of the Code; all that it means is that there must be an order of the State Government appointing an officer as District Magistrate of the District. In the absence of such an officer no officer can claim to be the District Magistrate of the District. *Ajaib Singh* v. *State of Punjab*, AIR 1965 SC 1619 : 1965 (2) CrLJ 553 (556) : (1965) 2 SCR 845.

[13685] ● ***District Magistrate and Addl. District Magistrate two different and district authorities.***—The scheme of Section 10 of the Code of Criminal Procedure leaves no room for doubt that the District Magistrate and the Additional District Magistrate are two different and distinct authorities and even though the latter may be empowered under sub-Section (2) to exercise all or any of the powers of a District Magistrate but by no stretch of reasoning can an Additional District Magistrate be called the District Magistrate which are the words employed in sub-Section (1) of Section 10 of the Code. *Hari Chand Aggarwal* v. *Batala Engineering Co. Ltd.*, AIR 1969 SC 483 : 1969 CrLJ 803 (807) : (1969) 2 SCR 201.

[13686] ● ***Court of Additional District Judge not subordinate to High Court within Section 195(3), CrPC.***—The Court of the Additional District Magistrate would not seem to be subordinate to the High Court as provided by Section 195(3) of the Code. *Santokh Singh* v. *Izhar Hussain*, AIR 1973 SC 2190 : (1973) SCC 406 : 1973 SCC (Cri) 828 (834) : 1973 CrLJ 1176 : 1973 CrLR (SC) 473 : (1974) 1 SCR 78. **TO THE SAME EFFECT :** (1) *Kuldip Singh* v. *State of Punjab*, AIR 1956 SC 391 : 1856 SCJ 387 : 1956 SCR 125.

[13687] ● ***Tender of pardon—Power of District Magistrate.***—Section 338, CrPC gives full power to the Court to which commitment is made, to tender pardon or order the committing Magistrate or the District Magistrate to tender pardon on the same condition. The proviso to Section 337 of the Code contemplates concurrent jurisdiction on the District Magistrate and the Magistrate making an enquiry or holding the trial to tender a pardon. The District Magistrate is empowered to tender a pardon even after a commitment is made if the Court so directs. Under Section 8(2) of the Criminal Law (Amendment) Act, 1952 the Special Judge has also been granted power to tender pardon. The conferment of this power on the special judge in no way deprives the District Magistrate of his power to grant a pardon under Section 337 of the Code. *State of U.P.* v. *Kailash Nath Agarwal*, AIR 1973 SC 2210 : (1973) 1 SCC 751 : 1973 SCC (Cri) 698 (704) : 1973 CrLJ 1196 : 1973 CrLR (SC) 369. **TO THE SAME EFFECT :** (1) *Kanta Prashad* v. *Delhi Administration*, AIR 1958 SC 350 : 1958 SCR 1218 (1224-1225) : 1958 SCJ 668.

[13688] ● ***DM and Sessions Judge directed personally or through surrogates to visit prisons.***—The District Magistrate and Sessions Judges shall, personally or through surrogates, visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances, shall make expeditious enquiries there into and take suitable remedial action. In appropriate cases reports shall be made to the High Court for the latter to initiate, if found necessary, *habeas* action. *Rakesh Kaushik* v. *B.L. Vig.-Superintendent, Central Jail, New Delhi*, AIR 1981 SC 1767 : 1980 SCC (Cri) 834 (838) : 1981 CrLJ 1438 : 1980 CrLR (SC) 757.

[13689] ● ***District Magistrate—Rent control officer to be deemed to be a Civil Servant.***—Section 34(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act provides that the District Magistrate, the prescribed authority or any appellate authority shall for the purposes of holding any enquiry or hearing any appeal under the Act have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908. Where trying a suit sub-section (2) of Section 34 would show that the expression "District Magistrate" has been defined in S. 3(c) to include an officer authorized by the District Magistrate to exercise, perform and discharge all or any of his powers, functions and duties under the Act. Rent Control Officer is one such officer who is authorized by the District Magistrate to exercise, perform and discharge the powers, functions and duties conferred upon him. It would follow that the Rent Control Officer shall be deemed to be a civil Court within the meaning of Ss. 345 and 346 of the Cr.P.Code, 1973 and in the view of sub-s. (2) of Section 34 of the Rent Act, shall be a Civil Court for the purpose of Section 193, IPC.

If, therefore, according to the complainant false evidence was given in a judicial proceeding before the Court, and a person given such to be affidavit under Section 193, IPC in or in relation to a proceeding before the court no Court can take cognizance of such offence except on a complaint in writing of the Court. The grievance is that a false affidavit was filed by the appellants which was receivable as evidence in the allotment proceedings before the Rent Control Officer which as a Tribunal would be comprehended in the expression "Court". If false evidence in the form of affidavits filed by the appellants was given before Rental Officer a Civil Court for the purpose of Section 193, IPC, that before a Judicial Magistrate, Section 195(1)(b)(i) would be attracted. The CJM, Sekendarabad had no jurisdiction to take cognizance or the offence or Section 193 IPC, in the circumstances on the complaint. *Chandrapal Singh v. Maharaj Singh,* AIR 1982 SC 1238 : (1982) 1 SCC 466 : 1982 SCC (Cri) 249 : 1982 CrLJ 1731.

[13690] ● ***Preventive detention—Activities attributed to detenu concerning more than two districts.***—Counsel of the petitioner, in the instant case, contended that the activities attributed to the detenue are concerned with two districts, namely Jammu and Kashmir. The order of detention issued by the District Magistrate Jammu is, therefore, illegal since it ought to have been issued by the Divisional Commissioner of the Division or by the State Government. We do not find any substance therefrom to the contention urged. Section 8(2) of J&K Safety Act, 1978 does not state that in inter-district activities, the Divisional Commissioner alone is competent to pass an order of detention. Power to detain has been confined on the Divisional Commissioner as well as the District Magistrate. *Swaran Singh* v. *State of Jammu and Kashmir*, AIR 1989 SC 188 : 1989 SCC (Cri) 191 (193) : 1989 CrLJ 792 : 1989 CrLR (SC) 33 : JT 1988 (4) SC 429 : (1989) 1 Crimes 68.

[13691] ● ***Power delegated to District Magistrate cannot be further delegated by State Government to ADM.***—The power of consent rests with the Central Government. The Central Government has delegated it to the District Magistrate. It is not competent for the State Government to further delegate to the Additional District Magistrate a power of the Central Government has delegated to the District Magistrate.

In the instant case, the consent fort the prosecution of the respondent was granted by the Additional District Magistrate and in this behalf, reliance was placed, on behalf of the appellant, upon a notification issued by the appellant. Whereunder it appointed the Joint Collector and Executive Magistrate as Additional District Magistrate for the District of Gawalior and directed that he should "exercise powers of District Magistrate conferred under the Criminal Procedure Code or under any other law for the time being in force". *State of Madhya Pradesh* v. *Bhupendra Singh*, AIR 2000 SC 679 : (2000) 1 SCC 555 : 2000 CrLJ 805 : 2000 CrLR (SC) 152.

DISTURBED AREA, DECLARATION OF

1. ARMED FORCES (SPECIAL POWERS) ACT (28 OF 1958), SECTION 3

[13692] ● ***Armed Forces (Special Powers) Act.***—Section 3 of the Armed Forces (Special Powers) Act (28 of 1958) does not confer an arbitrary or unguided power to declare an area as a disturbed area. For declaring an area as disturbed area under Section 3, there must exist a grave situation of law and order on the basis of which the Governor/administrator of the State/ Union Territory or the Central Government can form an opinion that the area is in such a disturbed or dangerous condition that the use of the armed forces in aid of the civil power is necessary. A declaration under S. 3 has to be for a limited duration and there should be periodic review of the declaration before the expiry of six months. Although a declaration under S. 3 can be made by the Central Government *suo motu* without consulting the concerned State Government, but it is desirable that the State Government should be consulted by the Central Government while making the declaration. The conferment of the power to make a declaration under S. 3 of the Act on the Governor of the State cannot be regarded as delegation of the power of the Central Government. The conferment of the power to make a declaration under S. 3 of the said Act on the Central Government, is not violative of the federal scheme as envisaged by the Constitution. *Naga People's Movement of Human* v. *Union of India*, AIR 1998 SC 431 (463) : (1998) 2 SCC 109 : 1998 SCC (Cri) 514 : JT 1997 (9) SC 431.

[13693] ● ***Power of Central Govt. to declare area disturbed area.***—Under Section (3) of the Armed Forces (Special Powers) Act (28 of 1958), as amended by Act 7 of 1972 the Central Government has been empowered to declare an area to be a disturbed area. There is no requirement that it shall consult the State Government before making the declaration. As a consequence of such a declaration the power under Section 4 can be exercised by Armed Forces and such a declaration can only be revoked by the Central Government. The conferment of the said power on the Central Government regarding declaration of areas to be disturbed areas does not, however, result in taking over of the State administration by the Army or by other Armed Forces of the union because after such declaration by the Central Government the powers under Section 4 of the Act can be exercised by the personnel of the Armed Forces only with the co-operation of the authorities of the State government concerned. It is therefore, desirable that the State government should be consulted and its cooperation sought while making a declaration. It is not possible to accept the contentions that the Central Act is *ultra vires* the legislative power conferred on Parliament inasmuch as it is not an enactment with respect to maintenance of public order which is a field assigned to the State Legislature under Entry 1 of the State list. *Naga Peoples' Movement of Human* v. *Union of India*, AIR 1998 SC 431 (448) : (1998) 2 SCC 109 : 1998 SCC (Cri) 514 : JT 1997 (9) SC 431.

[13694] ● ***Distinction between delegation of power and statutory conferment of power.***— There is a distinction between delegation of power by a statutory authority and statutory conferment of power on a particular authority/ authorities by the Legislation under Section 3 of the Armed Forces (Special Powers) Act (28 of 1958). There is no delegation of power on the Central Government to the Governor of the State. What has been done is that the power to issue a declaration has been conferred by the Parliament on three authorities, namely, (1) the Governor of the State, (2) the Administrator of the Union Territory, and (3) the Central Government. In view of the information available at the local level the Governor of the State or the Administrator of the Union Territory is in a position to assess the situation and form an opinion about the need for invoking the provisions of the said Act for use of the Armed Forces of the Union in aid of the civil power for the purpose of dealing with the situation that has arisen in the concerned State or the Union Territory. Moreover, the issuance of a declaration, by Itself, would not oblige the Central Government to deploy the Armed Forces of the Union. After such a declaration has been issued by the Governor/Administrator, the Central Government would have to take a decision regarding the deployment of the Armed Forces of the Union in the area that has been declared as 'disturbed area'. The conferment of power on the Governor of the State to make the declaration under Section 3 cannot, therefore, be regarded as delegation of power of the Central Government. *Naga Peoples' Movement of Human* v. *Union of India*, AIR 1998 SC 431 (453) : (1998) 2 SCC 109 : 1998 SCC (Cri) 514 : JT 1997 (9) SC 431.

DIVORCE DECREE PASSED BY FOREIGN COURT

[13695] ● ***Decree of divorce passed by American Court—Effect.***—In view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in U.S.A. respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in U.S.A. they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother.

Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than daughter, has good feeling for his father also. Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by Court in U.S.A. it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away of U.S.A. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held. Still there is some possibility of mother returning to U.S.A. in the interest of the children. Therefore, we do not desire to say anything more regarding entitlement of the custody of the children. The chances of the appellant returning to U.S.A. with the children would depend upon the joint efforts of the appellant and the respondent to get the arrest warrant cancelled by explaining to the Court in U.S.A. the circumstances under which she had left U.S.A. with the children without taking permission of the Court. There is a possibility that both of them may thereafter be able to approach the Court which passed the decree to suitably modify the order with respect to the custody of the children and visitation rights. *Sarita Sharma* v. *Sushil Sharma*, AIR 2000 SC 1019 : (2000) 3 SCC 14 : 2000 SCC (Cri) 568 : 2000 CrLJ 1459 (1463) : (2001) 1 Crimes 272.

DNA TEST

[13696] ● ***DNA test/finger printing.***—Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the Legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act, for example, if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not borne to the husband, the conclusiveness in law would remain irrebutable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above. *Kamti Devi* v. *Poshi Ram*, AIR 2001 SC 2226 : (2001) 5 SCC 311 : 2001 SCC (Cri) 892 (896).

[13697] ● ***Identification based on analysis of segments of Human DNA.***—The Forensic analysis of a biological material like blood, flesh, semen, hair, urinal, *etc.* have progressed to high level of sophistication for individualisation. In 1985, Professor Alec Jeffery from Lister Institute of Preventive Medicine, U.K. described a new approach to identification or individualisation, based on analysis of segments of Human DNA known as Hyper variable Minisatellite Region, or V.N.T.R. (Variable Number of Tandem Repeat) loci scattered along the chromosomes. *Modi's Medical Jurisprudence*, 22nd Edition, p. 198.

[13698] ● ***Process of DNA Test.***—Fingerprinting is a well-known method of identifying criminals by means of their digital or palmar prints (cf. Finger Prints, Galton System). Forensic biology-the testing of biological evidence material and paternity testing - has advanced dramatically over the last three years. Forensic biology should prepare itself to take advantage of a new category of genetic variation : polymorphism at the deoxyribonucleic acid (DNA) level. The new test, called DNA fingerprinting, looks directly at a person's genetic make-up.

In simplified form, the process works as follows : The DNA is extracted from the nuclei of white blood cells (or of spermatozoons or of the hair follicle cells that cling to the roots of hair that have fallen, or been pulled out). A DNA sample is first digested with a restriction enzyme that cuts it into fragments only at specific sites. The number of these sites present in an individual's DNA dictates the number and size of DNA fragments generated by the enzyme. The fragments are separated according to size by gel electrophoresis. When this process is repeated with several enzymes, each of which cuts at different sites, enough information is gathered to construct a detailed genetic fingerprint of a person. For detecting the fragments, Jeffreys (Nature 1985 : 316: 76-78) produced probes, short pieces of radioactively labelled DNA, that specifically bind to the core sequences. The locations of the fragments that bind the radioactive probes are detected with X-ray film. This produces a picture of a strip of 30 to 40 dark bands, which looks something like the bar Codes used to identify items at the grocery store. The degree of biological variation is so high that every individual, with the exception of identical twins, produces a unique band pattern, much as every individual has a unique set of ordinary (Galton system) fingerprints.

Identity of a criminal is determined by comparing the accused man's DNA fingerprint with that of the blood or seminal stain found at the scene of crime. If the DNA fingerprints are identical, there is an absolute identification.

Currently, the most important tool used to make a paternity determination is a blood test called a human leucocyte antigen (HLA) test. It is based on the principle that the genetic variation among individuals is partially reflected in the kinds of proteins, called antigens, that are present on their leucocytes. Because a child inherits half his genetic information from his mother and half from his father, his proteins should therefore be representative of both parents. If, for example, the HLA test shows that none of an accused man's proteins are present on a child's blood cells, then it can be said with nearly 100 per cent certainty that he is not the father of the child. If the accused man's proteins are on the child's cells, then it is highly likely that he is the father. The relationship, however, is not certain, because it is always possible that another man with the same proteins fathered the child. That is, the test falls short because the proteins used in the HLA analysis are not unique to any individual. There can be as much as 5 to 10 per cent chance that a man who is deemed the father is actually not. By contrast, the DNA fingerprints are unique (except for identical twins). The DNA fingerprints are inherited as simple Mandelian characters. Paternity is determined by comparing the accused man's DNA fingerprint with that of the child.

Of course, DNA typing can exonerate a suspect as well as incriminate him.

There are certain concerns with the application of DNA fingerprinting on medicolegal evidence samples.

Gene frequencies for the major population groups must be established to provide a base for the interpretation of findings. Standard typing reagents should be available to the forensic science community to allow independent testing in different laboratories. Methodological guidelines need to be defined to insure reliability of test results. These guidelines would include standard good practice in genetic testing: the use of appropriate standards and controls. For example, a control to determine the completeness of the restriction digestion is needed.

The DNA content of evidence samples is at present a limiting constraint. Bloodstains would have to contain at least 50 µl of blood to be amenable to analysis. The corresponding value for semen is about µl.

Assessment of the stability of DNA in evidence materials centers on two questions : Does DNA survive in high molecular form and are restriction sites modified in any way? The recovery of DNA fragments from mummy tissue and from 100 year-old dried skin proves the chemical stability in the dry state. Definition of the limits of survival requires measurement of hydrolysis rates as a function of moisture content, chemical environment, temperature, and exposure to light and other radiation. If DNA is demonstrated to maintain acceptable integrity in evidence materials, then the whole range o probes are open for use. Experts estimate that forensic DNA fingerprinting will be wide spread in 3-5 years. *J. Rackallio (Late Dr.) M.D., SCD Professor and ChAIRman, Department of Forensic Medicine, University of Turku, 20520, Turku Finland.*

[13699] ● ***DNA test to establish paternity.***—In the instant case, Dr. Lalji Singh Deputy Director, CCMB Hyderabad conducted the DNA test on dead foetus to establish paternity in rape case. He was examined as PW. He stated that after the detailed examination, the result was submitted vide Ext. P-185. The operative portion of the report is as follows :

> "When DNA profiles in Track 3 (Premananda) was compared with that of Track 2 (tissue from the foetus) and Track 1 (Aruljothi) it is seen that every band present in Track 2 is fully accounted for either being inherited from the mother (Track 1) or from the alleged father (Track 3). The alleged father Premananda (source of Exhibit A) and the mother Aruljothi (source of Exhibit C) are, therefore, the biological parents of the dead foetus (source of Exhibit B)."

Dr. Lalji Singh was subjected to lengthy cross-examination. He has categorically stated that if really there is any contamination, it would result only in non-matching of bands. He has also stated that multilocus/single-locus probe have been carried out throughout the world for DNA test.

Regarding database and contamination Dr. Lalji has stated in cross-examination as under :

> "As far as paternity is concerned, the paternity of the child is determined by identifying which are the bands of maternal and which are paternal. Therefore, comparison of DNA fingerprinting of the child with the mother will identify which are the bands maternally inherited. Elimination of these bands will leave those bands inherited from the child's father, the paternally specific bands. If the alleged father's fingerprinting pattern contains all of these bands, then he is the true biological father of that child and paternity is confirmed. The article published by a laboratory—CELLMARK, United States is ext. D-42."

The witness further clarified that a laboratory error can produce mismatch but it cannot produce a proper match.

The witness further clarified that when the sample is taken in a sterile container following the instructions given by CCMB scrupulously there is no possibility of any bacterial or any other infection.

The witness further stated that the contamination never results in proper match. It can give rise to exclusion not to positive inclusion. The witness in cross-examination has specifically stated as under :

> "According to me, for paternity test, large-scale population database was neither

> required not even today. When the samples of the parents are not available and when one has to establish the identity of the child based on probability only then database is required. In short, where both the parents are available, no database is required for paternity testing."

Both the trial Court and the High Court have appreciated the evidence of Dr. Lalji Singh and correctly. *Kamalantha* v. *State of Tamil Nadu,* 2005 SCC (Cri) 1121 (1149-50).

[13700] ● ***Presumption under Section 112, Evidence, cannot be rebutted by DNA Test.***—Law leans in favour of child being basterdised. The conclusiveness of presumption laid down in Section 112, Evidence Act cannot be rebutted by DNA Test. *Banarsi Dass* v. *Teeku Dutta*, (2005) 4 SCC 449 : 2005 (3) Supreme 569.

[13701] ● ***Legitimacy of child—D.N.A. Test should not be directed as a matter of routine.***—DNA Test would not be directed as a matter of routine. Direction for DNA Test can be given only in deserving cases. Direction for DNA Test in for assurance of succession certificate was refused. *Banarsi Das* v. *Teeku Datta*, (2005) 4 SCC 449 (455) : JT 2005 (4) SC 627.

DOCUMENT

[13702] ● ***Document.***—The forms prescribed under the Code requires that articles seized as a result of the warrant should be brought into Court, and a Magistrate, who issued a search warrant is entitled to see that his warrant is not abused and has been properly executed. In a suitable case, of course, a Magistrate may amend the warrant dispensing with the production of the goods or documents before him. That would however be in a clear case only, but if the Magistrate so desires he need not amend the form and keep the control of the goods or documents to himself. *Mohammad Sirajuddin* v. *R.C. Mishra*, AIR 1962 SC 759 : 1962 (1) CrLJ 692 (696) : 1962 Supp (1) SCR 545 : 1984 ECR 111 : (1983) 13 ELT 1370.

[13703] ● ***Public servant prohibited from producing document in Court.***—A public servant, under the old income-tax Act (S. 54) was unconditionally prohibited from producing documents in a Court and, therefore, Section 91, CrPC would not apply to such a person. *C.I.T.* v. *Laxmi Chand*, AIR 1962 SC 1121 : (1962) 2 CrLJ 254.

[13704] ● ***Court to draw adverse inference when.***—The Court has to drawn an adverse inference, when all the relevant documents have not been produced. *Raghavamma* v. *Chenchamma*, AIR 1964 SC 136 : (1964) 2 SCR 933.

[13705] ● ***Order for return of document to party from whom seized.***—There is no provision under S. 19-A of the Foreign Exchange Regulation Act, 1947 or any other section of the Act that the documents be returned to the party from whose custody they were seized, without an order from the Magistrate and that therefore no order for their return can be made by any other authority. No such express provision is necessary. Documents seized have to be returned if the law provides that they are not to be retained after a certain period of time. Such a direction under the statute is sufficient justification and the authority for the person in possession of the documents to return them to the person from whose possession they had been seized. Provisions are necessary for retaining documents of others and not for returning them to the persons entitled. *Nilratan Sixar* v. *Lakshmi Narayan Ram Niwas*, AIR 1965 SC 1 : 1965 (1) CrLJ 100 (104, 105) : (1964) 7 SCR 724.

[13706] ● ***Section 94, CrPC 1895 not to apply to accused person.***—Section 94, on its true construction, does not apply to an accused person on trial. No specific words indicate its application to accused persons on trial. A limitation should be put on wide words used; otherwise calling upon an accused person to produce documents which are incriminating as against him, will negate the safeguard of Art. 20(3) of the Constitution of India. It may be that this Construction of Section 94 would render Section 96 useless. But to a search by the police officer under Section 165, Art. 20(3) has no application. *State of Gujarat* v. *Shyam Lal Mohan Lal Choksi*, AIR 1965 SC 1251 : 1965 (2) CrLJ 256 : (1965) 2 SCR 457.

[13707] ● ***Entry made by public servant in official record.***—The reason why an entry made by a public servant in public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. *Brij Mohan Singh* v. *Priya Brat Narain Sinha*, AIR 1965 SC 282 (286) : (1965) 3 SCR 861 (864).

[13708] ● ***Summoning of document—Matter within discretion of trial Court.***—Whether a particular document should be summoned or not is not essentially in the discretion of the trial Court. Except fro any good reasons, High Court should not interfere with that discretion. *Assistant Customs Collector, Bombay* v. *L.R. Melwani*, AIR

1970 SC 962 : 1970 CrLJ 885 : (1969) 2 SCR 438.

[13709] ● ***Case instituted on private complaint.***—Section 173, CrPC is attracted only in a case investigated by a Police officer under Chapter XIV followed up by a final report. Therefore, in a criminal prosecution instituted on private complaint the documents mentioned in sub-Section (5) of Section 173, CrPC cannot be made available to the accused. *Assistant Collector of Customs, Bombay* v. *L.R. Melwani,* AIR 1970 SC 962 : 1970 CrLJ 885 : (1969) 2 SCR 438.

[13710] ● ***Entry whether made in discharge of official duty—Not proved.***—In the instant case it has not been proved that the entry in question was made by a public servant. No proof has been led as to who made the entry and whether the entry was made in the discharge of an official duty. In the result it must be held that Ex. D., the *hath chitha* was rightly held by the High Court to be inadmissible. *Ram Prasad Sharma* v. *State of Bihar*, AIR 1970 SC 326 : (1969) 2 SCC 359 : 1970 CrLJ 496 (499) : (1970) 1 SCR 694.

[13711] ● ***Unproved and unexhibited school certificate.***—The trial Court took into consideration an unproved and unexhibited school certificate which appears to have been obtained by the investigating officer. It is held that unproved and unexhibited school certificate cannot be relied upon. *Ram Murti* v. *State of Haryana*, AIR 1970 SC 1029 : 1970 SCC (Cri) 371 : 1970 CrLJ 991 (994, 995).

[13712] ● ***Proof of solemnization of second marriage.***—In the present case the High Court was of the view that the statement contained in Ex-2 would really be a confession statement and declining to act on the same for two reasons : firstly, that the statement in Ex-2 had not been put to the respondent when he was examined under Section 342, CrPC so as to give him an opportunity to explain the statements contained therein; Secondly, that even if the statement contained in Ex-2 can be taken into account by themselves they will not be proof of the fact that all the essential ceremonies necessary for a marriage have been performed. The reasons by the High Court are substantially correct. *Priya Bala Ghosh* v. *Suresh Chandra*, AIR 1971 SC 1153 : (1971) 1 SCC 864 : 1971 SCC (Cri) 253 : 1971 CrLJ 939 (944) : (1971) 3 SCR 961.

[13713] ● ***Person appearing in response to summons under Section 94(1), CrPC if becomes witness.***—According to sub-section (2) of Section 94, a person required under the section merely to produce a document shall be deemed to have complied with the requisition if he "causes such document to be produced instead of attending personally to produce the same." There is nothing on the chapter to provide that the person who appears in the Court, in pursuance of its summons under sub-section (1) of Section 94 thereby becomes a witness and can be examined and cross-examined by the Court although he has not been cited as a witness in the proceedings. Even if a person produces the document for which a summons has been issued to him, Section 139 of the Evidence Act clearly provides that he does not thereby become a witness by the mere fact that he produces it, and he cannot be cross-examined unless and until he is called as a witness. *Parmeshwari Devi* v. *State*, AIR 1977 SC 403 : (1977) 1 SCC 169 : 1977 SCC (Cri) 74(76) : 1977 CrLJ 245 : 1976 CrLR (SC) 553 : (1977) 2 SCR 160.

[13714] ● ***Suit for declaration that appellants Indian Nationals.***—The appellants instituted a suit for a declaration that they are Indian nationals. The Court found that the appellants have not produced any document to prove that the appellants 1 and 3 were born in India or any certificate from any school which would prove that they studied in India. No documents were produced to show that the appellants were doing any work in the ferry ghat or living in India. No voters list or any ration records were produced to substantiate their plea that they were Indian citizens. The counsel drew our attention to the fact that the document, the alleged mortgage deed was filed in Court but submitted that through the mistake of the advocate, it was not marked as an exhibit. It admitted that the document was not mentioned by any of the witnesses and was not put in evidence. The executant of the document which is styled as mortgage deed and is dated 29.9.1947, is Md. Mabeswar Ali Chaudhury who was examined on behalf of the appellants in the trial Court. Through this mortgage deed the appellants in the trial Court. Through this mortgage deed he leased 4 Bighas of land for Rs. 50. There is no evidence to prove that Mabeswar Ali is the owner of the land. He failed to produce any document to show that he owned any land. Even after taking into account the document on the counsel placed considerable reliance, though not marked in the Court below, there is no material for coming to the conclusion that the appellants are citizens of India. *Abdul Rahman Haldar* v. *Union of India*, AIR 1978 SC 1454 : (1978) 3 SCC 138 : 1978 SCC (Cri) 362 (363).

[13715] ● ***Expression "person" in Section 9(1), CrPC.***—It is indisputable that according to the majority opinion in *State of Bombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1962) 3 SCR 10 : (1961) 2 CrLJ 856 the expression "person" in Section 9(1), CrPC, 1973 does not take within its sweep a person accused of an offence which would mean that a summon issued to an accused person to produce a thing or document considered necessary or desirable for the purpose of an investigation, inquiry or trial would imply compulsion and the document or thing so produced would be compelled testimony and would be violative of the constitutional immunity against self-incrimination. *V.S. Kuttan Pillai* v. *Ramakrishnan*, AIR 1980 SC 185 : (1980) 1 SCC 264 : 1980 SCC (Cri) 226 (232) : 1980 CrLJ 196 : 1979 CrLR (SC) 657.

[13716] ● ***Absence of proof of mis-appropriation of govt. money by accused.***—Where there was no evidence to establish, that the accused misappropriated any Government money or that he prepared false muster rolls, no offence under Section 214 is established.

Conviction under Section 214 was confirmed by the High Court. Accused was acquitted for charge under Section 165-A by the trial Court. Essence of the case against the accused was that, he had misappropriated Government money by preparing false muster rolls. Certain incriminating documents alleged to be in the handwriting of the accused came into the possession of a person and in order to prevent him from taking further action the accused was alleged to have given him bribe. No evidence was produced in regard to the preparation of false muster rolls which had themselves not been produced nor nay one examined to say that his name was shown in the muster rolls as if he had been paid wages, though in fact he was not so paid. There was, therefore, no evidence to establish that the accused misappropriated any Government money or that he prepared false muster rolls. In view of the infirmities, the accused was not liable to be convicted on the charge under Section 214. The High Court's judgment was reversed. *Mohd. Aslam* v. *State of M.P.*, AIR 1981 SC 1735 : (1979) 3 SCC 767 : 1979 SCC (Cri) 864 : 1981 CrLJ 1285 : 1979 CrLR (SC) 1 : 1979 SCCrR 344.

[13717] ● ***Evidence—Appreciation of—Proof.***—"Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue, mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, *i.e.,* by the evidence of those persons who can vouchsafe for the truth of the facts in issue." *Ramji Dayawala & Sons (P) Ltd.* v. *Invest Import*, AIR 1981 SC 2085 (2092) : (1981) 1 SCC 80 : (1981) 1 SCR 899.

[13718] ● ***No legal requirement that public or official book be kept by public officer.***—"Under S. 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. The High Court seems to have confused the provisions of Sections 35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants under Ss. 34, 73 or 74 but which were admissible under Section 35 of the Evidence Act. . . . A perusal of the provisions of S. 35 would clearly reveal that there is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be regularly kept in discharge of her official duty." *Umesh Chandra* v. *State of Rajasthan*, AIR 1982 SC 1057 (1059, 1060) : (1982) 2 SCC 202 : 1982 SCC (Cri) 396 : 1982 CrLJ 994 : 1982 CrLR (SC) 259 : (1982) 3 SCR 583 : 1982 UJ (SC) 426.

[13719] ● ***Non-supply of material and documents alongwith grounds of detention.***—"It is true that under sub-s. (3) of S. 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities act, 1974 it is provided that for the purpose of Art. 22(5) of the Constitution, the communication to a person detained in pursuance of the detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention. This provision under which five days' period in normal circumstances and fifteen days' period in exceptional circumstances has been provided relates to the supply or communication of the grounds on which the order of detention has been made to the detenue. It has no reference to the documents and material on the basis of which the detention order has been made and it is quite clear that there is no reason why the documents and materials in support of the grounds on the basis of which the detention order has been made, the same being ex-hypothesis in existence at the time of the issuance of the detention order and framing of the grounds, should not be supplied to the detenue along with the grounds. Non-supply of such material and documents along with the grounds would clearly amount to a violation of the safeguard guaranteed under Art. 22(5) of the Constitution. Since in the instant case that safeguard afforded to the datenue has been violated, further detention of the detenue would be illegal and void." *Sunil Dutt* v. *Union of India*, AIR 1982 SC 53 (54) : (1982) 3 SCC 405 : 1982 SCC (Cri) 62 : 1982 CrLJ 193 : 1983 CrLR (SC) 535.

[13720] ● ***Documents relied on by authorities not supplied with grounds of detention.***—In the view that we have taken in a number of decisions starting from *Smt. Pechu Devi Choraria's* case (1980) 4 SCC 531 to the case of *Kamla Kanahaiya Lal Khasalami's* case, AIR 1981 SC 814, it is manifest that the question of demanding the documents is wholly irrelevant because it is the constitutional mandate whither requires the detaining authority to give the documents relied on or referred to in the order of detention *pari passu* the grounds of detention in order that the detenue may make an affective representation immediately instead of waiting for the documents to be supplied with. In the instant case, the detenue did make a representation promptly on December 30, 1980 but was seriously handicapped in making an effective representation because the aforesaid documents which were of vital importance were not supplied to him. *Mohd. Zakir* v. *Delhi Administration*, AIR 1982 SC 696 (696-697) : (1982) 3 SCC 216 : 1982 SCC (Cri) 605 : 1982 CrLJ 611 : 1982 CrLR (SC) 569.

[13721] ● ***Public documents what are.***—Section 73, Evidence Act prescribes what the public documents are. Section 75 declares all other documents are private. Section 35 enacts that if there is an entry in any public or official book, register or record and if there is any such entry in any book maintained under a statute by any person authorised by the statute to make the entry then such entries are relevant facts. To bring a document under the sweep of Section 35, Evidence Act, it must be shown that the concerned document was (a) prepared by a public servant and (b) it was so done in discharge of his official duty or prepared by one in performance of duty specially enjoined by law. The reason, as explained by this Court in *Ram Prasad* v. *State of Bihar*, AIR 1970 SC 326 : (1969) 2 SCC 359 : 1970 CrLJ 496 : 1970 Mad LJ (Cri) 102 : 1970 BLJR 144 : (1970) 1 SCJ 184 : 1970 Pat LJR 189 : (1970) 1 SCR 694, as to why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in discharge of this official duty, the probability of its being truly and correctly recorded is high. *State of Bihar* v. *Radha Krishna Singh*, AIR 1983 SC 684 : (1983) 2 SCC 118 : (1983) 2 SCR 808 : (1983) 1 Scale 789.

[13722] ● ***Admissibility of document—Conditions to be fulfilled.***—Section 35 of the Evidence act requires the following conditions to be fulfilled before a document can be admissible under this section :

(1) the document must be in the nature of an entry in any public or other official book, register or record;

(2) it must state a fact in issue or a relevant fact; and

(3) the entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept. ... Admissibility of a document is one thing and its probative value quite another—these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil. ... We would like to mention here that even if a document may be admissible or an ancient one, it cannot carry the same weight or probative value as a document which is prepared either under a Statute, Ordinance or an Act which requires certain condition to be fulfilled. ... In our opinion, therefore, where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has a statutory flavour in that it is given not merely by a administrative Officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight. The probative value of the documents which however ancient they may be, do not disclose source of their information or have not achieved sufficient notoriety is precious little. *State of Bihar* v. *Radha Krishna Singh,* AIR 1983 SC 684 (694, 695, 697, 698, 714) : (1983) 3 SCC 118 : (1983) 2 SCR 808 : (1983) 1 Scale 789.

[13723] ● ***Non-supply of document not substitute for copies of documents.***—The explanation for the non-supply of the document cannot be a substitute for the copies of the documents without which the respondent could not have made any effective representation against the detention. *Union of India* v. *Haji Mastan Mirza*, AIR 1984 SC 681 (684) : (1984) 2 SCC 427 : 1984 SCC (Cri) 271 : 1984 CrLJ 610 : 1984 CrLR (SC) 117 : 1984 (1) Crimes 651.

[13724] ● ***Letter addressed subsequently by father of deceased standing in position of prosecutor.***—Admittedly, by 29-4-1973 when this letter is said to have been written, investigation had started on the basis of the first information report and, therefore, a letter written by PW-1 who stood in the place of the prosecutor would not al all be admissible in evidence. *Vinod Chaturvedi* v. *State of Madhya Pradesh*, AIR 1984 SC 911 (913) : (1984) 2 SCC 350 : 1984 SCC (Cri) 250 : 1984 CrLJ 814 : 1984 CrLR (SC) 202 : (1984) 3 SCR 93 : (1984) 1 Crimes 733.

[13725] ● ***Non-supply of copies of documents relied upon in grounds of detention.***—"This Court has repeatedly held in several decisions that the failure to supply copies of documents referred to and relied upon in the grounds of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 vitiates the detention itself. In the present case also copies of documents which were indisputably material documents and were referred to in the grounds of detention and relied upon for the purpose of detention were admittedly not supplied to the respondent. Therefore, the detention of the respondent was bad in law and the order of detention could not be sustained and is liable to be quashed." *Union of India* v. *Haji Mastan Mirza*, AIR 1984 SC 681 (684, 685) : (1984) 2 SCC 427 : 1984 SCC (Cri) 271 : 1984 CrLJ 610 : 1984 CrLR (SC) 117 : (1984) 3 SCR 1 : (1984) 1 Crimes 651.

[13726] ● ***Writer of letter not examined as witness.***—When the writer of a letter (written by the Superintendent of Police to his administrative superior) has not been examined as a witness and no opportunity has been given to the defence to cross-examine the writer, the letter cannot be relied upon in the trial of a case. To rely on the contents of such a letter in the said circumstances would be totally misconceived. *Vinod Chaturvedi* v. *State of Madhya Pradesh*, AIR 1984 SC 911 : (1984) 2 SCC 350 : 1984 SCC (Cri) 250 : 1984 CrLJ 814 : 1984 CrLR (SC) 202 : (1984) 1 Crimes 733.

[13727] ● ***Search and seizure—When illegal.***—"The view taken by single judge of the Calcutta High Court in *New Central Jute Mills Co. Ltd.* case AIR 1976 Cal 178 that once the authorisation for carrying out the search is found to be illegal on account of the absence of recording of reasons in the formation of a reasonable belief, the officer who has seized documents during such search must return the document seized as a result of the illegal search is against the weight of judicial opinion on the subject and does not commend to us." *Pratap Singh* v. *Director of Enforcement, Foreign Exchange Regulation Act*, AIR 1985 SC 989 : (1985) 3 SCC 72 : 1985 SCC (Cri) 312 : 1985 CrLR (SC) 589 : (1985) 3 SCR 969.

[13728] ● ***Issuance of search warrant found to be not illegal or invalid.***—If the officer who issued the search warrant had material for forming a reasonable belief to exercise the power, the search cannot be styled as illegal and, therefore, no case is made out for directing return of the documents on the supposition that the search and seizure were illegal. *Pratap Singh* v. *Director of Enforcement, Foreign Exchange Regulation Act*, AIR 1985 SC 989 (995) : (1985) 3 SCC 72 : 1985 SCC (Cri) 312 : 1985 CrLR (SC) 589 : (1985) 3 SCR 969 : 1986 Cr App R (SC) 169.

[13729] ● ***Documents seized during search not providing sufficient material to officer for further action.***—"That the documents seized during the search did not provide sufficient material to the officer for further action cannot be a ground for holding that the grounds which induced the reasonable belief were either imaginary or fictitious or *mala fide* conjured up." *Pratap Singh* v. *Director of Enforcement, Foreign Exchange Regulation Act*, AIR 1985 SC 989 (994) : (1985) 3 SCC 72 : 1985 SCC (Cri) 312 : 1985 CrLR (SC) 589 : (1985) 3 SCR 969.

[13730] ● ***Detenu not entitled to disclosure of confidential source of information.***—In the instant case, the respondent contended and the High Court accepted the submission that not providing copies of intelligence reports to the detenue, though the same had been relied upon in the grounds of detention, vitiated the order of detention. The grounds of detention were divided into two groups, one levelled as criminal activities and the other as extremist activities. Against extremist activities it was further indicated, on the basis of 'confidential reports'. The facts by way accusations were detailed but copies of the reports as such were not furnished.

It is the settled position in law that the detenue has to be supplied all materials relied upon in making the order of detention with a view to being provided an adequate opportunity of making an effective representation. Personal freedom is an invaluable treasure and the founding fathers took great care to protect it by making appropriate provisions in the Constitution. Simultaneously taking into consideration the peculiar situations prevailing in the country, the right of the State to order preventive detention was also provided therein.

In order that personal freedom may not be curtailed beyond necessity and the executive administration may not make it an empty guarantee, detailed provisions were made in Art. 22 providing an effective procedure in the matter of making of representation and scrutiny of the materials in the presence of the detenue. While that is so, the detenue is not entitled to a disclosure of the confidential source of information used in the grounds or utilised for the making of the order. What is necessary for the making of an effective representation is the disclosure of the material and not the source thereof. By indicating that the facts have been gathered from confidential reports, a suggestive disclosure of the source has also been made. *State of Rajasthan* v. *Shamsher Singh*, AIR 1985 SC 1082 : 1985 SCC (Cri) 421 : (1985) 2 Crimes 242 : 1985 CrLR (SC) 1268.

[13731] ● ***Illegality of search not vitiate evidence collected.***—"It has after been held that the legality in the method, manner or initiation of a search does not necessarily mean that anything seized during the search has to be returned. After all in the course of search, things or documents are required to be seized and such things and documents when seized may furnish evidence. Illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the Court or the authority before which such material or evidence seized during the search shown to be illegal, is placed has to be cautious and circumspect in dealing with such evidence or material." *Partap Singh* v. *Director of Enforcement, Foreign Exchange Regulation Act*, AIR 1985 SC 989 (994) : (1985) 3 SCC 72 : 1985 SCC (Cri) 312 : 1985 CrLR (SC) 589 : (1985) 3 SCR 969.

[13732] ● ***Seizure of various books documents and papers by Investigations Officer—Inspection of.***—"In the course of investigation, the Investigating Officer has seized and taken into his possession various books, documents and papers. It appears that the petitioners have obtained directions for convening a meeting of the unsecured creditors of the company. As the meeting is once postponed it is likely that it may be directed to be convened in near future. To facilitate holding of the meeting of the company any documents seized in the course of the investigation are necessary, an appropriate application shall be made to the learned Company Judge and upon his direction, the Investigating Officer in whose possession or custody the documents are retained shall produce them before the Chairman, presiding over the meeting who after taking necessary inspection and permitting taking of the photostat copies shall return them to the Investigating Officer and he is entitled to retain the same and shall retain them. Respondents Nos. 1 and 2 are at liberty to approach the Investigating Officer and he will grant necessary facility for taking inspection of the documents seized." *Eastern Spinning Mills Shri Virendra Kumar Sharda* v. *Rajiv Poddar*, AIR 1985 SC 1668 (1669) : 1989 Supp (2) SCC 385 : 1985 CrLJ 1858.

[13733] ● ***Non-application of mind by detaining authority.***—"It appears to be clear to us that the documents mentioned by the appellant in his petition were not placed before the detaining authority and therefore, were not considered by the detaining authority. It is possible that they were placed before the Screening Committee in the first instance, but that is immaterial. It was the detaining authority that had to consider the relevant material before taking a decision whether it was necessary to detain the appellant under the COFEPOSA, 1974. That was not done and there was, therefore, a clear non-application of mind by the detaining authority to relevant material.

"No one can dispute the right of the detaining authority to make an order of detention, if on a consideration of the relevant material, the detaining authority came to the conclusion that it was necessary to detain the appellant. But the question was whether the detaining authority applied its mind to relevant consideration. If it did not, the appellant would be entitled to be released." *Sita Ram Somani* v. *Sate of Rajasthan*, AIR 1986 SC 1072 : (1986) 2 SCC 86 : 1986 SCC (Cri) 104 (107) : 1986 CrLJ 860 : 1986 CrLR (SC) 145.

[13734] ● ***Vital document seized from custody of accused not produced.***—In our opinion where, as in the instant case, defence is founded on a relevant and vital document seized from the custody of the accused and not deliberately produced, it is difficult to sustain the conviction of the accused.

It was the duty of the prosecution to produce the release order No. 115 in order to remove all doubts by showing that the goods which were being despatched by the appellant were not covered by the release order. The said statement of PW-2 that in the release orders dated March 7, 1968 delivery was marked in respect of the goods which were dispatched outside without producing the release order in question, is no evidence at all and is also no answer to defence plea that the said 22 bags of wheat were loaded in the truck as per the release order No. 115. *Chittaranjan Choudhury* v. *State of Bihar*, AIR 1987 SC 856 : (1987) 2 SCC 104 : 1987 SCC (Cri) 287 (289) : 1987 CrLJ 773 : 1987 CrLR (SC) 195 : JT (1987) SC 282 : (1987) 1 UJ (SC) 477 : (1987) 1 Crimes 383.

[13735] ● ***Document produced or given in evidence in proceeding in any Court.***—The original document was not filed in the civil Court, and temporary injunction was obtained on the strength of its copy. Sub-S. (1)(*b*)(*ii*) of S. 195 of the CrPC lays down that no Court shall take cognizance of any offence described in the sections mentioned therein when such offence is alleged to have been committed in respect of "a document produced or given in evidence in a proceeding in any Court." Interpreting the similar language of the corresponding provision in the earlier Criminal Procedure Code of 1898, the Privy Council in *Sanmukh Singh* v. *King,* AIR 1950 PC 31 observed that by production of a copy of the alleged forged document it cannot be said that the document itself was given in evidence. By production of a copy of the allegedly forged document, it cannot be said that the document itself was given in evidence. As the document was not forged during the period it was in Court custody, the bar of S. 195(1)*b*)(*ii*) of the CrPC was not attracted.

Since the document alleged to have been forged was not, in the present case, produced in the Court, the provisions of S. 195(1)(*b*)(*ii*) of the Code have no application". *Sushil Kumar* v. *State of Harayna*, AIR 1988 SC 419 (419-420) : 1988 SCC (Cri) 136 : (1982) 2 SCR 182 : 1988 CrLJ 427 : 1988 CrLR (SC) 15 : JT 1987 (5) SC 586.

[13736] ● ***Supply of copies of relevant documents to detenu.***—"There is no dispute that all the documents which were considered by the detaining authority in reaching his subjective satisfaction and referred to in the grounds of detention have been furnished to the detenue. It is not necessary to furnish copies of all the documents including the Bank pass books which are not material and relevant for reaching the subjective satisfaction of the detaining authority merely because they were mentioned in the panchnama Moreover, no application had been made before the detaining authority for giving the detenue the copies of the Bank pass books necessary for making an effective representation against the order of detention." *Haridas Amarchand Shah of Bombay* v. *K.L. Verma*, AIR 1989 SC 497 (500) : (1989) 1 SCC 250 : 1989 SCC (Cri) 111 : 1989 CrLJ 983 : 1989 CrLR (SC) 136 : JT (1988) 4 SC 632 : 1989 UJ (SC) 390 : (1989) 1 Crimes 111.

[13737] ● ***Partner responsible for carrying on business and during relevant time in charge of business.***—The documents seized by PW-3, who investigated the case indicate even remotely that all the partners were doing the business of the firm. There is no other evidence on record on this aspect. With these tidbits, it is impossible to hold that when the offence was committed all the partners were conducting the business of the firm. However, Lajpat Rai, accused No. 3, cannot escape the liability. The material on record indicates that he was conducting the business of the firm and in fact, he has signed the statement Ex P-8 on behalf of the firm. His conviction cannot, therefore be disturbed. But the conviction of other partners is absolutely uncalled for. *Sham Sunder* v. *State of Haryana*, AIR 1989 SC 1982 (1985) : (1989) 4 SCC 630 : 1989 SCC (Cri) 783 : 1989 CrLJ 2201 : 1989 CrLR (SC) 725 : (1989) 3 SCR 886 : (1989) 3 Crimes 347.

[13738] ● ***Employee involved in certain case giving petition to his superiors narrating entire facts.***—In the instant case, PW-8 sent a report by registered post to the Chief Minister with copies to the Home Minister, Director of Medical and Health Services and the Inspector General of Police only on 31-3-1967 which report is marked as Ex Ka-19 After carefully going through the document (Ex Ka-19) we are of the view that PW-8 could never be author of this document because it contains every detail of the occurrence from beginning to end even with reference to date and time, *etc*., the major portion of which was not within the knowledge of the author of this document. The illustrate it may be mentioned that while mentioning the number of the Jeep in Ex. Ka-9 it is stated thus : "In the jeep belonging to the Family Welfare Planning (Temporary No. 157-MRG-New number UPD 946 (1) drawn by Driver Mahfooz Ali". Similarly, even the minute details of the alleged offences which could not have been within the knowledge of PW-8 are made mention of in Ex Ka-19. Therefore, it is evident that this document was prepared by some one else and PW-8 was only a mere signatory to that petition. Further according to her on 31-3-1967 on which date the petition is said to have been sent by PW-8, Bhargava was almost in the deathbed. In fact, Bhargava died on that night itself. Can it be imagined that in such a tragic circumstance, PW-8 could have prepared this petition containing all the minute details which obviously would not have been within her knowledge and sent the same to the higher officials The answer would be in negative." *State of U P*

v. *Pheru Singh*, AIR 1989 SC 1205 (1213) : 1989 SCC (Cri) 420 : 1989 CrLJ 1135 : 1989 CrLR (SC) 405 : (1989) 2 Crimes 124.

[13739] ● *Abetment of suicide by deceased due to instigation.*—The degradation of society due to the pernicious system of dowry and the unconscionable demands made by greedy and unscrupulous husbands and their parents and relatives resulting in an alarming number of suicidal and dowry deaths by women has shocked the legislative conscience to such an extent that the Legislature has deemed it necessary to provide additional provisions of law, procedural as well as substantive, to combat the evil and has consequently introduced Ss. 113-A and 113-B in the Indian evidence Act and Ss. 498-A and 304-B in the IPC By reason of S. 113-A, the Courts can presume that the commission of suicide by a woman has been abetted by her husband or relation if two factors are present *viz.* (1) that the woman had committed suicide within a period of seven years from her marriage, and (2) that her husband or relation had subjected her to cruelty. These provisions are being referred to show that the Legislature has realised the need to proved for additional provisions in the Indian Penal Code and the Indian Evidence Act to check the growing menace of dowry deaths. In the present case, however, the abetment of the commission of suicide by Veena Rani is clearly due to instigation and would therefore, fall under the first clause of S. 306, I.P.C. *Brij Lal* v. *Prem Chand*, AIR 1989 SC 1661 : 1991 SCC (Cri) 394 (406) : 1989 CrLR (SC) 493 : JT 1989 (3) SC 1 : (1989) 2 SCR 612 : (1989) 2 Crimes 192.

[13740] ● *Exaggerated devotion to rule of benefit doubt not nurture fanciful doubts.*—Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to the law. *Gurbachan Singh* v. *Satpal Singh*, AIR 1990 SC 209 : (1990) 1 SCC 445 : 1990 SCC (Cri) 151 (155-156) : 1990 CrLJ 562 : 1990 CrLR (SC) 100 : JT (1989) 4 SC 38 : (1989) 3 Crimes 526.

[13741] ● *Mala fide when not to be inferred.*—Undoubtedly when it was brought to the notice of the Investigating officer of the existence of certain documents that throw doubt on the complicity of the accused, it would be salutary that he would also investigate into those aspects *vis-a-vis* the evidence in his possession to find whether they would throw any doubt on the commission of the offence alleged or otherwise. The omission to investigate into those aspects by no stretch of imagination would be inferred to be a *mala fide* act. It may be a *bona fide* opinion. *State of Bihar* v. *P.P. Sharma*, AIR 1991 SC 1260 : 1992 1 SCC (Supp) 222 : 1992 SCC (Cri) 192 : 1991 CrLJ 1438 : (1991) 2 Crimes 113 : JT 1991 (2) SC 147.

[13742] ● *Annexures and affidavits filed with petition—Quashing of proceedings by High Court by treating these documents as evidence not proper.*—The annexures were neither part of the Police reports nor were relied upon by the Investigating Officer. These documents were produced by the respondents before the High Court along with the writ petitions. By treating "the annexures" and affidavits as evidence and by converting itself into a trial Court, the High Court pronounced the respondents to be innocent and quashed the proceedings. The least we can say that this was not a case where the High Court should have interfered in the exercise of inherent jurisdiction. *State of Bihar* v. *P.P. Sharma*, AIR 1991 SC 1260 (1268) : 1992 1 SCC (Supp) 222 : 1991 CrLJ 1438 : JT 1991 (2) SC 147.

[13743] ● *Declaration under Section 9(1) COFEPOSA Act—Supply of documents.*—"The declaration under Section 9(1), COFEPOSA Act, 1974 is challenged on the ground that the second respondent failed to forward the copies of the documents on which he placed reliance for arriving at the subjective satisfaction that the detenues was likely to smuggle good out of and through Bombay Airport. ... Now if we turn to paragraph 2 of the declaration it becomes evident that the second respondent merely relied on the grounds of detention and the material in support thereto which had already been served on the detenue and nothing more :

If the documents relied on for the purpose of framing a declaration under S. 9(1) of the COFEPOSA Act are the very same which were earlier supplied to the detenues alongwith the grounds of detention under S. 3(1) we fail to see what purpose would be served by insisting that those very documents should be supplied afresh. Such a view would only result in wasteful expenditure and avoidable duplication." *Kamarunnissa* v. *Union of India*, AIR 1991 SC 1640 : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 (103) : 1991 CrLJ 2058 : JT 1990 (4) SC 7 : (1991) 1 Crimes 131.

[13744] ● *Non-supply of copies of bail application or order refusing bail.*—The non-supply of the copies of bail application or the order refusing bail to the detenue cannot affect the detenue's right of being afforded a reasonable opportunity guaranteed under Art. 22(5) when it is clear that the authority has not relied or referred to the same. *Abdul Sathar Ibrahim Manik* v. *Union of India*, AIR 1991 SC 2261 : (1992) 1 SCC 1 : 1992 SCC (Cri) 1 (17) : 1991 CrLJ 3291 : 1992 CrLR (SC) 21 : (1991) 4 SC 103.

[13745] ● ***Documents supply of—Failure to—Impaired detenu's right to make effective representation.***—"It is not sufficient to say that the detenue were not supplied the copies of the documents in time on demand but it must further be shown that the non-supply has impaired the detenue's right to make an effective and purposeful representation. Demand of any or every document, however irrelevant it may be for the concerned detenue, merely on the ground that there is a reference thereto in the grounds of detention cannot vitiate an otherwise legal detention order. No hard and fast rule can be laid down in this behalf but what is essential is that the detenue must show that the failure to supply the documents before the meeting of the Advisory Board had impaired or prejudiced his right, however slight or insignificant it may be. In the present case, except stating that the documents were not supplied before the meeting of the Advisory Board, there is no pleading that it had resulted in the impairment of his right nor could Counsel for the petitioners point out any such prejudice." *Kamarunnissa* v. *Union of India*, AIR 1991 SC 1640 : (1991) 1 SCC 128 : 1991 SCC (Cri) 88 (102) : 1991 CrLJ 2058 : JT 1990 (4) SC 7 : (1991) 1 Crimes 131.

[13746] ● ***Non-supply of documents relating to another criminal case.***—In the counter-affidavit field by the detaining authority himself in the High Court, it was clearly stated that the detenue was under misapprehension that he was an accused in criminal case No. 1026 of 1991 and as such he should be supplied also documents relating to the said case. As a matter of fact, he is not an accused in that case and as such non-supply of documents relating to that case has not caused any prejudice to him in making an effective representation as contemplated under Art. 22(5) of the Constitution. Besides, only a passing reference has been made to the other case and the detaining authority has not relied upon the same for arriving at his subjective satisfaction to retain the petitioner herein. *State of Tamil Nadu* v. *C. Subramani*, AIR 1992 SC 2161 : (1992) 4 SCC 495 : 1993 SCC (Cri) 28 (35) : 1992 CrLJ 3578 : (1992) 3 Crimes 286.

[13747] ● ***Dowry death—Suicide or homicide.***—It is true that sometimes a case of suicide is presented as a case of homicide specially when the death is due to burn injuries. But it need not be pointed out that whenever the victim of torture commits suicide she leaves behind some evidence—may be circumstantial in nature to indicate that it is not a case of homicide but of suicide. It is the duty of the Court, in a case of death because of torture and demand for dowry, to examine the circumstances of each case and evidence adduced on behalf of the parties, for recording a finding on the question as to how the death has taken place.

While judging the evidence and the circumstances of the case, the Court has to be conscious of the fact that a death connected with dowry takes place inside the house, where outsiders who can be said to be independent witnesses in the traditional sense, are not expected to be present. The finding of guilt on the charge of murder has to be recorded on the basis of circumstances of each case and the evidence adduced before the Court. In the instant case, the occurrence took place in the open courtyard during the day-time which is not consistent with the theory of suicide. Apart from that as already stated above the dying declaration of the victim alongwith the evidence of PWs-6,7 and 8, which can not be discarded, fully establishes the charges levelled against the appellants. *Om Parkash* v. *State of Punjab*, AIR 1993 SC 138 : (1992) 4 SCC 212 : 1992 SCC (Cri) 848 (852, 853) : 1992 CrLJ 3935 : JT 1992 (4) SC 524 : (1992) 2 UJ (SC) 710 : (1992) 3 Crimes 581.

[13748] ● ***Documents required by Court not submitted in time.***—"It betrays a misconception that any document can be produced at any time and stage of the proceedings and the Court can be expected to reassemble to give a fresh hearing or a second innings to fill the gaps left by the importers because of their default merely because they have the means to afford it. We cannot countenance such a demand and must deprecate strongly. We do so and reject both the applications. To allow them would encourage multiplicity of hearings and create a wrong precedent." *Jain Exports Pvt. Ltd.* v. *Union of India*, AIR 1993 SC 2383 (2389) : (1993) 4 SCC 51 : JT 1993 (4) SC 126 : (1993) 3 Scale 54 : (1993) 66 ELT 537.

[13749] ● ***Admission of additional documents by High Court in writ petition.***—The admission of additional documents by the High Court in writ jurisdiction is an exercise of discretion with which this Court does not normally interfere. But the genuineness of documents is an aspect which goes to the root of the matter. If the records have been tempered and fictitious documents were produced before the High Court then it certainly vitiates the findings. In absence of any finding on it, may be because it was not raised in the High Court yet being a fundamental question which if found to be correct would render entire proceedings bad. It appears expedient to direct the Commissioner of survey and settlement to examine it after affording opportunity to both sides to lead evidence. The finding shall be recorded after examining the original records. *Government of A.P.* v. *Karri Chenna Venkata Reddy*, AIR 1994 SC 591 (591-592) : 1995 Supp (1) SCC 462.

[13750] ● ***Documents placed on file of Magistrate—Copies given to fugitive within two months from date of apprehension.***—George was apprehended and produced before the Magistrate on 17.4.1989. Sufficient evidence in support of the extradition was to be produced within two months of apprehension. Ministry of External Affairs, Government of India presented the order of the Central Government dated 7.12.1988. All the documents which were sent along with the leller of request by the United States of America were also submitted before the learned Magistrate. The copies of all the documents, numbering 99 pages, were supplied to George by the Magistrate. The documents are duly authenticated and certified as required under Section 10 of the Extradition Act, 1962. These documents are eligible to be treated and received as evidence under Section 10 of the Extradition Act, 1962. Since these documents have been placed on the file of the Magistrate and copies thereof given to George within two months of the apprehension of George, it is futile to say that the terms of Art. 11 of 1931 treaty have been breached. *Rosiline George* v. *Union of India*, (1994) 2 SCC 80 : 1994 SCC (Cri) 304 (323, 324) : (1993) 3 Crimes 583 : (1994) 1 UJ 628.

[13751] ● ***Charge of continuous neglect of duty designed by.***—The question whether the respondents omitted to do their mandatory duties for months together designedly or negligently can be inferred only on an overall view of all the material collected during investigation and not in isolation as has been done by the learned Courts below. That apart in a case instituted upon a Police report the Court is required, at the time of framing of the charges, to confine its attention to documents referred to under S. 173 of the Code of Criminal Procedure. In that context the Court was not justified in referring to, much less relying upon the law and the letters purportedly written by the accused when their authenticity and veracity are yet to be gone into. *State of Jammu and Kashmir* v. *Sudershan Chakkar*, AIR 1995 SC 1954 (1955) : (1995) 4 SCC 181 : 1995 SCC (Cri) 664 : 1995 CrLJ 3606.

[13752] ● ***Dying declaration disbelieved by High Court on ground that when deceased had 100% burn over her body how thumb-mark appearing on dying declaration.***—The High Court disbelieved the dying declaration on the ground that even though according to the medical evidence Rita had 100% burns, the thumb-mark of Rita appearing on the dying declaration had clear ridges and curves. The High Court found the evidence of doctor (PW-1) unreliable as he failed to satisfactorily explain how such a thumb-mark could appear on the dying declaration when Rita had 100 per cent burns over her body. In view of such inconsistent evidence, the High Court was right in giving benefit of doubt to the respondents. *State of Punjab* v. *Gian Kaur*, AIR 1998 SC 2809 : 1998 SCC (Cri) 942 (943) : 1998 CrLR (SC) 299 : JT 1998 (2) SC 563 : (1998) 2 Crimes 25.

[13753] ● ***Power of Court to summon case diary.***—The case diary of another case maintained under Section 172, CrPC is a document within the meaning of Section 91(1), CrPC and can be summoned by the Court under Section 91, CrPC *dehors* the provisions of Section 172, CrPC for the purpose of using the statements made in the said diary for contradicting a witness. *State of Kerala* v. *Babu*, AIR 1999 SC 2161 : (1999) 4 SCC 621 : 1999 SCC (Cri) 611 : 1999 CrLJ 3491 : 1979 AIR SCW 2172 : 1999 (3) Crimes 27 (36).

[13754] ● ***Production of document "necessary or desirable".***—The powers conferred under Section 91 are enabling in nature, aimed at arming the Court or any officer-in-charge of a Police station concerned, to enforce and to ensure the production of any document or other things, "necessary or desirable", for the purposes of any investigation, inquiry, trial or other proceeding under the Code, by issuing a summons or a written order to those in possession of such material. The language of Section 91 would, no doubt indicate the width of the powers to be unlimited but the in-built limitation inherent therein takes its colour and shape from the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object. The question, before the trial Court, would be to address itself to find whether there is sufficient ground for proceeding tot he next stage against the accused. If the accused could produce any reliable material event at that stage which might totally affect even the very sustainability of the case, a refusal to even look into the materials so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/ public time. *Om Prakash Sharma* v. *C.B.I.*, AIR 2000 SC 2335 : (2000) 5 SCC 679 : 2000 SCC (Cri) 1014 : 2000 CrLJ 3478 (3480) : (2002) 2 Crimes 276.

13755] ● ***Bride burning—Cause of death suicidal not accidental.***—An analysis of the evidence of PW-3 depicts the behavioural position received at the in-law place by Ekta. Further evidence, however, records that there has been no improvement of the behavioural pattern and she was subjected to dowry torture as also various abusive treatment by reason of not being able to bear a child. Incidentally, the two families, namely, the bride's and groom's, related to each other. The torture continued and reached its peak in July 1985 by reason of a booking of a Maruti Van by the complainant which was asked to be delivered to the accused/appellant, on refusal, however, to comply with the demand for delivery of the Van by the complainant, the relationship was further estranged and PW-3 was given a warning as regards the events to follow and it is only thereafter that this incident of burn injury took place. It has been further contended that the factum of hospitalisation of Ekta in any event negates any ill treatment or torture but to be treated as a positive evidence of goodwill and affection we are however unable to record our concurrence therewith having regard to the evidence and other material on record. The death of Ekta was caused by burn injuries only and having considered the nature of injuries and since one cannot but rule out an accidental death as discussed herein before, the death of Ekta cannot but be attributed to be suicidal on the basis of the circumstances as is available on record with the situation existing and having regard to statutory presumption this Courts cannot but lend concurrence to the opinion expressed by the High Court. *Pawan Kumar* v. *State of Haryana*, AIR 2001 SC 1324 : (2001) 3 SCC 628 : 2001 SCC (Cri) 594 : 2001 CrLJ 1679 : JT 2001 (3) SC 475 : 2001 Cr App R (SC) 323 : 2001 CrLR (SC) 309 : (2001) 2 Crimes 1.

13756] ● ***Non-supply of documents accompanying the report under S. 173, CrPC.***—The accused is entitled to the entire set of documents which accompanied the report under Section 173, CrPC. As regards the case diary there is an embargo to the supply thereof subject to the rider that the Court can use them subject to the restrictions placed under Section 172(2) and (3), CrPC and the accused cannot claim to have copies of them. *C.B.I., New Delhi* v. *Mohinder Singh*, (2004) 13 SCC 578 : (2006) 1 SCC (Cri) 504 (505).

[13757] ● ***Documents to be supplied to detenu.***—All the documents placed before the detaining authority need not be supplied to detenu. It is only the relevant documents that are to be supplied to him. *Sunila Jain* v. *Union of India*, (2006) 3 SCC 31 : 2006 (2) SCC (Cri) 90 : 2006 CrLJ 1636 : 2006 (1) Crimes 240.

[13758] ● ***Document required to be supplied to detenu.***—All documents which are not material are not required to be supplied to detenu. The relevant documents must be supplied to detenu so as to enable him to make an effective representation. *Adishwar Jain* v. *Union of India*, (2006) 11 SCC 339 : JT 2006 (9) SC 432 : 2006 (8) Supreme 781.

[13759] ● ***Confessional statement of co-accused.***—The grounds of detention merely refer to the confession by the co-accused. That does not form foundation for the detention. On the other hand, it appears that the detenu himself made a confession and that was the main factor, or which the order of detention was founded. It is not disputed that the confessional statement of the detenu was supplied to him. Above being the position, the High Court was justified in coming to the conclusion that though reference was made to co-accused's statement that was not relied upon for the purpose of detention. *Senthamilselvi* v. *State of Tamil Nadu*, (2006) 5 SCC 676 : 2006 (3) SCC (Cri) 50 : 2006 CrLJ 4605 (4605, 4606) : 2006 (3) Crimes 63 (SC).

[13760] ● ***Non-furnishing of copy of bail application to detenu.***—On the petitioner's own showing, only that part of the application for grant of bail that the offence in question is a bailable, was relevant. No other submission had been raised at the bar. Whether a provision of law is bailable or not is a question of law. The same is presumed to be known to Courts and/or the detaining authority. It may not be necessary even to be stated in the application for bail. If a person had been released on bail on the ground that the offence is bailable, it would not be necessary to bring the said fact before the detaining authority. The detaining authority will have to satisfy himself on the basis of the materials placed on record, as to whether the order of preventive detention should be passed against the detenu or not.

It is also not in dispute that a copy of the order granting bail and order of remand has been furnished to the detenu. In this view of the matter we are of the opinion that non-furnishing of a copy of the application of bail cannot be said to be a ground which impaired the subjective satisfaction of the detaining authority or the same was a relevant fact which was required to be taken into consideration by him and the application for bail was required to be supplied to the detenu.

As in the fact of this case, we are satisfied that the application for bail was not a vital document copy whereof was required to be supplied to the detenu, in-our-opinion, the order of detention is not vitiated. *Sunila Jain* v. *Union of India*, 2006 (3) SCC 321 : 2006 (2) SCC (Cri) 90 : 2006 CrLJ 1636 : JT 2006 (2) SC 612 : 2006 (2) Scale 520 : 2006 (2) Supreme 277 : 2006 (1) Crimes 240 (SC).

[13761] ● ***Irrelevant documents need not be supplied to detenu.***—"The document in question did not prove any smuggling prejudicial activity on the part of the detenu. It only shows that the Department of Foreign Trade had stopped all EXIM benefits to Sandip Exports Ltd., pending further action, as certain illegal activities of that company had come to its notice. The said document was, therefore, neither relevant nor necessary to decide whether the detenu had indulged in smuggling or other prejudicial activity. The detaining authority obtained satisfaction in regard to that aspect from the material that was placed by the sponsoring authority to show illegal activities which amounted to smuggling.

The said document was also not relevant to establish propensity or potentiality of the detenu to continue his illegal activities. The export-import violations, which amount to smuggling, involve considerable planning, organization and establishing a network. The propensity is deducible from the *modus operandi* adopted by the violator, the inclination of the violator to indulge in such activities and the further opportunity to commit such illegal activities. Persons indulging in such prejudicial activities routinely create 'front' companies and firms. The fact that a particular 'front' company is denied the EXIM benefits will not deter a violator from continuing such activities, as he can always operate through other 'front' companies/firms. The contention of the detenu that as the said order dated 15/20.4.2004, stopped the EXIM benefits to Sandip Exports Ltd., he could not have continued the alleged illegal activity, and therefore, the detention order was not warranted, is untenable. The EXIM benefits were stopped with reference to only one company namely. Sandip Exports Ltd., and that too till finalization of further action. The investigation and search by the Directorate of Revenue Intelligence, had disclosed that the detenu had other 'front' companies. In fact the detention order makes reference to a similar violation by the detenu by using M/s. Scandia Investments (P) Ltd., which was another 'front' company controlled by him and his family. When the benefits of illegal activity are stopped to a particular company, the brain behind the violation, would merely shift the operations to another 'front' company or start the activities through a new company. It should also to be noted that whenever any irregularities/violations in regard to export/import comes to the attention of the department, the benefits are stopped in the normal course, pending finalization of further action.

"Therefore, it cannot be said that the document whereby EXIM benefits to one of the companies controlled by the detenu was stopped, was a 'relevant' document, non-consideration of which would vitiate the detention order. The first contention is therefore rejected." *Usha Agarwal* v. *Union of India*, (2007) 1 SCC 295 : JT 2006 (9) 507 : 2006 (11) Scale 173.

[13762] ● ***Non-production irrelevant documents before detaining authority.***—The High Court has examined the copies that were furnished to the detenu. In regard to the grievance relating to illegible copies occurring between pages 493 and 887 and the last page, the High Court found that these were copies of the documents which were supplied by the detenu himself, and the department could do no better than to furnish the copies thereof. If the documents furnished by the detenu to the department contained some portions or pages which were illegible, obviously the copies thereof furnished by the detaining authority to the detenu will also contain such illegible portions. The learned counsel for the appellant contented that if really any document furnished by the detenu was illegible, it could not have been used against the detenu. But this contention overlooks the fact that a document may contain several sheets and illegibility of some sheets or parts of some sheets will not come in the way of the authorities making use of the legible portions of the documents furnished by the detenu, supplemented by other documents secured during investigation. There is nothing strange in the department making use of partially legible documents furnished by detenu. Therefore, illegibility of portions of documents which are copies of documents furnished by the detenu, cannot be a ground for grievance by the detenu. Insofar as the allegation that some of the sheets between pages 124 to 371B were illegible, the High Court after having gone through the copies of documents furnished to the detenu, has found no substance in the contention. In fact, while acknowledging the copies of documents, the detenu has made an endorsement that they were legible.

The entire issue of furnishing of illegible copies is with reference to the question whether detenu's right to make an effective representation against his detention is hampered by non-supply of legible copies. The High Court after an examination of the copies of documents found that the detenu was not so hampered. Having gone through the representations made by the detenu against his detention, we also find that he was in no way hampered by the fact that a few of the sheets copies of documents were partly illegible. We therefore find no merit in the second condition, nor any reason to interfere with the finding of the High Court in this behalf. *Usha Agarwal* v. *Union of India*, (2007) 1 SCC 295 : 2006 CrLJ 89 (SC) : JT 2006 (9) SC 507 : 2006 (11) Scale 173.

[13763] ● *Entry relevant material must be placed before detaining authority.*—A detention under COFEPOSA Act is anticipatory and preventive. It is neither punitive nor curative. Preventive detention being one of the two exceptions to the constitutional protection under Article 22 against arrest and detention, certain procedural safeguards are provided in respect of exercise of the power to direct preventive detention. The procedural safeguards under the Constitution have been interpreted, to require every material which is relevant, having a bearing on the question as to whether a person should be detained under the Act, to be placed before the detaining authority, as the decision to detain a person is rendered by a detaining authority on his subjective satisfaction as to the existence of the grounds for such detention. The sponsoring authority should not undertake any exercise of examination and interpretation of the available material with a view to place the documents selectively before the detaining authority. It is not for the sponsoring authority to decide as to which of the relevant documents should be placed before the detaining authority, or which of the documents are likely to help or not help the prospective detenu. Consequently, the sponsoring authority cannot exclude any placed before the detaining authority. If the relevant facts or documents which may influence the subjective satisfaction of the detaining authority on the question whether or not to make the detention order, are not placed before the detaining authority, it may vitiate the detention order itself. It is no answer to say that the exclusion of a relevant document did not affect the decision to detain a person, in view of the other documents that were placed before the detaining authority or that the detaining authority would have come to the same conclusion even if he had considered the said document. *Usha Agarwal* v. *Union of India*, (2007) 1 SCC 295 : 2007 (1) SCC (Cri) 342 : 2007 CrLJ 39 (42, 43) : 2007 CrLJ 295 : 2007 (1) Crimes 79 (SC).

[13764] ● *Failure to supply documents having direct bearing on detention order.*—In the instant case, as some of the vital documents which had a direct bearing on the detention order had not been placed before the detaining authority, there was sufficient ground for the detenu to question such omission. *Held*, on accused of the non-supply of the documents, the detenu was prevented from making an effective representation against the detention. The order of High Court quashing the detention order was justified and warranted no interference. *Union of India* v. *Ram Bhandari*, (2008) 17 SCC 348 : 2008 CrLJ 4567 : 2008 (4) Crimes 130 (SC).

[13765] ● *Non-supply of relied upon documents.*—On proper construction of clause (5) of Article 22 read with Section 3(3) of COFEPOSA Act, it is imperative for valid continuance of detention that the detenu must be supplied all documents, statements and other materials relied upon in the grounds of detention. In the instant case, admittedly, the relied upon document, the detention order of Anil Kumar was not supplied to the detenu and the detenu was prevented from making effective representation which has violated his constitutional right under clause (5) of Article 22 of the Constitution.

Consequently, we accept appeals. The impugned detention order is quashed and the detenu is directed to be released forthwith, if not required in any other case. *Thahira Haris* v. *Government of Karnataka*, AIR 2009 SC 2184 : (2009) 11 SCC 438 : 2009 CrLJ 2451 (2456) : JT 2009 (5) SC 417.

DOGS TRACKING

[13766] ● *Dogs tracking.*—Evidence of tracker dog has been much discussed. In Canada and in Scotland it has 000been admitted. But in the United States there are conflicting decisions :

There have been considerable uncertainty in the minds of the Courts as to the reliability of dogs in identifying criminals and much conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases, however, reveals that most Courts in which the question of the admissibility of evidence of trailing by blood-hounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime. Para Am. Juris. 2nd edn. Vol. 29, p. 429. There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination the dog's human companion must go into the box and report the dog's evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being could not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value. In *R.* v. *Montgomery*, 1866 NI 160 a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behaviour of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog's reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument" and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But Dogs are intelligent animals with many though processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking even if admissible, is not ordinarily of much weight. *Abdul Razak Mintoza Dafadar* v. *State of Maharashtra*, AIR 1970 SC 283 : (1969) 2 SCC 234 : 1970 CrLJ 373 (377) : (1970) 1 SCR 551.

[13767] ● ***Pointing out by dogs of dog squad and injuries on person of accused not conclusively leads guilt of accused.***—The possibility that the entire case was built up after the dogs of the dog squad pointed towards the appellant cannot be ruled out. Since, the appellant had slept in the verandah near the cot where the dead body of his wife was found, had locked the collapsible door with the recovered lock before going to sleep and had himself been close to the dead body before the Police came, the picking up of smell by the dogs and pointing towards the accused could not be said to be a circumstance which could exclude the possibility of guilt of any person other than that of the appellant or be compatible only with hypothesis of guilt of the appellant. The pointing out by the dogs could as well lead to a misguided suspicion that the appellant had committed the crime. *Surinder Pal Jain* v. *Delhi Administration*, AIR 1993 SC 1723 (1732) : 1993 Supp (3) SCC 681 : 1993 SCC (Cri) 1096 : 1993 CrLJ 1871 : (1993) 1 Crimes 987.

[13768] ● ***Reception of evidence—Criticism advanced against.***—A four-fold criticism is advanced against the reception of such evidence. First, it is not possible to test the correctness of the canine movements through the normal method available in criminal cases *re* in cross-examination. Second is that the life and liberty of human beings should not be made in depend on animal sensibilities. Third is that the possibility of a dog misjudging the smell or mistaking the track cannot be ruled out, for many a time such mistakes have happened. Fourth is that even today science has not finally pronounced about the accuracy of canine tracking. *Gode Lakshmi Mangaraju* v. *State of U.P.*, AIR 2001 SC 2677 : (2001) 6 SCC 205 : 2001 SCC (Cri) 1082 (1087) : JT 2001 (5) SC 340.

[13769] ● ***Sniffer/Tracker dog's evidence.***—There are basically three kinds of police dogs—the tracker dogs, the patrol dogs and sniffer dogs. Recent trends show that hounds belonging to certain special breeds sheltered in a specialised kennels and imported special training or capable

of leading the investigating agency to very useful clue in crime detection and thereby help detectives to make a break through in investigation. English Courts have already started treating such evidence as admissible. In Canada and in Scotland, such evidence has become of late, admissible though in the United States the position is not uniform in different States. *Gode Lakshmi Mangaraju* v. *State of U.P.*, AIR 2001 SC 2677 : (2001) 6 SCC 205 : 2001 SCC (Cri) 1082 : JT 2001 (5) SC 340.

[13770] ● *Trained dogs can pick up scent from scene of object.*—The uncanny smelling power of canine species has been profitably tapped by investigating agencies to track the culprits. Trained dogs can pick up scent from the scene of any object and trace out the routes through which the culprits would have gone to reach their hide-outs. Developing countries have utilised such sniffer dogs in a large measure. In India also the utilisation of such tracker dogs is on the increase. Though such dogs may be useful to the investigating officers, can their movements be of any help to the Court in evaluating the evidence in criminal cases? *Gode Lakshmi Mangaraju* v. *State of U.P.*, AIR 2001 SC 2677 : (2001) SCC 1082 : 2001 SCC (Cri) 205 : JT 2001 (5) SC 340.

DOLI INCAPAX

[13771] ● *Domicile of choice.*—The domicile of choice is acquired by actually settling in another country with the intention of permanently residing there. The onus to prove that a person has changed his domicile of origin lies upon him and for this purpose, the course of his conduct both before and after the material time is relevant. *Kedar Pandey* v. *Narain Bikram*, AIR 1966 SC 160 : (1966) 1 SCR 102.

[13772] ● *Doli incapax.*—When a teenager, tensed by his elders or provoked by the stone-hit on the head of his father, avenges with dangerous sticks or swords, copying his brothers, we cannot altogether ignore his impaired understanding, his tender age and blinding environs and motivations causatory of his crime. It is common grounds that the appellant was 12 years old at the time of occurrence. At common law in England, as noticed by *Archbold* in *Criminal Pleading*, evidence and Practice, a child under 14 years is presumed not to have reached the age of discretion and to be *doli incapax*; but this presumption may be rebutted by strong and pregnant evidence of a mischievous discretion.... for the capacity to commit crime, do evil and contract guilt; is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. In English law, when an adolescent is charged with an offence the prosecution has to prove more than the presence of a guilty mind but must go further to make out that "when the boy did the act, he knew that he was doing what was gravely wrong, not merely what was wrong but what was gravely wrong, seriously wrong". Adult intent, automatically attributed to infant means, is itself an adult error. It is every day experience that little boy as a class have less responsible appreciation of dangers to themselves or others by injurious acts and so it is that the new penology in many countries immunises crimes committed by children of and below ten years of age and those between the ages of 10 and 14 are 'in a twilight zone in which they are morally responsible not as a class, but as individuals when they know their act to be wrong'. The Indian penal Code, which needs updating in many portions, extends total immunity upto the age of seven (Section 82) and partial absolution upto the age of twelve (Section 83). No evidence as to whether he was under twelve, as conditioned by Section 83, I.P.C. is adduced; no attention to feeble understanding or youthful frolic is addressed. And we are past the judicial decks where factual questions like this can be investigated. The *prima facie* inference of intent to endanger the life of the deceased with a sharp weapon stands unrebutted. Indeed, robust realism easily imputes doli capax to twelver who cuts on the neck of another with a sword; for, if he does not know this to be wrong or likely to rip open a vital part he must be very abnormal and in greater need of judicial intervention for normalisation. The conviction under Section 326, I.P.C. therefore, must be reluctantly sustained. When such is the law, we cannot innovate to attenuate, submit to spasmodic sentiment, or ride an unregulated benevolence. *Hiralal Mallick* v. *state of Bihar*, AIR 1977 SC 2236 : 1977 SCC (Cri) 538 : 1977 CrLJ 1921 : 1977 CAR 320 : 1977 CrLR (SC) 395.

DOMICILE

[13773] ● *Domicile.*—The language of Section 4, Penal Code, and Section 188, Criminal Procedure Code, means that if at the time of the commission of an offence the accused is a citizen of India, the Penal Code applies to him and he is subject tot he jurisdiction of the Courts in India, even if the offence is committed outside India. On the other hand, if at the time of the commission of the offence the accused is not a citizen of India, and the offence is committed completely outside India, the Penal Code does not apply to him and Indian Courts have no jurisdiction over him

Illustration (*a*) to Section 4 delimits its scope and indicates its extent and ambit. It clearly shows that if at the time of the commission of an offence outside India the accused is not an Indian citizen, Section 4 could not apply to his case. The circumstance that after the commission of the offence the accused has become domiciled in India or has acquired Indian citizenship cannot confer any jurisdiction on Indian Courts retrospectively so as to authroise them to try the accused for an offence committed and completed outside India at a time when he was not an Indian citizen. In other words the test for the determination of the question of the applicability of Section 4 is citizenship at the time of the commission of the offence, and not citizenship thereafter. *Central Bank of India Ltd.* v. *Ram Narain*, AIR 1955 SC 36 : 1955 CrLJ 152 : 1955 SCJ 4 : 1954 SCA 1305 : 1955 SCR 697 : 1955 AWR (Sup) 12 : 1954 MWN 999 : 57 Pun LR 153.

[13774] ● *Domicile—Different for different states.*—Domicile has reference to the system of law by which a person is governed, and we speak of the domicile of a country, we assume that the same system of law, prevails all over the country. But it might well happen that laws relating to succession and marriage might not be the same all over the country, and that different in the State might have different laws in respect of these matters. In that case, each are having a distinct set of laws would itself be regarded as a country for the purpose of domicile. *D.P. Joshi* v. *State of M.P.*, AIR 1955 SC 334 : 1955 SCR 1915 : 1955 SCA 511.

[13775] ● *Domicile of origin.*—*Article 5(c), Constitution of India.*—The domicile of origin communicated by operation of law to the appellant at birth at Sylhet could not on partition of India be called Indian. The domicile of choice is that every person of full age is free to acquire in substitution for that which he possesses at the time of choice.

Domicile means the place which a person has fixed as a habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home. Every person must have a domicile. A person cannot have two simultaneous domiciles. Domicile denotes connection with the territorial system of law. The burden of proving a change in domicile is on those who allege that a change has occurred. In order to attract Article 5(c), one must have an Indian domicile. Mere residence is not domicile. *Abdus Samad* v. *State of W.B.*, AIR 1973 SC 505 : 1973 CrLJ 1 : 1972 SCD 1134.

DOMINION OVER PROPERTY

[13776] ● *Dominion over property.*—Upon the plain reading of Section 405, IPC, it is obvious that before a person can be said to have committed criminal breach of trust, it must be established that he was either entrusted with or entrusted with dominion over property, which he is said to have converted to his own use or disposed of in violation of any direction of law, *etc.* Every partner has dominion over property, by reason of the fact that he is a partner. This is a kind of dominion, which every owner of property has over his property. But it is not dominion of this kind which satisfies the requirements of Section 405. In order to establish "entrustment of dominion" over the property to an accused person the mere existence of that person's dominion over the property is not enough. It must be further shown that his dominion was the result of entrustment. Therefore, as rightly pointed out by HARRIS, C.J., the prosecution must establish, that dominion over the assets or a particular asset of the partnership was by a special agreement between the parties, entrusted to the accused person. If in the absence of such a special agreement, a partner receives money belonging to the partnership, he cannot be said to have received it in a fiduciary capacity or in other words cannot be held to have been "entrusted" with dominion over partnership properties. It was then contended by the respondent that item No. 15 of the minutes of the meeting showed, that the appellant had to recover the monies from one Shri Kabalsingh and he had to deposit the same in the bank but he did not do so and hence at least in respect of that amount there was a special agreement. But item No. 16 of the said minutes authorised the partner to spend the amount recovered as dues towards expenses of partnership business. That is to say, if the money was required for the business of the partnership, it was not obligatory upon the appellant to deposit it in the bank. The appellant cannot be said to have been guilty of criminal breach of trust even with respect to the dues realised by him from Kabalsingh and in not depositing them in the bank as alleged by the prosecution. *Velji Raghavji Patel* v. *State of Maharashtra*, AIR 1965 SC 1433 : 1965 (2) CrLJ 431 (433, 434) : (1965) 2 SCR 429.

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